Jamia Law Journal

2019

Volume IV

ISSN No. 2456-2718

Jamia Law Journal

Vol. IV

Jamia Law Journal

Faculty of Law
Jamia Millia Islamia (A Central University)
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Maulana Mohammad Ali Jauhar Marg, New Delhi–110025.

ISSN No : 2456-2718
Volume: IV
Year of Publication: : 2019

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Jamia Law Journal is published, printed, and distributed by the Faculty of Law, Jamia Millia Islamia, Maulana Mohammad Ali Jauhar Marg, New Delhi – 110025.

JAMIA LAW JOURNAL

Vol.4 2019

Cite this Volume as
[4] JLJ<page no> (2019)

ISSN No.: 2456-2718
(Double-Blind Peer Reviewed Journal)

2019

JAMIA LAW JOURNAL

Vol.4ISSN No.: 2456-2718 2019

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MESSAGE FROM THE VICE-CHANCELLOR

It is a moment of pride and pleasure for me to bring forward the Fourth volume of the Jamia Law Journal (JLJ), 2019. JLJ publishes high quality research articles/research papers in the field of law and other disciplines like Sociology, Political Science, Public Policy and Economics etc. Through the field of interdisciplinary studies, scholars have attempted to corelate the law with other areas of research. This is largely an endeavour which seeks to substantially connect different aspects of human life and society with the law of the time. I believe that the JLJ will thrive to become an invaluable source for the researchers, academicians and students who wish to do further research and contribute to the arena of knowledge based wisdom. I hope that the articles/research papers published in JLJ will boost the researchers to undertake new research ventures.

Change is the law of nature. We should always strive for the best and adapt ourselves to the changing times, technology and the needs of the changing society. In order to keep pace with time, it is necessary to have access to the sources of knowledge. It is, therefore, the social responsibility of any educational institution to promote and develop the understanding of democratic governance. It is in this context that JLJ has added importance and relevance. It is highly expected that this journal would go a long way in reaching out to the people across various fields in order to enhance and spread the efficacy of freedom of speech and expression as the most powerful tool in the hands of all citizens and institutions of a civil society.

It is firmly believed that the readers will find the present issue of the JLJ interesting, insightful and thought provoking. I congratulate all the contributors of this issue & give my heartfelt appreciation to the entire team of the Editorial Board of this Journal.

Najma Akhtar

(Prof. Najma Akhtar)

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Prof. Sajid Zaheer Amani
Dean

FROM THE DESK OF THE DEAN

It is with overwhelming joy and pride that the Editorial Board of 2019 brings out the fourth edition of the Jamia Law Journal (JLJ). The JLJ has been launched in the year 2016 with the aim of remedying the lack of authoritative academic writing devoted to the critical analysis of law and legal institutions. It is intended to serve as a platform where students, academics, lawyers, policymakers and other scholars can contribute to the ongoing legal, political and social debates in this field.

The encouragement and accolades garnered by the previous editions of JLJ has gone a long way in setting a benchmark for the succeeding issues. The Journal is committed to providing its readership scholarly works of quality in the field of law and it is our sincere hope that we have fulfilled this duty bestowed upon us. The Editorial Board would like to express its appreciation to the authors whose works are included in this issue. It is indeed a privilege to receive the finest of contributions from distinguished personalities towards our Journal. The fourth edition of JLJ is a continuation of the efforts of the previous editorial boards and the coordination of the present editorial board. We genuinely expect the good work to continue in the years to come. Academic debates, deliberations and discussions are the first step towards conceptualizing an ideal inter-play between law and society. There is a need today to explore and continually question this relationship and the values our society embodies to catalyse the process of evolution. This would be best served through a socio-legal understanding of our concerns, based in and influenced by our historical, cultural and economic context. Through the medium of our Journal we seek to influence the body of law to make it more responsive to and compatible with the desired societal goal.

On behalf of the JLJ Editorial Team, I would like to extend a very warm welcome to the readership of JLJ. I take this opportunity to thank our authors, editors and anonymous reviewers, all of whom have volunteered to contribute to the success of the journal. Finally, we wish to encourage more contributions from the legal fraternity and social scientists to ensure a continued success of the journal. Authors, reviewers and guest editors are always welcome. We also welcome comments and suggestions that could improve the quality of the journal.

(Prof. S. Z. Amani)

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Editorial Note

It is with pride and enthusiasm that I present Volume 4 (2019) of the Jamia Law Journal (JLJ). It consists of words and complete analysis of the articles/research papers covered. This issue of the Journal touches upon a number of issues worthy of note in present scenario. A highly evolved and complex justice system makes enormous demands on the people who work in it. Therefore academicians, law students and legal professionals need upto date information as well as professional analysis on land mark judgments. JLJ delivers this vital information to them.

It is pertinent to mention that JLJ is a blind two fold peer reviewed annualjournal. Accordingly, it brings to the readers only selectedarticles/research papers of high standard and relevance. In a country governed by the rule of law, it is important that awareness about the research is created among those who are supposed to be concerned with these researches. Academicians can play a very important role in the development of the higher research, and there is need to encourage young minds to participate in development of research based on the needs of the changing society and technical advances. This Journal provides an excellent platform to all the academicians and research scholars to contribute to the development of sound research for the country.

I would like to express our gratitude to the Editorial Advisory Board and the Panel of Referees for their constant guidance and support. Appreciation is due to our valued contributors for their scholarly contributions to the Journal. Finally, and perhaps most importantly, I want to thank the entire editorial team of the Jamia Law Journal for the hard work, positive attitudes, and dedication that make this Journal excellent on so many levels.

I, therefore, hope that this issue of JLJ will prove to be of interest to all the readers. We have tried to put together all the articles/research papers coherently. We wish to encourage more contributions from academicians as well as research scholars to ensure a continued success of the journal.

(Prof. Nuzhat Parveen Khan)
Editor-in-Chief

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TRADITIONAL KNOWLEDGE--
DOES IT WARRANT POSITIVE PROTECTION:
A CASE STUDY OF INDIA

Dr. S. Z. Amani*
Misbah Malik**

Abstract

Traditional Knowledge (TK) is the 'knowledge available based on the tradition of any local or indigenous community'. Such knowledge being the result of intellectual creative or inventive ideas of any given local or indigenous community are apt to be considered as a kind of intellectual creation or invention. But do they really need positive protection in the manner other intellectual creations of traditional kinds like copyright work, industrial designs, trademarks, geographical indications and patent invention are protected. To have an answer to this broad question, the paper in hand is directed to address the meaning and concept of traditional knowledge, dilemma in defining traditional knowledge, the interface of IPRs and traditional knowledge, positive and defensive IPR protection to traditional knowledge, Indian legal system protection to traditional knowledge, needs for positive protection of traditional knowledge and to analyse and catalyse each in order to reach a fair conclusion on the statutory incorporation in India of positive protection of traditional knowledge through a law of *sui generis* nature.

1. MEANING AND CONCEPT OF TRADITIONAL KNOWLEDGE

Traditional Knowledge (TK) is the 'knowledge available based on the tradition of any local or indigenous community'. Such knowledge, obviously, is the result of intellectual creative or inventive ideas of any given local or indigenous community and, hence, apt to be considered as a kind of intellectual creation or invention. Traditional knowledge, as intellectual creation, is not confined to any specific field of art or

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technology. It is an intellectual creation that may materially be both of visible and invisible forms. It refers, on the one hand, to literary, dramatic, musical, artistic or scientific works, performances, designs, marks, names and symbols, and, on the other, to inventions, scientific discoveries, innovations, undisclosed information, all resulting from intellectual activities in the industrial or non-industrial fields, as the case may be, but *all developed based on the tradition of a certain community or nation.*[1] All such referrals are various kinds of traditional knowledge. It is thus a vast concept touching upon such conceivable areas, as "expression of folklore" such as folk language, script, music, dance, robs as well as handicrafts such as textiles, plastic arts and crafts etc., or as "folk know-how" such as folk medicine, health-care, bio-diversity conservation, environment, food, agriculture etc. In the words of Daniel Gervais:

> "Traditional Knowledge" is a shorter form of "traditional knowledge, innovations and practices". It includes a broad range of subject matters, for example, traditional agriculture, bio-diversity related and medicinal knowledge and folklore.[2]

'Tradition' in the context of knowledge refers to the 'manners' of producing such knowledge –the manners, generally non-systematic type or, say, trial-and-error method, which are generally transmitted from generation to generation of a certain community or nation as and when evolved in response to or, say, in consonance with its cultural environment. Traditional knowledge is thus the knowledge that has been developed based on the manner of producing it prevailing in a certain community or nation. Traditional Knowledge for that simple reason, therefore, does not refer to the date on which the knowledge was produced. "Traditional Knowledge is thus the knowledge that is traditional only to the extent that its creation and use are part of the cultural traditions of a community –"traditional", therefore, does not necessarily mean that the knowledge is ancient or

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[1]. cf. WIPO, *Intellectual Property: Needs and Expectations of Traditional Knowledge Holders* –WIPO Report on Fact-Finding Mission on Intellectual Property and Traditional Knowledge (1998-1999), p 25 (WIP Geneva, 2001).

[2]. Daniel Gervais, *The TRIPS Agreement: Drafting, History and Analysis*, (Sweet & Maxwell, London, 2nd Ed., 1998), p. 58.

static"[3]. It could, therefore, be said that 'Traditional knowledge' that has been produced yesterday or, eventually, many generation ago, is being produced and will continue to be produced every day by the communities as a response to their own environmental demands and needs.[4]

Although, as a matter of general perception, traditional knowledge, as intellectual creations, is not confined to any specific field of technology or the arts, the WIPO's stand is to segregate it into three distinct yet related areas, namely, traditional knowledge (i) in the strict sense (e. g. technical know-how, practices, skills, and innovations related to, say, biodiversity, agriculture or health), (ii) in cultural expressions/expressions of folklore sense (cultural manifestations such as music, art, designs, symbols and performances), and (iii) associated with genetic resources (genetic material of actual or potential value found in plants, animals and micro-organisms).[5]

The WIPO's three distinct yet related areas, however, is considered by some as constituting the whole of the folklore[6] which, in turn, is a composition of two words "folk" means people in general as community, and "lore" means special knowledge of a form. In the context of traditional knowledge, it, therefore, may mean the community-knowledge in perpetuity of its culture in the form of (i) expression, referred expression of culture or *folklore expression* comprising in its fold cultures like *folk literatures* rich

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3. Id. p. 59.

4. Ibid. *See* also Nuno Pires de Carvalho, The TRIPS Regime of Patent Rights, (Kulwer Law International, London/the Hague/New York, 2002), pp. 194-195.

5. cf. Meeting Statement: *A Policy and Action Agenda for the Future,* WIPO Inter-Regional Meeting on Intellectual Property and Traditional Knowledge (November 9 to 11, 2000) organized in Chiangray, Thailand., whereat it was declared as: *"With the emergence of modern bio-technologies, genetic resources have assumed increasing economic, scientific and commercial value to a wide range of stakeholders; . . . traditional knowledge, whether or not associated with those resources, has also attracted widespread attention from an enlarged audience; . . . other tradition-based creations, such as expression of folklore, have at the same time taken on new economic and cultural significance with a globalised information society." See* also "Traditional Knowledge and Intellectual Property –Background Brief", *available* at http://www.wipo.int/pressroom/en/briefs/tk_ip.html# [last visited on 12. 5. 2016].

6. Ms P.V. Valsala G. Kutty, *National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines*, (written for the World Intellectual Property Organization (WIPO), at 23, *available* at wipo.int/edocs/pubdocs/en/tk/912/wipo_pub_912.pdf [last visited on 14. 5. 2016].

of written or oral version of communities intellectual ideas e.g. folk languages, tales, myths, fairy tales, legends, animal tales, anecdotes, short stories, dramas, proverbs, riddles, ballads, songs, lullabies, rhymes, chants, charms, speeches, etc., *folk handicraft* e. g. folk textiles, floor coverings, pile carpets, pottery and terracotta, wood work, metal-ware, jewelry, stone carving, cane furniture, ivory and horn carving, basket-making, mat-weaving and many others, *folk arts*, both performing and non-performing categories like folk dances, drum beats, folk dramas, folk gestures, folk caricature and folk painting, and sculpture, *folk tradition* e. g. folk rituals and custom etc., and (ii) know-how, referred as *folk know-how* comprising in its fold know-how such as folk technologies, practices, skills, and innovations etc. related to, say, biodiversity, agriculture or health, and genetic resources.

The above concept of traditional knowledge substantiates the statement that "it is, perhaps, more reasonable to limit folklore to the creative aspects of a society, as reflected in its day-to-day life and expressed in material or non-material forms, rather than referring purely to the form of transmission, whether written or oral."[7]

Carvalho has detailed the peculiar characters that are inherent and specific to Traditional Knowledge and found them out on the basis of his thorough and deep insight into it as summarized below[8] –

(i) Traditional Knowledge is *holistic* in nature meaning thereby the holder of the knowledge is not identifiable but His Holiness, the God, or gods/goddesses as the originator and holder of all the knowledge, and, therefore, is undocumented and transmuted orally from generation to generation;

(ii) Traditional knowledge is *complementary* in nature meaning thereby the practical and spiritual sides of the knowledge are mixed and indivisible;

(iii) Traditional Knowledge is *adoptive* in nature, that is, it evolves according to the needs of the traditional communities and in response to new challenges posed by environment and thus is cultural or, say, environmental basis;

[7] . Ibid.

[8] . Nuno Pires de Carvalho, *Supra* note 4.

(iv) Traditional Knowledge is *non-scientific* in nature meaning thereby produced non-systematically, that is, according to trial-error-method.

2. DILEMMA IN DEFINING TRADITIONAL KNOWLEDGE

Traditional knowledge, being of such a concept covering broad range of matters and consisting of the above said peculiar characters that are inherent in and peculiar to it, it is not easy to define traditional knowledge. Despite the good attempts, like the first ever definition of it found in Art. 3 of the Portuguese Decree –Law No. 118 of April 20, 2002 [9], a comprehensive and all-encompassing legal definition of it in the sense of inclusive of all kinds of knowledge, is not yet possible. Daniel says: "One way to define traditional knowledge might be by defining who the holders are"[10]. Could it be aboriginal peoples? Certainly not, to the sense of the learned author, for he says: "But even agreeing that it is knowledge held by aboriginal peoples is insufficient, because (a) then a definition of aboriginal is required; and (b) it is fair to assume that at least some knowledge held by aboriginal peoples could be considered 'non-traditional."[11]

3. IPRS AND TRADITIONAL KNOWLEDGE: AN INTERFACE

However, the traditional knowledge, despite being considered a form of intellectual property creations, is not apt, because of the peculiar character that are inherent in and peculiar to it, to the criteria meant for IPRs-protection of *traditional* kind, such as copyright, industrial design, trademark, geographical indication, and patent rights. Consequently there is a general idea that a Traditional Knowledge, whether taken as an *expression* of ideas, such as the folk expressions, or the *ideas* themselves, such as folk technical know-how, could never be protected by statutorily created IPRs of traditional kind. "Because they are too old and are, therefore, in the public domain. Providing exclusive rights of traditional kind for an unlimited period of time would seem to go against the principle that intellectual

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[9]. *Available* at http://www.wipo.int/wipolex/en/text.jsp?file_id=206632#LinkTarget_94 [last visited on 8. 5. 2016].

[10]. *See* Daniel Gervais, *supra* note 2, p 117.

[11]. Ibid.

property can be awarded only for a limited period of time, thus ensuring the return of it to the public domain for others to use. In other cases, the author or inventor of the material is not identifiable and there is thus no "right-holder" in the usual sense of the term. In fact, the author or inventor is often a large and diffuse group of people and the same creation or invention may have several version and incarnations. Textile patterns, musical rhythms and dances are good examples of this kind of material. Additionally, expressions of folklore are refined and evolve over time. Apart from the above mentioned reasons for excluding some forms of traditional knowledge from existing forms of intellectual property protection of traditional kind, there is clearly a lot of traditional material that is unfit by its very nature for protection by extant intellectual property norms. Examples include spiritual beliefs, methods of governance, languages, human remains and biological and genetic resources in their natural state, i.e. without any knowledge concerning their medicinal use"[12]**.** "From a conceptual understanding, traditional knowledge, therefore, goes beyond the traditional dichotomy *idea v. expression*, which has been the basis of intellectual property, as it (TK) has been known for a long time."[13]

Because of these peculiar characters that are inherent in and peculiar to a traditional knowledge and, therefore, not apt to the criteria meant for IPRs-protection of traditional kinds, an indigenous and local community of such a traditional knowledge is left high and dry, that is, almost helpless and destitute to preserve and protect it by an actionable claim of any sort against an individual or association, be it an insider or outsider of the said community. For example, "often an author outside the group that, in turn, created the folklore, will create a *derivative* work using folklore as a basis but with enough derivative originality to benefit from copyright protection.

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[12]. Daniel Gervais, *supra* note 2, pp. 60-62. The author developed his argument by the remarkable works of M.F. Brown's "Can Culture Be Copyrighted?" *(1998) 39 Current Anthropology 193;* B. Jewsiewicki & M. Pastinelli's "The Ethnography of the Digital World, or How to Do Fieldwork in a 'Brave New World'", *(2000) 22 Ethnologies;* M. McGrath's, "The Patent Provisions in TRIPS: Protecting Reasonable Remuneration for Services Rendered –or the Latest Development in Western Colonialism?" *(1996) 18 E.I.P.R 398;* and S. Someshwar Singh's "Biopiracy of South's Biodiversity", *Third World Network (July 20, 2000).*

[13] . Nuno pires de Carvalho, *supra* note 4, p 111.

For example, sound recordings using traditional music are common[14]. Similarly, traditional knowledge in the form of an invention, could never be protected by way of patent grant as such (because of it being not new), but otherwise as 'piracy' or, say, 'misappropriation' of it as, for example, practice adopted by developed countries Patent Offices in granting patents in Traditional Knowledge to Western industries and research institutions –a problem which increasingly is becoming a matter of debate and disputes at various national and international fora.[15] "Many creators of folklore find these situations doubly unacceptable: while they are unable to benefit financially and otherwise from their creative efforts, others are using the intellectual property system not only gainfully, but, in fact, against the original folklore creators who may be prevented from using their own material if, as it evolves, it comes to resemble the derivative work. To traditional knowledge holders, this is a perverse, if an unintended, result. The same set of problem occurs with patents. While discoveries and other forms of traditional medicinal knowledge based on plants or animal parts or fluids generally cannot be patented either because they are obvious or because they are in the public domain, drugs *derived* from such plants and animals are generally patentable. The companies that developed and refined the molecule will own the patents. However, the research and development efforts concerning traditional medicinal knowledge and products is often inspired by holders of traditional knowledge, who may directly instruct western scientists or teach them by letting them observe their traditional practices. There have been allegations that using this knowledge, and then obtaining a patent, which will be the exclusive property of the company that conducted the additional research and expended efforts to refine the molecule, is unfair to the holders of traditional knowledge. In sum, the negative exclusionary effect of the current intellectual property system (which generally does not protect traditional knowledge as such for the reasons mentioned above) is compounded by the positive exclusionary

[14] . Daniel Gervais, *supra* note 2, pp. 60-62.
[15] . *See* WIPO document, WIPO/GDTKF/IC/2/9 of Dec.3, 2001.

effect because intellectual property rights are acquired by non-traditional knowledge holders to exclude their pre-existing rights."[16]

Such a sordid atmosphere led the holders of traditional knowledge to argue that the current intellectual property regime enabling the author or inventor, from within or outside the community, of their derivative works or inventions based on the said communities' traditional knowledge was designed by western countries for western countries. The world community, however, rose to the occasion to address the concern of the indigenous communities and adopts the measures of this and that nature that have the object of protecting their traditional knowledge against the calculated move of the free mongers to exploit it to the virtual detriment of the interest of such communities.

There was a sudden move to the forefront in 2000 when WIPO members established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIGC), and subsequently and especially in the Doha Ministerial Conference of Nov. 9 to 13, 2001 whereby the "[Ministers] instruct the Council for TRIPS, in pursuing its work programme . . . . to examine, *inter alia,* the protection of traditional knowledge and folklore . . . . raised by members pursuant to Art.71.1"[17].

4. POSITIVE AND DEFENSIVE IPR PROTECTION TO TRADITIONAL KNOWLEDGE

Consequently, many countries attempted to protect the traditional knowledge either by way of positive protection in the sense of recognizing the intellectual property rights of exclusionary nature in favour of the indigenous community taken as whole, as is the case with the Portuguese Decree –Law No. 118 of April 20, 2002, or by way of defensive protection in the sense of providing that the indigenous community's traditional knowledge does not fall within any one's exclusive right of any kind, as is the case with Indian legal system.

Taken as such, one the one hand, for the positive protection, few countries, like Portugal, have developed specific legislations of *sui generis*

[16] . Daniel Gervais, *supra* note 2, pp. 60-62
[17]. Document/ WT/MIN (01)/DEC/1, para 19.

nature recognizing the intellectual property rights of exclusionary nature for the traditional knowledge of all forms in favour of the indigenous community taken as whole.

On the other hand, for the defensive protection, a number of countries, like India, without developing specific legislations of *sui generis* nature recognizing the intellectual property rights of exclusionary nature in favour of the indigenous community taken as whole, provides with the usual statutory provisions which in effect aims to stop anyone from acquiring intellectual property of one or other denomination over traditional knowledge of respective forms.

5. PROTECTION OF TRADITIONAL KNOWLEDGE AND INDIAN LEGAL SYSTEM

India is a citadel of rich and diverse forms of traditional knowledge –be it, in the WIPO's sense, of the area of (i) traditional knowledge in the strict sense, (ii) traditional knowledge in the form of cultural expressions/folk expressions, or (iii) traditional knowledge associated with genetic resources. Before, deliberating one by one on the WIPO's three distinct areas of traditional knowledge in the context of the statutory enactments under the Indian legal system, it would be interesting to explore how the Indian Constitution has addressed to the issues of traditional knowledge protection of the Indian indigenous communities.

Indian Constitution and the Traditional Knowledge

It is to everybody observation that the Constitution of India, the basic law of the land, has not directly addressed the issue of protection of the folklore culture –whether of strict or wider ambit.

A few Articles, such as Art. 29, speak of the protection of folklore but not in general sense except one. For example, Article 29 of the Constitution declares that "any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same." It is possible to protect the folk culture of the distinct groups in India under the notion "any section of the citizens residing in the territory of India or any part thereof". But this distinct groups must belong to the constitutionally considered

minority sects and not the majority. "However, the majority of the folklore existing and misused now in India belong to small communities who do not come under the scope of the aforementioned constitutional provision (because of such communities belonging to majority section and not constitutionally considered minority sects)."[18] Despite such constitutionally privileged right of the minority-sect to conserve its folk-culture thereby inviting the legislative intervention to positively protect that right, no such legislative enactment has so far been framed.

The only provision in the Constitution that speak of the protection of folk-culture in general terms is its Article 51A (f) that declares that it is the fundamental duty of every citizen of India "to value and preserve the rich heritage of our composite culture." But here again there is also no legislation based on this provision for translating this constitutional objective into practice. The Indian anthropology speaks of the numerous tribal and nomads scattered all over its land each with distinct cultural identity. "The areas where there are only tribal communities they, as per Article 371 read with the Schedule 6 of the Constitution, are permitted to have separate Autonomous Councils for self-governance in accordance with their customary laws. The normal laws of the land are applicable only if accepted by the community and the Council has the power to make laws even to protect their social customs. For other parts of the country, as per Schedule 5 of the Constitution, the government has the power to create scheduled areas to protect the interests of the tribes. The application of the normal laws, if they are in conflict with their customs, can be prohibited by the head of the State. The tribes not falling in the above categories are subjected to the normal laws of the land."[19]

Apart from the Constitutional provisions addressing upon the issue of protection Indian folklores, it becomes of importance to explore the various statutory enactments that virtually address the protection of WIPO's traditional knowledge in the form of folk-expressions, strict sense, and genetic resources.

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[18] . Ms P.V. Valsala G. Kutty, *supra* note 6. Bracket supplied.
[19] . Ibid.

Statutory Protection to Traditional Knowledge of the Form of Folk Expression:

As observed above, WIPO's Traditional Knowledge in the sense of folk expressions comprises in its fold cultures like *folk literatures* rich of written or oral version of communities intellectual ideas e. g. folk languages, tales, myths, fairy tales, legends, animal tales, anecdotes, short stories, dramas, proverbs, riddles, ballads, songs, lullabies, rhymes, chants, charms, speeches, etc., *folk handicraft* e. g. folk textiles, floor coverings, pile carpets, pottery and terracotta, wood work, metal-ware, jewelry, stone carving, cane furniture, ivory and horn carving, basket-making, mat-weaving and many others, *folk arts*, both performing and non-performing categories like folk dances, drum beats, folk dramas, folk gestures, folk caricature and folk painting, and sculpture, *folk tradition* e. g. folk rituals and custom etc., *folk tradition* e. g. folk rituals and custom etc. These traditional knowledge are the intellectual creations as the mundane depictions of intellectual ideas of men of indigenous community in some forms of appearance, expression or impression etc.

In India the laws that deal with the intellectual creations as mundane depictions of intellectual ideas in some forms of appearance, expression or impression, such as of the denominations of literature, drama, music, arts (of performing and non-performing nature), cinematographic film and sound-recording, but of the nature devoid of any industrial applicability (as in the case of drama, cinematographic film) or left out of any such applicability (as in case of a mark –a kind of literature, music or art or any combination thereof, which though capable of being used industrially as industrial design, trademark or geographical indication yet is not being so used), thus, resulting neither in the enhancement or promotion of the commercial or economic value of any object on which they are applied non-industrially nor in the productions of any other goods or services, compendiously referred as "works", are contained in its Copyright Act. 1957.[20] Traditional knowledge of the forms of "expression of cultural

[20]. Officially termed "Copyright Act, 1957" (comprising sections 1 through 79) is a "body of laws and applicable rules related to the subject copyrights in India and came on the Statute Book as The Copyright Act, 1957 (14 of 1957), after being assented by the

folklores" though could be of the nature of intellectual creations/works, yet could not be protected by the said Act, for it not fulfilling the basic requirements for copyright protection, as discussed below.

(i) Copyright protection is conferred to an identifiable owner of the work (including the author who is always considered to be the first owner)[21], while traditional knowledge is holistic in nature meaning thereby the holder of the knowledge is not identifiable but His Holiness, the God, or gods/goddesses as the originator and holder of all the knowledge.[22] Even if it is taken that Traditional Knowledge is community owned knowledge generally developed and evolved through generations to generation. In such case tracing the author of the traditional knowledge is not only difficult but almost impossible;

(ii) Copyright protection is conferred to an identifiable owner of the work, but for limited term/period, that is, throughout the life of the author plus sixty years in case of work published during his lifetime, or only for sixty years in case of works published posthumously, anonymously or pseudonymously.[23] Traditional Knowledge is imperative and it should have perpetual protection rather than copyright limited protection;

(iii) Copyright protection is given generally, though subject to academic discussion[24], to the work in materially visible form. Traditional knowledge is generally undocumented and transmuted orally from generation to generation;

President on 4th June, 1957, entered into force on 21st January, 1958, and extends to the whole of India. Contemporary to the Act, 1957 was enacted the Copyright Rules, 1958 that got replaced by much expected Copyright Rules, 2013 (comprising rules 1 through 28). *Vide* S. R. O. 269, dated 21st January, 1958, published in the Gazette of India, Extra, Pt. II, Sec. 3, p. 167. Also *Vide* Gazette of India, Extra, Pt. II, Sec. 3 (i), dated 14th March, 2013, notifying the Copyright Rules 2013.

21 . *Vide* section 14 of the Act.

22 . Nuno pires de Carvalho, *supra* note 4.

23 . *See* Sections 22-29 under Chapter V of the Act.

24 . It may be noted that under the Indian legal system (Copyright Act, 1957) there is no specific requirement that a copyrightable work must be in fixed form, while under the English legal system (Copyright, Designs and Patent Act, 1988) requires the copyrightable literary, dramatic and musical works to be in fixed form without speaking about artistic work for the simple reason that artistic works are by nature always in fixed form because no one can draw art in air.

(v) Copyright protection is given to the work that satisfies the requirement of originality in the sense that the work must be the result of author's intellectual labour, skill, judgment, reasoning and logic without any element of spirituality. Traditional knowledge is complementary in nature meaning thereby the practical and spiritual sides of the knowledge are mixed and indivisible.[25]

It can, thus, be said that neither the Indian Copyright Act and, for that matters, the Design, Trademarks or Geographical Indications Acts contain any provisions for the protection of traditional knowledge of the form of folk expressions[26] nor there is any separate legislation of *sui generis* nature along with the lines of the Model Provisions[27]**,** to serve the purpose of offering legal protection to the traditional knowledge of the form of "expressions of folklore".

Mutatis mutandis for the same reasons for which copyright protection is not available to tradition knowledge of the form of "expression of folklore" in non-industrial fields, it could fairly be said that there is no protection to materially visible expression of traditional knowledge in industrial fields under the Design, Trademarks or Geographical Indications Acts.

An inference of a person, from within or outside the indigenous community, to have a right in his performance of traditional knowledge of the form of "expression of folklore', however, can be drawn from the provisions of the Copyright Act 1957, as introduced by its amendments since 1994, as respect the "rights of performers" under its section 38, in his performance in contrast to provisions as respect "rights of the owner/author

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25 . Nuno pires de Carvalho, *supra* note 4.

26 . According to some "an inference can be drawn from Section 31A of the Indian Copyright law, which protects the unpublished Indian work." *See* Zoya Nafis, "India: Protecting Indian Traditional Knowledge As Intellectual Property", available at http://www.mondaq.com/india/x/344510/Trade+Secrets/PROTECTING+INDIAN+TRADITIONAL+KNOWLEDGE+AS+INTELLECTUAL+PROPERTY [last visited 9. 5. 2016].

27 . Model Provisions so called for the "Model Provision for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, 1982" as adopted by UNESCO and WIPO.

to perform" under its section 14 (1) (a) (iii), in his work.[28] Such inference can be drawn from a line of reasoning that by virtue of section 38 dealing with "performer's right' *"(1) where any performer appears or engages in any performance, he shall have a special right to be known as the "performer's right" in relation to such performance. (2) The performer's right shall subsist until fifty years from the beginning of the calendar year next following the year in which the performance is made."* However, by virtue of section 2(q), *"performance, in relation to a performer's right, means any visual or acoustic presentation made live by one or more performers."* Further, by virtue of section 2(qq), *"performer includes, an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture, or any other person who makes a performance."* Furthermore, section 38 conferred "performer's right" is, by virtue of section 38A, of exclusionary nature of specified activities to do or authorise for doing any of the following acts in respect of the performance or any substantial part thereof, namely:- (a) to make a sound recording or a visual recording of the performance, including- (i) reproduction of it in any material form including the storing of it in any medium by electronic or any other means; (ii) issuance of copies of it to the public not being copies already in circulation; (iii) communication of it to the public; (iv) selling or giving it on commercial rental or offer for sale or for commercial rental any copy of the recording; (b) to broadcast or communicate the performance to the public except where the performance is already broadcast.

From a reading of sections 38(1), 2 (q) and (qq) altogether, it could be said that where any person, including an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture, or a group of persons makes a performance, that is, makes any live visual (visible) or acoustic (audible) presentation, obviously, of nothing but 'work' –copyrighted or non-copyrighted (because these sections are parts of the

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[28] . A lyricist, L, composes a song "Jai ho……….." L himself, or a licensee from him, say, A. R. Rehman, may perform this song –a kind of literary work by singing in his own style and manner by virtue of the copyright to perform under section 14(1)(a)(iii) of the Act. His own 'style and manner of singing' identifies his 'performance' of the song and it is this performance over which he has a right, called right to perform by virtue of section 38 of the Act.

Copyright Act whose subject-matter is a 'work'), he or the group, as the case may be, shall have a special right, known as the "performer's right" in relation to such live visual (visible) or acoustic (audible) presentation for fifty years from the beginning of the calendar year next following the year in which the said presentation is made, to do or authorise for doing any of the acts specified under section 38A of the Act in respect of his performance or any substantial part thereof.

If such a reading is made out in the context of traditional knowledge of the form of "folk expression" –visual (visible) or acoustic (audible), it goes to show that, although neither the indigenous community in question nor any person from within or outside the community can acquire any kind of copyright rights of activities specified under sub-clauses (i) to (vii) of clause (a) of sub-section (1) of section 14 as respect traditional knowledge of the said form, because of it not fulfilling the basic requirements, at least the above stated ones, for copyright protection in the sense that no one can be excluded from exploiting, commercially or non-commercially, the said traditional knowledge. But, by virtue of section 38 read with section 38A, the performer(s) of the folk-expressions can claim, in his/her/their performance, i.e. live visual (visible) or acoustic (audible) presentation of it for fifty years from the beginning of the calendar year next following the year in which the said performance is made, as such performer the performer's right to do or authorise for doing any of the acts specified under section 38A of the Act in respect of his performance or any substantial part thereof.

In the context of traditional knowledge of the form of expression of folklore, it could be argued that the statutory provisions concerning performer's right is not in the interest of its indigenous community because "(it) is not limited to the members of the community. So anyone, whether he belongs to the community or not, can enjoy the benefit of the protection of performer's right in the performance of expressions of folklore." [29] Accordingly "There seems to be a need to limit it to the performers from the community or those who perform with its consent."[30]

[29] . Ms P.V. Valsala G. Kutty, *supra* note 6, at 21.
[30] . Ibid

Statutory Protection to Traditional Knowledge in Strict Sense:

WIPO's Traditional Knowledge in strict sense is identified with *folk know-how* such as folk technologies, practices, skills, and innovations related to, say, agriculture, biodiversity conservation, food, health-care and medicine. Such traditional knowledge are the intellectual creations as the mundane depictions of intellectual ideas of men of indigenous community in some invisible forms, that is, devoid of any appearance, expression or impression etc.

In India the laws that deal with the intellectual creations as mundane depictions of intellectual ideas of no forms of appearance, expression or impression etc., referred, in intellectual property parlance, as "inventions", such as of the denominations like *agro technology*[31], *bio-diversity technology* (e. g. genetic technology as one kind of it, others being eco and species technologies), *chemical technology*, *civil technology*, *digital technology* (like cell-phone technology and computer technology), *electrical technology*, *mechanical technology* and *pharmaceutical technology* etc. etc., but of the nature always of any industrial applicability, thus, solving some technical problems in the production of goods or serves, are contained in its Patents Act. 1970. Traditional knowledge in strict sense identified with traditional/folk know-how or invention though could be of the nature of intellectual invention, yet could not be protected by the said Act, for it not fulfilling the basic requirements for patent right protection, as shown below.

(i) Patent protection is conferred to an identifiable owner of the invention[32], while traditional knowledge is holistic in nature meaning thereby the holder of the traditional know-how is not identifiable but His Holiness, the God, or gods/goddesses as the originator and holder of all such knowhow.[33] Even if it is taken that Traditional Knowledge is community owned knowledge generally developed and evolved

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31. Agrotecnology is technology that focuses on technological processes used in agriculture, to create an understanding of how processes, equipment and structures are used with people, soil, plants, animals and their products, to sustain and maintain quality of life and to promote economic, aesthetic and sound cultural values.

32. *Vide* section 14 of the Act.

33. Nuno pires de Carvalho, *supra* note 4.

through generations to generation, in such case tracing the owner of the such knowledge is not only difficult but almost impossible;

(ii) Patent protection is conferred to an identifiable owner of the invention, but for limited term/period, that is, twenty years.[34] Traditional Knowledge is imperative and it should have perpetual protection rather than patent limited protection;

(iii) Patent protection is given to the invention that satisfies the requirement of novelty, inventiveness and industrial applicability. Novelty both in the sense of new, that is, invention not known earlier or, say, not falling in public domain, and original, that is, the invention must be the result of inventor's intellectual labour, skill, judgment, reasoning and logic without any element of spirituality. The traditional know-how, however is neither new as they are in the public domain nor original as they are *complementary* in nature meaning thereby the intellectual and spiritual sides of the knowledge are mixed and indivisible.[35] They also do not involve inventiveness as they are generally very obvious to a person skilled in the art. Traditional Knowledge is *non-scientific* in nature meaning thereby produced non-systematically, that is, according to trial-error-method not meant for patent protection.

Here also it is quite clear from the above contentions that positive patent protection will not work for traditional knowledge under the Indian Patents Act, nor there is any separate legislation of *sui generis* nature to that effect.

The Act, however, provides defensive patent protection to traditional knowledge of the kind of know-how, such as all the conceivable areas as medicine, health-care, bio-diversity conservation, environment, food, agriculture, in the sense that Section 3 (p) of its Patent Act, 1970, as added by Patents (Amendment) Act, 2002,, makes an invention of 'Traditional Knowledge effect' not an invention within the meaning of the Patents Act. The said Section thus declares *"an invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of*

[34] . *See* sections 22-29 under Chapter V of the Act.
[35] . Nuno pires de Carvalho, *supra* note 4.

traditionally known component or components" not an invention within the meaning of the Patents Act, 1970. The severity of the matter with which the Traditional knowledge is protected from being fallen into the hands of few people by ensuring patent to themselves could be understood from the national policy that it enables the defendant to challenge the novelty of the invention in a suit for infringement of patent in terms of Section 64 (1) (q) of the Act *"that the invention so far as claimed in any claim of the complete specification was anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere."*

Statutory Protection to Traditional Knowledge of the Form of Genetic Resources:

WIPO's Traditional Knowledge in the sense of genetic resources is the knowledge closely associated, over generation upon generations, with genetic resources (GR), that is, with any material of plant, animal, microbial or other origin containing functional units of heredity, known as genetic material,[36] through the utilization and conservation of the resource. Genetic resources (GRs) are the parts of biological materials (cells) that contain genetic information of heritable functional value –the gene; and are capable of reproducing or being reproduced. They refer to genetic material of actual or potential value.

Genetic resources themselves are not intellectual property creation. They are not the creation of human intellect, rather they are already present in the nature of the thing. Accordingly, they cannot be protected directly as intellectual property. However, inventions based on or developed using genetic resources (associated with traditional knowledge or not) may be patentable and protected by patent rights or by rights of *sui generis* nature such as plant variety rights/breeders' rights.

In the context of the Indian legal system, it is found that that the genetic resources as well as traditional knowledge associated with genetic resources have not been *positively* protected by its Patents Act, 1970 for the simple reason that genetic resources are not the creation of human intellect, and traditional knowledge associated with genetic resources, though of the

[36] . *See* at https://ghr.nlm.nih.gov/primer/basics/gene [last visited on 26. 5. 2016].

nature of intellectual creations, is not fulfilling the basic requirements for patent right protection.

The Act, however, provides *defensive* patent protection to genetic resources as well as traditional knowledge in strict sense including traditional knowledge associated with genetic resources. Thus, as respect the genetic resources, referred, under section 3(j), to 'plants and animals in whole or in part thereof other than micro-organisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals' has been declared by it not an invention within the meaning of the Patents Act, 1970. The severity of the matter with which the said genetic resources is protected from being fallen into the hands of few people by ensuring patent to themselves could be understood from the national policy that it enables the defendant to challenge the grant of patent in a suit for infringement of patent in terms of Section 64 (1) (d) of the Act *"that the subject of any claim of the complete specification is not an invention within the meaning of this Act."* They are, however, positively protected by IPRs of *sui generis* nature such as the Protection of Plant Varieties and Farmers Rights (PPVFR) Act, 2001, Biological Diversity Act, 2002, the Environment Protection Act, 1986 and Seeds Act, 1966.

Similarly, Section 3 (p) of its Patent Act, 1970, as added by Patents (Amendment) Act, 2002, makes an invention –whether of genetic or non-genetic elements, of 'Traditional Knowledge effect' not an invention within the meaning of the Patents Act. Under the said Section *'an invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components is not an invention within the meaning of the Patents Act, 1970'.* The severity of the matter with which the Traditional knowledge is protected from being fallen into the hands of few people by ensuring patent to themselves could be understood from the national policy that it enables the defendant to challenge the novelty of the invention in a suit for infringement of patent in terms of Section 64 (1) (q) of the Act *"that the invention so far as claimed in any claim of the complete specification was anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere."*

6. NEEDS FOR POSITIVE PROTECTION OF TRADITIONAL KNOWLEDGE

The whole body of Indian legal system as regards the intellectual property rights of traditional kinds, namely, copyright, industrial design, trademarks, geographical indications and patent, reflects that, though it provides defensive protection to fewer, it has not at all addressed to the positive protection of the traditional knowledge, as a form of intellectual property, either of the form of folk expression, know-how or genetic resources. Of late, in response to calls of international communities, made from time to time, individual countries resorted to develop *sui generis* legislations specifically to address the positive protection of TK.[37] India was not an exception to such calls. In as much as it has positively protected the traditional knowledge at least of the form of "genetic resources" by enacting *sui generis* legislations such as Protection of Plant Varieties and Farmers Rights (PPVFR) Act, 2001, Biological Diversity Act, 2002, Environment Protection Act, 1986 and Seeds Act, 1966.

However, there is no, like at international level, any Indian enactments even of *sui generis* nature addressing the issues of traditional knowledge of the forms of folk-expression and know-how, equally considered, at least by developing countries, as an important components of their cultural heritage that are in constant threats posed by its improper exploitation as a matter of grave concern. At international level, realizing the magnitude of the problem, efforts were made by the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO) to find out a long-lasting solution through a mechanism for protection and preservation, in particular, of the expression of folklore –a form of traditional knowledge. This resulted in the formulation of what is called 'the Model Provision for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, 1982 (in short "the Model Provisions'). Some national governments enacted legislation based partially on these Model Provisions. However, there is no similar Model Provisions that could provide a mechanism for protection and preservation of the traditional knowledge of the form of folk know-how.

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[37] . *See* at http://www.wipo.int/tk/en/tk/ [last visited on 28. 5. 2016].

These heterogeneous type of enactments both at national and international fora force the individual nations and the international community each to have its own an all-encompassing legislative enactment of *sui generis* nature providing for the positive protection of the indigenous community traditional knowledge of all forms. [38] No doubt, such an instrument would take the task of defining what is meant by traditional knowledge encompassing all the three senses in which it is understood, who the rights holders would be, how competing claims by communities would be resolved, and what rights and exceptions ought to apply. Working out the details is complex problem of balancing the two extremely equally prejudicial rights –one of the private rights of individual indigenous community to have and commercially enjoy its traditional knowledge and another of the individual public to have an access to the enjoyment of that traditional knowledge.

A good attempt has been made by Portugal in this direction. For illustration, Portugal Decree-Law No. 118/2002 of 20 April (Autochthonous plant material) reveals under its Article 3 that the Traditional Knowledge of any form, as defined under its clause(1)[39], could be protected on its very

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[38]. In 2000, WIPO members established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), and in 2009 they agreed to develop an international legal instrument (or instruments) that would give traditional knowledge, genetic resources and traditional cultural expressions (folklore) effective protection. Such an instrument could range from a recommendation to WIPO members to a formal treaty that would bind countries choosing to ratify it. Although the negotiations are underway in WIPO, this would make it possible, for example, to protect traditional remedies and indigenous art and music against misappropriation, and enable communities to control and benefit collectively from their commercial exploitation. *Available* at http://www.wipo.int/pressroom/en/briefs/tk_ip.html [last visited on 29. 5. 2018].

[39]. The said Article 3 (1) defines traditional knowledge as: "Traditional knowledge comprises all intangible elements associated with the commercial or industrial utilization of local varieties and other autochthonous material developed in a non-systematic manner by local populations, either collectively or individually, which form part of the cultural and spiritual traditions of those populations. That includes, but is not limited to, knowledge of methods, processes, products and designations with applications in agriculture, food and industrial activities in general, including traditional crafts, commerce and services, informally associated with the use and preservation of local varieties and other spontaneously occurring autochthonous material covered by this Decree." *Available* at

registration on satisfying as respect itself the protectability criteria, as per clause (2), of being "identified" and "described" one, that would, as per its clause (4), *afford its owners the right to: (i) object to its direct or indirect reproduction, imitation and/or use by unauthorized third parties for commercial purposes; (ii) assign, transfer or license the rights in the traditional knowledge, including transfer by succession; (iii) exclude from protection any traditional knowledge that may be covered by specific industrial property registrations.* In other words, it result in the conferment of the exclusive rights that empower the communities to promote their traditional knowledge, control its uses and benefits from its commercial exploitation. The registration of traditional knowledge, however, has been made effective for a period of 50 years from the application therefor, that may be renewed for an identical period.

A legal instrument of *sui generis* nature that would give traditional knowledge, genetic resources and traditional cultural expressions (folklore) effective protection is certainly needed. In India, traditional knowledge (TK) is integral to the identity of its numerous local indigenous communities spread throughout the length and breadth of the country. The rich endowment of TK and biodiversity plays a critical role in her local communities' social and physical environments ranging from their health-care, food security, culture, religion, identity, environment, trade and development. Accordingly, its preservation is of paramount importance. Yet, this valuable asset is under threat like in many parts of the world. Attempts to exploit TK for industrial or commercial benefit can lead to its misappropriation and can prejudice the interests of its rightful custodians. In the face of such risks, there is a need to develop ways and means to protect and nurture TK for sustainable development in line with the interests of TK holders. India must rise to the occasion and set a better precedent, by formulating a comprehensive legation on the protection of traditional knowledge of all forms, for other nations and international communities to follow in the protection and preservation of the indigenous communities' traditional knowledge while embarking upon to enact a legal instrument of *sui generis*.

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http://www.wipo.int/wipolex/en/text.jsp?file_id=206632#LinkTarget_94 [last visited on 8. 5. 2016].

7. CONCLUSION

Traditional Knowledge (TK) is the 'knowledge available based on the tradition of any local or indigenous community'. Such knowledge, obviously, is the result of intellectual creative or inventive ideas of any given local or indigenous community and, hence, apt to be considered as a kind of intellectual creation or invention. Although, as a matter of general perception, traditional knowledge, is not confined to any specific field of technology or the arts, the WIPO's stand is to segregate it into three distinct yet related areas, namely, traditional knowledge in the strict, cultural expressions and genetic resources senses. Traditional knowledge, despite being considered a form of intellectual property creations, is not apt to the criteria meant for IPRs-protection of *traditional* kind. But since they are of paramount importance to their holders, attempts have been made at national as well as at international level to provide them either defensive, but not positive, protection under such traditional laws or *sui generis* protection on individual and piecemeal basis. To have a comprehensive law of sui generis nature for the positive protection of the traditional knowledge of all format is the need of time. Initiatives have been taken in this direction both at national and international levels. Some countries even have successfully formulated such a law. India should not remain a mute spectator. It is time for it to rise to the occasion and set a better precedent, by formulating a comprehensive legation on the protection of traditional knowledge of all forms, for other nations and international communities to follow in the protection and preservation of the indigenous communities' traditional knowledge while embarking upon to enact a legal instrument of *sui generis*.

RECOGNITION OF FOOD RIGHT IN THE FOOD SECURITY LAWS IN INDIA

"*Without food, it is difficult to remember God and hunger eats into the ethos of culture*." [Mahatma Gandhi]

Dr. Nuzhat Parveen Khan*

Abstract

Despite being a food secure country India is commonly attributed to starvation and squalor. According to Food and Agricultural Organization (FAO), India still houses to the largest number of malnourished people in the world. The depletion of natural resources, unequal distribution of assets, inappropriate production technologies, inhibiting government policies and loopsided distribution system which forced millions to suffer chronic hunger.[1] There are more than 1 billion undernourished people worldwide, primarily in developing countries.[2] Of that total, 6 million are children who die every year, directly or indirectly, from the consequences of malnutrition i.e. 1 child in every 5 seconds.[3] To fight against hunger, States undertook two quantifiable commitments. In the 1996 Rome Declaration on World Food Security and the Plan of Action of the World Food Summit (WFS), States pledged to halve the numberof undernourished people by 2015. Four years later, in the United Nations Millennium Declaration, they undertook to halve the proportion of undernourished people by 2015.[4] Prior to the global food crisis, experts had already recognized that the goals above

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[1] <http://www.geocities.com/righttofood/campaign/campaign.html> (Accessed on August 12, 2017)

[2] FAO, More people than ever are victims of hunger, June 2009.

[3] FAO, The State of Food Insecurity in the World 2005, p. 20

[4] The quantifiable difference between these two commitments is as follows: under the 1996 WFS, the number of undernourished persons in 2015 would stand at 408 million 2015, whereas under the Millennium Declaration in 2015 the total of undernourished individuals would number 591 million. Kracht, U., "Whose Right to Food? Vulnerable Groups and the Hungry Poor" in Eide, W. B. and Kracht, U., (eds.), *Food and Human Rights in Development: Legal Institutional Dimensions and Selected Topics* 120 (Antwerp, Intersentia, 2005)

would be difficult to achieve.[5] The number of undernourished people increased every year after 1996, while the corresponding proportion fell only 3% through 2007.[6]

Having recognized this failure, States and the FAO, spurred by civil society organizations, sought to reverse the trend registered since 2002.[7] To this end, they have decided to effect a paradigm shift from an anti-hunger approach centered on food security to one based on the right to food.[8] The decision to adopt a new approach was taken at the 2002 WFS. The 179 participating States reaffirmed the right to food and tasked a FAO intergovernmental working groups with developing voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food securityin order to provide practical guidance for achieving the goals established in 1996.[9] This paper shows how India has accepted the concept of a right to food through its constitution, its legislation and court decisions that give the broadest legal meaning to this indispensable human right to a practical shape. This paper makes a case for the recognition of right to food as an inalienable human right by strong legal framework.

1. INTRODUCTION

The Constitution of India under the fundamental right to life in *Article* 21 emphasizes the value of human dignity which in turn addresses the importance of health and nutrition as a fundamental right. The directive principle of the Constitution under *Article* 47 declares that the 'state shall regard the raising of the level of nutrition and the standard of living of its

[5] General Assembly (GA), The Right to Food-Report of the Special Rapporteur on the Right to Food (22nd August, 2007)
[6] FAO, State of Food Insecurity in the World 2008, p. 6
[7] Golay, Christophe, 'The Right to Food and Access to Justice: Examples at the National, Regional and International Levels,' Food and Agriculture Organization (FAO), Rome, 2009; available at <http://www.fao.org/righttofood/publi09/justiciability_en.pdf > (Accessed on August 10, 2017)
[8] Barth Eide, W., "From Food Security to the Right to Food" in Eide, W. B. and Kracht, U., (eds.), *Food and Human Rights in Development: Legal Institutional Dimensions and Selected Topics* 67-97(Antwerp, Intersentia, 2005)
[9] FAO, Declaration of the World Food Summit: five years later, paragraph 10

people and the improvement of public health as among its primary duties. The right to food is considered that everyone has a fundamental right to be free from hunger and malnutrition. This requires not only equitable and sustainable food systems, but also entitlements relating to livelihood security such as the food to work, land reform and social security. The primary responsibility for guaranteeing these entitlements rests with the state and lack of financial resources cannot be accepted as an excuse for abdicating this responsibility. The right to food includes the guarantee for each person to have under all circumstances access to adequate food and encompasses as follows:

> Right to adequate food is a human, inherent in all people, to all have regular, permanent and unrestricted access, either directly or by means of finance purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of people to which the consumer belongs, and which ensures a physical and mental, individual and collective fulfilling and dignified life free of fear.[10]

This definition entails all normative elements, which *inter alia* states that the 'the right to adequate food is realized when every man, woman and child, alone or in community with others, have the physical and economic access at all times to adequate food or means for its procurement.[11] Thus the right to adequate standard of living includes adequate food and state free from hunger. The 'right to food' means 'right to adequate food' and should never distract from the need for nutritional adequacy of food as well as the interdependence with other human rights. The right to food is, in some ways, a more complex right than the right to education or the right to information. To start with, the entitlements and responsibilities associated with the right to food are far from obvious. In the case of, say, the right to information, some basic entitlements and responsibilities are easy to identify: every citizen has a right of access to public records (subject to specific exceptions, pertaining for instance to 'national security'), and

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[10]Special Rapporteur on the Right to Food 2008: Para. 17; quoted in Special Rapporteur on the Right to Food 2012a

[11]Committee on Economic, Social and Cultural Rights 1999: Para. 6.

conversely, every civil servant has a duty to part with the relevant records under pre-specified terms. If he or she refuses to do so, action can be taken. To a larger extent, the right to information can therefore be translated into legal entitlements and enforced in a court of law. In other words, it is justifiable.

2. INTERNATIONAL PERSPECTIVE

Food is a vital issue at global level also, not for one or two country. In this era a number of international statutes have been laid down to protect and safeguard the right of food which is being recognised by the various significant statutes. The right to food is a human right. It protects the right of all human beings to live in dignity, free from hunger, food insecurity and malnutrition. The right to food is not about charity, but about ensuring that all people have the capacity to feed themselves in dignity. Human Right is a universal phenomenon therefore Right to Food has to be seen from international perspectives, and as it is recognized on international level expressly in many documents/ instruments quite early. The statutes that guard this social need and made a humane as well as justifiable right are *Universal Declaration on Human Rights*(UDHR)and *the International Covenant on Economic, Social and Cultural Rights* (ICESCR) and International Code of Conduct on the right to adequate food.

The right to food is protected under international human rights and humanitarian law and the correlative state obligations are equally well-established under international law. The right to food is recognized in the *Universal Declaration on Human Rights*, 1948and the*International Covenant on Economic, Social and Cultural Rights*, 1966 as well as a plethora of other instruments. Noteworthy is also the recognition of the right to food in numerous national constitutions. The *Committee on Economic, Social and Cultural Rights* (ESCR)in its General Comment 12 observed as under:

> The right to adequate food is realized when every man, woman and child, alone and in community with others, has physical and

> economic access at all times to adequate food or means for its procurement.[12]

Inspired by the above definition, the Special Rapporteur has concluded that the right to food entails the following:

> The right to have regular, permanent and unrestricted access, either directly or by means of financial purchases to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear.[13]

It is generally accepted that the right to food implies three types of state obligations - the obligation to respect, protect and to fulfil. These types of obligations were defined in General Comment 12 by the Committee on ESCR and endorsed by states, when the FAO Council adopted the Right to Food Guidelines (Voluntary Guidelines) in November 2004.[14]

The states should enforce appropriate laws to secure right to food in pro-active manner. The right to food means that governments must not take actions that result in increasing levels of hunger, food insecurity and malnutrition. It also means that governments must protect people from the actions of powerful others that might violate the right to food. States must also, to the maximum of available resources, invest in the eradication of hunger.

Furthermore, under *Articles* 2(1), 11(1) and 23 of the ICESCR, states agreed to take steps to the maximum of their available resources to achieve progressively the full realization of the right to adequate food. They also acknowledge the essential role of international cooperation and assistance in this context.

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[12]General Comment 12, Committee on Economic, Social and Cultural Rights,1999 Para 6

[13]Para 17, Special Rapporteur to Committee on Economic, Social and Cultural Rights, 1999 (A/HRC/7/5, Para 17)

[14]Comment 12, Committee on ESCR & FAO Council adoption of Right to Food Guidelines (Voluntary Guidelines), 2004

Under *Article* 2(2) of the ICESCR, governments agreed to guarantee that the right to food will be exercised without discrimination on grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status. The principle of non-discrimination is a cardinal principle of international law. It plays a major role in the full realization of the right to food not only at normative level, but also at practical level. As such, the Voluntary Guidelines recommend establishing food insecurity and vulnerability maps and the use of disaggregated data to identify:

> Any form of discrimination that may manifest itself in greater food insecurity and vulnerability to food insecurity, or in a higher prevalence of malnutrition among specific population groups, or both, with a view to removing and preventing such causes of food insecurity or malnutrition.[15]

Thus, identification of vulnerable, disadvantaged and marginalized groups and action towards removing the factors determining vulnerability are paramount towards the realization of the right to food. The Committee on ESCR in 2002 elaborated General Comment 15 on the right to food to include right to water.[16] In the words of the Committee: "the right to water is a prerequisite for the realization of other human rights.[17] The intrinsic link between the right to water and the right to adequate food is nowhere as evident as in the case of peasant farmers. It is crucial to ensure sustainable access to water resources for agriculture in order to realize the right to food. The Committee stresses the special attention that should be given in this context to disadvantaged and marginalized farmers, including women farmers.[18]

[15] Id.,Guideline 13
[16] Id.,Guideline 15
[17] Id.,Guideline 1
[18] Id.,Guideline 7

3. CONSTITUTIONAL SAFEGUARDS

The Constitution of India not only provides for the health care by securing social and economic justice by laying elaborate directive principles.[19] The fundamental rights guarantees health care by promoting equality[20] and protection of life and personal liberty.[21]Thus apart from the fundamental rights the directive principles entails right to an adequate means of livelihood.[22] This is buttressed by the right to work, education and public assistance.[23]This seems substantiated by the level of nutrition and the standard of living[24] and to improve public health.[25]

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[19] Pandey, J. N., 'The Constitutional Law of India' 411(Central Law Agency, Allahabad, 49th Ed., 2012)

[20] Article 14: The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India. Article 21: Protection of life and personal liberty: No person shall be derived of his life or personal liberty except according to procedure established by law.

[21] Article 21: Protection of life and personal liberty: No person shall be derived of his life or personal liberty except according to procedure established by law.

[22] Article 39: Certain principles of policy to be followed by the state: The State shall, in particular, direct its policy towards securing-

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

[23] Article 41: Right to work, to education and to public assistance in certain cases: The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want.

[24] Article 47: Duty of the State to raise the level of nutrition and the standard of living and to improve public health: The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and in particular, the State shall endeavour to bring about prohibition of the consumption except for medical purposes of intoxicating drinks and of drugs which are injurious to health.

[25]Bakshi, P.M., Constitution of India, 46,90(Universal Law Publishing House, New Delhi, 6th Ed. 2005)

The Supreme Court observed that right to life includes right to a quality life not mere animal existences.[26] The quality of life can be realized only when right to food shall be realized and thus court ordered government to supply 'nutritious food' to the children as part of a comprehensive strategy for progressively eliminating child labour. The right to life include not mere animal instinct but other basic necessities also which makes life meaningful, complete and worth living.[27] Everyone has a right to be free from hunger, starvation, to be under nutrition and basic human needs for the survival of the life. The Madras High Court recognized access to food as constitutionally protected right and found that Tamil Nadu's prison conditions, with inadequate food and drinking water facilities, and denial of or delays in serving meals, amounted to deprivation of prisoner's liberty and a violation of constitutional and legal rights to which the prisoners are entitled.[28] The Supreme Court stressed Central government's obligation under *Article* 8 of the *Declaration on the Right to Development,* 1986 to ensure equality of opportunity in access to food and affirmed the importance of access to food in preventing prostitute's children from following their mother's profession.[29] As a part of remedy, the Supreme Court held that anything which endangers the life of a person in derogation of laws, a person can take recourse of *Articles* 32 and 226 to that may be detrimental to the quality of life. In this respective the right to food shall also include because in its dearth of absence life will come in danger or the existence of human being is likely to cease.[30]

4. JUDICIAL RECOGNITION TO FOOD

The right to life guaranteed in *Article* 21 of the Constitution thus includes the fundamental right to food, clothing and shelter, but it is definitely dreadful that the justifiability of the specific right to food as an integral right under *Article* 21 had never been recognized until 2001.The Supreme Court observed that the Government is bound to provide food

[26]*Bandhua Mukti Morcha* v. *Union of India* ,(1984) 3 SCC 161
[27]*Menaka Gandhi* v. *Union of India*, AIR 1978 SC 597
[28]*G.K. Moonpanar*, *MLA and Other* v. *State of Tamil Nadu*, 1990 Cri.LJ 2685
[29]*Gourav Jain* v. *Union of India* AIR 1997 SC 3021
[30]*Subhash Kumar* v. *State of Bihar* 1991 AIR 420, 1991 SCR (1) 5

grains when it has surplus stock in the godown and state is duty bound to provide in such case especially when the people are affected by draught and are not in a position to buy food on their own. If State fails to do so, it would be violation of fundamental right to life enshrined under *Article* 21 of the Constitution.[31] It was the very first time when a distinct right to food was being recognized under *Article* 21 by the Court. There have been some encouraging developments in India regarding the enforcement of the right to food, which courts taking up Public Interest Litigation (PIL) cases relating to the violation of the right.[32] The Supreme Court expressed serious concern about the increasing number of starvation deaths and food insecurity despite overflowing food in FCI godowns across the country.[33] The Bench comprising Justices Kirpal and K.G. Balakrishnan even broadened the scope of the petition from the initially mentioned six drought affected States, to include the entire country. The Court directed all State Governments to ensure that all public distribution shops are kept open with regular supplies and stated that it is the prime responsibility of the Government to prevent hunger and starvation. On 23-7-2001 recognizing the right to food, the Supreme Court held:

> In our opinion, what is of utmost importance is to see that food is provided to the aged, infirm, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of their family do not have sufficient funds to provide food for them. In case of famine, there may be shortage of food, but here the situation is that amongst plenty there is scarcity. Plenty of food is available, but distribution of the same amongst the very poor and

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[31] Writ Petition (Civil) No. 196 of 2001

[32] *Chameli Singh* v. *State of U.P.* (1996) 2 SCC 549; *Paschim Banga Khet Mazdoor Samity*v. *State of W.B.* (1996) 4 SCC 37; *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi* (1981) 1 SCC 608

[33] The case of starvation deaths due to poverty in two of the poorest villages of Orissa was brought to the Supreme Court in a PIL in 1989, but the petition did not articulate a violation of the right to food on the part of the State. The Supreme Court in that judgment noted that on evidence, "starvation deaths could not be ruled out", but failed to recognize that the right to food, an integral part of the right to life, was being violated. In this case the Court reviewed governmental plans and responses to poverty and starvation in that area and merely ordered increased participation of community members on the Natural Calamities Committee to oversee working of all social welfare measures designed to alleviate poverty. *Kishen Pattnayak* v. *State of Orissa*, 1989 Supp (1) SCC

> the destitute is scarce and non-existent leading to malnourishment, starvation and other related problems.[34]

By for the most significant case relating to the food is seeking enforcement of the right to food, was filed by the Peoples Union for Civil Liberties (PUCL) in the Supreme Court on May 9, 2001 against the Union of India, Food Corporation of India and the State Government of Orissa, Rajasthan, Chhattisgarh, Gujarat, Himachal Pradesh and Maharashtra, prompted by reports of acute starvation in various parts of the country. The petition draws attention to the fact that inspite of the 50 million tons of food grains lying in FCI storehouses, 208 million Indians are affected by chronic hunger. Among the questions the petitions raised were the following:

(a) Does not the right to life under Article of the Constitution of India include the right to food?

(b) Does not the right to food imply that the State has a duty to provide food, especially in situations of drought, to people who have been affected and are not in a position to purchase food?

The petition also demanded the immediate release of food stock for drought relief and related purposes.

Expressing serious concern over the increasing number of starvation deaths and food insecurity despite overflowing government storehouses, the Supreme Court broadened the scope of the petition from the six States to include the entire country. It accepted the importance of actions like free distribution of food grains to the poor, but emphasized the need for long term solutions aimed at raising the capabilities of the people by various means, including providing employment. The Court also recommended that there should be immediate zeroing in on States requiring urgent attention. In its Order of 23 July 2001, the Supreme court held, 'what is of utmost importance is to see that food is provided to the aged, infirm, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they

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[34] *No Starvation Deaths: Minister*, UNI, *The Hindu*, 3-8-2001.

or members of their family do not have sufficient funds to provide food for them. Moreover, the Court directed the States to see that all the Public Distribution System (PDS) shops, if closed, are re-opened and start functioning within one week from the day of the Order and that regular supply are made available.

5. REALISATION OF FOOD RIGHT

On 28 November 2001, the Court came out with a significant 'Interim Order' directing the State governments to implement fully eight different centrally sponsored schemes on food security. These are National Old Age Pension Scheme (NOAPS), National Family Benefit Scheme (NFBS), National Maternity Benefit Scheme (NMBS), National Programme for Nutritional Support to Primary Education or the Mid-Day Meals Scheme, Integrated Child Development Services (ICDS), Antodaya Anna Yojna (AAY), Targeted Public Distribution System (TPDS) and Annapurna Scheme. The Court's Interim Order directed the State governments/Union Territories to introduce cooked mid-day meals in all government and government assisted schools by 28 February 2002 in half the districts and within six months in all districts.

The Supreme Court appointed the N.C. Saxena and S.R. Sankaran as commissioners of the Court to redress complaints that had not been resolved by the Court's order. In its Order of 29 October 2002, the Supreme Court reaffirmed the previous order and added that chief secretaries will be held responsible for starvation deaths in their States and that each State will appoint one officer as an assistant to the commissioner. The Supreme Court directed the State Government to Implement the Mid-day Meal Scheme by providing every child in every government and government assisted primary schools with a prepared midday meal with a minimum content of 300 calories and 8-12 grams of protein each day of school for a minimum of 200 days. Those Governments providing dry rations instead of cooked meals must within three months start providing cooked meals in all government and government-aided primary schools in atleast half districts of the State (in order of poverty) and must within a further period of three months extend the provision of cooked meals to the remaining parts of the

State. In addition to the above Midday Meal Scheme, the Supreme Court also held that under the Targeted Public Distribution Scheme, the States should commence distribution of 25 kg grain per family per month (as against the earlier limit of 20 kg grain per family per month), latest by 1-1-2002. All State Governments were directed to take their 'entire allotment of foodgrains from the Central Government under the various schemes and disburse the same in accordance with the schemes.' Further, the Court required that 'the Food for Work Programme in the scarcity areas should also be implemented by the various States to the extent possible.'

It is interesting to note that this time the Supreme Court did not merely direct the States to formulate appropriate schemes for distribution as had been done earlier by the Court in several cases relating to the right to housing and shelter but went several steps further in directing strict implementation of already formulated (and modified, where considered necessary) schemes within fixed time- frames, to make them entitlements and to ensure accountability.

With a view to ensuring adequate food to the poorest of the poor, the Supreme Court in March 2002 asked all States and Union Territories to respond to an application seeking the framing of wage employment schemes such as the Sampoorna Gramin Rozgar Yojna (SGRY) ensuring the right to work to adults in rural areas. On 8-5-2002, the Supreme Court agreed on a system of monitoring. The Bench also added that the States are to provide funds utilization certificate before the money is released for use.

6. NATIONAL FOOD SECURITY ACT 2013

Since independence, India has not only seen development and progress but also becoming one of the fastest growing economies in the world. This accomplishment takes a shattering twist when one looks at the hunger problem booming within it. Out of the estimate 1.32 billion

population, a total of 77% are considered poor and vulnerable, and millions of people fail to get two square meals a day.[35]

The existence of this problem is not merely confined to rural areas but also extend to urban region. To combat this perennial problem, Government did introduce some major programme such as Public Food Distribution System (PDS), the Integrated Child Development System (ICDS), 1975, Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGS) 2005, Antyodaya Anna Yojana (AAY), 2000 etc. This major programme fails to penetrate in every section of the society and hunger continues to thrive among the poor people.The disappointment in the failure of these programmes can mainly be attributed to the prevalence of inequality among the society, unsuccessful delivery of public services, pathetic liability system and infringement in the implementation of pro-poor policies. In this backdrop, the National Advisory Council (NAC) drafted a new 'Food Security Bill' in 2010, the bill which is considered as the biggest ever experiment in the world for distributing highly subsidized food for any government through a "rights based" approach . The National Food Security Bill after much debate and analysis was passed and became a law on 12thSeptember 2013. According to this Act, Food Security is defined as the availability of sufficient food grains to meet the domestic demand as well as access, at the individual level, to adequate means of food at affordable prices.

This Act ensures food security to enable assured economic and social access to adequate food and life with dignity to all persons in the country at all times in pursuance of their fundamental right to live with dignity.[36] It defines food security as the supply of the entitled quantity of

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[35]Sandeep Thoudam, Understanding National Food Security Act, 2013, *available at*: http://e-pao.net/epSubPageExtractor.asp?src=education.Human_Rights_Legal.Understanding_National_Food_Security_Act_2013_By_Sandeep_Thoudam_Part_1 (Accessed on August, 2014)

[36] Menon, Parvathi and Dixit, Divya, 'Starving India: Food Security Vis-À-Vis Right to Food in Indian Context', 6(9) *OIDA International Journal of Sustainable Development* 47-58 (2013).

food grains and meal specified under Chapter 2 of the Act.[37] The Act categorizes the population into AAY group, a priority group and an excluded category. The excluded category is retained at 25 percent of the rural and 50 percent of the urban population. The AAY group will receive 35 kg of food grain per family per month while others, i.e., the priority group will receive 5 kg of food grain per family per month.[38] The Act specifies that up to 75 percent of the rural population and 50 percent of the urban population shall be entitled to food grains.[39] All beneficiaries will have to pay Rs. 3 per kg for rice, Rs. 2 per kg for wheat and Rupee 1 per kg for coarse grains.[40]In a bid to give women more authority in running their households, the Act provide that the oldest adult woman in each house would be considered the head of that household for the issuing of ration cards. [41]Moreover, pregnant and lactating women are entitled to free meals during pregnancy and six months after child birth as well as maternity benefits of Rs 6000 in installments,[42] assistance to pregnant women under NFSA, is similar to Indira Gandhi Matrutva ShayogYojana, 2012 under which pregnant women are given Rs 4000 in 3 installments. The Act specifies with regards to the children's entitlement that in the age group of 6 months to 6 years as well as children suffering from malnutrition will be provided with free meal by the local anganwadis and children between 6 to 14 years will be provided with one free mid-day meal in school except on school holidays to meet the nutritional need of the children.[43]

The Central Government is responsible for determining the total number of persons to receive food security in each state. Similarly each state government is responsible for specifying criteria for identifying households. AAY households are to be identified according to the scheme guidelines. The Act provides for some reforms to the TPDS which include using technology, introducing cash transfer and food coupons to ensure

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[37] Section 2(7) of National Food Security Act, 2013
[38] Id., Section 3(1)
[39] Id., Section 3(2)
[40] Id., Schedule 2
[41] Id., Section 13
[42] Id., Section 4
[43] Id., Section 5

food grain entitlements for beneficiaries. It also allows for the use of Aadhar Cards to identify the beneficiaries and for the delivery of food grains to the doorstep of each ration shop.[44] In case of non-supply of the entitled quantities of food grains or meals to the beneficiaries, such persons shall be entitled to receive such food security allowance from the State Government as prescribed by the Central Government.[45] There are states and district-level redress mechanisms and State Food Commissions are formed for implementation and monitoring of the provisions of the Act. If this scheme is successful, it will be one of a kind and it will be the largest food security programme that the world has witnessed.

Section 12 of the Act makes it the responsibility of Central and State Governments to progressively undertake necessary reforms of the TPDS such as doorstep delivery of foodgrains to Fair Price Shops (FPSs), application of information and communication technologies with the aim of end-to-end computerization of TPDS, transparency of records, shifting management of FPSs from private owners to public bodies such as women's cooperatives, diversification of commodities distributed, leveraging Aadhaar for identification of beneficiaries and introducing programmes such as cash transfers and food coupons.

7. FOOD ADMINISTRATION & MECHANISM

In India, the government buys a large amount of food grains from farmers at the Minimum Support Price, through an agency called the Food Corporation of India (FCI). These grains are then allocated to the states at the Central Issue Price through the Public Distribution System. The difference between the two prices constitutes the Food Subsidy. The system aims at efficiency through maintenance of buffer stocks which ensure stabilization of prices. From a Universal approach there was a move towards Targeted PDS in 1997 in which the subsidy is restricted to the BPL families while the APL families are eligible to buy grains from the ration shops, but at the full economic cost. According to the estimates of the Planning Commission only 57% of the BPL households are actually

[44] Id., Chapter 7
[45] Id., Chapter 13

covered by the PDS and only 42% of the subsidized grain actually reaches the target group.[46] The reasons which led to the failure of the PDS in India are errors of inclusion and exclusion, estimation of the BPL families, Conversion of income, illiteracy and physical disabilities. This is marred by inefficiency of operations of FCI and huge gaps between the level of procurement and the storage capacity: In the summer of 2010, the total procurement stood at 60 million tons, while the godowns had a storage capacity of only 50 million tones. The Centralized System of Distribution leads to huge transportation costs, subsidy bill and damage of grain due to poor storage facilities. This is coupled by corruption, Black Marketing, Hoarding and use of Fake ration cards due to poor governance.

To make food for all a legal right, it is necessary to adopt a Universal Public Distribution System with common but differentiated entitlements with reference to the cost and quantity of food grains. The Act adopted the nomenclature suggested by the National Advisory Council (NAC) and divides the populations into priority i.e. those who need adequate social support and general i.e. those who can afford to pay a higher price for food grain. The initial prices proposed are Rs. 3, 2 and 1 kg of rice, wheat and millet respectively for the priority group and 50% of the Minimum Support Price (MSP) for the general group. In a Universal PDS system, both self-selection and well-defined exclusion criteria operated by elected local bodies will help to eliminates those who are in need of social support for their daily bread. In fact, it is the general group that should support financially the provision of highly subsidized food to the economically and socially underprivileged sections. In the case of the well to do, the aim of Universal PDS should be to ensure physical access to food.

The widening of the food basket by including a range of nutria-cereals along with wheat and rice is an important feature of the Food Security Act. Nutri-cereals such as bajra, ragi, jowar, maize constitute 'health foods', and their inclusion in the PDS, along with wheat and rice,

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[46]Performance Evaluation of Targeted Public Distribution System (TPDS) -2005, *available at*: http://planningcommission.nic.in/reports/peoreport/peo/peo_tpds.pdf (Accessed on August 5, 2017)

will encourage their production by farmers. Nutri-cereals are usually cultivated in rain fed areas and are more climate-resilient. Hence, in an era of climate change, they will play an increasingly important role in human nutrition security. During 2010-12, India's farmers produced 86 milliontons of wheat, 95 milliontons of rice and 42 milliontons of nutria-cereals, grown in dry farming areas, will go up if procurement and consumption go up. Thus, the addition of these food grains will help to strengthen food grain availability and nutrition security.

8. ASSESSMENT OF THE ACT

The hurry in passing of Food Security Bill gives rise to the suspicion that it was enacted to suit the political interest and to secure the vote bank. The required groundwork was not completed before the enactment of the National Food Security Act (NFSA). The Act does not involve legal commitments referred to agricultural production, procurement and safe storage of grain, clean drinking water and sanitation. The temptation to provide cash instead of grain to the 'priority' group should be avoided. Currency notes can be printed but grain can be produced only by farmers, who constitute nearly two-thirds of India's population. This in turn will affect production, procurement and safe storage.

This is fact that NSFA gives legal rights to subsidized food grain to 67% of our population and covers 75% of rural and 50% of the urban population. Altogether it covers two third of our population. In the pre-NFSA period, the Central Government set the 'Central Issue Prices (CIP)' for subsidized foodgrains distributed through TPDS. The prices were INR 5.65, 4.15 and 3 for rice, wheat and coarse grains, respectively. However, many state governments provided state subsidies to further reduce prices. According to Schedule I of Act, all eligible households shall be entitled to foodgrains at subsidized prices not exceeding INR 3, 2 and 1 for rice, wheat and coarse grains, respectively, for the first three years since the commencement of the Act. After the three-year period is over, the Central Government may set prices that should not exceed the minimum support prices of each of the three foodgrains. The poorest of the poor continue to be covered under AAY and get 35 kg of food grain per month.Table 1 gives a comparison of TPDS provisions pre and post NFSA.

Table 1 Comparison of TPDS provisions before and after NFSA

Provisions		Pre-NFSA	Post-NFSA
Coverage (by Central Government)		BPL Population (29.5% in 2011-12)	813.4 million (75% in Rural Areas and 50% in Urban Areas)
Selection Criteria		Below Poverty Line (BPL) Survey-2002 (Rural) and 2007 (Urban)	Determined by State Government
Quantity of Rations	APL	15 kg (depending on availability)	Excluded
	BPL (Priority)	35 kg	5 kg per member
	AAY (AAY)	35 kg	35 kg
Price of Food Items (per kg)	APL	Rice- ₹ 8.30; Wheat- ₹ 6.10	Excluded
	BPL (Priority)	Rice- ₹ 5.65; Wheat- ₹ 4.15; Coarse Grains- ₹ 3	Rice- ₹ 3; Wheat - ₹ 2; Coarse Grains-₹1
	AAY (AAY)	Rice- ₹ 3; Wheat- ₹ 2	

It also provides prerequisite for pregnant women and lactating mothers to get nutritious meal and maternity benefit of atleastRs 6000 for six months. In case of children, it covers free mid-day meals at school in the age group of 2-16. In case of non-supply of the entitled quantities of food grain or meal to the entitle person then he is eligible to receive food security allowance from the concerned state government. The Act aims to address basic issues that need immediate attention and no one can question the noble intention behind it. But in order to make this Act successful, an estimate of 61.2 million tonnes of food grain is required (including the grains of other welfare scheme) and a huge amount of money. It is to be seen whether the farmers will be able to provide the huge quantity of food grains required by the government and if so, will there be enough storage facilities to store the food grains. The food grains procured by the government are to be provided to the beneficiaries through Public Distribution System (PDS). The ultimate question is with so much flaws and scam occurring within PDS, will it benefit the poor people and remove hunger. So, in order to have a comprehensive idea about the authenticity of NFSA, it is necessary to look into the problem occurring within the farmer community in the production of food grain, availability and capacity of storage facilities, working of the PDS and its fiscal implication

The Act provides the higher food subsidy allocation that will sure reduce the growth rate and increase the inflation as well as fiscal deficit in the coming years. As the government aims to procure large quantities of food grains to meet the targets of the Act, the household budgets of the non-beneficiaries may be adversely affected as there might be an unprecedented rise in the prices of food grains in the open market. To tackle such situation, Government may apply other means to achieve food security instead to implementation of National Food Security Act.[47]

The Act provides for the creation of Food Security Commission at the State and Central levels. The two essential ingredients of implementing the legal right to food are political will and farmer's skill. Hence, State-level Food Security Commission should be chaired by farmers with an outstanding record of successful farming. They will then help ensure adequate food supply to feed the PDS.[48] Unless we develop and introduce methods to ensure effective political and farmer participation in implementing the Food Security Act, we will not be able to overcome the problems faced by the PDS in some places arising from corruption in the distribution of entitlements. The Act has not taken care of three dimensions of security such as food availability, access and absorption. The Act will fail to deliver on the count of demand-supply imbalance because of rising incomes and population.

The major concerns for the success of this Act are: (i) the method of dividing the poor into below and above poverty line groups leads to significant errors of exclusion, (ii) the system of cash voucher or transfer in the place of distribution of food sometimes compel the beneficiaries to divert the amount to areas other than food items, (iii) lack of emphasis onaccess to safe drinking water, sanitation, health care education which are

[47]Vala V.G. & Gujarati H.S., *Impact of Food Subsidy on Inflation and Growth in India* (Proceedings of National Conference on Emerging Trends in Engineering, Technology and Management, Indus University, Ahmedabad, 2014)

[48] Swaminathan, M. and N. Misra, 'Errors of Targeting–Public Distribution of Food in a Maharashtra Village (1995-2000),' 36(26) *Economic & Political Weekly*2447-2454 (2001)

complementary conditions for nutritional absorption, (iv) inadequate budget allocation for the implementation of Act, which is not even about two-thirds of what is actually needed.[49](v) A significant shortcoming of the Act is that the scheme could upset the budget with the subsidies on food doubling to a whopping 23 billion dollars. This will not help India as it won't be able to afford such huge costs. (vi) Another important concern is that the food under this Act has to be distributed through India's notoriously corrupt and leaky state owned cheap food ration shops which might prove to be catastrophic.

It is therefore incumbent on the government to analyze the long term consequences of such measures and not merely adopt them with a myopic view of securing its vote bank. The whole chain of food distribution needs to be strengthened structurally so that the new schemes do not meet the same fate as the old ones or are rendered ineffective with time. Any framing of food security must take into account the implication it may have on society. The government should look beyond its political and economic considerations if it actually wants to rid India of hunger and malnutrition. [50]

9. CONCLUSION AND SUMMATIONS

The Constitution of India provides a sound framework for right to food as the basic socio-economic justice. However the mass hunger is fundamentally incompatible with democracy in any meaningful sense of the term.51 The right to food is nowhere near being realized in India as under nutrition is highest in the world. The improvement of nutrition indicators overtime is very slow. There is also some evidence of increasing disparities in nutritional achievements (between rural and urban areas as well as between boys and girls) in the 1990s. The recent accumulation of nearly 70

[49]Ramulu Bala Ch., 'Governance of Food Security Policies in India', 59(1) *Indian Journal of Public Administration* 50-68(2013)

[50] Jain, Shreyans, National Food Security Bill: A Critical Analysis, *available at*: http://shreyansjain100.blogspot.in/2013/07/national-food-security-bill-critical.html(Accessed on July 14, 2017)

[51]Cheriyan, George, Enforcing the Right to Food in India-Bottlenecks in Delivering the Expected Outcome, *available at*: http://www.cuts-international.org/pdf/RighttoFoodinIndia.pdf>(Accessed on August 5, 2014)

million tones of grain against a background of widespread hunger is a particularly startling violation of the right to food. The nutrition situation in India is a sort of 'silent emergency'; little attention is paid to it in public debates and democratic politics. This manifests tremendous lack of responsiveness to the needs and aspirations of the underprivileged. Against this background, economic and social rights have a crucial role to play as built in safeguards against the elitist biases of public policy. The right to food is a somewhat complex right that does not readily translate into well-defined entitlements and responsibility. Though the scope for enforcing it through the courts can be significantly enlarged but serious difficulties are involved in making it fully justifiable. Nevertheless, the right to food can bring interventions within the realm of possibility in at least three different ways: through legal action, through democratic practice, and through public perceptions.[52]

The right to food with reference to the provisions of mid-day meals, public distribution system, social security arrangements, anganwadi facilities and land rights, among other,[53]there is a need for interlinkages with other economic and social rights, such as the right to education, the right to work, the right to information and the right to health. These economic and social rights complement and reinforce right to food. In this backdrop, the National Food Security Act, 2013 provides platter to launch a frontal attack on poverty-induced hunger. The National Food Security Act has been characterized as the world's largest and most ambitious food safety net program. Such a scale is appropriate for a country with the highest number of malnourished people in the world. The program is ambitious in its reach and resource commitment yet it relies on existing problematic institutions and channels for delivering food subsidies. Although the Act has created several mechanisms to reduce leakage and ensure effective monitoring, it remains to be seen how transparent and cost-effective the proposed institutional frameworks will be. Going forward, it

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[52]Sharma, D., 'Hold Economists Accountable too', India Together, 4th April, 2005, *available at*<www.indiatogether.org/2005/apr/dsh-subsidies.htm>(Accessed on August 5, 2014)

[53]Swaminathan, M., *Weakening Welfare: The Public Distribution of Food in India* 25-30(LeftWord Books, New Delhi, 2000)

would be prudent for the state and central governments of India to experiment with other mechanisms (such as direct cash transfers or food stamps), wherever appropriate. There is a fear that the bulk procurement, stocking, and distribution of rice, wheat, and coarse cereals will distort markets and lead to higher prices for grain sold in the open market. This suggests a need to ensure that distorted markets do not adversely affect farmers. Furthermore, the Government needs to bring about a transparent and lucid mechanism for identifying the various categories of the beneficiaries of PDS, Food Security Act etc. Better vocational training and job opportunities to the people will go a long way in freeing India from the vices of starvation and hunger.

DECONSTRUCTION OF CRIMINALIZATION: CRITICAL QUALIFIERS BEHIND *CULPA* AND THE LAW

Dr. Debasis Poddar*

Abstract

Since time immemorial, criminalization is driven by the dominant discourse vis-à-vis value judgment of the given time and space. Motivated in a way or other, construction of the *culpa* in course of policymaking- legislative and judicial alike- appears charged with critical qualifiers as variables; agency, ethics, culture, economics, ideology, politics, transparency, etc. being few among them. All or some of these qualifiers jointly and severally bring in the law to fruition. Criminalization, therefore, resembles much more political rather than a juridical construct in its character albeit with cloak of the law and with institutional endorsement of the legislature and the judiciary. Thus, making and unmaking of the *culpa* (criminalization and decriminalization) through text of the law as its embodiment ought to get appreciated in context: be the same enactment or judgment is a point apart. At bottom, these critical qualifiers prompt the state apparatus (read the legislature and the judiciary) characterize the crime and thereby suit dominant interest of the community. Crime is not devoid of subjectivity as otherwise appears.

The author hereby explores major qualifiers in their nitty-gritty and arrives at jurisprudent propositions- albeit with reasoning of his own- to formulate more fortified trajectory toward better criminalization through introspection on qualifiers leaving spatial politics toward subjectivity (error in disguise) in course of legislative as

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well as judicial proceeding and thereby attain judicious policymaking for the liberal democratic governance.

1. INTRODUCTION

With its increasingly interesting coverage as savage for one while saviour for another, criminalization with special reference to its basis constitutes an engaging discourse toward understanding criminal law in its given social- and albeit political- apparatus underlying in a(ny) system of governance. In forthcoming paragraphs, jurisprudence of criminalization- including the absence of such jurisprudence therein- underwent minute introspection with reference to interdisciplinarity approach and thereby offered the readership conceptual clarity over hitherto fuzzy areas of study in its characteristics to the best extent plausible. Thus, theoretical nitty-gritty of criminalization vis-à-vis lawmaking, besides critical qualifiers involved therein, were dealt with in details toward better understanding on the making of crime, criminal law and criminal justice as integral parts of much larger project named power arrangement for the time being in force. Also, interestingly enough, decriminalization constitutes another threshold while erstwhile taboo becomes diluted to set a particular behaviour free from the label of criminality since the same is no longer in conflict with a dominant normative order for the time being in force. Criminalization appears relative in its essence: something criminalized somewhere for some time may not necessarily possess the omnipresence elsewhere with the same degree of proscription elsewhere; and vice versa. Therefore, text of criminalization ought to get construed in its context.

In the given variety of state apparatus in liberal democratic governance, criminalization takes place through two institutional routes: instruments enacted by the legislature and instruments issued by the judiciary. Statutes and judgments, taken together, constitute the corpus of institutional policymaking toward criminalization and decriminalization of action and omission, whatever the case may be.

At times, extra-legal means get played out for criminalization and more so while the same cannot get accomplished through institutional proceeding; vigilantism to check cattle trade as initiated by non-state agency with state indulgence- albeit arguably- appears classic citation to this end. Besides, those engaged in the dicey business themselves got themselves criminalized by next regime after topsy-turvy in the seat of power. History is ridden with statesmen, such as Napoleon, Hitler, etc. in the West and Zulfikar Ali Bhutto, Mrs. Gandhi, etc., to name few among them, thereby substantiate the same.

2. THEORIZING CRIMINALIZATION

In the domain of jurisprudence, criminalization has had its basis in a presupposition of normative behavioural order; along with conviction that such defiance ought to get defeated for maintenance of the given public order in the form of normative order and one in defiance of the same deserves retribution of the state on behalf of its citizenry. Also, implicit value judgment prevails over in public sphere to ascertain that defiance ought to get labelled as crime. As mentioned earlier, rhetoric of crime often than not appears elastic construction rather than abstraction of something evil in its essence and quite often than not gets played out as per whim and fancy of the dominant cult operative for furtherance of the given power arrangement:

> "The simplest way of defining crime is that it is an act that contravenes the criminal law. This is nevertheless a problematic definition, for many people break the criminal law but are not considered to be 'criminals'. In English law, for example, some offences such as murder, thefts, or serious assaults are described as *mala in se* or wrong in themselves. These are often seen as 'real' crimes in contrast to acts that are *mala prohibita*, prohibited not because they are morally wrong but for the protection of the public. Thus, the criminal law is used to enforce regulations concerning public health or pollution not

> because they are morally wrong but because it is considered to be the most effective way of ensuring that regulations are enforced."[1]

No wonder that, since time immemorial, crime went culture specific across the world. Even in the age of globalization, while the world stands fictionalized to get reduced to a village vis-à-vis means and methods of connectivity, criminal law is still governed by the rule of *lex loci* (law of the land) and thereby isolates its judicial proceedings from the trendy web of globalization worldwide. Hue and cry over the criminal law apart, at bottom, criminalization is but a public policy initiative determined by the state determined by cultural orientation of the society in terms of its given time and space. In its essence, therefore, criminalization is embedded in the process of multiculturalism:

> "Legal definitions also change over time and vary across culture. Thus, for example in some countries, the sale and consumption of alcohol is a crime, while, in others, the sale and consumption of opium, heroin or cannabis is perfectly legal. … On the other hand, there has been a demand for other activities to be criminalized, and in recent years these have included 'stalking', racially motivated crime and knowingly passing on the aids virus. The way that crime is defined is therefore a social construction and part of the political processes."[2]

Besides presence of public policy in the realm of criminal law, by courtesy Holmes, another factors plays critical role toward criminalization. Quite contrary to the realism of Holmes, therefore, the life of law ought to be logic- besides experience- if the same

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[1] Roger Hopkins Burke, *An Introduction into the Criminological Theory*, 4th ed., Routledge, New York, 2014.

[2] Roger Hopkins Burke, *An Introduction into the Criminological Theory*, 4th ed., Routledge, New York, 2014.

needs to pass the test of time in time ahead. Thus, to plead for objective value judgment as basis of criminalization, the Kantian arguendo of categorical imperative is advanced to counter otherwise omniscient Holmes though hardly taken by legislative draftsmen and priests of judicial justice in practice:

> "Utilitarian arguments raise broader questions of moral philosophy and, therefore, they resist refutation by laying bare their premises. There is nothing hidden in Holmes' argument. "Public policy", he tells us, "sacrifices the individual to the common good". An assault on this explicit and coherent premise requires far more than the feeble claim that it is unjust to sacrifice the individual to the common good. Unjust it may be, but one needs to ground the imperative to do justice in a set of values at least as compelling as the value of furthering the social good. The most compelling argument offered to date is the Kantian thesis that the categorical imperative requires us to respect persons as ends in themselves, and we violate this imperative when we punish a person solely to further interests of other persons."[3]

So far as consequence of the applied criminology is concerned, jurisprudence apart, social audit of the same appears deterrent enough not to overreach hitherto remnants of peace and tranquility whatever minimal the same may be. Also, political economy of the existing administration of criminal justice appears too inimical to cost efficiency in terms of its assessment vis-à-vis comparative advantage to reap marginal benefits out of captive isolation for these wrongdoers from mainstream public sphere:

> "I have in mind the costs of criminalization. A proposed criminal statute might directly advance a substantial state interest and be no more extensive than necessary to

[3] George P. Fletcher, *Rethinking Criminal Law*, (Oxford University Press, New York, 2000).

> achieve such purpose, and yet its costs might still overweigh its benefits. Certainly the enactment of over-inclusive legislation, and the consequent effect of chilling socially beneficial, or at least socially neutral, conduct counts as costs of criminalization. But there are other costs as well, les explicitly acknowledged. All forms of criminalization entail costs in terms of investigation, prosecution, adjudication, and punishment. Sometimes these costs are direct, such as paying salaries to police, prosecutors, public defenders, judges, prison guards, and probation officers. Other times they are indirect, such as when family members suffer because a parent or spouse is in prison, or when an offender has difficulty finding a job after release from prison."[4]

The basis of criminalization, therefore, deserves review to get rid of all these lacunae; both in terms of its ontology and deontology as such. Rather than outreach of crime as social- and albeit political-construction, an imperative for abstraction on the basis of universalism attracts attention of the community. Indeed, abstraction is construction in a way or other, the bottom-line statement lies in minimizing cultural interpolation of crime and thereby leaving yokes of subjectivity apart to the best extent plausible. The concept of crime ought to shrink to its bare minimal corpus and thereby allow all its stakeholders of the community move ahead sans phobia out of *mens rea* syndrome. In superficial concern for guilty mind of the few, no statecraft affords to handcuff one and all under the Sun; thereby subvert pace of the society. Liberal democratic system revolves around the public trust upon the state apparatus. As the trustee of public good, state ought to reciprocate the same to all its

[4] Subhradipta Sarkar, Right to Free Speech in a Censored Democracy, University of Denver Sports and Entertainment Law Journal, Vol. 7 (2009), pp. 62-89. Available at: <http://www.law.du.edu/documents/sports-and-entertainment-law-journal/issues/07/right.pdf>

stakeholders until compelled with reasoning of its own to act otherwise. Thus, criminology and penology are by default conditioned by the promise of minimalist measures for maintenance of public order and thereby run the society in consonance with good governance genre.

3. POLITICIZING CRIMINALIZATION

In the theory of criminology, crime is theorized from diverse ideological perspectives. First, traditional (read consensus) approach perceives the concept of law as instrument of broad-based agreement among members of the society about normative order meant to create a corpus of behavioural discipline to be followed by members in public sphere. Consequently, failure to comply with order created on the basis of public consensus constitutes 'crime' to get inserted into concerned statute as part of criminal law. Thus, underlying object of the consensus theory may be traced back into control mechanism the society thereby exerts upon others with difference in their characterization on crime:

> 'Crime' is often viewed as an evil and criminal law as 'good' and we rarely bother to even think about the other view point. Such a belief about 'wrongness' of crime and 'rightness' of all measures against crime, be it the criminal code, the police, the prosecutor, the criminal courts, the prisons and even crime stereotyping is accepted as gospel truth by the society, by and large. The reasons for such unanimity, apart from our traditional acceptance of 'consensus', may lie in the 'harm' potential of the conduct or the imagined need for social solidarity that criminalization provides. However, there always exists in every society a handful of nonconformists for whom crime and criminal law are nothing more than a set of power resource that the dominant classes use for their benefit. … Crime, according to labelling theorists, has no inherent attributes; it acquires meaning when it is labelled as a crime. Therefore, for every crime you would have two

> opposite perspectives of labeller and that of the labelled. The trend of a-moralization of crime does challenge the traditional thinking about crime and criminal law, but its value for critical understanding of crime and criminal law system remains enormous, particularly for systems that are in the mode of change and reform.[5]

A contrary approach, advanced by classical Marxist schools of thought in particular, perceived the conflict between and among competing interests out of the class rivalry as a thumb rule toward formulation of the criminal law. Accordingly, crime is a product of conflict out of class struggle in a way or other and the law is meant to carry forward interests of the dominant classes to the detriment of those of others under the disguise of criminal law. Thus, to Marx, concept of crime is ridden with the politics of its own:

> Like right, so crime, i.e., the struggle of the isolated individual against the predominant relations, is not the result of pure arbitrariness. On the contrary, it depends on the same conditions as that domination. The same visionaries who see in right and law the domination of some independently existing general will can see in crime the mere violation of right and law. Hence the state does not exist owing to the dominant will, but the state, which arises from the material mode of life of individuals, has also the form of a dominant will.[6]

As pro-establishment approach, consensus theory has put emphasis on integrative input while, as anti-establishment one,

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[5] B. B. Pande, Concordant and Discordant Developments in the Area of International Criminal Law, *ILI Golden Jubilee: 1956-2006*, a paper presented as part of conference proceedings in the International Conference on Criminal Justice under Stress, pp. 240-245.

[6] Tim Delaney and Bob Schwartz (tr.), *Karl Marx, The German Ideology (1846)*, Progress Publishers, Moscow, 1968.

conflict theory has put its focus on coercive character of the law as a political (read politicized) instrument played in the hands of those who run the state apparatus behind the musk of consensus. Both contributes to the project of deciphering the basis of criminalization in context. While there is a broad consensus in the gentry, the same hardly happens for subaltern strata.

Taken into consideration the realpolitik of crime, by courtesy postmodernism, Foucault grapples with the discursive nexus among diverse factors in its nitty-gritty to expose the underlying power arrangement, e.g. criminality as a social construction of knowledge, prison as a political institution, and all professionals engaged in course of administration of criminal justice; the way together these three craft the neat texture for the state apparatus. To him, rather than offshoot of exclusion, criminality is inbuilt within the system itself- as the same resembles the language of power with the politics of its own- to eliminate the overpowered from mainstream of the political arrangement:

> The delinquent is an institutional product. It is no use being surprised, therefore, that in a considerable proportion of cases the biography of convicts passes through all these mechanisms and establishments, whose purpose, it is widely believed, is to lead away from prison. … Conversely, the lyricism of marginality may find inspiration in the image of the 'outlaw', the great social nomad, who prowls on the confines of a docile, frightened order. But it is not on the fringes of the society and through successive exiles that criminality is born, but by means of ever more closely placed insertions, under ever more insistent surveillance, by an accumulation of disciplinary coercion.[7]

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[7] Alan Sheridan (tr.), Michel Foucault, *Discipline and Punish: The Birth of a Prison*, Vintage Books, 2nd ed., New York, 1991.

The craftsmanship of criminalization as product is subjected to manufacturing process through media coverage of relevant fiction that may be far away from fact (read truth). Even if departure from truth is not intentional, mere incidental departure out of typical systemic reasoning seems enough for subversion of justice through criminalization without cause and thereby victimization of otherwise innocent soul on diverse grounds out of mediated projection of the surreal truth while, at bottom, the real lies otherwise:

> "The mediated criminalization of popular culture exists, of course, as but one of many media processes that construct the meanings of crime and crime control. … Cultural criminology incorporates a wealth of research on mediated characterizations of crime and crime control, ranging across historical and contemporary texts and investigating images generated in newspaper reporting, popular film, television news and entertainment programming, popular music, comic books, and the cyberspaces of the internet. … Working within organizational imperatives of efficiency and routinization, media institutions regularly rely on data selectively provided by policing and court agencies. In doing so, they highlight for the public issues chosen by criminal justice institutions and framed by criminal justice imperatives, and they in turn contribute to the political agendas of the criminal justice system and to the generation of public support for these agendas."[8]

Back to original argument of social harm as one- if not only- basis of criminalization, the state may and does decriminalize such an offence if the same stands in consonance of its policy even though inflicts harm to the society at large. There are illustrations where lawmakers compromise with their self-proclaimed theory of social harm while state finds the same beneficial either for prospect of its

[8] Jeff Ferrell, Cultural Criminology, 25 *Annual Review of Sociology* 395-418 (1999).

exchequer or otherwise. Thus, evil practices with far-reaching adverse impact on social progress get decriminalized:

> While, historically, the criminalization of gambling may well have been aligned with the interests of organized religion and the newly industrialized state in a disciplined workforce, contemporary forms of decriminalization and regulation protect the fiscal interests of the state. In other words, the choice to categorize forms of gambling as non-criminal protects the financial interests of the state. In this case, the real work being done by the criminal law is that of consolidating a provincial monopoly over expanding gambling revenues rather than controlling social harm. Indeed, the decriminalization of gambling may have caused greater harm since gambling addicts feed their addiction through theft, embezzlement and fraud and leave their dependents to fend for themselves. … The state's interest in profit by no means exhausts- indeed barely begins.[9]

A popular perception to get confused between society and state thereby stands diluted to provide opportunity for a counterargument to underscore such vacuum, if not void, between these institutions with occasional overlap between them *inter se*, yet they stand apart with agenda of their own, even if the same inimical to another. A social wrong is marked by lack of morality (read legitimacy) in popular perception. On the contrary, a legal wrong is marked by lack of fidelity (read legality) to the system of governance and in perception of those in power. Nowadays, in the wake of increasingly widening face-off between society and the state, hitherto gap between legality and legitimacy of the policymaking (read politicking) appears on sharp rise to generate newer paradox of criminalization and consequent sentencing on this count.

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[9] Janet Mosher and Joan Brockman (ed.), *Constructing Crime: Contemporary Processes of Criminalization*, (UBC Press, Vancouver, 2010).

4. CRIMINALIZATION AND THE LAW

On other side of the coin, despite several social phenomena deserve decriminalization, state still continues to victimize those who are no longer criminals on the count of harm but on the count of governmentality archaic in its given time and space. Thus, over-criminalization emerges as conundrum of governance to damage the society and the state alike. Reformulation of general principles toward criminalization, therefore, ought to offer opportunity for the lawmakers to rework on state of affairs in the law:

> The processes of criminalisation and the power to punish have been approached in specific contexts as particular forms of social calculation, in the belief that what are essentially different forms of regulation will be continued to be developed by policymakers under the broad label of 'criminal law' and that it will be increasingly difficult to identify 'general principles' underlying all criminal offences. Having said that, and despite scepticism at the possibility of developing a normative theory of criminal law through the agency of moral philosophy, rather than sociological critique and empirical analysis, the attempt to establish a set of normative principles that generally should be taken into account in decisions to criminalize particular forms of behaviour, as part of an exercise to combat 'over-criminalisation' and promote debate over the appropriate limits of the criminal law, has been broadly supported.[10]

Also, morality has had complicated underpinnings with criminalization. Thus, action or omission cannot get criminalized by law only because the same is not in consonance with moral standards in specific context of given time and space of the society until there are protective interests recognized by law of the land for the time

[10] David Brown, *Criminalisation and Normative Theory,* 25(2) *Current Issues in Criminal Justice* 605-625 (November 2013).

being in force. At the same time, mere endorsement of the black letter law to get action or omission criminalized lacks the legitimacy- despite the legality- since the same leads to injustice:

> How can one demarcate the legal world from the moral world? Certainly they are not independent worlds. A rights-centred approach must give reasons why in a process of pre-legal deliberation a right should be acknowledged to be protected by the criminal law. If such reasons are based on recognizing intersubjective and important human interests, the line of argument necessarily interacts with moral reasoning: what really is important to persons tends to figure prominently in the world of moral duties and moral rights. But the point is to narrow the much larger field of moral wrongs down to acts which are wrong in a legal-political sense, meaning they violate interests which are so important to citizens that they deserve to be accepted as protective rights.[11]

In the given trail of legality-legitimacy dilemma, several yardsticks of criminalization get contested, criminalization on the basis of age, disease, economic status, sexuality, etc. being few of them, where criminal jurisprudence lacks sound reasoning in defence of law and practice. The way lower age of criminalization stands compromised in India, HIV patients get victimized across the world, poverty is put to peril by criminalization of the underprivileged, sexual minority stands subjected to criminalization out of taboo, all these are insignia of pervasive vacuum, if not void, vis-à-vis law-morality face-off *inter se* while poor subjects suffer the brunt. Representative concerns follow hereafter:

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[11] Tatjana Hornle, Theories of Criminalization, Comments on A. P. Simester/ Andreas Von Hirsch: Crimes, Harms and Wrongs. *On the Principles of Criminalization*, Hart Publishing: Oxford and Portland, Oregon, 2011.

> It is most paradoxical that on the one hand we speak of a distinct juvenile justice/ youth justice system, yet bring in the issue of criminal responsibility. … Perhaps the reason for this paradox lies in in the fact that world-over, the juvenile justice system continues to be heavily dependent upon the adult criminal justice system in matters of definition of delinquency, pre-trial processes, adjudication and punitive responses. As a consequence, though every system claims that they render juvenile justice through a distinct and exclusive system, the reality is that the juvenile justice system is, at best, an entailed system. But the fact cannot be denied that over a period of past one hundred years the lower age of juvenile justice has progressively increased.
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> The position of age in respect of total and partial exception from criminal liability has remained unchanged over a period of nine decades during which the system of juvenile justice has slowly evolved on the account of the enactment of the Provincial Children Acts, the State Children Acts, the Juvenile Justice Act, 1986 and the Juvenile Justice Act, 2000. In none of the aforesaid statutory measures was the lower age bar for instituting juvenile justice proceedings or the concept of 'age of innocence' ever debated. The focus remained on fixation of the upper age of 16 or 18 years for claiming exclusion from the adult criminal justice system.[12]

While the criminalization of tender age represents a universal concern, several others being specific to individual concerned are even worse, e.g. criminalization of disease, poverty, sexuality, may get illustrated to this end. In particular, HIV phobia constitutes a

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[12] B. B. Pande, In the Name of Delhi Gang Rape: The Proposed Tough Juvenile Justice Law Reform Initiative, 2 *Journal of National Law University Delhi* 145-166 (2014).

major concern of law far and wide in perspective of criminalization across the world:

> 'HIV criminalization' refers to the use of criminal law to penalize alleged, perceived or potential HIV exposure; alleged nondisclosure of a known HIV-positive status prior to sexual conduct. (including acts that do not risk HIV transmission); or non-intentional HIV transmission. Sentencing in HIV criminalization cases sometimes involves decades in prison or requires sex offender registration, often in instances where no HIV transmission occurred or was even likely or possible.[13]

As offshoot of an increasingly materialist public policy, poverty becomes criminalized in a way or other. In particular, while welfare is played out, state apparatus is driven by presupposition against the underprivileged as the opportunist in search of fortune and that also free of cost. Consequently, the beneficiary is dehumanized by the state:

> Today, when applying for welfare in the United States, many applicants are photographed, finger-printed, drug-tested, interrogated, and asked to prove paternity of children. Similarly, eligibility for public housing is restricted or denied if the applicant has a criminal record, including misdemeanours or a price lease violation. Further, local public housing authorities, can be even more restrictive and evict occupants if a member of their family or another person residing in- or in some cases visiting-commits a crime, such as misdemeanour drug offence.

[13] AIDS-WATCH, the Elizabeth Taylor Aids Foundation (undated). Available at: <https://www.aidsunited.org/data/files/Site_18/AW2015-Criminalization_Web.pdf> last visited on September 16, 2016.

> Poverty, in other words, is too often treated as a criminal offence.[14]

Also,

> The criminalization of poverty highlights economically and legally institutionalized ideologies of neoliberalism, racism, sexism and the dehumanization of the poor. The growth of punitive welfare policies and the policing of welfare fraud add to something more than the policing of crime. These policies and practices are rooted in the notion that the poor are latent criminals and that anyone who is not part of the paid labour force is looking for free handouts.[15]

Likewise, despite consensual sexual life being private life and beyond public domain, the law pokes its nose in the sexual orientation as well with criminalization of personal behavioural pattern of individual subjects as usual. In a way or other, sexual minority is thereby exposed to illicit victimization so perpetrated by conservative majority rule:

> In at least 76 countries, discriminatory laws criminalize private, consensual same sex relationships exposing millions of individuals to the risk of arrest, prosecution and imprisonment- and even in at least five countries- the death penalty.[16]

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[14] Karen Dolan and Jodi L. Carr, *The Poor Get Prison: The Alarming Spread of the Criminalization of Poverty*, Institute for Policy Studies, Washington DC, 2015.

[15] Kaaryn Gustafson, The Criminalization of Poverty, 99(3) *Journal of Criminal Law and Criminology* 643-716 (1999).

[16] United Nations Office of the High Commissioner for Human Rights (OHCHR) factsheet (undated). Available at: <https://www.unfe.org/system/unfe-43-UN_Fact_Sheets_-_FINAL_-_Criminalization_(1).pdf> last visited on September 16, 2016.

In the realm of crimes, of criminalization in particular, lawlessness seems apparent. In the absence of jurisprudence vis-à-vis criminalization, who may get criminalized and on what count are left to whim and fancy of those in the seat of power and driven by eventuality rather than rationality followed by reasoning out of criminology. Import of constitutional morality seems a route to fill in the blank. Due to want of mention, morality but appears a mere derivative and too remote to get translated to positive law of the land; to pervasive detriment of criminal justice itself:

> In the absence of an explicit constitutional right not to be criminalized, unprincipled criminalization can be regulated by restructuring the policy of criminalization along the principles of constitutional morality.
>
> Since the Constitution of India protects of all facets of individual diversity, any conduct that is a reflection of diversity, cannot be labelled as harm. … transforming the structure of society by addressing the existing social and economic inequalities, is the aim of social revolution. In the Preamble, the Constitution guarantees justice- social, economic and political- to all the citizens; it protects the identities of minorities secures the wellbeing of marginalized and vulnerable individuals, and directs the government to work towards the interests of impoverished classes by policy decisions that have an egalitarian objective and content. These all form part of the norms of constitutional morality. The text of the Constitution of India is an important guide to establish a connection between what the Constitution wants and what should not be permissible in criminalization decisions.
>
> There can be no possible reconciliation of state's conduct in violating the norms of constitutional morality, there by endorsing policies that create impoverishment whilst

simultaneously imputing criminality on the impoverished through its unprincipled policies of criminalization.[17]

Lawlessness apart, criminalization of thought constitutes an increasingly emerging area of concern as basis of criminalization. Whatever thought of political potential appears inconvenient to the dominant discourse is thereby subjected to retribution of the state and at times with too crude tools and techniques to keep the same undercover anyway. On this count, sedition and contempt of court- along with concerned law and practice- resemble two sides of a coin to silence dissidence roaming around. Even without action or omission, mere expression of thought- or even slightest suspicion of state apparatus thereof about alleged expression- is enough for one to get victimized. Consequently, the same may and does open floodgate for witch-hunt on the part of those in the seat to settle score against those in the street and thereby eliminate the political opposition for prospective electoral mileage. With the next regime change, however, savage-victim relations may and does reverse, to turn worse than ever before. What remains constant is criminalization, and consequent victimization, of thoughts contrary to official one getting oppressed by otherwise liberal democratic governance.

Nowadays victimology is on its rise to raise newer concern appurtenant to criminal law and thereby facilitate betterment for administration of criminal justice. In a nutshell, victimology concentrates its focus on the victim of the criminal and the crime. Savage-victim relations thereby paves the way for its newer jurisprudence. While a fallacy lies in the basis of traditional criminalization leaving the victim further vanquished (read vanquished) by the systemic subversion of public policy, law,

[17] Latika Vashist, Rethinking *Criminalizable Harm in India: Constitutional Morality as a Restraint on Criminalization*, Indian Law Institute, 2013, pp. 73-93.

practice and procedure involved therein, for no fault of his own. All these lead to the travesty of justice and thereby defeats the purpose of good governance while the state as a political institution is meant for the same. Victimology, on the contrary, has turned the table upside down with its focus on the vanquished and thereby urged the state to compensate the damage through reasonable means rather than disciplining those indulging in getting outlawed; thereby challenging the public order. Through restorative social engineering, however, both ends may get together through reparation of the victim by the convict.

Basis of criminalization, therefore, constitutes a blind spot just below the nose and falls severely short to attract attention of the lawgivers and of the policymakers alike to gross detriment of crime governance. As a subject matter, criminalization has had potential to creates interdisciplinary space for those in the seat of power to grapple with multidisciplinary issues of concern; cynicism, multiculturalism, populism, being few- too few among them. Besides, power arrangement and the given politics, economics, and the law involved therein play their respective roles. As a political institution and as part of the state apparatus as well, even the judiciary is yet to transcend the trend. For instance, Delhi gang rape judgment (Mukesh v. State of NCT of Delhi)[18] onward, death penalty in rape-n-murder cases got frequented manifold on the spur of moment to put abolitionist movement to peril while the rhetoric for "rarest of the rare cases" is yet to get settled with its reasonable qualifiers, if any.

5. CRIMINALIZATION AND LEGISLATIVE POLICYMAKING

In the legislation landscape of India, the genre of criminalization suffers from paradox at several crossroads with

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[18] Mukesh & Another v. State of NCT of Delhi & Others, Supreme Court of India, judgment in the Criminal Appeal No. 607-608 of 2017, May 5, 2017. Available at: <http://judis.nic.in/supremecourt/imgs1.aspx?filename=44879> last visited on May 10, 2017.

caste, ethnicity, gender, and other socio-economic dynamics involved therein. Also, at times, there lies crude contradistinction in the legisprudence (the way V. R. Krishna Iyer referred to). For instance, while the constitutional regime is by and large adhered to liberal feminism to claim equality with men before the law, Indian Penal Code criminalizes the male partner alone in the offence of adultery case under section 497 of the Penal Code that deals with sexual intercourse with the wife of another man. Indeed, by implication, the same ought to be mutually consensual (otherwise the same is construed as rape under Section 375 of the Code), implied *culpa* of female partner (despite being stakeholder of the offence for her consent by default) stands ignored by the law under Section 497 of the Code in unambiguous departure from the discursive positioning of liberal feminism. Also, in an age of increasingly pervasive trend of self-determination for the individual, the criminalization of attempt to commit suicide under Section 309 appears otiose while the underprivileged are left to hunger and consequent malnutrition, even starvation death; by courtesy *de facto* state policy of neoliberal economic governance. Whether and how far the State has the *locus* to criminalize poses a moot point. Also, this is one- and only one- crime where the accomplice is not criminalized; but in case of failure, it is criminalized. Several other statutes also deserve due inclusion to this inventory. On this count, inventory of statutes includes, yet cannot get limited to, following:

(i) The Evidence Act, 1872
(ii) Probation of Offenders Act, 1958
(iii) Narcotic Drugs and Psychotropic Substances Act, 1985
(iv) Prevention of Corruption Act, 1988
(v) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989
(vi) The Transplantation of Human Organs Act, 1994
(vii) Information Technology Act, 2000
(viii) Protection of Women from Domestic Violence Act, 2005
(ix) Protection of Children from Sexual Offences Act, 2012

(x) Statutes vis-à-vis economic offences, viz.
    (a) Import and Export Control Act, 1947
    (b) Banking Regulations Act, 1949
    (c) Income Tax Act, 1961
    (d) Customs Act, 1962
    (e) Antiquity and Art Treasures Act, 1972
    (f) Securities and Exchange Board of India, 1992
    (g) Competition Act, 2002
    (h) Foreign Exchange Management Act, 2002
    (i) Prevention of Money Laundering Act, 2002
    (j) The Companies Act, 2013
    (k) Statutes vis-à-vis intellectual property offences

All these appear ridden with a paradox of their own. For instance, rather than the truth, the law is content with evidence to prove the fact contended beyond reasonable doubt. In several statutes, there is but provision for reversal of onus of proof to put the burden on the accused with rationale that may get contested. The jurisprudence of probation, despite its otherwise *bona fide* legislative intention behind, falls short of its purpose vis-à-vis durable rehabilitation in favour of the probationer concerned. In particular, economic offence being nonviolent in its essence, there are better curative measures than mundane imprisonment of an otherwise talented- yet tainted- mind with potential to play critical role toward development of market economy in the globalized world. Also, moral poverty vis-à-vis intellectual property offender deserves creative treatment rather than blanket criminalization followed by sentencing a creative soul to get rotten behind the bar. More than mundane retribution, restoration has had potential to serve remedial purpose; thereby spearhead the teleological end of justice.

Last but not least, formal legislation must not get frequented as panacea to cure the evil in everyday sundry case. Criminalization has had sacrosanctity of its own and the same ought to get applied sparingly as the last and final refuge to cure whatever evil left out as otherwise incurable anyway. By resort to criminalization through

formal legislation at regular intervals, sacrosanctity of criminalization is increasingly reduced to naught. While taking resort to criminalization, in larger public interest, care and caution ought to get taken on the part of state in democratic governance that criminal jurisprudence may transcend the given dominant discourse for criminalization and thereby merge with wherever is instrumental for larger public good. Here, once again, determination of such goodness poses the conundrum. Strict objectivity- with due heed to plurality- appears axiomatic to attain inclusive genre for better criminal governance to this end. Under the disguise of cultural relativism, however, local evils ought not to get included to earn inclusivity for the same of say; thereby turning the jurisprudence upside down to the travesty of criminal justice. Major best practices worldwide resemble compass to underscore broad-based guidelines. There are but lips to cry foul since universalism is often than not construed as a discursive version of the Occidental outreach to defeat poles apart diversity of diversity in lifeworld across the world. This is exactly the case for abolitionist arguendo vis-à-vis the International Criminal Court. At the same time, however, how far the regional parochial practice may be allowed to get played out appears conundrum before the criminal governance to grapple with.

6. CRIMINALIZATION AND JUDICIAL POLICYMAKING

Even in course of judicial policymaking, the court cannot claim freedom from bias. A classic case of its subjectivity may get demonstrated by the cases of contempt where the court triplicates its own conscience into three, e.g. plaintiff, pleader and adjudicator; thereby brutalizes the defendant to complete travesty of the adjudicatory jurisprudence that preaches pronouncement of position of the law by third party. The jurisprudence of third party stands on the assumption of impartiality on the count of his detachment; something critical enough to a natural justice principle- none can judge his own cause- that appears defeated *ab initio* in contempt cases. To quote a relevant judgment here:

> In the offending portion of her affidavit, the respondent has accused the court of proceeding with absurd, despicable and entirely unsubstantiated petition which, according to her, amounted to the court displaying a disturbing willingness to issue notice. She has further attributed motives to the court of silencing criticism and muzzling dissent by harassing and intimidating those who disagree with it.
>
> "There is no defence to say that as no actual damage has been done to the judiciary, the proceedings be dropped. The well-known proposition of law is that it punishes the archer as soon as the arrow is shot no matter if it misses to hit the target. The respondent is proved to have shot the arrow, intended to damage the institution of the judiciary and thereby weaken the faith of the public in general and if such an attempt is not prevented, disastrous consequences are likely to follow resulting in the destruction of rule of law, the expected norm of any civilized society.

Thus, at times and with the governmentality of its own, even the court may and does indulge in the criminalization of free speech with clear departure from natural justice; something otherwise held by the same court as fundamental to justice delivery system. Irrespective of technical points in Article 12- read with Article 36- of the Constitution, here there lies deceptive similarity between the state apparatus and the judiciary since both suffer from want of patience, thereby unleash prosecution in the wake of criticism with no heed to intention behind. No wonder that honourable men with robes of justice discover arrow within the pen of unarmed woman; unbecoming enough for themselves and for the court alike as a democratic institution.

The court thereby succumbs to travesty of justice on two counts. First, while truth constitutes a defence in defamation cases,

truth is not so fortified in contempt cases. The Court never contested the truth in her statement. Her conviction went pronounced as routine since the Court did not like the truth. Second, reasoning behind the making of criminal law lies in public good to uphold security of the society from within. Thus, an otherwise *bona fide* interest of those harmed by the aftermath of crimes is incidental and never constitutes the focus. Indeed, there is newer domain of victimology to focus upon individual interest. Even victimology is meant to supplement- and not to supplant- crime as offence against the society in final count:

> The criminal law establishes which actions are offences against society and prescribes the punishment to be imposed for such conduct. The criminal law thus is a branch of public law. The parties in a criminal case are always the government, which prosecutes the case, and the defendant charged with the criminal violation. Although they may have an interest in the outcome of a prosecution, victims of crime are not parties to the litigation. The criminal offence is understood as a violation of the public order, not as an offence against a particular person.[19]

Contempt apart, voices of sanity may get heard to get adhered to the decriminalization of offences across the borderline of behavioural disorder rather than delinquency. Plenty of these prohibition laws ought to appeal to conscience about very legitimacy of the law of crimes. For instance, criminalization of poverty appears in commonplace:

> There is an increasing demand among behavioural scientists and others to decriminalize some of the existing offences. For instance, some sections want to repeal offences under the prohibition laws while others are

[19] G. Alan Tarr, *Judicial Process and Judicial Policymaking*, (Wardsworth Cengage Learning, Boston, 2010).

> seeking to decriminalize 'offences' such as beggary, some of the offences against marriage, etc. keeping in mind the need to adopt the principle of decriminalization and use of noncriminal strategies to control conduct in marginal areas of deviance, it is for the lawmakers to decide which of the existing offences should be so changed and when. … In short, it is time to adopt decriminalization as a part of national policy and seek advice of expert bodies like the Law Commission of India and of the implementation agencies in the departments concerned in this regard, periodically.[20]

Like decriminalization of the poor and the marginalized, criminalization of the elite and the mighty remains a great grandeur of criminology. While getting body corporate into the inventory of crimes, the court takes queue after tortoise with a default hideout- that a body corporate has had no mind of its own but driven by those inside the body- to serve interest of wrongdoers inside. In recent times, however, the court is inclined not to indulge in the evil practice out of another legal fiction- that wrongdoers cannot take advantage of a legal fiction otherwise meant to safeguard interest of the righteous (read entrepreneur) in capitalist economy:

> Like most other common-law jurisdictions, English law has long recognized the capacity of corporate bodies to bear criminal responsibility, either vicariously via the actions of employees, or directly, but commentators have also recognized the almost complete inability of criminal law to apply to corporate bodies in practice. Since it was established in 1944 that corporations could commit

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[20] N. R. Madhava Menon *et al*, Report of the Committee on Draft National Policy on Criminal Justice, Ministry of Home Affairs, Government of India, New Delhi, 2007. Available at: <http://mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/DraftPolicyPaperAug.pdf> last visited on May 10, 2017.

> offences of *mens rea*, the problem has always been that responsibility for causing criminal outcome must be attributed to the corporation via the state of mind of its individual employees. … To borrow the famous analogy of one leading English judge, the corporate body is given life by the workers who act as its hands and the managers who act as its brain; we have to locate the intentionality of this brain in order to hold the body responsible for the actions of its hands.[21]

In the given position of these bodies incorporated to spearhead market economy ahead, if assigned to prosecutors alone, the burden appears too heave to bear with high risk low profit game for themselves. Therefore, systemic balance is required to get the Inc. criminalized by the deterrent regulatory regime with combination of strong oversight, rules, laws, etc. and not to get all these devils left to the court alone as troubleshooter for all sundry evils on its own:

> Corporate prosecutions upend our assumptions about a criminal justice system whose playing field is tilted in favour of prosecution. It is admirable that prosecutors have taken on the role of David in prosecuting the largest corporations- but if they miss their shot at Goliath, the most serious corporate crimes will be committed with impunity. The surge in largescale corporate cases shows how federal prosecutors have creatively tried to prevent corporate malfeasance at home and overseas, but real changes in corporate culture require sustained oversight of

[21] Paul Almond, 'Political Culture and Corporate Homicide Liability in the UK and Europe', in Judith Van Erp *et al* (ed.), *The Routledge handbook of White-collar and Corporate Crime in Europe* (Routledge, New York, 2015).

> management, strong regulators, and sound rules and laws.[22]

While getting body corporates criminalized, priests of justice ought not to get hesitant with the superstition that they are too big to jail; that criminalization of these players leaves adverse impact on the market economy to affect larger interest of the society. All these are extraneous considerations and interpolation of the same ought to affect justice and market alike since the impugned trend in judicial policymaking ought to set precedent for the common law court and thereby boost the confidence of errant players to plead the same in subsequent occasions. Thus, market-driven justice (!) ought to get reduced to mockery of justice and market alike. On the contrary, blindfold justice ought to alert market players and get adhered to rule of law diction. In consequence, market ought to get more just toward better prospect for one and all:

> Corporate crime deserves more public attention. What is particularly chilling about the problem is that corporate complexity may not only enable crime on a vast scale but also make such crimes difficult to detect, prevent and prosecute. … When we ask if some companies are being treated as too big to jail, it is not enough to ask whether the largest firms are so important to the economy that they are treated as immune from prosecution. We need to ask whether individuals are held accountable. We need to evaluate whether the corporate prosecutions that are brought are working.[23]

Likewise, in the society of nations, there is diplomatic effort to safeguard wrongdoers with the cloak of statecraft while individual

[22] Brandon L. Garrett, Too Big to Jail: How Prosecutors Compromise with Corporations, Harvard University Press, Cambridge, Cambridge, 2014.

[23] Brandon L. Garrett, Too Big to Jail: How Prosecutors Compromise with Corporations, Harvard University Press, Cambridge, Cambridge, 2014.

criminal responsibility is order of the day. Here the same political economy appears at work to serve interest of mighty statesmen despite they may have wronged the humanity with most wretched means to its height:

> Crimes against peace had a considerable foundation in the normative statements prohibiting aggressive war as national policy and defining aggressive war as a crime. It was the United States, and especially Justice Jackson, who insisted on criminalizing war of aggression in the Nuremberg Charter. In Nuremberg, the United States clearly viewed this crime as one for which responsibility attaches to individuals. Nonetheless, in recent statement on the proposed International Criminal Court, the United States expressed many caveats about attaching responsibility to the individuals for the crime of aggression. Instead, it describes aggression as essentially a crime of states, which is problematic for two reasons: it is ill-defined and liable to be politicized.[24]

Indeed, eternal in its essence, the jurisprudence behind criminalization of thought and expression- in particular while odious to those in power- appears increasingly on its rise to collateral detriment of free speech- otherwise getting hallmark of liberal democracy- and thereby offer an ideological juxtaposition of 'censored democracy'; albeit coined in poles apart context of cinematography. The candid apprehension hereby advanced appears larger than the entertainment media house alone with coverage of every sundry counterpart of mass media; individual thought and expression cannot get spared from supervision; something contrary to the epistemology of welfare state. Despite the given edge of its

[24] Theodore Meron, Is International Law Moving towards Criminalization? European Journal of International Law, Vol. 9 (1998). Available at: <http://www.ejil.org/pdfs/9/1/1474.pdf> last visited on May 10, 2017.

liberal democracy, the state could not resist but to pounce upon the representative voices of dissidence at regular intervals. Likewise, there are many- too many- to suffer from the hostile governmentality fond of incrimination; e.g., M. K. Gandhi, Subhas Chandra Bose, A. K. Gopalan, Shyamaprasad Mookherjee, Charu Majumdar, etc., to name few among them. On this count, political orientation of the statecraft often than not transcends ideological divides to pounce upon dissidence and irrespective of whatever diction vis-à-vis rule of law discourse may get scribbled in their respective statute books across the world.

At bottom, there lies a crisis in the jurisprudence to expose the act of criminalization to the fallacy of subjectivity, in turn, to whim and fancy of those in the seat of power. There is no grammar of what amounts to *culpa* and what is the nexus between *culpa* and the law of the land. The following literature appears apt to expose the decadence:

> The evolution of the framework of human rights and resurgence of constitutionalism has had little regulatory impact on the exponential and unprincipled growth of criminal laws and penal statutes in India. Though the issues of over-criminalization and disproportionate application of criminal law have detrimental consequences for people, there is no sustained and coherent dialogue amongst law-makers on the policy of criminalization followed by the criminal justice system in India. Even the judiciary, though recognized for its human rights activism, has not been able to direct the judicial process towards a well-conceptualized theory of criminalization in order to fill the gaps in the existing framework.
>
> The only way in which this right can be overridden by the state is by reasonable, fair and principled criminalization. Under the scheme of the Indian

> Constitution, there is no express guarantee of "right not to be criminalized". While there have been significant path-breaking developments in Indian jurisprudence through judicial process- right to life has evolved to include within its scope right to privacy, right to speedy trial, right to free legal aid, and even socio-economic rights like right to shelter and livelihood, right to health, right to clean drinking water and fresh air, right to education, right to development, etc.- the right against unfair criminalization or right not to be criminalized has not been read in right to life or any other right.[25]

While Articles 20, 21 and 22 of the Constitution- taken together- constitutes the corpus of rule of law vis-à-vis administration of criminal justice in India, there lies vacuum- if not void- in the basis of criminalization to render otherwise unproblematic texture of the praxis at bay. Consequently, in the absence of certainty in the meaning of crime, the otherwise great grandeur of rule of law suffers setback out of fundamental fallacy since crime is yet to get determined on the basis of reasonable weights and measures beyond reasonable doubt. In the whirlpool of criminalization and decriminalization, laws may often than not get driven by caprice of the ruling regime while justice may get pushed to the backseat. A sublime tension in cases of dominance upon the voice of dissidence but lies in a systematic subversion of the purpose state is but meant for; to protect the right from preponderance of might. The feud flows on between free speech and criminalization, criminalization of poverty and decriminalization of the mighty, and the like, more so while the conundrum culminates out of judicial policymaking; something that ought to get, yet often than not falls short of getting, judicious enough to address reasonability check of the lawmaking under Article 14 of the Constitution. The criminal

[25] Latika Vashist, 'Rethinking Criminalizable Harm in India: Constitutional Morality as a Restraint on Criminalization', *Indian Law Institute* 73-93 (2013).

law without reasoning lacks legitimacy and thereby succumbs to fragility by default to gross detriment of stability for the society. Therefore, no welfare state affords to avoid jurisprudence of (de)criminalization in tune with its given character since absence of jurisprudence is pregnant with potential to get the law and lawmakers void to real peril of both: rule of law and the lawmakers alike.

Political crime appears a classic illustration to this end. The policy of criminalization, if politically motivated, ought to push the opposition party leadership behind the bar on one clandestine charge or the other with collateral damage to democratic character of the statecraft. Desperate life looks forward for desperate means to safeguard its soul. All these means taken together thereby contribute to breakdown of social solidarity; something fundamental to life and health of the society. Tolerance, if not endurance, appears *sine qua non* for solidarity to ascertain sustainable development for the state; and the same went reflected by Article 15 of the Constitution.

Here lies problematic in the premise of criminalization at random. In ancient antiquity, criminalization went functional by public. Getting at random, public justice was devoid of reason: often than not driven by emotion of the given crowd on the spur of moment. In recent times, political motivation behind criminalization in the name of public justice appears enough to get the aberration back; if lynching as practice on the count of cattle is taken into account. Communal realpolitik apart, the wretched practice appears revival of mobocracy- where reasoning as nonnegotiable source of democracy and rule of law takes backseat- to intimidate the judiciary as embodiment of institutionalized justice and, after regime change, the same may well get counterproductive for all those behind. Even at the time of indulgence in public justice, the legacy ought to put life and property of those with the same faith elsewhere in peril due to identity politics there; something to appeal to the parochial crowd with majoritarian politics not to engage fire and fury to mutual detriment of both in public interest. The minority status ought to stand

spatial in its essence. "Injustice anywhere is threat to justice everywhere".[26] Thus, minority oppression here triggers violence elsewhere with reverse demographic count.

7. CONCLUSION

To sum up, what requires mention is an unambiguous statement to underscore the law- criminal law in particular- as a social and albeit political instrument for state apparatus to run dominant discourse the way joyriders run roller-coaster with little heed around. Criminalization with pervasive want of jurisprudence thereby leads to social exclusion of whatever appears odd to the mainstream lifeworld. Consequently, diversity is reduced to defiance in the eye of criminal law; followed by consequent wrath of administration of justice and penology of its own along with wide variation in given time and space of the society concerned. Together these characteristics carry forward the larger project of state governmentality under the disguise of legal fictions, e.g. collective interest, public order, social good, etc. while *bona fide* individual interest, micro-level justice, etc., along with established canons of criminal jurisprudence turn vulnerable. While the basis of criminalization is stuck to these pitfalls, state of affairs in criminal justice needs no mention to narrate the judicial travesty further in vivid details. Criminology, therefore, needs engagement by dialogue among diverse stakeholders of the society and its state *inter se* with judicious ramifications rather than mere judicial discourse in its essence. A level playing space with liberal democratic caucus of stakeholders- representation of many voices aboard- minimizes the inbuilt fallacy of dominance lest canons of criminalization get reduced to disciplinary decadence of criminology. Even the caucus may not necessarily spearhead a fortified forum to secure criminalization from the wrath of arbitrariness if not driven by political will.

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[26] Martin Luther King, Jr., Letter from a Birmingham Jail, dated 16 April 1963. Available at: <https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html>

An agendum lies in minimizing the menace of crime and thereby striving for perfection as perennial ordeal and not deal in itself. With the passage of time, criminalization may and does take volte-face to maintain its pace with ever-changing value judgment of the given time and space concerned. More the system welcomes call of the time, more there is need for stakeholders to customize with the same lest criminalization shoot through the roof of the society. On other side of the coin, more the system is averse to call of the time, more there is docility due to want of updates of criminal justice. At bottom, the same is but meant to hoodwink the world and thereby expose the system to upheaval on the spur of moment toward collapse the same like palace of cards. Thus, jurisprudence lies in optimized balance between either end.

Taking experience from pages of the past, resort to the axiomatic- that slow yet steady wins the race- appears turnkey for sustainable development across the world vis-à-vis criminal governance. In course of its progress, adherence to modest governmentality facilitates state escape evils of extremism- leftwing and right-wing, conservative and progressive: all alike- in criminology. Likewise, in penology, moderate policymaking in course of sentencing prevents aftermath of error to get worsened in its effect. Thus, there is affordable space still left out in the vacuum- if not void- of justice to get back to desired track once again and thereby avoid rupture out of state-sponsored injustice with impunity. Want of space for retreat turns the state apparatus vulnerable in itself and thereby get the same subverted from within; with likelihood to get criminalized by new force in the seat of power- after regime change- for detriment of the innocent. The counterproductive consequence may get blamed as 'victors' justice', consequence (read reaction) has had its own aftermath getting equal and opposite in its direction; thereby resembles Newton's third law. If not otherwise, swap of criminalization alone poses deterrence against the hardliners to get apprehended by eccentricity of their own.

ROLE OF CUSTOMARY LAWS IN SUSTAINABLE DEVELOPMENT

Ritu Dhingra*
Dr. Kanupriya**

Abstract

Customary laws play very important role in sustainable development of a country. These are laws developed by the indigenous people over a long span of time and usually are focused at using the natural resources sustainably. Many indigenous communities are involved in this conservation and no sovereign laws are required for this type of sustainable use of natural resources. In India there are many such laws, which are followed by the indigenous people to the extent that they have sacrificed their lives for the conservation of nature. Sustainable development is achieved when the natural resources are used in a sustainable way and the development goes hand in hand with sustainability by not harming the nature. The UN 17 sustainable development goals of 2015 and UN agenda 2030 can also be achieved with the help of the customary laws Need of the hour is to revive these laws and to implement them in the contemporary legislations for a sustainable development of the country.

1. INTRODUCTION

Customary laws comprise of various practices, which are followed by many indigenous people and local communities from time immemorial. These laws usually portray the very identity of an indigenous community. These laws are followed by the natives in various fields of life like personal laws; laws relating to spiritual life, and laws related to the use of natural resources. These protocols are followed by the indigenous people with due diligence. As far as laws relating to the use of natural resources are concerned, a lot can be learnt from these customary laws for the conservation and preservation of nature and for a sustainable use of the natural resources. This paper is an attempt to highlight these laws and to inculcate them in the present day scenario for the sustainable use of the natural resources.

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Traditional knowledge (TK) is knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity[1]. In many cases, traditional knowledge has been orally passed from one generation to other." This knowledge forms the very basis of the customary laws as this the foundation of the practices followed by the indigenous people, which become a law or a tradition.

According to the Commission of Sustainable Development, *Sustainable development is development that meets the needs of the present, without compromising the ability of future generations to meet their own needs*.[2]

Conservation of natural resources is extremely important for intergenerational equity and the principle of sustainable development paves its way in it. Development must go hand in hand with nature conservation. Customary laws for nature conservation can be highly beneficial in achieving this aim. Traditional knowledge, which is possessed by the indigenous people, is quite valuable for the biological conservation. Since this knowledge is largely linked to practice and belief so it is difficult to put it in the framework of the western science. It is also true that this knowledge is directly connected to the utilization of the natural resources like the medicinal properties and the time of fruiting. These indigenous cultures must be conserved for the conservation of biodiversity.[3]

2. CUSTOMARY LAWS AND SUSTAINABLE USE OF NATURAL RESOURCES- ANCIENT INDIA

While tracing the history of customary laws in the Indian subcontinent it is revealed from various texts that nature had always been an integral part of Indian subcontinent since time immemorial. In various time periods different rules and regulations have been observed for the protection and conservation of forests and natural resources. From the Vedic period to the post Vedic era and even till the later time periods, natural resources have

[1] WIPO, World Intellectual Property Right Organization, Traditional Knowledge (July 13, 2018, 9.32 PM), http://www.wipo.int/tk/en/tk/ . (last visited on Sep.24, 2018).

[2] IISD, The Knowledge to Act, Sustainable Development (July 13, 2018, 9.38 PM), http://www.iisd.org/topic/sustainable-development . (last visited on Sep.24, 2018).

[3] Madhav Gadgil et al., Indigenous Knowledge for Biodiversity Conservation, 22 *Ambio* 151, 154-55 (1993).

been conserved and preserved by the inhabitants of this Indian subcontinent. They knew the importance of nature and various benefits, which can be derived from them, quiet well.

Customary Laws for the Conservation of Natural Resources in Ancient India The Vedic Period (2000 -500 BC).

The Vedas

Vedas were conceived by Maharishi Vedvyasa during the Vedic period.

The ancient texts, Vedas elucidates as to how each element on this planet Earth is related and connected to each other. Even our five senses of hearing, touching, tasting, seeing and smelling are interrelated and how these magnificent senses were interconnected to a particular element of earth and how all are knitted together to create this living biome, where each and every component is dependent on the other. Any disturbance anywhere in the Earth's ecosystem can disturb all other components, proving the concept of coherence in the World's ecosystem.[4] This belief in a way has been conserving the whole environment including living and nonliving from and the whole biome. No temples existed during the Vedic Era; and the whole earth and in fact the universe was their temple. People of the Vedic period worshipped nature and which ultimately had lead to its conservation. Vedic people were one with nature (Rig Veda, VII;2-3)Evidently, concise texts of the Vedas reflect only the essence, or the conclusions of the vast amount of empirical and experimental scientific knowledge that was accumulated generation after generations of *acaryas* (teachers).[5] Vasudev Katumbakam is an old saying from the Vedas, which means that the inhabitants of the whole world belong to lord Vasudev's (mother earth) family as Vasudha means earth in devanagri language.[6] When the studies on Vedas related to

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[4] Hinduism and Environment Conservation, *available at:* http://vedic-yoga.blogspot.in/2007/11/hinduism-and-environment-conservation.html (last visited on Sep.24, 2016).

[5] M. Vannucci, *Human Ecology in the Vedas*, 51-60 (D.K. Print World (P) Ltd Delhi 1999).

[6] Albertina Nugteren ,*Belief, Bounty, And Beauty: Rituals Around Sacred Trees in India* 77(Brill, Leiden, Boston, 2005).

the environmental aspects of the earth's ecosystem are done, always a referral to the five elements of the Eastern tradition are found and they are Air, Water, Fire, Earth and the Akasha. In mythological parlance, all the five elements, earth, wind, water, fire and sky are interlinked. Water and fire form one group, heaven (sky) and earth form a couple and the wind is regarded as an all-pervasive binding force. And all of them are connected with Prajapati who creates them by power of tapas.[7] Vedic people were one with Nature and had virtually worshipped the nature as their mother Goddess. Religious literature of Hindus from the Vedas to the contemporary philosophers is being discussed as a natural world with a systematic approach to the five elements. These elements are mentioned not only in the earliest oral texts of India like the Rig Veda but also in other religions like Jainism and Buddhism.[8]

According to the Vedic philosophy energy and matter as well are the spirit of the God almighty vis-à-vis the human being are all in harmony with the nature and the concept of oneness and interchangeability is also attached with it. So human being, universe, God and nature are all one and the same. When the physical body dies, its elements merges with the earth as basic elements of life on this planet Earth. When it is seen from the modern ecological concept where matter is recycled and is a form of energy, which can be interchanged, in different forms. This concept is also explained in the Vedas to elucidate the importance and magnanimity of nature and the miniscule status of human being in the front of this gigantic universe. This philosophy is very deep and gives a message of environmental conservation and is even applicable in the present day scenario.

The Post Vedic Period (1250 -1000 BC)

During the post Vedic period, agriculture became a source of nutrition and food. Now forests were also a part of the civilization but cultivation of grains and various other edible crops was initiated.

Manu Sahmita or Manusmruti and Laws on Nature Conservation (1250 BC and 1000 BC)

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[7] Kapil Vatsyayan & Baidyanath Saraswati (eds.), *Prakarti: The Integral Vision,* 19(Indira Gandhi National Centre for the Arts, New Delhi, 1995).

[8] David Landis Barnhill & Roger S. Gottlieb (Eds.), *Deep Ecology and World Religions : New Essays on Sacred Ground* 61(State University of New York Press, 2001).

Manusmiriti is considered to be the world's first ethical compendium on human jurisprudence, compiled by Maharishi Manu. Manusmiriti, an ancient legal text that was written in the post-Vedic era also depicts that religion played an expanded role in the conservation of the environment in that time period also.[9]

In the pronouncements for prevention of pollution as depicted in Manusmiriti, a clear indication is shown for the ecological awareness. As per this text, biodiversity has been divided in living forms generally into two categories "Chara" and "Achara". Chara means the living beings that can move and are mobile. Acahara means the living forms that cannot move basically the plant kingdom. Pollution means the spoilage of the five basic elements the "panch mahabhuta" from which the world is made of, namely Akash (Ether) air, water, fire and earth. Any damage done to the pure forms of these five elements was considered to be pollution in the Manusmiriti. Contamination was considered to be any deviation from the pure form of any of the basic elements. Any action, against the wholesomeness or the "Ssoucha" in Sanskrit. It was considered a major crime in that era. Tuberous root, tubers, underground stems, leafy vegetables, tasteful fruits, crops beautiful flowers, and timber yielding trees were all considered to be very precious and objects of allurement. Storage organs of plants like tuberous roots and underground stems, leafy vegetables, beautiful flowers, tasteful fruits, timber yielding trees, crops etc. remained objects of allurement in that period. The plants and the parts of the plants were to be protected from any injury and in Manusmiriti there are descriptions for the various punishments for the lawbreakers. It becomes amply clear that, floral biodiversity was being protected by the law itself, which further depicts the advancement of the legal system for the conservation of biodiversity at that time, which is commendable. Importance of protection was even extended to the domesticated animals and stress was laid on the inculcation of vegetarian food habits so as to avoid any killing of the animals. This rule was extended to the extent that Manu was of the view that agriculture instigates injury to

[9] Sachidananda Padhy, Santosh K. Dash, Ratnaprava Mohapatra, "Environmental Laws of Manu: A Concise Review" 19(1) J. Hum. Ecol., 1-12(2006).

animals especially to the insects and the germs in the soil. This view is still not imbibed in the contemporary scenario, proving that the conservation of biodiversity was of a very high magnitude in that era. That consciousness, is not yet, even thought of in the present world. This proves that how scientific and systematic were the laws of the conservation of biodiversity. A lot can be learnt even today and need of the hour is to imbibe these laws in the contemporary environmental legislations. Conservation of biodiversity of a very high magnitude was observed in that era. According to Manu, fishes of all kinds must not be killed for eating, village pigs, one hoofed animals, unknown beast and animals, solitary moving animals, birds, even carnivorous birds, water birds, village birds, web footed birds, birds with striking beaks, diving birds who are feeding on fish etc. all of these should not at all be killed for the purpose of eating them. This clearly shows the enormousness of the laws on the conservation of avian biodiversity, which is breath taking and is so advanced for that era. These kinds of conservation laws are needed in the present era as well. He even stated that killing of "Khara" (ass) "asva" (horse), "ustra" (camel) "mriga" (deer), "ibha" (elephant), "aja" (goat), "ahi" (snake), "ahisa" (buffalo) is a sin.[10] This is so very impressive and the fact that ancient Indian laws or Hindu laws were so very developed in that era that if they are inculcated in the present day legislations and implemented to the core, then perhaps the loss of biodiversity can be diminished and reduced to a very large extent. It is pertinent to note here that law was like a religion at that time and was connected to the well being of the physical and the spiritual life of the human being. Laws were supported by logics and punishments were also given for not abiding them. It became a lifestyle of the people to follow those laws. In India there are so many tribes and many religious beliefs and virtually all the religions lay stress on vegetarianism. In this manner by following the norms of religion, the environment and biodiversity was automatically protected. Religion played a very important role in environmental conservation.

[10] *Ibid.*

Sushruta and Chakra Samitha (600- 800 BC) and Importance of Natural Resources

Ayurveda originated from the Arthava Veda and the Vedic era was an era when this medical science of ayurveda flourished. Aroud 600 BC to 800 BC two principle texts Charka Samhita and Sushruta Samhitawere composed. This text of Sushruta Samihta is a compendium of medicine for treating human beings for various ailments with the help of the herbs. This text was compiled by Sushruta , who was an Indian Ved or a doctor, which explains his ideas about treatment of human beings. This was known as Sushruta Samhita. There was another text, the Chakara Samihta , it is also a medical text and was also compiled at the same time. These Indian doctors try to treat the patients by looking at both the physical and mental or psychic features of a disease so as to fully heal the patient. Both the texts aim to heal the patient completely with the aspiration that disease should not reoccur.[11] These systems of medicine are still followed by many people in India. These systems of medicine use many herbs and make concoctions out of them for making the medicine for healing the disease. It is pertinent to note here that in both the medical treatments most of the medicines were derived from herbs and plants growing in the forest. During this period each and every plant growing in the forest had some or the other medicinal use leading to a conservation of biodiversity. The plants although wild and might not be otherwise edible but had medicinal qualities, so these plants and herbs were conserved by the people leading to a conservation of nature and biodiversity. This is a major contribution from the traditional knowledge systems, which are benefitting the society since ancient times. Need of the hour is to share and spread this knowledge for the betterment of the people at large. These systems of medical sciences are environment friendly and do not harm the nature and are beneficial for a sustainable living.

The Mauryan Empire, The Arthshashtra (323-185 BC) and Nature Conservation

[11] Amritpal Singh, *Compendia of World's Medicinal Flora* 2,3 (Science Publishers, New Hampshire, U.S.A. 2006).

In the Mauryian reign, forests were protected and different laws were made and were implemented for their conservation. There was a demarcation of forests as different types of forests were protected like for the supply of timber, forests where lions and tigers live (basically for preserved and protected for their skins) Even protectors of animals were appointed to keep a check on the thieves and other animals like tigers and other carnivores so as to protect the grazing forest for the cattle. The forests were demarcated as per their economic value and were controlled and managed by the officers of the government at that time. But the forest tribes were not trusted by forest officers and were controlled and dominated by giving them bribery and by the political power. Although some of the tribes were employed as food collectors or gatherers and were called "aranyaca". Aranyaca used to protect the borders and used to trap animals. In this manner the Mauryans were able to guard their huge empire and forests. Interestingly the Mauryan great emperor Ashoka (304-232 BC) embraced Buddhism after the Kalinga war in the latter part of his reign and brought about noteworthy transformations in his style of governance and became a protector of living beings. He provided protection to fauna to such an extent that he relinquished the royal hunt. In this manner he became the first ruler to extend the conservation of wild life and made laws for them and they were even inscribed on rocks as Ashoka's stone edicts. Buddhism changed him completely. Many people gave up the slaughter of animals in that era and it was inscribed in of the Ashoka's edicts; one of them proudly states: "Our king killed very few animals". (Edict on Fifth Pillar). The edicts of Emperor Ashoka and the subject matter of Arthashastra, depicts the intentions of the rulers to conserve the forests, animal and in totality the forest biodiversity. The penalty of 100 panas for poaching a deer in royal hunting suggests that lawbreakers existed at that time also and they were being checked and penalized for the offences related to the wild life. There was a difference in the legal restrictions on freedoms the common people for hunting of animals, felling of trees, fishing, setting forests on fire.[12]Conservation of forests and nature was done in an organized manner, proper legislations like the Kautilaya's Arthshashtra were written and laws were implemented for the conservation of forests and wild life. Officers were appointed and even tribal people were involved in the guarding and

[12] Indian Natural History, The Maurya Period, *available at*: http://www.liquisearch.com/indian_natural_history/the_maurya_period (last visited on Jan 12, 2018).

protection of forests. King Ashoka, after the Kalinga war embraced Buddhism and even stopped royal hunting, this shows the turning point of that reign as the King who was once a warrior turned into a protector of all life forms. It is a classic example of a religion playing a huge role in conservation of forests and biodiversity. This apt example of a tradition called Buddhism, where all life forms are revered and protected. If such preaching is inculcated the contemporary legal systems then of course a lot of conservation of nature can take place. This is only an example to show that how in the ancient times there were strict laws were in practice for the conservation of nature. The tenet of sustainable development was applied in those times and now in the contemporary world, there is a dire need for such practices for a sustainable development and living. This traditional knowledge must be expended in the contemporary world.

Mrig Pakshi Shastra - Chalukya Period (6th to 12th Century AD) and Conservation of Nature

The Chalukya dynasty refers to an Indian royal dynasty that ruled large parts of southern and central India between the sixth and twelfth centuries. Mrig Pakshi Shashtra the best known treaty on hunting in Sanskrit which was as good as an encyclopedia on animals written during the Chalukaya (the twelfth century rulers of the Deccan) period by a Jain Poet Hamsadeva in the 13th Century and is known as the best treaty on mammals and birds written in that period[13]. This treaty explains a lot about the biodiversity in animals and is a remarkable compendium written in that era. First compendium of its kind, which explains about special diversities of various animals and birds. Animals and birds like different varieties of cows, Jackals, dogs, swans, parrots, pigeons, deer's, monkeys, cats, rats, wolves, eagles, swans, cranes, owls, cuckoos, peacocks, cocks, sparrows, skylarks, lions, elephant, horses, bulls, jay birds, hyenas, beers, wagtails, camels, crows and many more faunal biodiversity is being discussed in this

[13] Indian Natural History, *available at*: http://www.revolvy.com/main/index.php?s=Indian%20natural%20history&item_type=topic (last visited on Jan.12, 2018).

compendium.[14] The text is marvelous as it divided the animals and birds into 36 groups and then explains their various features, types, time of intercourse, time of pregnancy, early stages of development and growth, the nature of male and female, their life span in terms of age and their behavior and nature like calm, ferocious or dull. This is a treat to the science of zoology.

Here it is observed that numerous texts have been synthesized in ancient India and had laws for the conservation of nature and biodiversity. It is interesting to note here that the people followed these laws at large in that era and many of them are still followed by the indigenous people of various terrains in India. It is high time that these laws should be revived and inculcated in the contemporary legislations as they are highly beneficial for environmental conservation. There many species and subspecies of animals that are depicted in this compendium, that if a genuine effort is made by the concerned authorities then may be more species can be conserved in the present day scenario leading to a conservation of life forms for the intergenerational equity.

3. INDIGENOUS PEOPLE, BISHNOISM, CHIPKO MOVEMENT AND PROTECTION OF NATURE

Bishnois is a community who live in the desert train of the Indian Subcontinent. This community is vegetarian and is hugely instrumental in conserving the forest biodiversity of their terrain. For them forests and trees are Gods, who give then food, fuel and fodder. Since the terrain is a desert, not much vegetation is found here. There are certain varieties of trees and shrubs, which grow in this desert terrain, and these people are very conscious and concerned about the well being of these plants. This Bishnoism is a religion, which is a subsection of Vedic tradition was developed in the 15th century and is a great forerunner in the conservation and protection of nature. This is a unique religion in the world, which originated in India and has compassion for plants and animals and treats them as their own offspring. This religion is an apostle of love, honesty, compassion, peace, simple living, forgiveness and sustainable use of natural resources. Bishnois have been protecting the forests and animals from time immemorial and have even given their lives for the protection of tress. Such

[14] Hamsadeva, *Mriga-Pakshi-Sastra* 3-90(Sundaracharaya (trans) (P.N. Press Travancore,1927).

a high level of sensitivity is commendable and is rare to be found in the world. The Bishnois follow the teachings of their Guru Jambheshwarji and conserve the forests since they live in the harsh climate of desert. Their faith has been tested from time to time from 1730 incident when 363 Bishnois from 83 villages sacrificed their lives to protect the Khejri trees of their area, when they were ordered to be logged down by maharaja Abhay Singh of Jodhpur. They hugged the trees and said, "sir santhe runkh rahe to bhi sasto jan", which means that if a tree can be saved by sacrificing one's head, even then its a good deal. They sacrificed their lives but saved the trees.[15] This kind of compassion is hard to find anywhere in the world. By far this is the best example of sustainable development and sustainable lifestyle, where natural resources cannot be sacrificed for human material needs. For Bishnois life of a tree is more important than the life of a human being. A lot can be learnt from this philosophy of Bishnois in the present day scenario. In Nutshell this is form of using the natural resources sustainably and sustainable development can be achieved if these ideologies are used in the contemporary scenario, where greed of the mankind has taken a front seat and conservation of natural resources are a distant thought for most of the exploiters of nature.

In India such kind of belief and compassion for plants and animals is seen in many parts of the country. Indigenous populations are afore runner in this regard and history of India shows there have been many such events when people were ready to sacrifice their lives for the sake of saving the trees, one such example is the famous Chipko movement in India, where womenfolk just embraced the trees to protect them from being logged down by the loggers in the year in 1973 in the state of Rajasthan and was again followed by women in Tehri District in Uttar Pradesh in 1980's.[16] It is interesting to note here that these movements were started by women and are examples of ecofeminism, where women become the protector and the

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[15] Herma Brockman & Renato Pichler, *Paving the Way For Peace- The living Philosophies of Bishnois and Jains* 13-69, (Originals, Delhi, 2004).

[16] Shobhita Jain, "Women and People's Ecological Movement: A Case Study of Women's Role in the Chipko Movement in Uttar Pradesh"19(41) *Econ Polit Wkly.*1788-1794 (1984).

conservator of nature. The communities all over India protect sacred grooves, which are forests and have some religious connotation attached to them.

4. UN AGENDA 2030, 17 SUSTAINABLE DEVELOPMENT GOALS AND CUSTOMARY LAWS

The UN Agenda 2030 is an action plan for the people of this planet and paving a way for their prosperity. It is also looks for a universal peace and has a feeling of a superior freedom in the human beings. It has a big aim of exterminating poverty from this planet, which is big challenge but a prerequisite for sustainable development. All the countries must implement this plan collaboratively by taking the help of each other to achieve this big aim of sustainable development. Poverty must be eradicated from this planet for the security and healing of this planet. Bold steps and innovative recourses must be taken urgently by all the countries to take this world on a resilient and sustainable track of development. This journey has to be taken by all the countries together and no nation should be left behind. The 17 sustainable development goals with 169 targets are universal agenda for sustainable development all over the planet. They are a step ahead of the millennium Development Goals (MSD's) and it is an attempt to fill in the gap of the lacunas in the MSD's. They are an apostle of the basic human rights, gender equality, empowerment of girls and women. They are looking forward to an indivisible three-dimensional sustainable growth, which includes the economic, social and environmental development all over the planet.[17] The traditional knowledge systems and customary laws can be highly beneficial in achieving this aim as the ancient knowledge as engraved in the old scriptures speaks on the same lines for human development. A lot can be learnt from this deep philosophy of the ancient traditions and customary laws. The 2030 Agenda for Sustainable Development' has to be inculcated in various fields of development .A list of the seventeen SGDs goals and the role of traditional knowledge systems to achieve this aim are as follows [18]:

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[17] United Nations , Sustainable Development Knowledge Platform, *available at:* https://sustainabledevelopment.un.org/post2015/transformingourworld (last visited on Aug. 12, 2017).

[18] UNRIC, United nations Regional Information Centre for Western Europe, *available at:* http://www.unric.org/en/latest-un-buzz/29844-17-sustainable-development-goals-are-set-and-welcomed (last visited on Jan.17, 2018).

Goal 1) Poverty to be eradicated in all forms.

Programmes and schemes for a sustainable management of the natural resources by the help of the traditional knowledge systems in the local areas must be introduced as a part of development of rural set up, and giving a sustainable livelihood to the backward and the poverty stricken human beings. Natural resources like forests can give livelihood to many people, as they are a great source of food, fodder, shelter medicine and many other important things, which are important for the survival of a human being. By using the traditional methods a sustainable use of natural resource can be achieved. This information or bio information can be used internationally and can have cross border transfer pricing arrangements. This can increase the price of the traditional knowledge, which can correspond to its true international value.[19]

Goal 2) Promotion of sustainable agriculture, achievement of food security, eradication of hunger and up gradation of the nutritional standards.

If forestry, fisheries and agriculture are sustainably managed, then problems like poverty, malnutrition, hunger, can be eradicated from the whole world. Lot of employment and livelihood shall be provided to the poor people. With this scheme rural areas will be developed sustainably and environment also will be protected and preserved. Sustainable agriculture also can be promoted by the help of customary laws and organic farming and by using traditional methods of agriculture as used by the indigenous people. The indigenous people have used traditional knowledge systems in the agricultural systems that are based on the extensive and applied knowledge about the natural processes that even conserve the other life forms living in that area. [20] Traditional knowledge systems followed by the indigenous people in fishery can be very helpful in achieving a sustainable use of this natural resource. This knowledge is being transferred from

[19] Ajeet Mathur, "Who Owns Traditional Knowledge?"38 (42) *Econ Polit Wkly,* 4471-4481 (2003).

[20] Professor Dani Wadada Nabudere, *From Agriculture to Agricology : Towards a Glocal Circular Economy* 143, (Real African Publishers, Johannesburg, 2013).

generation to generation and is tried and tested from older times and thus is highly useful. This knowledge must be conserved for a sustainable living.[21]

Goal 3) Promotion of well-being and ensuring healthy lives for people of all ages.

Healthful human beings can live only in healthy ecosystems. Traditional knowledge systems can prove to be highly beneficial in achieving this aim as these systems are developed over a long period of time and are highly advantageous for a particular terrain. It has been observed that these customary laws and traditional knowledge systems as followed by the indigenous people are a source of good health as ancient medicine systems like Ayurveda a are highly beneficial for maintaining a good health. More studies must be done to see the nexus between sustainable use of natural resources, customary laws and human health. The real challenge is to bring this traditional science of medicine to the global market so that the world community is benefitted at large.[22]

Goal 4) Promotion of lifelong learning prospects by ensuring comprehensive and rightful education for all.

Traditional knowledge systems play a very important role in imparting this precious knowledge to their family members and the whole clan there of. This knowledge is then transferred from generation to generation and is knowledge where most of the time natural resources are being used sustainably. [23] Lifelong education must also include, the information about the importance of the nature and natural ecosystem and children from childhood must be educated about the importance and sustainable use of the natural resources. Environmental education a must be made as essential as the other elementary education and traditional

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[21] James R. A. Butler, Alifereti Tawake, Tim Skewes, Lavenia Tawake and Vic McGrath, "Integrating Traditional Ecological Knowledge and Fisheries Management in the Torres Strait, Australia: the Catalytic Role of Turtles and Dugong as Cultural Keystone Species" 17 (4) *ecol. & soc.* 1-19 (2012).

[22] Madhulika Banerjee, "Local Knowledge for World Market: Globalising Ayurveda" 39 (1) *Econ Polit Wkly.* 89-93 (2004).

[23] Preston Hardison, "Commentary: Traditional Knowledge Studies and the Indigenous Trust"
27(1) *Practicing Anthropology*, 42-45(2005).

knowledge systems can play a pivotal role in this regard. Rightful education must be imparted to all the human beings on this earth and in my opinion education about the ecosystems, environment and the conservation of nature must be included in the elementary education. In the entire world, the state governments must make sure that teaching about the environment is to be made compulsory for the children in the world.

Goal 5) Empowering all girls and women and achieving gender equality

The gender equality is essential even in the present scenario, when women from ages are the pioneers in environmental conservation but probably the elementary education is not imparted to them in the backward and remote areas in most of the parts of the world. So women can be empowered by doing various ecofriendly works like tree plantations, nurturing crops, agro forestry and then revenue so earned by them can be used for improving their lifestyles. Gender equality can easily be achieved if women are engaged in the environmental conservation jobs as they nurture nature by nature

Ecofeminism was originally associated with the view that women and nature are connected because both are identified with femininity.[24] Women are the forerunners in environmental conservation. Ecofeminism is a known phenomenon in the present day's world. From sowing of the seed to growing and rearing up the plants and till the harvesting part, women play a very important role in the agriculture. From Rachel Carson, to Medha Patekar to Vandana Shiva and the unforgettable, Nobel prize winner Wangari Mathaii, women have played a mammoth role in environmental conservation. This even reminds me of the Chipko andolan in India, where women took a lead in the protecting the forests and trees being cut. In the 18th century, in the state of Rajasthan, this movement was started. Amrita Devi with 84 villagers endangered their lives to guard the trees of the local forest from being logged down, in order to obey the order of the king. This

[24] Chris Cuomo, "On Ecofeminist Philosophy" 7(2) *Environ. Ethics* 1-11 (Autumn 2002).

phenomenon was again observed in India in the year 1973.In all there is a major scope, in the eco friendly jobs for the women.

Goal 6) Sustainable water management to be observed for safeguarding availability of water and sanitation for all

The indigenous people use the natural resource water quiet sustainable and do not waste it like the urban people. They know the value of water since they fetch water from distant places. The Manu samhita has penalties for if the contamination of water is done. As per Manu samhita (IV, 56) Filthy substances like urine, faeces, saliva, cloths defiled by impure substances, blood, poisonous things and any other substance considered to be impure, should not be thrown to water body. He, who has committed any blameable act in water (as above), shall subsist during a month on food obtained by begging and shall mutter the seven verses addressed to gods like Indra etc. Manu Samhita (XI/256).[25] By the following the rules followed by these traditional knowledge systems even water resources can be conserved and preserved.

Goal 7) Provision for sustainable, reliable, affordable modern-day energy for all

When water and other natural resources are managed properly leading to a healthy forest ecosystem then even energy can be drawn from various resources like, wood, thermal, hydro, solar and even geothermal. A lot can be learnt from the traditional knowledge systems. In many terrains where there are hot water springs, the indigenous communities have been using it for cooking of food. They usually sun dry many vegetables and food products during the summers and use them in winter when there is a scarcity of food products. And now for a sustainable management solar energy and gobar gas are good alternatives to the wood as an energy resource. Energy source should be less polluting and must help in lessening the green house effect. The aim of atmospheric temperature to remain constant and even lower must be the aim of using any such source.

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[25] Wendy Doniger and Brian K. Smith (trans.) *The Laws of Manu* 39-55 (Penguin Books, Gurgaon, Haryana, 1991 edn., 2014 (reprinted).

The indigenous people have been using traditional techniques in various fields like agriculture, agroforestry, water conservation, water collection and purification, maintaining traditional seed varieties, organic farming, dry-land farming, nitrogen fixation, pest management, using green manures, post harvest technology, food preservation, veterinary practices, live stock management, fisheries, aquaculture, renewable resource management, forestry and many more such systems which are utilized by the traditional people for their living from time immemorial. [26]The need of the hour is to document this knowledge and use it the contemporary environment for a sustainable living and a sustainable use of natural resources.

Goal 8) "Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all"

Traditional knowledge systems can be highly beneficial in attaining economic growth as the indigenous people know the use natural resources very well. From medicines to food, fodder, dyes, latex, tannins, clothes, they virtually fetch every thing from the forest, which is a natural resource. Forests and forest-based industry are increasingly recognized as key elements of development as they figure prominently in people's lives explicitly constructed to maximize the economic and employment benefits of forests and forest-based industry. Additionally, some forestry activities are complementary to on-farm activities, as they occur during agricultural slow periods, and some agricultural skills are easily transferable to forestry and wood processing.[27]

Goal 9) Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation

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[26] Nirmal Sengupta"Salvaging 'Traditional' Knowledges" 30 (50) *Econ Polit Wkly* 3207-3211 (1995).

[27] Forest and Employment, "FAO Corporate Document Repository" *available at* : http://www.fao.org/docrep/w2149e/w2149e09.htm (last visited on Oct. 4. 2017).

Traditional knowledge systems are most of the time inclined towards a sustainable use of the natural resource. Sustainable development is required in the present scenario, when forests are depleted and a huge loss of biodiversity has taken place. The underground water table is getting at an even lower level and water, air and soil pollutions are every day problem. The systems, which have been followed from ages by the indigenous people, have tried and tested from time immemorial. Innovation must go hand in hand with sustainability. Even designing of infrastructures cam be learnt from the indigenous knowledge systems. Since indigenous people have been shifting and changing as per the climatic conditions. These people understand the environment better than their contemporary counterparts and they respond like wise to the environmental conditions.[28] The traditional knowledge systems have been developed over a long period of time and have always been changing and evolving. This knowledge can be used for making environment friendly structures as indigenous people are one with nature and they understand nature very well.

Goal 10) Reduce inequality within and among countries

Conservation of forests, biodiversity, ecosystems, environment, ozone layer, polar ice and glaciers are all common important for the global community. The environment is one; the whole earth forms a big ecosystem and belongs to all the inhabitants of this Earth. The Hindu concept of "Vasudev Katumbakam" meaning there by that the whole world is mother earth's family and there is no difference in any human being and other life forms, world over. All the life forms are one big family of mother earth. The original verse is contained in the Mahopanishad VI.71-73.[29] This verse discloses the ancient wisdom of the Hindu saints emphasizing upon the need to understand the ecological balance and the harmony in the earth's ecosystem, which is probably missing in the contemporary world. This ancient wisdom of the Upanishads and Vedas and other texts can teach mankind much about the environmental and forest conservation. The old wisdom and traditions of the Indian Subcontinent and the fact of the world being a global community and is not limited to learn from a single tradition and this Vedic knowledge by keeping aside the

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[28] Norman W. Sheehan, "Indigenous Knowledge and Respectful Design: An Evidence-Based Approach" 27(4) *Des. Issues* 68-80 (Autumn 2011).

[29] S. Shah and V. Ramamoorthy, *Soulful Corporations* 449 (Springer, India 2014).

arsenals of mass destruction of forests and wild life is a way to achieve sustainable development. This concept must be inculcated in the contemporary scenario in the world for attaining an equal status for all the human beings on this earth. The inequality can easily be eradicated by sharing the knowledge with each other. This is very important even for the environmental conservation, where the idea is that we are all connected and live in one huge ecosystem and customary laws can play a great role in this regard. This knowledge has also its roots embedded in the ancient indigenous knowledge, which has very deep meaning.

Goal 11) Make cities and human settlements inclusive, safe, resilient and sustainable.

Human settlements can be made more sustainable when a balanced ecology becomes the target of the developers. When there is a loss of biodiversity, then definitely there is an imbalance caused in the ecosystem, leading to the onset of various diseases and also other calamities. When herbivores increase in number abnormally, then huge loss of vegetation takes place leading to soil erosion and a desert like situation, so there has to be balance between the herbivores and carnivores for the functioning of a healthy ecosystem. All the components are important for a proper functioning of this ecosystem from an ant to antelope, from grass to trees, from a pond to ocean, all these factors jointly makes a healthy biome fit for a healthy life for all. The indigenous people and the customary laws are very strong for examples the laws of Manu speaks a lot on this topic and expertise can be taken from this and can be used to achieve this aim. Ancient scriptures like the Vedas, Manu Samhita, Arthshashtra and many more ancient compendiums speak a lot on this issue and if not all but some of the provisions can be inculcated in the present day legislations. Safe and environmentally resilient can be maintained by following the principles prescribed in these scriptures. The people following these religious beliefs intend to conserve the nature as well. Bio-divinity is very much common in the religious traditional belief systems and this lead to the sustainable use of

the environment.[30] The use of eco-friendly fuels, the rainwater harvesting for the replenishment of the underground water table, the use of alternative energy sources like wind, solar, geothermal etc. must be made a priority in these new cities.

Goal 12) Ensure sustainable consumption and production patterns.

Indigenous people are not greedy they take only that much from the nature which is required by them and rest they leave for others. This type of realization must be adopted by the people at large and a lot needs to learnt from them. Sustainable use of the natural resources must be adopted by the people at large and help can be taken from the customary laws and if the need arises even these laws can be inculcated in contemporary legislations for the conservation and preservation of natural resources and the nature at large. Philosophy of mahatma Gandhi of a sustainable living and his model of a sustainable village must be observed. The Gandhian view of simple life is very important in this regard. As Gandhi ji rightly said that nature provides for every one's need and not every one's greed.[31] The villages and towns must be made sustainable.

Goal 13) Take urgent action to combat climate change and its impacts.

Traditional knowledge systems and the customary laws for the conservation and preservation of the natural resources must be used for achieving this aim. Besides this, forests play a mammoth role in combatting climate change by absorbing carbon dioxide and emitting water vapours and reducing the temperature. Conserving forests can be a big leap in fighting with the climate change. And this growing of forests must be done at a large scale and international contribution and collaboration must be invited for a successful outcome. Here forests can be conserved with the help of the traditional knowledge systems, which further uses the natural

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[30] Emma Tomalin, "Bio-Divinity and Biodiversity: Perspectives on Religion and Environmental Conservation in India" 51(3) *Numen* 265-295 (2004).

[31] Ramchandra Guha, *Environmentalism - A Global History* 28- 34 (Penguin Books, Delhi, 2014).

resources in a sustainable manner.[32] Policy makers and researchers need to understand the human dimension to address global climate change effectively. Indigenous people have an understanding of their immediate climate. This expertise is based on the their observation and ethnography. This knowledge is what they have inherited from their ancestors and amounts to an intergenerational understanding of the local knowledge systems related to climate and environment. Their perceptions about the future climatic conditions are based on certain parameters of the local climate. These local scientist know how climate change is effecting their local areas. This knowledge can be used by the technologist and scientist to find out solutions for this climate change.[33]

Use of green energy and avoiding the fossil fuels must be made a priority in all the countries. Wind energy and solar energy do not cause any atmospheric pollution and provide energy throughout the year based on the situation of wind and the sunlight.

Goal 14) Conserve and sustainably use the oceans, seas and marine resources for sustainable development

Oceans cover almost 70% of the earth's surface area and are great repositories of marine biodiversity. Oceans also act as a major carbon sink for the planet and sequester an enormous of carbon dioxide from the atmosphere. There are many phyto-planktons and other organism living in the oceans, which absorb a lot of carbon dioxide and store them in their body cells. The marine biodiversity is immense and needs to be protected from getting lost. Over exploitation of oceans natural resources including the fish can lead to an imbalance in the marine ecosystem as well. The

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[32] Rajib Shaw, Juan Pulhin *et. al.*, *Climate Change Adaptation and Disaster Risk Reduction : Issues and Challenges* (Emerald Publishing Limited, United Kingdom, 2010).

[33] Susan A. Crate and Alexander N. Fedorov, "A Methodological Model for Exchanging Local and Scientific Climate Change Knowledge in Northeastern Siberia" 66(3) *Arctic* 338-350 (2013).

marine protected areas must be conserved and protected for all times to come. No garbage should be thrown into the oceans and strict penalty must be validated for such offences. A joint effort by the indigenous people and advanced technology must be used for the conservation of the marine resources. A collaborative effort is required in this regard. This traditional knowledge is quite helpful in the scientific research in the resource management.[34] Again an international effort and collaboration must be acquired for these tasks of conservation. The ocean belongs to all and awareness programmes must be started world wide for the conservation and protection of oceans.

Goal 15) Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss

The terrestrial part of the earth comprises of 29% of the earth's surface rest 71% is covered by the oceans and other water bodies. This 29% again has water bodies like ponds, lakes, rivers, and also the continents of this planet are covered in this zone. Earth's polar regions, the South Pole and the North Pole are covered with ice, popularly known as the Arctic ice pack and Antarctic ice sheet. This terrestrial along with its water bodies need to be protected from any type of pollution and over exploitation from the anthropogenic activities. The terrestrial ecosystems are a home to many species of animals and plants and also virtually all the human beings live on this 29% of the earth's surface. It is fascinating to know that ancient India not only had a medical science for the humans (Ayurveda) but also for plants, called *Vrikshayurveda*. The colophon of the manuscript mentions Surapala as the writer of the text. He is described as a scholar in the court of Bhimapala. Surapala is stated to be "*Vaidyavidyavarenya*", a prominent physician. Vrksayurveda is a giant work consisting of twelve chapters namely Bhumi nirupana, Bijoptivithi, Padapavivaksa, Ropana vidhana, Nise canavidhi, Posana vidhi, Drumaraksa, Taru Cikitsa, Upavanakriya, Nivasa sanna taru Subhasubha Laksana, Taru Mahima and Citrikarana. All these chapters deal with the growth of the trees and the science of plant life. From

[34] Thomas F. Thornton and Adela Maciejewski Scheer, "Collaborative Engagement of Local and Traditional Knowledge and Science in Marine Environments: A Review"17 (3) *E&S* 1-25(2012).

classification of soil and seeds to the preservation of seeds and sowing of seeds and by taking care of the tree and various ailments which a plant can encounter. The book also deals with methods of cultivation of trees and various types of fertilizers, which should be used, for a robust growth of the plants.[35] This text is much more technical and explicit in its treatment with the science of nurturing trees. Not only this, Brihadaranyaka Upanishad is also a great source of traditional knowledge , the name literally means "great wilderness or forest Upaniṣhad". Its credit goes to the ancient sage Yajnavalkya, but was possibly refined and developed by a number of ancient Vedic scholars. Thus, the Brihadaranyaka Upanishad has six adhyayas (chapters) in total. Brihadaranyaka Upanishad consists of a self explanatory psychological arguments, which further explains the meaning of life and the importance of nature and the universe instead of coming at conclusions, it explains the concept in the form of a conversation. [36] This further elucidated the importance of the universe, which stays there for a longer duration and needs to be protected and conserved. Here traditional knowledge systems and customary laws can play a mammoth role by utilizing the knowledge and customary laws for this purpose.

Goal 16) Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels

The ancient knowledge of justice for all, peaceful societies, non violence, this also must include that no harm should be done to the animals and plants and a compassion for these life forms must be developed in the people at large. A lot can be learnt from the customary laws and traditional knowledge systems. Ecocides, cruelty against the animals must be forbidden at all costs. Strict penalty must be imposed on those who indulge in such shameful acts. Ashoka 5th edict speaks a lot on this, which depicts

[35] C.K. Ramachanran "Vrikshayurveda -Arboreal Medicine in Ancient India" IV, 2 *ASL*, 110-111 (1984).

[36] Gopal, Madan and K.S. Gautam (eds.), *India through the ages* 80 (Publication Division, Ministry of Information and Broadcasting, Government of India, New Delhi, 1990).

"our King killed no animal".[37] If in the medieval era one can achieve this type of consciousness then why can't this be done it in the contemporary world? The animals and plant cannot speak for themselves, only human beings can take care of their well beings and thus living in peace is also their birth right and it must be granted to them besides giving it to the Homo sapiens. Importance of biodiversity, creating passion for the animals and plants must be inculcated at a young age in the children at large. All life forms must be given due respect, not only in the written literature but also in the day-to-day life.

In many traditional societies, majority of the disputes are solved by the elders of the society and no outside agency is involved in solving their internal problems.[38] All the major religions or traditions of the world speak about living with peace. Non violence is one of the major tenets of the all these traditions. When the focus is shifted to India then India being a secular country with a multicultural society where the people are free to follow any faith or religion. Various religions, which are followed by the people in India, include Hinduism, Buddhism, Jainism, Sikhism, Christianity, and Islam.[39] Although majority of the people follow Hinduism in India but other religions are also prevalent in the country and all have something to offer for the environmental conservation. From the teachings of each religion several directives can be brought froth to form a code for an ecologically sustainable development. In Hinduism, philosophy of living in harmony with nature has a religious connotation attached to it. The ancient Indian scriptures like Vedas, Puranas, Upanishads, Bhagavad Gita, Mahabharata and Ramayana, support conservation of environment and maintenance of ecological balance. There are ample evidences for society's respect for plants, earth, sky, water and every form of life in these scriptures. Man should not meddle the nature and must endure it even if it gets unfavorable. Similarly Jainism also proliferates a very high philosophy for environmental conservation and nonviolence and even goes to the extent of conserving the nonliving metal and stones besides protecting all the life

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[37] Fabio Scialpi, "The Ethics of Aśoka and the Religious Inspiration of the Achaemenids" 34 (1/3) *East and West* 55-74 (1984).

[38] Bruce D. Bonta, "Conflict Resolution among Peaceful Societies: The Culture of Peacefulness" 33(4) *JPR,* 403- 420 (1996).

[39] Axel Michaels, "India's Spirituality, The Plurality of Hinduism and Religious Tolerance" 41 (2) *IIC Quarterly Autumn,*145- 156 (2014).

forms on this planet. The Jain philosophy treat all souls as equal and the type of body, which they inhabit, depends on the different amount of karmic particles. Buddhist teachings require every person to consider right livelihood and actions and the impact that it would have on society and the environment. (Noble eight fold path) According to Buddhist teachings, the perfect king must not only protect his subjects but also animals, birds and the environment. Guru Nanak Dev Ji, the founder of Sikh religion, considered nature as divine and also promoted the concept that respect should be given to all the creations of God. In Islam, the Quaranic message given by the Prophet Mohammed forms the base for the guidelines for the conservation of nature and further gives a message for following the nature's laws and not to exceed the defined limits. Christianity also pronounces the existence harmonic relationships between divinity, human beings and nature and if this relationship is not balanced it might separate humanity from its creator and nature as well. Religions are instrumental in forming the world views and orient human beings to the natural world. The environmental crisis and the need to live sustainably requires a collaboration amongst religions and a long term dialogue between religious supporters and Earth Stewardship and other domains of the society including the science, economics, education and public policy.[40]If teachings related to environmental conservation and non violence, of these religions are imbibed in the contemporary laws, then some positive change can be brought in this field leading to a sustainable development and peaceful society, who follows a sustainable living.

Goal 17) Strengthen the means of implementation and revitalize the global partnership for sustainable development.

All countries must come together to achieve this aim and help each other for a sustainable development by the exchange of knowledge and expertise. This knowledge must comprise of the traditional knowledge

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[40] Gregory E Hitzhusen and Mary Evelyn Tucker, "The potential of religion for Earth Stewardship"
11(7) *E&S* 368-37 (2013).

systems and the customary laws, which are tried and tested by indigenous people from generations to generations. For mitigation of climate change, and for achieving sustainable development goals, aid can be taken from the traditional knowledge systems (TKS) by growing right varieties of plants as they are well adapted to local environmental conditions and also by using the forest ecosystem sustainably as these systems are developed by the indigenous people over a period of time, which help in maintaining the soil fertility, reduce erosion, and often require less fertilizer than many alien plants resulting in maintaining the ecological equilibrium. There are various multilateral environmental agreements between developing nations and industrialized nations for saving the environment. These agreements must also include the exchange of the traditional knowledge systems. This calls for a global partnership.[41] Sacred Forests, protected areas, protected forests, urban forests, village forests all of them to be conserved to ensure forest conservation and many other benefits like conservation of water resources, reduction in floods and draughts, trapping of green house gases, maintaining the atmospheric temperature and reducing the carbon foot print and also achieving the 17 sustainable development goals will be accomplished. Ways and methods are to be established for this conservation.

5. CONCLUSION

Sustainable development does not mean that only human beings should have a comfortable living but it includes, a comfortable life of all the life forms on this earth. All other life forms also have a right to propagate their progeny peace fully and live a healthy life. This is sustainable development, when development does not hamper the growth of any other life form or flourishing of any ecosystem. The concept of sustainable development must be followed at all the levels in the country.[42] Environmental impact assessment must be done before launching any project in any area, and all the prospects must be calculated in advance before the onset of the project. Environmental auditing should be performed with due diligence and achieving environmental conservation up to the

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[41] Akampurira Abraham, *Sustainable Development and the Environment: An Aspect of Development* 14-34 (*Anchor* Academic Publishing, Hamburg, 2014).

[42] David Lempert, "Testing the Global Community's Sustainable Development Goals (SDGs) Against Professional Standards and International Law" 18 *Consilience* 111- 175 (2017).

utmost genuineness and honesty should be the motto of the auditors. A lowering of atmospheric temperatures and a rise in the biodiversity and a healthy ecosystem must be the objective of all the legislations and policies in any field of life. People from all the societies must be taught and given information about the importance of growing forests and trees and such information must be disseminated at the national and the international level to achieve this goal. Evils like ecocides must be removed from the society and the world at large at a war footing. What happened in the Vietnam War (1961-1975) must not repeat itself in the future. Knowledge related to the conservation of the ecosystems should not be confined to the reports of the conventions but real practical work must be followed at the grass root levels to pursue this task of conservation. If the legislations are made at the domestic levels for the conservation of environment, then their implementation must also be followed at the lowest strata of the hierarchy.

The crux is, that conservation processes must be followed at all the levels whether there is law for it or not. Conservation of Mother Nature need not be confined with in the four walls of legislation and legislatures. The nature, the environment, the ecosystems, the earth, the atmosphere, the water all are essential for the survival of a human being as well as for the other life forms on this earth and need to protected by all.

LEGAL FRAMEWORK FOR ERADICATION OF MANUAL SCAVENGING IN INDIA: A CRITICAL ANALYSIS

Manjesh Rana*

Abstract

The present paper intends to critically analyse the legislative framework in India with respect to the eradication of the age-old ill practice of 'Manual Scavenging', which is still prevalent in various States throughout the country. There have been many legislative steps taken for the purpose of protecting every individual's status, dignity and self-respect. The lawmakers, with an intention to make a bias-free society, focused from time to time on the serious problems of untouchability and other social disabilities. All the people falling under the category of 'Manual Scavengers' had been protected indirectly by legislative Acts such as The Protection of Civil Rights Act, 1955, The Bonded Labour (Abolition) Act, 1976, The Scheduled caste and Schedule Tribe (Prevention of Atrocities) Act, 1989, The Protection of Human Rights Act, 1993 and National Commission of Safai Karamcharis' Act, 1993.

In 1993, for the first time, a legislative Act [The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993] came into enforcement, which was solely dedicated to protect the rights of manual scavengers. But the Act could never attain its intended objectives because of some of its faulty provisions and lack of will on the part of the state in implementation of its provisions. Recently, in 2013, another Act [The Prohibition of Manual Scavengers and their Rehabilitation Act, 2013] came into force providing for the prohibition of employment of people as manual scavengers.

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With the help of this paper, the researcher intends to study these two major Acts and understand the reasons for failure of the 1993 Act, which was passed with an aim to curb this menace. The researcher further intends to meticulously analyse the new Act of 2013, which overrides the 1993 Act, highlighting its loopholes which might act as potential hurdles in fulfilling its sole objective.The researcher also aims to analyse the progress of the 2013 Act so far. In the end the researcher aims intends to suggest some amendments in the new Act of 2013, which could be helpful in the achievement of the intended objectives.

1. INTRODUCTION

Since India gave itself a Constitution, there have been many legislative steps taken for protecting every individual's status, dignity and self-respect. The lawmakers, with an intention to make a bias-free society, focused from time to time on the serious problems of untouchability and other social disabilities. Since almost all the people who are engaged in the manual scavenging work belong to the category of *dalits*, their rights, of not being discriminated and to live with dignity, were automatically protected by these legislative enactments. However, in reality, all these enactments more or less failed to reach up to the manual scavengers.[1] It was very unfortunate of them to be ignored by the Government, the lawmakers and the society at large. In the so-called hierarchy of the society, they were always given the lowest position. They have been facing discrimination even by other members of *dalit* community. Over the time, they have been categorized as '*dalits* of *dalits* 'or 'lowest of the lowest'. They have always been invisible to the Government as well as to the society at large.

It was not until 1990 that the Government finally started taking notice of them and started working on framing up laws to protect their dignity. It was only because of 'social activism' that they started becoming visible to the Government as well as to the other people. In 1993, for the first time, a legislative enactment came into enforcement, which was solely

[1] The work of manual scavenging means the manual lifting and removal of human excreta, at both private homes as well as at the departments maintained by public authorities.

dedicated to protecting the rights of manual scavengers. The 1993 Act[2] came into force on June 5th, 1993. It was a social as well as a penal legislation. The various provisions of the Act were intended to protect and restore the dignity of the people engaged in the work related to manual scavenging. The main aims of the 1993 Act were to prohibit the construction and continuance of 'dry-latrines' and to prohibit the employment of individuals as manual scavengers. It further intended to regulate the maintenance of water-seal latrines i.e. the ones which has the flush and water facilities. However, the Act could never attain its intended objectives because of some of its faulty provisions and lack of will of the Government in implementing its provisions.

In 2003, the issue again came into light with the help of efforts of the *Safai Karamchari Andolan* (SKA) and other organizations working for the benefit of manual scavengers. The SKA along with other organizations put into light the failure of the Central and State Governments in implementing the 1993 Act. Because of the petition filedby them in the Supreme Court of India, pressure again fell on the Central Government to take the issue seriously. Finally, the efforts were paid off when the Parliament cleared the way for another legislative enactment in this regard. The 2013 Act[3] came into force on Sep 18th, 2013. The Act is another step of the Government in promoting fraternity among the citizens of India, assuring the dignity of every individual, which is enshrined as one of the goals in the Preamble to the Constitution of India. The Act provides for the prohibition of employment of people as manual scavengers. It further provides for the rehabilitation of the people engaged in manual scavenging work, including the manual scavengers and their families. Since the existing laws of the country were proved to be inadequate in eradicating the inhuman practice of manual scavenging, the 2013 Act came into force. The 2013 Act has an overriding effect on 1993 Act and on all other State Acts related to manual scavenging. However, the 2013 Act is also not free from loopholes. It could possibly be another example of Government covering its

[2] The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993.

[3] The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013.

inactions and failures of the past. The main area of problem has always been proper implementation of the Acts. For proper implementation of this Act, the most important requirement is a will to protect the dignity of manual scavengers and rehabilitating them.

2. LEGAL FRAMEWORK

Constitution of India provides adequate safeguards to protect a person from the job of manual scavenging. In its preamble it promises equality of status and of opportunity to every citizen of India. It further promises to assure dignity of every individual. Part III of the Constitution contains six Fundamental Rights, which a person enjoys for just being a human. These are the basic rights, which every citizen of India enjoys equally. Fundamental Rights, which are relevant for the purpose of protecting a person from being involved into manual scavenging related work, are enshrined in Article 14, which gives all the people 'right to equality'; Article 15 which protects the citizens of India by prohibiting any discrimination on grounds of religion, race, caste, sex or place of birth; Article 16, which gives to the citizens of India an equal opportunity in matters of public employment; Article 17, which abolishes untouchability; Article 19(1)(g), which gives to citizens of India a fundamental right to practice any profession, or to carry on any occupation, trade or business; Article 21, which protects every person's right to life and personal liberty; and Article 23 prohibits trafficking in human beings and forced labor. By virtue of above mentioned Fundamental Rights, no person can be engaged into the manual scavenging work by anyone. These Fundamental Rights are available to all the citizens of India. Also, these rights can be enforced in the court of law.

Further, Part IV of the Constitution of India contains Directive Principles of State Policy. The provisions under this part cannot be enforced by any court of law but they are really important as they facilitate proper governance of the states. Article 38 says that a state must secure a social order for the promotion of welfare of the people. Article 39 contains policy principles, which should be followed by the states. Article 42 says that the State shall make relevant provisions for the purpose of 'just and humane'

conditions for work. Article 43 insists that a State must endeavor to secure to all its workers a living wage and conditions for purpose of ensuring a decent standard of life, either by suitable legislation or economic organization or by any other ways and means. Article 46 insists that a state shall promote educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections. Further, Article 256 casts a duty upon the state to ensure compliance of the laws made by the parliament and any other existing laws, which apply in the state.

India is Party to many International Conventions and Covenants such as Universal Declaration of Human Rights (UDHR), Convention on Elimination of Racial Discrimination (CERD), and Convention for Elimination of all Forms of Discrimination Against Women (CEDAW). Being a party to all these, India is obliged to get rid of the inhuman practice of manual scavenging.

Article 1 of UDHR protects the dignity of every individual. It declares all human beings to be free and equal in both dignity and rights. It further states that they must live in spirit of brotherhood. Article 2 (1) makes every person entitled to the rights stated in the UDHR, irrespective of what race or religion they belong to and what language they speak. This makes people of all races, religions, countries and social origins to be equal. This makes a person who is engaged in the practice of manual scavenging to be entitled to all the right and freedom provided in UDHR. Article 23 (3) grants every individual who works, with a right to just and favourable treatment as well as human dignity. It also insists on giving them social protection as and when it is needed. This guarantees every working individual, including those indulged in the filthy task of cleaning human excrement, just and favorable working conditions, human dignity and social protection. Article 5 (a) of CEDAW puts a responsibility on all the State Parties to take appropriate measures to modify the social and cultural patterns for purpose of eliminating all inferior prejudices and practices that are prevailing. The inhuman practice of manual scavenging is an age-old customary caste-based practice, based on the idea of superiority and inferiority in the society. Therefore, India, which is one of the States who

are party to this covenant, must take all the appropriate measures with regard to completely eradicate this practice. Article 2 puts all the State Parties under an obligation to form appropriate policies without any delay for elimination of all forms of racial discrimination. The State must take appropriate legal measure in order to eliminate such discriminations from the society. Therefore, India is now obliged to take legislative measures to completely eradicate the practice of manual scavenging and to form adequate policies for the benefit of manual scavengers.

Highlighting some of the major efforts done by the Government in the form of legislative Acts during last six decades it is important to highlight The Protection of Civil Rights Act, 1955. Initially the Act was called the Untouchability (Offences) Act, 1955. The Act was enacted to abolish the practice of untouchability and the social disabilities which arise out of it against the members of Schedule Castes. It got amended in 1977 and was also renamed as the Protection of Civil Rights Act, 1955. Since the time of amendment, untouchability is both cognizable and non-compoundable offence. Stricter punishment was provided in the new amended Act. The Bonded Labour System (Abolition) Act, 1976 provided for the abolition of ‘Bonded Labour System’. The intention of the Act was to prevent the economic and physical exploitation of the people who belong to weaker sections of the society. The Central Government also made rules for this purpose, which is called Bonded Labour System (Abolition) Act, 1976. Main intention of the the Schedule Caste and Schedule Tribe (Preventive of Atrocities) Act, 1989 was to make India a bias-free society. The Act protected the dignity of a member of a Schedule Caste or a Schedule Tribe. It laid down punishment of imprisonment for minimum six months to maximum five years and fine for offences of atrocities. It punishes any person who forces a member of a Schedule Caste or a Schedule Tribe to do any form of forced or bonded labour.[4] The Protection of Human Rights Act, 1993 defines Human Rights in terms of life, liberty,

[4] Sec. 3(1) (vi), The Schedule Caste and Schedule Tribe (Preventive of Atrocities) Act, 1989.

equality and dignity.[5] In the same regard, the Rights of a person who is involved in the scavenging related work is also protected by this Act. The Act enabled the National Human Right Commission (NHRC) and the State Human Rights Commissions (SHRCs) to take appropriate steps whenever such rights of an individual are infringed. When any person employs another person for doing the scavenging work, the NHRC and SHRCs must take required action against them for such an act of violation of a person's basic rights of life, liberty, equality and dignity. The Act was amended in 2006. National Commission of Safai Karamchari's Act, 1993 came into force on September 4th, 1993. The Act constituted a National Commission for *Safai Karamcharis* and contained necessary provisions for dealing with the matters connected therewith. The commission performed various functions and has been given many powers for their performance.[6] The commission also made periodical reports on any of the matters connected to *Safai Karamcharis.* It took into account all the difficulties or disabilities, which were being faced by *Safai Karamcharis* and reported the same to the Centre and respective State Governments.

The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 came into force on June 5th, 1993. It was a social as well as a penal legislation. The various provisions of the Act were intended to protect and restore the dignity of the people engaged in the work related to manual scavenging. The main aims of the 1993 Act were to prohibit the construction and continuance of 'dry-latrines' and to prohibit the employment of individuals as manual scavengers. It further intended to regulate the maintenance of 'water-seal latrines' i.e. the ones which has the flush and water facilities. The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013 came into force on Sep 18th, 2013. The Act is another step of the Government in promoting fraternity among the citizens of India, assuring the dignity of every individual, which is enshrined as one of the goals in the Preamble to the Constitution of India. The Act provides for the prohibition of employment of people as manual

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[5] Sec. 2(d), The Protection of Human Rights Act, 1993.
[6] Sec. 8, National Commission of Safai Karamchari's Act, 1993.

scavengers. It further provides for the rehabilitation of the people engaged in manual scavenging work, including the manual scavengers and their families. Since the existing laws of the country were proved to be inadequate in eradicating the inhuman practice of manual scavenging, the 2013 Act came into force. The Act has an overriding effect on 1993 Act and on all other State Acts related to manual scavenging.

3. CRITICAL ANALYSIS OF THE ACTS OF 1993 AND 2013

Though the 2013 Act has many loopholes, but it cannot be denied that it is way ahead in its scope and applicability as compared to the 1993 Act.It hasmany additional features in comparison to the 1993 Act. Firstly, the Act prohibits the cleaning of sewers and the septic tanks and allows such cleaning only with the 'protective gear'. The 1993 Act only talked about 'dry-latrines'. Secondly, the 2013 Act talks about conducting surveys for identification of manual scavengers. There was no such provision in the 1993 Act in this regard. Thirdly, it also talks about converting insanitary latrines into sanitary ones. Fourthly, unlike the old Act, the 2013 Act contains necessary provisions about rehabilitation of the manual scavengers and states the manner for the same.

Finally, as far as the penal provisions are concerned, offences under the 1993 Act were cognizable, however, in 2013 Act they are non-bailable as well. The penalty prescribed by 2013 Act is much stricter than what was prescribed in the 1993 Act. The penalty in the old Act was imprisonment of a year and fine up to Rs. 2000 but in the new Act it has been increased up to 5 years of imprisonment and up to Rs. 5 lacs fine, depending upon the nature of the offence. Moreover, the application of the 2013 Act has been extended as compared to 1993 Act. The Act also applies to railways and cantonment boards.

The 1993 Act

The issue of manual scavenging was first time taken seriously by the Government in the year 1990 and a law in this regard began to shape up. The first legislative step to eradicate the inhuman practice of manual

scavenging was the enactment of The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 or 1993 Act.However, the first step in the direction of making a proper legislation for the eradication of manual scavenging turned out to be detrimental. The subjects of 'cleanliness' and 'health' are parts of the Concurrent List, so the 1993 Act came under Article 252 of the Constitution of India. Any law passed by the Central Government on the subject(s), which comes under the Concurrent List given in the Constitution can be implemented in any State only when it is also approved by the *Vidhan Sabha* or Legislative Assembly of that particular State. The law was, thus, given a prior approval by only five of the States. Moreover, the Parliament passed the law in the year 1993 but the President took another four years to sign its notification. The President of India finally signed its notification on January 25th, 1997.

The Act was applied in the first instance to the States of Andhra Pradesh, Goa, Karnataka, Maharashtra, Tripura and West Bengal and to all the Union territories.[7] The Act also applies to any of the other States, which adopt this Act by a resolution under clause (1) of Article 252[8] of the Constitution of India.[9] No other state of India adopted this Act until 2005. Even the National Capital city New Delhi approved the Act as late as 2010. The irony is that this is the city where the Parliament, which passed the Act in the year 1993, sits. By 2013, twenty-three States and all Union Territories had adopted the 1993 Act and two other States- Rajasthan and Himachal-Pradesh had enacted their own laws in this regard, which are similar to 1993 Act. The snail-pace of this law clearly shows the lack of will of the lawmakers. We still need to cover the distance up to the total eradication of

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[7] Sec. 1(2), 1993 Act.

[8] Art. 252(1), Power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State:
(1) If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in Articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the House of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State.

[9] Sec. 1(2), 1993 Act.

the practice of manual scavenging from India and then further to the total rehabilitation of the individuals engaged in manual scavenging.

The 1993 Act came into force on June 5th, 1993. It is a social as well as a penal legislation and it promises to protect and restore the dignity of the people engaged in manual scavenging work. The main objectives of the 1993 Act were to prohibit the construction and continuance of dry-latrines and to prohibit the employment of individuals as manual scavengers. It also intended to regulate the maintenance of water-seal latrines i.e. the ones, which have the flush and water facilities.However, even after the States have been notified, the law will not become effective automatically as the states are required to issue another notification for the identification of the areas where the inhuman practice of manual scavenging exists.[10]

In addition to this, there are two more conditions attached to the enforcement of the Act in a particular State: one, that a 90 days' notice must be given before issuing the notification and the other, that the notification can only be issued in the areas where adequate facilities for the usage of water-seal latrines exist.[11] This provision hinders the basic objective of the Act. Thus, the Act does not prohibit the manual scavenging in a direct fashion, which is against the basic spirit behind formation of this Act.

Further, there are many provisions in this Act, which hinder the fulfillment of the basic objectives of the Act. The Act has given a very narrow definition to'manual scavenger' by including only those people who clean dry latrines.[12] It clearly fails to take into its ambit all those people who are involved into cleaning of manholes, sewages, septic tanks, railways tracks etc. All these works involve manual handling of human excrement and the basic nature of all these works is that of a manual scavenger. By putting such a narrow definition, the Act automatically puts a limit on its reach and scope.

[10]Sec. 3(1), 1993 Act.
[11]Sec. 3(2), 1993 Act.
[12]Sec.2(j), 1993 Act.

In addition the above limitation, the scope of the Act is again limited by another provision, which confers a special power to the State Governments to exempt any area, category of buildings or class of persons from any provisions, rules, requirements, order, and scheme of the Act.[13] This is a discretionary power, which has been given to the State Governments for which there is no need to specify any reasons to support their decision of giving exemption. Such exemptions undoubtedly affect the basic objective of the Law itself.

As far as the rehabilitation of manual scavengers is concerned, the Act does not carry detailed provisions or guidelines or schemes or directions in this regard. The Act simply states that for the rehabilitation, the State Governments should do whatever is possible.[14]

Talking about the punishments, the 1993 Act, despite being a penal legislation, has not seen a single conviction in the last 21 years, i.e. since the time of the enactment of the Act.[15] The 1993 Act punishes whoever fails to comply with or contravenes any of its provisions with imprisonment up to one year or fine unto ₹ 2000.[16] Despite the widespread prevalence of the inhuman practice of manual scavenging throughout the nation, not even a single conviction was seen in the more-than-20-year history of the Act.

The provision of punishment also creates ambiguity as to who should be punished- the employer of manual scavenger or the manual scavenger himself. There have been some real cases in this regard when the notice was issued to the manual scavengers- in July 2009, The Mandal town council of *Dholpur* in Rajasthan, the notice was issued to twelve manual scavengers, and in another case eight manual scavengers were issued notices *Nagapattinam*, Tamil Nadu.[17]

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[13]Sec. 4, 1993 Act.
[14]Sec. 6, 1993 Act.
[15]Get Serious, The Hindu, Sep 13, 2013, available at http://www.thehindu.com/opinion/editorial/get-serious/article5120916.ece (May 14, 2017, 3:29 PM).
[16]Sec. 14, 1993 Act.
[17]Singh Bhasha, *Unseen: The Truth About India's Manual Scavengers*, 210 (1st ed. 2014).

The Act carries another faulty provision where the manual S=scavengers who wish to file a complaint need to take prior permission of the operative officers.[18] The irony is that the operative officers are the officers responsible for the implementation of the provisions of the Act and they are the ones from whom the manual scavengers have to take prior permissions before filing an official complaint against them.

This Act is being into enforcement since last two decades. The various faulty provisions of the Act infer the failure of its proper implementation and the continuance of the inhuman practice of manual scavenging in India.

The 2013 Act

The 2013 Act provides for the prohibition of employment of individuals as manual scavengers and the rehabilitation of all the manual scavengers and their families. The Act is another effort of the Government to eradicate the age-old practice of manual scavenging. The Act came into force on September 18th, 2013. The Act has an overriding effect on 1993 Act and on all other State Acts related to manual scavenging. Many feels that it is nothing but the pressure from the ground, which has forced Government to bring this new Act on manual scavenging.

The Act expands the definition of 'manual scavenger'. Compared to 1993 Act, it gives a wider definition to 'manual scavenger'. The 2013 Act defines manual scavenger in clause (g) of Subsection (1) of Section 2 as the following:

> 'Manual scavenger' means a person engaged or employed, at thecommencement of this Act or at any time thereafter, by an individual or a local authorityor an agency or a contractor, for manually cleaning, carrying, disposing of, or otherwisehandling in any manner, human excreta in an insanitary latrine or in an open drain or pitinto which the human excreta

[18]Sec.17, 1993 Act.

> from the insanitary latrines is disposed of, or on arailway track or in such other spaces or premises, as the Central Government or a StateGovernment may notify, before the excreta fully decomposes in such manner as may beprescribed, and the expression "manual scavenging" shall be construed accordingly.[19]

The definition is far more detailed as compared to the one given in the 1993 Act. The new definition provided in the 2013 Act includes in its ambit, manual scavengers employed by an individual, a local authority, an agency and a contractor.The previous Act of 1993 failed to draw any difference between e a permanent employee from those hired on the contract basis working in various institutions like Municipalities, Indian Railways, Government Hospitals etc. Taking benefit of the narrow definition provided in 1993 Act, all these authorities denied the mere presence of manual scavengers by not including the people engaged in manual scavenging on contract or hire basis. This definition, unlike the definition given in the 1993 Act, differentiates between regular employees and the employees hired on the contract basis. It further carries two explanations, one of which says that for the purpose of this clause "engaged or employed" will mean engagement or employment of both regular and contract basis. [20] It makes it clear by specifying that engagement or employment can either be on a regular basis or on a contract basis.

Also, the previous Act only talked about dry-latrines but the new Act includes an insanitary latrine, an open drain, a pit, and also railways tracks. This Act expands its horizon to other forms of manual scavenging as well.

It is praiseworthy how the 2013 Act has expanded the definition of manual scavenger for the first time but at the same time it has a big loophole, which will ensure the continuance of this inhuman age-old practice of manual scavenging. The second explanation given in the Section

[19] Sec. 2(1)(g), 2013 Act.
[20] Sec. 2(1)(g), Explanation (a), 2013 Act.

2(1) (g) of 2013 Act seems to have a big fault. Second explanation reads as follows:

> A person engaged or employed to clean excreta with the help of suchdevices and using such protective gear, as the Central Government may notifyin this behalf, shall not be deemed to be a 'Manual Scavenger'.[21]

The 2013 Act provides most horrifying escape clause by excluding those persons from the definition of 'manual scavenger', which are using such devices and protective gear as notified by Central Government. Such people shall not be deemed to be manual scavengers as per the 2013 Act. It has killed the soul of the Act by including such an exception clause. The manual scavenging must be totally prohibited in any form.

The term 'protective gear' is a very vague term. It can be used for exploitation of manual scavengers as only a glove can also be claimed to be protective gear. This gives an open ground for continuance of inhuman practice of manual scavenging. This will ensure the continuance of manual scavenging in various institutions as they can always excuse themselves by stating that the persons being employed by them have been provided with protective gears and other devices. By this it can simply exclude their employees from purview of 2013 Act. No matter what tools, devices and protective gears are used by the manual scavengers, the undignified nature of the work cannot be avoided. It is continuously pushing them to the social discriminations.

As far as the manual cleaning of sewer tanks and septic tanks are concerned, the Act has called it to be 'hazardous cleaning' only when it is done without employer fulfilling his obligations to provide with protected gear and other cleaning devices.[22] Such definition may increase the incidents of persons manually entering into manholes or drainages and

[21]Sec. 2(1)(g), Explanation (b , 2013 Act.
[22]Sec. 2(1)(d), 2013 Act.

subsequently it may add to the consequential deaths of such workers. With no proper specifications of protective gearsthe authorities may end up using basic tools in the name of protective gears. This again adds to the ongoing exploitation of manhole workers.

However, the punishment for employing manual scavengers has been increased in the new Act. The Act prescribes a very strict punishment for any person who employs manual scavengers. The violator is now punished with an imprisonment of one year up to five years or a fine of Rs. 50,000 up to Rs. 5 lacs or both, depending upon the nature of the offence.[23]

Further, while providing meaning of the term 'insanitary latrine' the Act excludes the water flush latrines, which are used in by the Indian Railways in their train coaches. It is stated that when such latrines are cleaned by employees using protective gear it is not deemed to be an insanitary latrine.[24] By doing this, the Act has exempted the Indian railways from the definition of insanitary latrines. The Indian Railways are the biggest employer of manual scavengers and with such a definition the sad state of Indian railways will continue.

Further, the Act has provided municipal cantonment boards and railway authorities with a period of 3 years, from the date of commencement of the Act, to construct adequate number of sanitary community latrinesin order to eliminate the practice of open defecation in their respective jurisdictions.[25] By such a provision the Act has assured the continuance of the practice of open defecation for another three years. Knowing the pace of urbanization, the Act should have specified a lesser time to fulfill its objective.

In the 2013 Act, the Government has been given a power to exempt any area, category of building or class of persons from any provisions of the Act or from any specific requirements, rules, orders, notifications, bye-laws

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[23]Secs. 5 to 10, Chapter III, 2013 Act.
[24]Sec. 2(1)(e), 2013 Act.
[25] Sec. 4(2), 2013 Act.

or schemes for a period not exceeding six months at a time.[26]It is against the spirit of the Act to empower the Government to let the inhuman practice of manual scavenging continue for a period of six months as and when it intends.

Unlike the 1993 Act, the new Act does provide specific provision for rehabilitation of the manual scavengers and their liberation. The previous employers of the manual scavengers are required to provide monthly income to them and apart from this they are also required to provide them necessary help in finding an alternative employment. According to the 2013 Act, no person employed or engaged as manual scavenger on a full-time basis shall be retrenched by his employer and he shall be retained by the employer for doing other work of at least the same emoluments if he is willing to work.[27]

Chapter IV of the Act further provides for the identification of manual scavengers and their rehabilitation. The process of rehabilitation for a person identified as manual scavenger has been specified in Section 13 of the Act. The Act prescribes that the person identified as a manual scavenger shall be given, within one month, a photo identity card, containing details of all members of his family dependent on him, and such initial one time, cash assistance as may be prescribed.[28] The Act also makes his children entitled to scholarship as per the relevant scheme of the Central Government or the State Government or the local authorities.[29] It further talks about allotment of a residential plot and financial assistance for house construction, or a ready-built house, with financial assistance, to a Manual Scavenger subject to his eligibility and willingness.[30] The Act also talks about giving him, or any adult member of his family, training in a livelihood skill for which a stipend of minimum Rs. 300 shall be paid during the training period.[31]It

[26] Sec. 39(1), 2013 Act.
[27]Sec. 6(2), 2013 Act.
[28]Sec. 13(1)(a), 2013 Act.
[29]Sec. 13(1)(b), 2013 Act.
[30]Sec. 13(1)(c), 2013 Act.
[31]Sec. 13(1)(d), 2013 Act.

further provides him, or any adult member of his family, subsidy and concessional loan for taking up an alternative occupation on a sustainable basis.[32] Finally, the Act provides him for such other legal and programmatic assistance, as the Central Government or State Government may notify in this behalf.[33]

The Act further holds responsible the District Magistrate of the concerned district for the rehabilitation of the manual scavenger.[34]The Act, as it has been stated above, does talk about providing land as the part of rehabilitation package but it is silent on location of the land i.e. whether it would be outside of the village or within the village and it is also silent on other important measures in order to ensure dignity of life to the manual scavengers within a certain time limit. Further the Act does not specify the responsibilities and accountabilities of the local authorities whose job is to supervise rehabilitation.

Another major flaw of the Act is that it fails to take into consideration those manual scavengers who have left the job during last twenty years and are still struggling for the basic amenities of life. The Act is silent on the rehabilitation of such people who are no longer into scavenging work and never got rehabilitated under any of the schemes of the Government during last two decades.

4. SUGGESTIONS AND CONCLUSION

The Government of India and various State Governments have been working on eradicating the caste based inhuman practice of manual scavenging since the time the Constitution was formed but the situation of manual scavengers remained the same all through these years.

It was only because of sincere efforts of some of the organizations working for the benefit of manual scavengers that the Government of India brings into force a legislative Act dedicated to end the ill practices in the year 1993. Though, the legislation suffered from big loopholes but despite

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[32]Sec. 13(1)(e), 2013 Act.
[33]Sec. 13(1)(f), 2013 Act.
[34]Sec. 13(2), 2013 Act.

of them, all these organizations and the manual scavengers themselves had a big hope from this legislative measure. Their hopes crashed when only few of the States showed willingness in adopting this Act. Even in the States, which adopted this Act, all the provisions could never be implemented properly. So, another hurdle, which these organizations and the manual scavengers had to cross in order to free this country from the curse of manual scavenging was to force all the States and Union Territories, as well as all the civic authorities and other institutions, to properly implement all the provisions of the Act including that of introducing adequate rehabilitation schemes.

Even after a decade since the Act was introduced, the state of manual scavengers throughout India remained very sad. In 2003, these organizations and some of the members of the community of manual scavengers again put a lot of effort by filing a petition in the Supreme Court of India demanding a complete eradication of this inhuman practice through proper implementation of the Act by all the States, Union Territories and various authorities. Their struggle in the Court lasted for another decade and in 2003, probably because of pressure from the ground and the time-to-time interventions by the Supreme Court, another Act was passed by the Parliament with respect to manual scavenging. The petition was also disposed of in March 2014, for the 2013 Act would now occupy the entire field.

The 2013 Act, unlike the 1993 Act, carries broader definitions and stricter provisions including detailed provisions with respect to rehabilitation of the people engaged in the practice of manual scavenging. However, even this Act is not free from the loopholes, some of them being of such a nature as to destroy the soul and substance of the Act itself. The Act, despite of its defective provisions and loopholes, can still be another positive step towards the complete eradication of this age old evil practice of manual scavenging. All eyes are now on the administrative bodies and it is still to be seen how different provisions of the Act are implemented by them to achieve the intended object of the Act.

Millions of the people who are positioned at the lowest in the so-called caste-hierarchy of the society are still forced to continue working as manual scavengers in one form or the other. The practice is still into continuation in many regions throughout India, from Kashmir to Kanyakumari and with this the humanity continues to suffer. Indian Railways is still the largest employer of the manual scavengers and due to some of the escape clauses of the new Act such position of Indian Railways might not change for another few decades.

Since the 2013 Act suffers from many loopholes, the following amendments might be helpful in achieving the intended objectives of the Act:

(i) The 2013 Act should be aimed at the complete abolition of the inhuman practice of manual scavenging. The Act is named as the 'Prohibition' of Employment as Manual Scavengers and their Rehabilitation Act. It should have been named as 'The Abolishment of Employment as Manual Scavengers and their Rehabilitation Act'. The focus must be on the complete abolishment of this age-old inhuman caste-based practice. The practice can be compared to the practice of slavery and bonded labor. Thus, the Government should consider suitably re-naming the Act and focusing on the complete abolition of manual scavenging through its provisions to deal with the issue more seriously.

(ii) What cannot be done directly should also not be done indirectly**.** The manual scavengers should not be made to continue doing manual scavenging by indirect means. The evil practice of manual scavenging, which is caste based, should not be made to continue in the shadow of 'protective gear'. The term 'protective gears' is a very vague term. It can be used for exploitation of manual scavengers as only a glove can also be claimed to be 'protective gear'. This gives an open ground for continuance of inhuman practice of manual scavenging. This will ensure the continuance of manual scavenging in various institutions as they

can always excuse themselves by stating that the persons being employed by them have been provided with 'protective gears' and other devices. By this, it can simply exclude their employees from purview of 2013 Act. A suitable amendment must be made in the Act regarding this.

No matter how much protective the gear is, it is a well-known fact that there is a direct nexus between the person who is doing this job and the caste he belongs to. The protective gear cannot help in getting his dignity back. Certainly, a manual scavenger's soul needs more protection than his body. Thus, rather than protecting his body with safety gears and security tools, the Government should take proper initiatives to protect his soul.

(iii) The 2013 Act provides the most horrifying 'escape clause' by excluding those persons from the definition of 'manual scavenger', which are using such devices and protective gear as notified by Central Government. Such people shall not be deemed to be manual scavengers as per the 2013 Act. It has killed the soul of the Act by including such an 'exception clause'. The manual scavenging must be totally prohibited in any form. A necessary amendment must be made in the Act with this regard. Such an escape clause must be deleted. There should be no exception regarding the practice of manual scavenging.

(iv) Regarding sewer tanks and septic tanks, the 2013 Act has called it to be hazardous cleaning only when it is done without employer fulfilling his obligations to provide with protected gear and other cleaning devices. Such definition may increase the incidents of persons manually entering manholes or drainages and subsequently it may add to the consequential deaths of such workers. With no proper specifications of protective gearsthe authorities may end up using basic tools in the name of protective

gears. This again adds to the ongoing exploitation of manhole workers.

(v) Further, while providing meaning to the term 'insanitary latrine' the 2013 Act excludes the water flush latrines, which are used in by the Indian railways in their train coaches. It is stated that when such latrines are cleaned by employees using protective gear it shall not deemed to be an insanitary latrine. By doing this, the Act has exempted the Indian railways from the definition of insanitary latrines. The Indian Railways are the biggest employer of manual scavengers and with such a definition the sad state of Indian railways will continue. An amendment regarding this will help in the complete eradication of the practice of manual scavenging in the Indian Railways.

(vi) By the 2013 Act and Rules, the Government also fixes anamount as the rehabilitation costfor total rehabilitation of all the persons and families engaged in the manual scavenging work. The Government should have fixed such an amount only after it has identified all the manual scavengers throughout the nation. Even in the opinion of various organizations, which are working for the benefit of manual scavengers, the amount fixed is inadequate.

(vii) Also, the 2013 Act failed to include any rehabilitation provision for the benefit of those manual scavengers who left this job during last two decades, i.e. after the enactment of 1993 Act. Such manual scavengers must also be identified as majority of them failed to find an alternate job for them and are still having problems in supporting their families.

(viii) The 2013 Act does not state the responsibilities and accountabilities of the local authorities, which will be supervising the rehabilitation process of the people who are in the list of identified manual scavengers. The Act must be suitably amended,

and the responsibilities and accountabilities of these local authorities should be clearly spelt out.

(ix) The 2013 Act has provided municipal cantonment boards and railway authorities a period of 3 years, from the date of commencement of the Act, to construct adequate number of sanitary community latrines in order to eliminate the practice of open defecation in their respective jurisdictions. By such a provision the Act has assured the continuance of the practice of open defecation for another three years. Knowing the pace of urbanization, the Act should have specified a lesser time to fulfill its objective. Such time limits must be revised through suitable amendments.

(x) In the 2013 Act, the Government has been given a power to exempt any area, category of building or class of persons from any provisions of the Act or from any specific requirements, rules, orders, notifications, bye-laws or schemes for a period not exceeding six months at a time. It is against the spirit of the Act to empower the Government to let the inhuman practice of manual scavenging to continue for a period of six months as and when it intends. An amendment must also be done with this regard.

India prides itself for having a Constitution, which intends to protect dignity of every individual. India is growing at a very fast pace in the direction of becoming the fastest growing economy in the world. But the prevalence of manual scavenging in many states and Union Territories and in various governmental as well as private institutions, even after six decades, is very shameful. The Government, as well as, the people continue to dehumanize and degrade the most vulnerable groups of the society.

The Government of India should handle the issue more responsibly and the inhuman practice of manual scavenging must come to an end. The Government of India as well as the respective State Governments must

work for the proper implementation of various provisions of the 2013 Act for liberation and rehabilitation of all those people who were or still are engaged in the work of manual scavenging throughout the nation. The Act must also be suitably amended to eliminate any chances of exploitation of manual scavengers.

Let's hope that the work of liberation and rehabilitation of manual scavengers begins in the spirit of the final words of Dr. Bhim Rao Ambedkar:

> "… ours is a battle not for wealth or for power. It is a battle for freedom. It is the battle of reclamation of human personality."

LEGAL AID AS A MECHANISM OF SOCIAL JUSTICE AND ITS ROLE IN JAMMU AND KASHMIR

Dr. Musadir Farooq*

Abstract

The Legal Aid is a legal mechanism of peaceful transformation of society so as to ensure social justice. The underlying purpose of legal aid is to deliver legal advice and aid to the very neighborhood of the underprivileged. It is a concept of administration of justice. Free and competent legal aid to the needy is very important for the effective survival for social system and its denial will entail a failure of rule of law. Equality before the law necessarily involves the concept that all the parties to the proceeding in which justice is sought must have an equal opportunity of access to the Court. Inability of a person to obtain access to the Court of law for redressing his grievances makes justice unequal and thus law loses its meaning and fails in its purpose. In reality, legal aid is a constitutional imperative. The mandate of Article 38 of constitution of India reads as the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice- social, economic and political shall inform all the institutional of life.

The concept of Legal Aid is rightly related to be the spirit of equality. Equal justice is a fair treatment within the judicial process. Equal justice is therefore corrective of inequalities which causes social imbalance. In order to make equality of law and equality before law a reality for downtrodden and deprived sections of society, the Legal services has been a remedy provided in the Constitution of India and Constitution of Jammu and Kashmir.The aim of this paper is to analyse the mechanism of Legal Aid to ensure the underprivileged sections of society effective means to have access to Justice.

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1. INTRODUCTION

Enhancing access to justice and promoting human rights and fundamental freedoms for all, including women, children and marginalized populations, are among the principal aims of ABA ROLI. ABA ROLI implements targeted strategies to promote human rights worldwide while simultaneously applying human rights and gender perspectives across all its programs and practice areas, in keeping with a general human rights-based approach to legal development. In doing so, ABA ROLI is guided by human rights principles enshrined in the Universal Declaration of Human Rights and other international human rights instruments.

The concept of legal aid has its roots in the well settled principle of natural justice "*Audi alteram partum*" it is the very spirit of equality and its movement is dedicated to the principle of equal justice to the poor. To ensure equality of justice it is not only sufficient that law treats rich and poor equally, but it is also necessary that the poor must be in a position to get their rights enforced and should put up proper and adequate defenses when they are sued for any liberty. If this is not done the law despite its equality will become discriminatory against the poor[1]. Equal Justice is fair treatment existing in our society. Equal justice is corrective of inequalities which creates social imbalance without which justice in the society cannot be established in truth. If a large section of society is prevented from exercising of their rights and securing of an honorable existence, there can be neither equality nor justice in such a society. In the absence of legal aid entire scheme of fundamental rights and other substantive and procedural rights become meaningless without having any mean to enforce them. Underlining the importance of legal aid, the Fourteenth Law Commission of India emphasized that without legal aid Equality before Law, an integral part of Rule of Law can't be achieved. The following words of the report are self speaking:

"…. Equality is the basic principle of all systems of jurisprudence and administration of justice…. In so far as a person is unable to obtain access to the Court of law for having his wrong redressed or for defending

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[1] B.N.Manani Tripathi., *Jurisprudence*, 391 (Allahabad Law. Agency Faridabad, 2004).

himself against a criminal charge justice become unequal and law which are meant for his protection have no meaning and to that extend fails in their purpose. Unless some provision is made for assisting the poor man for the payment of court fee, lawyer fee and other incidental costs of litigation, he is denied equality of opportunity to seek justice.[2]

2. IDEA OF JUSTICE:

Justice is the first virtue of all social institutions of the world, in the same way as truth is for all system of thought. A theory however elegant and economical must be revised or rejected if it is untrue; likewise laws and institutions of laws like courts and tribunals, no matters how efficient and well arranged they are must be reformed or abolished if they are unjust. Every individual possess rights, liberties and freedoms which are all based on justice and even the welfare of society as a whole cannot override them. It does not allow that the sacrifice imposed on a few are out weighted by the larger some of advantage enjoyed by many. Therefore in the just society the rights, liberties and freedom of equal citizens are taken as well settled; the right, liberty and freedoms secured by justice are not either subjected to political bargaining or to the calculus of social interests of a group of individual. The only thing that permits us to acquiesce in an erroneous theory that lack the better one; analogously, an injustice is tolerable only when it is necessary to avoid an even greater injustice. Being first virtue of human activities, truth and justice are uncompromising.[3] Justice is primarily a desired and a possible, not a necessary, quality of social order relating to the mutual relations of man. The concept of justice involves an analysis of the claims of more than one person and asks for something like a balance between the varied claims. A man is said to be just, if his behaviour conforms to the norms of the social order supposed to be 'just'. It means that a 'just' social order regulates the behaviour of man in ways satisfactory to all men and finds their approval in it. Thus justice may be said to bestow a sense of 'correctness' and 'achievement' guaranteed by a social order. It follows that a man cannot find justice in isolation as an independent

[2] LCI, 14th Report, 587, 1958.
[3] Rawls John., *Theory of Justice*, 3(Harvard University Press, Cambridge, 2000).

individual being, and hence, seeks it in society. The theme that a man can enjoy the sense of achievement guaranteed by society, reveals the social basis of justice.[4]

India being a welfare State and the most important function of the welfare state is to assure social justice by removing social inequalities which has been created within the society. Poverty has been the problem in all times and the problem did not become less acute with the advancement of civilization but indeed a great responsibility is cast upon the State to ensure social justice towards the poor masses of the society. The eradication and control over poverty is essentially the function of modern welfare state and it can be achieved only through socio-economic policies led by the Government but so long as it exist, it creates disabilities on the part of the poor person by disabling them to have the full benefits of legal and political rights. The paramount duty of the state is to provide protective legislation for the welfare of the weaker sections of the community. India being a welfare State has also taking its long stride towards socialism and in order to mitigate economic inequalities and social disabilities incorporation of social justice become necessary in the administration of justice.[5] Justice and equality are inter-connected and the idea of equality plays an important role in the scheme of justice meaning thereby all individuals are entitled to equality before law and equal protection of law.

Evidently, justice is closely associated with political rights, social obligations, moral values, economic plans, administrative decisions and legal process, it is a continuous method for making itself acted upon by Society, Government and other related agencies; and negatively, justice is opposed to injustice, violence exploitation, suppression, discrimination, untouchability, casteism, apartheid, inequality, intolerance, slavery, forced labour, class superiority, fanaticism, adultery, theft, telling lie, lust, war, bloody revolution, bonded labour, terrorism, racism, dogmatism, illiteracy, divinity, selfishness, hunger, poverty and the like evils prevailing in the

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[4] Upadhyay K. Ashok., *Rawls John: Concept of Justice,*15 (Rawat Publication, New Delhi 1999).

[5] Sharma S.S., *Legal Aid to Poor: The Law and Indian Legal System*, 3 (Deep and Deep Publication, New Delhi,1993).

society. Undoubtedly, justice is a double edged process, which on one hand, destroys all the obstruction elements coming in its way; and on the other, establishes and maintains, all the helping elements, values and agencies facilitating its effectiveness. Justice thus has both its negative and positive aspects. If justice is the creator, it is also a destroyer. If law makes it effective, then morality and religious makes it prosperous. Justice not only takes up the case of weak and the poor; but it also reforms and mends, the strong and the rich; and in its long process, justice relate something to it and shuns something as well. This way justice is the protector of individual, and maintainer of society, the weapon of state and the emancipator of humanity.[6]

If we talk about legal aid in terms of justice and equality then we came to know that there is indivisible connection or nexus between justice and equality and the heart of justice is elimination of arbitrariness also called as discrimination and the governing principle between rights and duties is equality. The term justice has a wide association with social justice, political justice, economic justice, legal justice, etc. but here as a right to free legal aid services we are only concerned with legal justice. Justice consists in the ordering of human relations in accord with broad principles applied informally and impartially to one and all the sections of the community. Justice has to be administered by the courts and tribunals according to the law of the land and procedure followed by the courts must be just, fair and reasonable which is indeed reflected in quote "Justice must not only be done, it must be seen to be done". A court of law is a temple of justice where peoples go with the hope and belief that justice will be done to them.[7] The main thrust of justice and equality is to see that the poor are not deprived of their rights, privileges and benefits and they have the right to receive reasonable aid and advice.[8]

[6] Jatava. R.D., *Social Justice in India*, 34 (ABD Publishers, Rajasthan, 1998).

[7] Khan. S.L.A., *Justice Bhagwati on Fundamental Rights and Directive Principles* 77 (Deep and Deep Publication, New Delhi, 1996).

[8] Chakrabarty. Koyel., *Justice For All: Reading Literature as a potent source for reflecting lives that need legal aid in Indian society from human rights perspectives*, 33 (Satyam Law House, New Delhi, 2012).

3. IDEA OF SOCIAL JUSTICE

Social justice is that sort of justice which prescribes certain ideas closely related to human society; it sustains the existence and continuity of the individual, family, society and the nation; its implementation safeguards the interest of the weaker section of society; and this removes all the serious unjust imbalances found between man and man so that the life of all the citizens become improved and emancipated.[9] Social justice is so wide a concept that it includes all other kinds of justice in its sphere. It gives a vivid depiction of the whole of human society and is similar to a looking glass wherein one can find the picture of the country, or a society.[10] Social justice represents a great humanistic aspiration in the world and provides necessary help to those persons who are no getting justice. Ulpain, who describes justice, as "giving each man his due" must be properly understood. Social justice provides social due, and postulates that no person should be deprived of justice due to social inequalities. Poverty must not become disqualification for those who seek justice.[11] The preamble and Article 38 of the Constitution of India envisages social justice as its doorway to ensure right to life a meaning full and liveable along with human dignity of an individual. The Constitution commands justice, liberty, equality and fraternity as supreme values to usher in the egalitarian social, economic and political democracy. "Social Justice" is an integral part of "justice" in generic sense. Justice is a genus, of which social justice is one of its species social justice is a dynamic device to mitigate the sufferings of the poor, weak, Dalits, Tribals, and deprived section of the society and to elevate them to the level of the equality to live a life with dignity of a person.[12]

Keeping in view the deplorable conditions of the peoples, Dr. Ambedkar, Dr. Lohia, Pandit Nehru and a host of other put forth a strong

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[9] *Supra* note 5 at 13.

[10] *Id.* at 15.

[11] Kumar. Santosh., 'Concept of Legal Aid and its Functions', in Raman Mittal & K. V. Sreemithun, *Legal Aid: Catalyst for Social Change* 60 (Satyam Law Internation, New Delhi, 2012).

[12] Consumer Education and Research Centre and others v. Union of India and others, AIR 1995 S.C. 922.

plea for the establishment of a society based on socialism, equality and fraternity. They emphasized that the weaker section, especially the scheduled casts, the schedule tribes and other backward classes must get the benefit of social justice. They wanted to establish a democracy, which would be purely humanistic, socialistic and secularistic and wherein the people will remain free from the shackles of narrow-mindedness, fanaticism, communalism, caste discrimination, social inequalities, economic insecurity, religious fundamentalism, exploitation and bonded labour. In order to make these evils ineffective, Dr. Ambedkar stresses the need of preaching the ideas of liberty, equality and fraternity. He was of the firm opinion that if the principle of fraternity becomes the life-breath of all Indians, then the feeling of nationalism and patriotism would necessarily be strengthened and it would be beneficial to all and it would also promote the spirit of social justice.[13] The concept of social justice which prevails in our culture has now being perfectly defined. According to this concept a society is without justice insofar it is without rules (statute, or precedents, written or unwritten rules, legal or moral rules); it must in both of its formal and informal aspect treat similar case similarly and must also treat human beings equally. In particular it must respect differences in capacities and needs and in contribution or merits. Such differences may often make it just to treat people unequally in certain respects, thus at least qualifying the prima facie test requirement of equality.[14]

Poverty has been the problem of all times since the organisation of the society and this problem has not become less acute with the development and advancement of civilization. A great responsibility is put on the solders of the socialistic State to assure social justice in the form of equal justice to the poor and marginalized group of the society. The eradication of poverty and control over poverty are essential functions of the modern Welfare State and these functions can only be achieved by pursuing to suitable socio-economic policies enacted by the Government. But so long as poverty exists it creates disability on part of marginalized

[13] *Supra* note 9 at 6.

[14] Rao Mamta., *Public Interest Litigation, Legal Aid and Lok Adalat*, 47 (Eastern Book Company, Lucknow, 2015).

section of the society due to which they become unable to take full benefits of their legal and political rights. It is the paramount duty of the State to undertake protective legislation for the welfare of the weaker sections of the society.[15]

4. CONSTITUTIONAL AND STATUTORY FRAMEWORK OF LEGAL AID

Legal aid is a constitutional right not only the preamble which ensures social, Economic and political justice but Article 14 provides that "The state shall not deny to any person equality before law or the equal protection of law within the territory of India."

As per Dr. Jennings:

> The right to sue and to be sued, to prosecute and to be prosecuted for the same kind of action should be same for all citizens of full age and understanding without distinction of race, religion, wealth, social status or political influence.[16]

The underlying purpose of legal aid is to deliver legal advice and aid to the under-privileged. It is a concept of administration of justice. Free and Competent legal aid to the needy is very important for the effective survival for social system and its denial will entail a failure of the rule of law.[17] Article 21 of the Constitution of India has lent much strength to legal aid. It reads as:

> No person shall be deprived of his life and personal liberty except according to procedure established by law.[18]

Justice Krishna Iyer in *M.H Haskot v. State of Maharashtra*[19] has held that the right to free legal services is an essential ingredient of

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[15] *Supra* note 4 at 3.

[16] Jennings, *Law of Constitution* 49 (University of London Press, London, 2001).

[17] Hussaniara Khatoon v. State of Bihar, AIR 1997 SC 1369; See also Sukh Das v. Union Territory of A.P. 1986, L.J.1084.

[18] P.M. Bakshi, *The Constitution of India* 46 (Universal Law Publishing, New Delhi, 2007).

reasonable, fair and just procedure for a person accused of an offence and is implicit in Article 21 of the constitution.

In *Hussanara Khatoon and others v. Home Secretary, State of Bihar,*[20] The Supreme Court in this case held that the accused who goes through the trial without legal assistance cannot possibly regarded as just, fair and reasonable within the principle of natural justice or an accused detained in jail for period longer then what they would have been sentenced if convicted is illegal as being in violation of Article 21 of the Constitution of India. The Court further held that "The right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and is implicit in Article 21 of the Constitution of India.

In *Gopalanachari v. State of Kerala,*[21] the court clearly held that in Article 21 the "procedure established by the law" must be just, fair and reasonable. Not any piece of enacted law is just, fair and reasonable but laws enacted in conformity with Article 22 are valid enactments. Therefore procedural safeguards under Article 22 are necessary to ensure right to life and personal liberty. Right to hearing is considered as one of the important procedural safeguard against the infringement of right to life and personal liberty. Majority of population in India is poor, ignorant and illiterate, unable to safeguard and defend their rights in the court of law. So the duty is cast upon the State under Article 21 and 22 to provide legal assistance to the accused person to defend his case.

In *Khatri and others v. State of Bihar and others,* [22] the Supreme Court in this case held that free legal aid services is essential for reasonable fair and just procedure guaranteed under Article 21 of the Constitution of India. The Court further held that the State is bound to provide free legal aid services to the accused person who is unable to secure legal services due to

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[19] AIR 1978, S.C 1548, See Maneka Gandhi v. U.O.I, AIR 1978, S.C 547, Also See State of M.P v. Shobaram, AIR 1968 S.C 1910.
[20] A.I.R. 1979, S.C. 1360.
[21] 1981 Cri. L.J 337
[22] A.I.R. 1981, S.C. 928.

economic disabilities. The Court further held that the magistrate is under statutory obligation to inform the accused person of his right to legal assistance in state expenses.

In *Kadra Pabadiya and others v. State of Bihar*,[23] The Court held that under-trial prisoners who are unable to pay lawyer fee due to economic inequalities shall be provided free legal services. The Court further held that legal assistance shall be provided to convicted as well as under-trial prisoners at the State expenses. Further, Article 22(1) reads as-

> No person who is arrested shall be detained in custody without being informed as soon as may be of the grounds for such arrest nor shall be denied the right to consult and to be defended by a legal practitioner of his choice.[24]

Furthermore, Article 38 of the Indian constitution reads as-

> The state shall strive to promote the welfare of the people by securing and Protecting as effectively as it may a social order in which justice- social, economic and political shall inform all the institutions of the national life.[25]

In *Moti Bai v. The State*,[26] the court in this case held that it is a Constitution mandate under Article 22 not only to provide opportunity of representation to the accused person but to provide free legal assistance at the State expenses. The court further make the following propositions out of Article 21, 22 39-A and 304 of Cr.P.C regarding the provisions of free legal aid; (1) that the accused is having right to consult a lawyer at this right starts since his arrest; (2) in order to make such consultation effective it is necessary to allow the lawyer to interview the accused although in presence

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[23] A.I.R. 1981, S.C. 939.
[24] Supra note 5 at 57.
[25] *Id*. At 85; See Section 13 of constitution of Jammu and Kashmir; Also see Air India Statutory Corporation v. United labour union, AIR 1997 SC 645; Kasturi lal v. State of J&K, AIR 1980 SC 1992, Shyam Sunder v. State AIR 2009 J&K 23.
[26] AIR 1954 Raj. 241.

of the police officer;(3) reasonable restrictions may be imposed upon such interview as regarding time and convenience of the police officer in charge but a duty is cast upon the police authorities not to hamper the communication between the lawyer and the accused on aribitory grounds. The communication between the accused and the lawyer is confidential under section 126 of the Evidence Act and can be only disclosed with the consent of the accused.

In *Saiyad Afjal Hussain and others v The State,*[27] the court held that the trial of criminal cases by the court of law must be conducted during the working hours and this rule shall be made a part and parcel of fair trial and any deviation from this rule is questionable in the court of law and may be only allowed in exceptional circumstances. Commencing of a trial during night hours means denial to accused person to consult his lawyer which will in turn vitiate the proceeding and the conviction cannot stand.

The court in *A.K. Roy v. Union of India,*[28] strictly interpreted the provision of Article 22(4) and (5) of the Constitution of India and held that if a person is detained under National Security Act 1980 then under the said Article he is not having right to representation before the advisory board since its constitution and denial of representation cannot be considered as unjust, unfair and unreasonable. But if the detaining authority or the advisory board constituted appoints a legal advisor on their behalf then the detenu must be also allowed to appoint a legal counsel to defend his case.

At present Article 39-A expressly provides Equal justice and free legal aid:

> The State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity and shall in particular provide free legal aid by suitable legislation or schemes or in any other way, to ensure that opportunity for securing justice

[27] AIR 1962 (Raj) 216
[28] AIR 1982 S.C. 710

are not denied to any citizen by reason of economic
or other disabilities.[29]

In *Ranjan Dwivedi v. Union of India,*[30] the accused was tried for murder and he approaches the Supreme Court for issuance of Mandamus against the Session Court for the appointment of lawyer. The court held that the accused is not entitled to mandamus for the enforcement of Article 39-A under Directive Principle of the State Policy. Although the social objectives enshrined in Article 39-A can be only achieved by enacting special legislation regarding free legal services and at this time the accused is having right to free legal services under section 304 of Cr.P.C. and not by a petition under Article 32 of the Constitution of India.

The court while allowing free legal aid services in a maintenance case in *Mokshed Ali v. Mst Safura Khatoon,*[31] held that it is a Constitutional mandate under Article 39-A to provide free legal aid services to the poor and downtrodden section in the society. The poor and leveraged section of the society cannot be denied justice merely on the ground that they are poor. We have to consider the objectives i.e. justice-social, economic and political enshrined in the preamble of the Constitution before disallowing a person his right to free legal services. It is not a charity but a Constitutional as well as statutory right of a person to ask for free legal representation under Article 39-A and Article 14. It is a high time to realise that free legal aid to the poor and downtrodden will help them enforce their rights as provided in the Constitution and if a poor divorcee, neglected children and parents are not given free legal assistance to vindicate their rights this would be "anti-Constitution inaction.

State of Maharashtra v. Manubhai Pragaji and Others, [32] the Supreme Court while revealing the importance of free legal aid service and speedy trial as a part of fundamental right under Article 21 and the obligation of the State to enact suitable legislation and welfare schemes for

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[29] Inserted by the Constitution 42nd Amendment Act, 1976.
[30] AIR 1983 SC 624.
[31] 1987 Cri.L.J. 1652.
[32] AIR 1996 SC 1.

the deprived section of the society are not denied right to equal representation before the court of law due to economic and other social disabilities under Article 39-A of the constitution of India. The court said that the objectives underlying therein preamble, Article 14, Article 21, Article 22 and Article 39-A of the Constitution will be achieved only if well trained lawyers are available in the society and this will be possible only if well number of law colleges are established in the country and a duty is cast upon the Government to recognise more and more law colleges and to provide them grant-in-aid. This will restrain the law colleges from increasing their admission fee and will also help them to work efficiently. The grant-in-aid shall be provided on similar lines as provided to other streams of education like Art, Science, and Commerce etc.

While considering the petition for restoration of electricity which has been disconnected by the Delhi Vidyut Board in *Abdul Hassan and National Legal Service Authority v. Delhi Vidyut Board and Others,*[33] held that the language of Article 39-A[34] is mandatory and the emphasis shall be laid down on the equal opportunity and speedy remedy in public utility services for securing justice. Further the court held that one of the purposes of Legal Services Authority Act 1987 is to organise Lok Adalat[35] for the

[33] 1999 AIR (Del) 88.

[34] The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or scheme or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

[35] Chapter VI of National Legal Service Authority Act 1987 which provides: Sec. 19(1); Every State Authority or DLSA or SCLSC or HCLSC may organise Lok Adalat at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fir; (2) Every Lok Adalat organised for an area shall consist of such number of: (a) serving or retired judicial officer;(b) Other persons, of the area as may be specified by the SLSA or DALSA or SCLSA or HCLSC or as the case may be, the TALSC, organising such Lok Adalat; (4) The experience and qualification of other persons referred to in clause (b) of Sub-sec. (3) shall be such as may be prescribed by the State Government in consultation with the Chief Justice of the High Court. Lok Adalat may have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a disposal in respect of: (i) any case pending before; or (ii) any matter which is falling within the jurisdiction of and is not brought before, any Court for which Lok Adalat is organised. Provided that the Lok Adalat shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under any law. Also see sec 20.

timely disposal of cases with less cost. Further the court makes a serious note for the establishment of Permanent Lok Adalat at National and State level for the disposal of pendency of litigations for the effective access to justice system.

In *Rajoo @ Ramakant v. State of Madhya Pradesh,*[36] the court held that 42nd Constitutional Amendment which inserted Article 39-A brought a historic change in the provision of legal aid. Prior to this amendment free legal aid services were provided under Article 21, and 22 as a matter of right but the direction for the enactment of legislation for providing free legal aid services was provided in this Act only and under section 12 every person, not having sufficient means to fight his case is entitled to free legal services at State expenses and the Act does not provide any distinction between trial stage and appellate stage so legal aid at State expenses may be provided at both the stages if the court is of view that it will lead to miscarriage of justice.

Order XXXIII Code of Civil Procedure provides[37] Pauper (indigent person)[38] to file a suit in the Court of Law if he is not possessed of sufficient means to enable him to pay the Court fee prescribed by the law for the plaint in such suit. Whereas Rule 18 Order XXXIII empowers State Government to provide free legal services to indigent person. This rule also empowers Central or State Government to make supplementary provisions as it thinks fit for providing free legal services to those who have not been permitted to sue as indigent person and such rules may include the nature and extent of such legal service the condition under which they may made available.

The court in *Bharat Abhyudoy Cotton Mills v. Maharajadhiraj Sir Kameswar Singh and Another,*[39] interpreted the word "pauper" and "person" in Order 33 Rule 1 of Civil Procedure Code and held that it is an enabling provision and the plaintiff having no sufficient means can file a

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[36] AIR 2012 S.C 3034

[37] C.K Takwani, *Civil Procedure with Limitation Act*, 1963 451-52 ((Eastern Book Company, Lucknow, 2015).

[38] Pauper has been substituted by Indigent Person, *Ibid*.

[39] 1938 AIR (Cal) 745.

case under order XXXIII Rule 1. It is clear that the explanation[40] under Order XXXIII, Rule 1 sets two principles: (1) the litigant must be unable to pay the court fee prescribed by the law; and (2) if no such fee is prescribed by the law, the litigant is not entitled to property worth Rs. 100 other then his necessary wearing and the subject matter in suit. In *Hemaram, Chela of Padamdasaji Sadhu v. Mansukhram, Chela of Bhikaram Sadhu and Another,* [41] three litigants were party to the case and only one among them files an application to sue as indigent person. The court interpreted Order XXXIII, Rule 3 of C.P.C and held that under the said Order the only condition precedent is to file an application along with the plaint to sue in "forma pauperis" is that the application must mention the particulars of the litigant along with the schedule of movable and immovable property. Such application must be presented by the applicant in person unless he is exempted by the court under certain circumstance, in such a situation his agent is entitled to file the application on his behalf. Therefore it was held that he is a competent person to file a case under forma pauperis on the behalf of other two litigants.

Relying upon the Constitutional mandate under Article 21 and 39-A of the Constitution of India the court in *Sudhansu Jyoti Mukhopadhaya v. Gopala Gowda,*[42] were the petitioner was not allowed by the sub-Judge to file an appeal under indigent person, the court while considering such matter interpreted section 149[43] and held that no doubt it is the discretion power of the court to allow the petitioner to file a suit under order XXXIII but the court must exercise this power in bona fide manner in favour of the petitioner. A duty is cast upon the court to see that justice is meted out to the petitioner irrespective of economic and other social barriers. If the appellant is not having sufficient fee to file the case in the court of law then he deserves waiver of court fee. The appellant is at liberty to approach the

[40] When he is not entitled to property worth Rs. 100 other then his necessary wearing apparel and the subject matter of the suit

[41] AIR 1961 (Raj) 15.

[42] 2014 (4) SCC 163.

[43] Civil Procedure Code 1908.

District legal Service Authority or Tehsil Legal Service Committee as the case may be.

Section 340[44] Criminal Procedure Code provides legal aid to accused at State expenses in a trial before the Court of Session if he is not represented by a pleader due to lack of finance.

The Court is under duty to assign a pleader for his defence and empowers High Court to make rules with the previous approval of State Government for modes of selecting pleader, fee payable to him and the facilities to be allowed to such pleader.

While considering the question of right to counsel under Section 340 of the Cr.P.C. in *Janardhan Reddy v. The State of Hyderabad and Others,*[45] the court give narrow interpretation to section 340 of Cr.P.C and held that under section 340 the accused is having right to be represented by a lawyer of his own choice, however its denial did not vitiate the proceeding. The court while referring to section 271[46] of Hyderabad Cr.P.C. along with the Rules made by the High Court which corresponds to section 340 of Cr.P.C held that the provisions of the section shall be construed in favour of the accused and the accused having no means to fight his case shall be provided by a lawyer to defend his case but in every case it cannot be said that if the accused remains unrepresented the trial is vitiated but if in appeal it is found that the accused was in need of free legal services then it can be said that un representation amounts to unfair trail.

In *Tara Singh v. The State,*[47] the court in this case held that under Section 173(1)(a) of Cr.P.C. the police officer is under obligation to furnish a copy of FIR to the magistrate as soon as possible after the completion of the procedure of investigation. It must consist of all particulars related to the accused and the nature of offence committed by him and the subsequent

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[44] Ratanlal & Dhirajlal, *The Code of Criminal Procedure*, 655 (Lexis Nexis, Gurugram, 2016).

[45] AIR 1951 SC 217.

[46] Any person accused of an offence before a Criminal Court or against whom proceedings are instituted under this Code in any such court may of right to be defended by a lawyer.

[47] AIR 1951 SC 441.

challan the name and particulars of the witnessed must be mentioned. Whileas section 340 of Cr.P.C. provide that the accused must be represented by a lawyer of his own choice and a duty is cast upon the magistrate to the inform the accused of his right to representation but court is not bound to provide a lawyer for the accused person, the magistrate is only bound to provide necessary opportunity to the accused person. Under section 340 a privilege is provided to the accused and it is his duty to ask for a lawyer or to engage a lawyer for himself or by his next friend.

In *Ram Adhar and Others v. State,*[48] the court in this case held that one of the most important principle of criminal jurisprudence is that "justice must not only be done but seems to be done" and if the litigant in Civil case or Criminal case is of view that the court is not prepared to hear the argument addressed to him, the litigant will lack the confidence in the administration of justice system. At the same time duty is cast upon the court to disallow the frivolous arguments and the court shall keep in mind that if a competent lawyer will not be appointed on behalf of the accused the quality of work will possibly suffer and all this will hinder the administration of justice.

Further the court in the case of *Bashira v. State of Utter Pradesh*[49] considered Rule 37[50] of Allahabad High Court and held that the word appearing in Rule 37 is mandatory and the court is bound to provide amicus curiae to the accused person at State expenses. Although section 340 of Cr.P.C. empowers the courts to appoint amicus curiae for the accused person at the State expenses but such appointment is not mandatory under the said section. While considering both section 340 and Rule 37 the court said that it cannot be held that Rule 37 is void on the ground it contravenes S. 340.

It is true that in some countries it is not deemed to be essential for the accused to be represented by a lawyer but in country like ours right to representation is a fundamental right and cannot be abrogated. While

[48] AIR 1954 (All) 645.
[49] AIR 1968 SC 1313.
[50] Allahabad High Court General Rule (Criminal) 1957.

considering the importance of right to representation a new dimension/ interpretation to section 304 of Cr.P.C. was provided by the court in *Jagmalaram and Others v. State of Rajasthan,*[51] while referring to various Articles in the Constitution of India along with Section 304 of Cr.P.C the court held that duty of the court to inform the accused person of his right to be represented by a lawyer of his own choice does not only mean right to representation during the trial but it also includes right to representation in case of spot trial and extends to an accused released on bail, having same right to be defended by a lawyer before the court of law at State expenses.

In *Pitamber Dehury and Others v The State of Orissa,*[52] the court held that it is the duty of the court to inform the accused of his right to counsel under section 304 of Cr.P.C, indigence should not be the ground for denial of fair justice to the accused. Attention should be paid for the appointment of the counsel for complete justice and sufficient time should be given to the advocate to prepare his case.

5. ROLE OF JAMMU AND KASHMIR LEGAL SERVICE AUTHORITY IN PROVIDING LEGAL AID

Like National Legal Services Authority, the Jammu and Kashmir Legal Services Authorities also enacted similar Schemes for the protection of weaker section of the society. Various schemes are launched by the Jammu and Kashmir Legal Service Authority for the betterment of the marginalised section of the society as categorised in Section 12 of the SALSA Act 1997. State Legal Service Authority enacted legal aid clinics scheme[53] to provide easy access to legal services to the marginalised section of the society. These legal aid clinics are established to provide basic legal facilities like notice, applications, replies, petitions etc. The legal aid clinics help the litigant to resolve their disputes through mediation, conciliation and negotiation thereby reducing the number of litigations in the court. These legal aid clinics are located at places which are easily accessible to the

[51] 1982 Cri.L.J. 2314. Also see State of Madhya Pradesh v. Shobharam, AIR 1966 S.C 1910, Hadu Sahu v. State AIR 1967 Orissa 37.
[52] 1985 Cri.LJ. 424.
[53] The Jammu and Kashmir State Legal Service Authority (Legal Aid Clinics) Scheme, 2010.

peoples so that geographical barrier will not hinder access to justice. They are managed by the legal retainer lawyers or penal lawyers and Para-legal volunteers. Various legal aid clinics are opened in various Districts and Tehsils including District jail.[54]

Jammu and Kashmir Legal Service Authority introduced scheme for mentally ill and persons with mental disability.[55] The scheme is meant for proper representation of mentally ill and retarded persons in the court and giving social protection to them. The scheme ensures protection of human rights and fundamental right to the mentally ill and persons with mental disability. The scheme further ensures reasonable accommodation to them including free treatment, privacy and dignity. The legal services authority under this scheme had to aware the peoples about the right of mentally ill persons.

The Jammu and Kashmir Legal Service Authority launched scheme for unorganised labours[56] whereby a survey will be conducted for identification of unorganised labour in the locality. The survey will be conducted by the Para-legal volunteers, law students, and other social welfare groups. The purpose of the survey is to categorise the unorganised labours into various groups according to the welfare schemes[57] launched by the Government for their welfare and to check whether they have availed the benefits under the schemes or not. Further the SALSA had to launch legal awareness among these unorganised labours about their rights and benefits and if required the SALSA can provide necessary legal services to them in case they are being exploited by the employers.

[54] Legal Aid Clinic at District Jail Jammu inaugurated on 6 Feb 2014, Legal Aid Clinic at Ramban inaugurated 19 April, 2013, Legal Aid Clinic at Kashmir inaugurated on......, Legal Aid Clinic at Awantipora inaugurated on 28 June 2014,

[55] The Jammu and Kashmir State Legal Services Authority (Legal Services to the Mentally Ill Persons and Persons with Mental Disabilities) Scheme, 2010.

[56] The Jammu and Kashmir State Legal Service Authority (Legal Services to the Workers in the Unorganised Sector) Scheme, 2010

[57] Admi Bima Yojna, Contributory Social Security Scheme, MGNREGA Scheme, Social Security Scheme for the Unorganised Workers, Aam Admi Bima Yojna etc

The Jammu and Kashmir Legal Services Authority has launched middle income group legal aid scheme[58] for those citizens whose income is less than 60,000 per month or 7,50,000 per month. The Scheme is applicable to those cases which are filed before the Supreme Court and the purpose of the scheme is to appoint a penal of lawyers whose fee will be such as provided in the Schedule appended to this Scheme and the fee is payable by the applicant. The persons who are eligible for legal services under this scheme may file a case in the Supreme Court and the advocate will be assigned to him and if the advocate is not taking full interest in the case then the case will be withdrawn from him along with the fee payed by the applicant. The main object of the scheme is to prevent the litigant from harassment.

The Jammu and Kashmir Legal Service Authority incorporates National Scheme[59] for legal service clinics at universities etc in the State of Jammu and Kashmir. The purpose of the scheme is to spread legal education to the masses through the participation of law students. The universities, law colleges and other educational institutions are directed to establish legal aid clinics for the easy access to justice. They are directed to organise legal awareness camps, conduct seminars, debates etc for spreading legal awareness among the poor masses.

The Jammu and Kashmir Legal Service Authority implemented Scheme for Para-Legal Volunteers[60] for easy access to justice. The Scheme aims at temporary appointment of Para-legal volunteers for legal awareness among all the section of the society. The Para-legal volunteers work at every District Legal Service Authority and Tehsil Legal Service Authority and are paid daily wages. The Para-legal volunteers are working at the gross root level in bridging the gap between people and access to justice and supporting the legal retainer lawyers or penal lawyers in drafting the applications and plaint. Recognising the important role played by the Para-

[58] Supreme Court Middle Income Group Legal Aid Scheme

[59] National Legal Services Authority (Legal Services Clinics in Universities, Law Colleges and other Institutions) Scheme, 2013

[60] Scheme for Implementing the Project of Para-Legal Volunteers by the Jammu and Kashmir Legal Service Authorities .

legal volunteers the National Legal Service Authority revised the Scheme for Para-legal volunteers. The aim of revision was to improve the functions of PLV's through training programmes, providing methods of selection, monthly report, and other regulations necessary for their improvement. The PLV's have to assist the legal literacy camps and to encourage the litigants to settle their dispute through mediation, conciliation and negotiation. Further refreshers course[61] for Para-legal volunteers were incorporated for their legal education. The purpose of the course was to make them understand the law from the legal aid point of view so that they may aware the peoples in a better way. Advanced training were also provided to them relating Right to information Act, 2005, Motor Vehicles Act, 1988, Right to Education Act, 2009 etc.

Jammu and Kashmir Legal Service Authority introduced disaster victim scheme[62] for the protection and rehabilitation of disaster victims. Both manmade and natural disaster victims are included in it. The legal services authorities are directed to coordinate the working of Government official and other social action groups in providing basic essentials to the disaster victims. They are further directed to supervise the distribution of relief materials and other basic facilities of life including temporary construction of homes and reunion of families. One of the achievements of the legal services authority during the earth quake in District Badarwah and Kistawar is a glaring example of participation of legal services authority during the disaster.[63]

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[61] Modulation for the Orientation-Induction-Refreshers Course for Para-Legal Volunteers Training .

[62] Scheme for Legal Services to Disaster Victims Through Legal Services Authorities.

[63] Legal Services Authority comes to the rescue of Boarder Firing Victims on International Boarder in 2014, Legal Service Authority comes to Rescue of Flood Affected Victims at the time of flood disaster of Sept 2014, Legal Service Authority comes to Rescue of Flood Affected and Land slide hit areas in District Udampur on Sept, 2014, Legal Service Authority comes to Rescue of Flood Affected victims in District Rajouri on Oct. 2014, Legal Service Authority comes to Rescue of Flood Affected victims in Kulgam on Sept 2015.

6. CONCLUSION

Legal aid system in our country needs to be strengthened. In the absence of any mass movement of Legal Aid the common man is deprived of the benefits of law enacted for him. The role of judiciary has however been positive and dynamic in providing legal aid as per the social needs. But the existing provisions of legal aid is lacking and lagging behind as effective services of legal aid clinics in the rural areas and in the law colleges and Universities are not effectively utilized.

A STUDY OF COLONIAL STEREOTYPES IN LAW THROUGH ORIENTALISM

Vrinda Singh*

Abstract

This paper aims to understand the presence of colonial stereotypes within the Indian Penal Code, 1860. It elaborates on the concept of Orientalism, given by Edward Said to study how knowledge or identity becomes dominant through a discourse created by a powerful source. The above assertion is supported by taking instances of knowledge creation by the British in colonial India. The stereotypes about the Orient like feminine nature of Indian men, unreliability of native witnesses, uncivilized nature of the Indian population etc. were made a dominant knowledge because it came from the mouth of the powerful Imperialist empire. This knowledge further became permanently and systematically institutionalized in the Indian laws coded by the British. The paper analyses these institutionalized stereotypes by studying the origins and the causes behind the formation of Section 377, 124A and 356 of the Indian Penal Code read with certain repealed provisions of Indian Evidence Act, 1872. The paper aims to provide an informed opinion on the continued existence of the above provisions considering that these laws were formed as a result of the dominant stereotypical discourse of the British empire to serve their purpose.

1. INTRODUCTION

The term 'Orient' derives its meaning from the latin verb '*orior*' which means 'to rise'. In latin '*oriens*' means morning. Consequently, 'Orient'[1] was derived to mean the place from where the sun rises i.e. East. In ordinary sense, anyone who teaches, writes or researches on the Orient, is

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[1] 'Orient', OED Online, Oxford University Press, (2018) <https://en.oxforddictionaries.com/definition/orient. last assessed 25.06.2018

an Orientalist and his work is Orientalism.[2] However, Edward Said, in his book 'Orientalism' has provided a new perspective to the term.

As Said puts it, Orientalism is a discourse used by the West 'for dominating, restructuring and having authority over the Orient.'[3] Discourse consists of several statements working together to what French social theorist Michael Foucault calls 'discursive formation'.[4] Discourse produces knowledge through language. Hence the discourse coming from those in power like the west in the 19th and 20th century, whose colonies extended over approximately 85 percent of the Earth's surface, keep immense potential to shape the lives of people.[5] Such discourse by a powerful source tends to create knowledge which the subjects find difficult to disagree with. This is the extent interplay between power and knowledge discourse, through which the West has been able to, in Said's words, 'produce the Orient'.

Further, knowledge created through this power discourse continues through a 'form of cultural leadership or hegemony'[6]. Hegemonic power works to make individuals and social classes concede to the norms and social values of even an exploitative system.[7] The positional superiority of the west led to creation of hegemony of certain ideas which were not imposed by force but by consent of the civil and political society.

Hence through power, knowledge and hegemony, a discourse is created and sustained. This is what Said refers to when he states that west has been able to 'produce the orient' or create a parallel identity for the Orient. In this process, the stereotypes that the west possessed regarding the Orient begun to be perceived as dominant knowledge by virtue of it being

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[2] Edward W. Said, *Orientalism* (Pantheon Books, New York 1978).
[3] *Id.* at 2.
[4] Roger Maaka, Chris Anderson, *The Indigenous Experiences: Global Perspectives* 165 (Canadian Scholar Press 2006).
[5] European expansion since 1763 (2012). In *Encyclopædia* <*Britannica*https://www.britannica.com/topic/colonialism/European-expansion-since-1763> last assessed 25.06.2018.
[6] *Supra* note 2 at 4.
[7] Stoddart Mark, "Ideology, Hegemony, Discourse: A Critical Review of Theories of Knowledge and Power" Social Thought & Research 28 191-225 (2007).

sourced through the Imperial power. This included the process of annotating superiority to the European identity. An identity of the Other (East) as different from the west on the basis of nature, culture, civilization etc. came to be produced. Different treatment to the Other was justified placing of the society at the primitive end of the civilization scale, in need of being civilized.[8] The object of colonial discourse was to construe the colonized as a population of degenerate types on the basis of racial origin, and the conquest over such population was justified to establish system of administration and instruction. With Charles Darwin's Origin of Species in 1859, many started to believe that the dominion over the Asian and African population was not an accident of history but immutable law of biological and human progress.[9] James Mills in his essay 'Civilization'[10] argues that all features of 'civilization' reside in 'modern Europe, and especially Great Britain, in a more eminent degree than any other place or time'. EIC governor Charles Grant[11] wrote that the Indians were depraved victims of fallen civilization.' Stereotypes about the Indian population were ubiquitous, being present from travel accounts to popular official reports. As stated by Bhabha, these stereotype were always in excess of what can be empirically proved or logically construed.[12] In the common discourse, such excess was described in size of the species in the travel accounts, monarchic expenditure, aberrant and transgressive behavior of the warrior, animal hunting for pleasure beyond utility etc.[13] Indians were considered as liars, feminine, easily excitable in an abnormally excessive way. In this way, colonial discourse produces the colonized as a social reality which is at once an 'other' and yet entirely knowable and visible.[14] . This narration of excess created space for an English authority to bring 'normality' to this

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[8] Ratna Kapur, *Erotic Justice: Law and the new politics of Postcolonialism*, 23 (Permanent Black 2005).
[9] Donald C. Gordon, *The moment of Power, Britain's imperial epoch*, Prentice Hall (1970).
[10] *Id.* at 35.
[11] *Id.* at 35.
[12] *Id.* at 100.
[13] Piyel Halder, *Law, Orientalism and Postcolonialism: The jurisdiction of lotus eaters*, 59 (Routledge-Cavendish 2007).
[14] Homi K Bhabha, *The location of Culture* 101 (Routledge, New York 1994).

behavior. The stereotypical discourse paved the way for subjugation of the natives.[15]

Since the western stereotypes were already taking shape of dominant knowledge, it became difficult to keep such stereotypes out of the legal field. Legislature started encoding laws on the basis of prevailing stereotype leading to a systematic institutionalization of these stereotypes in the law of the land. An example of this can be seen through the Criminal Tribes Act, 1871. It was based on a predominant view that certain castes or tribes are genetically criminal thus need to be punished. While introducing the Act, Justice T.V. Stephens stated "The special feature of India is the caste system. When a man tells you that he is an offender against law, he has been so from the beginning, and will be so to the end, reform is impossible, for it is his trade, his caste, I may almost say his religion to commit crime."[16] Due to belief that certain tribes are inherently criminal and reform is impossible, warrior tribes like Minas of Rajputana etc. were gradually reduced to lowly criminal tribe.[17] Certainty the colonial defense behind this act was to contain the bourgeoning crime, but the ground fact remained that stereotypes about Indian caste identities were created and applied in favor of the West.

In other instances of codification of law, 'knowledge' that had previously existed as an attitude, an abstract, scholarly position began to have a direct material impact on colonized people and territory.[18] Through this narrative/discourse of law, the natives faced a loss of tradition, culture and identity.

2. INSTITUTIONALIZING THE STEREOTYPES

In 1860, Thomas Babington Macaulay completed the task of drafting the comprehensive Indian Penal Code.[19] Through this paper, I will analyze three main provisions of this Code i.e. Section 377, Section 375 in

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[15] *Supra* Note 12.

[16] K. M. Kapadia, "The Criminal Tribes of India" 1 Sociological Bulletin 99-125 (1952).

[17] Mark Brown, "Crime, Liberalism and Empire: Governing the Mina Tribe of Northern India" 13 Soc. & Legal Stud. 191 (2004).

[18] Jenni Ramone, *Postcolonial Theories* 84 (Palgrave 2011).

[19] Preeti Nijhar, *Law and Imperialism*, 27 (Pickering and Chatto: London 2009).

conjunction with Indian Evidence Act, 1872 and Section 124 A. These provisions are the quintessential embodiments of institutionalized colonial stereotype in the Code. This paper will analyze the dominant perception that went behind the formation of these provisions and will suggest a need for removal or alteration of the same.

Section 377

Under Section 377 of the Indian Penal Code, 1860 any 'carnal intercourse against the order of nature' is punishable with imprisonment that may be extended to ten years or life. Its history may be traced to the book *Leviticus*, which forms a part of the Jewish Torah and the Christian Bible's Old Testament. There is a striking resemblance between these rules of Jewish-Christian religious law, and parts of Islamic religious law (shari'a law) which included death penalty for adultery, blasphemy and male-male sexual activity, condemned by human rights lawyers today.[20] From the book of Leviticus, this provision was put in the Buggery Act, 1533, enacted under King Henry VIII. Under this Act, "detestable and abominable Vice of Buggery committed with mankind or beast," was punished by death.[21] The jurist Edward Coke, in his seventeenth-century compilation of English law, wrote that "Buggery is a detestable, and abominable sin, amongst Christians not to be named."[22] This was the extent to which homosexuality was being abhorred in the English culture.

The argument frequently used by the proponents of homosexuality in India is that homosexuality has always been a part of Indian culture as is also evidenced from the passages of Kamasutra.[23] The paper will not get into the deliberation of Indian culture being a proponent of homosexuality. Instead, the paper aims to show that it was the colonial discourse that

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[20] Timothy George, *Is the Father of Jesus the God of Muhammad? Understanding the Differences Between Christianity and Islam* (Harper Collins 2002).

[21] This Alien Legacy, Human Rights Watch https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism last assessed 25.06.2018.

[22] *Id.*

[23] *AIDS Bedbhav Virodhi Andolan v UOI*, Civil Writ Petition 1993; *NAZ Foundation v NCT of Delhi*, 160 Delhi Law Times 277.

primarily added to the current despicable behavior towards homosexuality that has firmed its roots in the Indian population and law today.

Section 377 is a form of cultural imperialism imposed by the colonial power to address their stereotypes and concerns about Indian sexuality. It highlights the hostile reaction of an ancient middle eastern society towards homosexuality as a violation of a strict gender hierarchy (the man penetrated by other 'was acting like a woman'), and to a perceived threat to the expansion of society's population (the two men were wasting their 'sperm' by engaging in sexual activity with no procreative potential).[24]

This law made its way in the Indian Penal Code through the passage of a 'hyper masculinist' British empire. According to the empire, even the Indian land was described as feminine, wanton, whorish, naked and reclining. This can be observed from commentaries and fiction accounts. One of the passage describing India from a well acclaimed novel by H. Rider Haggard reads as follows "These mountains […] are shaped after the fashion of a woman's breasts and at times the mists and shadow beneath them take the form of a recumbent woman, veiled mysteriously in sleep […] and upon the top of each is a vast hillock covered with snow, exactly corresponding to the nipple of female breast".[25] The critique of this passage does not lie in its feminine description of Indian geography, rather it lies in the usage of such description in a way that portrayed inhibiting feminine characteristic as a depravity. As a result, if a man was feminine, he was depraved or lacking essential characteristics. Through this unashamedly carnal interpretation of feminine characteristics and human body, the Oriental world of appearance came to be regarded as an effeminate space which privileged the sensual over the rational and the poet over the lawyer, which were undesirable qualities to possess.[26]

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[24] Robert Wintemute, "Same sex love and Indian Penal Code S. 377: An Important Human Rights Issue for India", 4 NUJS L. Rev. 31 (2001).

[25] H. Rider Haggard, *King Solomon's mind* (Cassell: London 1885) 66; *Supra* Note 18, at 7.

[26] *Supra* Note 14, at 71.

As opposed to the above mentioned effeminate Indian space, Englishmen were described as powerful and superior.[27] The flawed effeminate Indian male came to be associated with hosts of sexual practices, including homosexuality.[28] Various explanations such as diet, the hot and humid climate of India, the social and economic organization of the Indian society were offered as explanations for the stifling of 'manly independence' of the men in India.[29] This form of effeminacy and unmanliness was seen as a deviant sexual behavior by the British and Section 377 was the solution to treat such deviant behavior. Surveying the culture of Indian subcontinent, A.L. Basham wrote, "The eunuch is avaricious and accumulates wealth in excess of his needs."[30] The words of Italian traveler Manucchi "The tongues and hands of these baboons act together, being most licentious in examining everything, both goods and women coming into the palace."[31] Thus, any form not adhering to strict masculine requirement of the empire was treated as 'monster' category breaching the law by rendering important legal questions uncertain with their bodies acting as an obstacle to the structure of law and society.[32] This monstrousness can be understood in terms of act of sodomy or threat to heterosexual gender order[33]. The identity of 'monsters' were associated with the Other. As stated by Said, society can only describe itself against its strangers.[34] A dominant identity of Indian men as effeminate and flawed as against the civilized and powerful British men became a dominant form of knowledge forming a justification for subjugation. Indian effeminate men i.e. those who could not reach the British standard of masculinity came to be treated as sexually deviant and subordinate and were termed uncivilized. This identity created through the power discourse was then made punishable under a law which, in the original place, was never a part of the

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[27] *Supra* note 8, at 89.
[28] *I.d.*
[29] Mrinalini Sinha, *Colonial Masculinity: The 'manly' Englishmen and the 'effeminate' Bengali in Late nineteenth centuary* 20 (Manchester University Press: 1995).
[30] A.L. Basham, *The Wonder that was India*, (Ingram: London1954).
[31] *Supra* Note 14, at 70.
[32] Ben Golder and Peter Fitzpatrick, *Foucault and Law*, 260 (Ashgate: Burlington, 2010).
[33] *I.d.* at 271.
[34] *Supra* Note 2.

Indian culture or jurisprudence. Hence in this case, the west created an unfamiliar identity for the Other and then further punished them under an unfamiliar law was used to justified the need for the rule.

What is peculiar in this age is that the identity that Britishers created and institutionalized for allegedly effeminate Indian men, continue to exist in Indian law with impunity till date. It is true that homosexuality was a detestable characteristic to be possessed by a man punished by death penalty in Queen Victoria's Britain, however, the continuance of a law based on the Victorian morality in India becomes a matter which needs to be given due consideration by the legislature and the judiciary. Section 377 was a merger of the stereotype of effeminate Indian men and English morality of such effeminacy being unwarranted and India as a country continues to carry forward this legacy. Britain has come a long way since then, by legalizing same sex marriage in 2014. In India, on the other hand, the stigmatization and the chilling effect of 377 makes it much harder for the Indian LGBT minority to be visible and to challenge legal and social discrimination. Despite attempts by the Law Commission and parliamentarians, there always exists technical issues to the repeal of 377. [35]

Section 375

In another analysis, the crime of rape was included in the Indian Penal Code in 1860 under Section 375, 376. However, the criminal justice system pertaining to the rape law is very differently applicable.

The infamous 'Hale Warning'[36], by the seventeenth century jurist Mathew Hale placed emphasis on the character and prior sexual experience of a rape victim. It was believed that a woman, who publicly admitted to a sexual encounter, whether consensual or nonconsensual, was unchaste and had lost her credibility as a complainant. Hale asserted that there was a presumption of false charge by the rape victim. Various other writers had asserted that rape victim's age, social status, previous sexual history and

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[35] Law Commission of India, 172 Report (Review of Rape Laws) (March25, 2000) ; Indian Penal Code(Amendment) Bill, 2016 < http://www.prsindia.org/mptrack/shashitharoor> last assessed on 25.06.2018.

[36] Mathew Hale CJ, History of Pleas of the crown.

conduct were relevant for 'medical' enquiry.[37] In contrast to law's approach where the focus should be on *actus reus* and *mens rea*, Hale's strict evidentiary requirement focused on the victim. The victim's claim and credibility required corroborating 'circumstances of fact', all of which centered attention on her character, body and behavior before, during and after the alleged incident. He advised that a cautionary message that the accusation of rape is easily made and is hard to prove should be read before the juries warning them about accepting women's testimonies.[38] The Indian penal code until 2003 shared Hale's fear of malicious prosecution.[39]

In colonial India with British judges, the use of Hale's warning was abundant. One of the many cases where this grossly unjust law was applied include the 1854 case of Jhakoo Wulud Bhowanee. In this case, a twelve-year-old was allegedly raped by a thirty-year-old man who smothered her face with saree to prevent the passerby from hearing her cries. A court in Bombay acquitted the accused using Hale's warning and stating that the accused could not have raped the victim because no one heard her cries.[40] Hale stated that incidents like concealing the injuries, silence during the incident etc play a major role in determining whether the testimony is forged. Even though substantive law has not outrightly incorporated these provisions, similar reasoning is often given in courts even in 2017 and used to acquit the accused.[41] The reminiscence of this argument can still be seen in the Indian mentality where women are blatantly and blindly accused of filing false rape, domestic violence and abduction cases.

In addition to the above, the identity of victims was used to corroborate her inclination towards lying. Through this identity discourse, the powerful west created a dominant knowledge about the Indian rape victim and then

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[37] N.M. Maclean, "Rape and False Accusations of Rape" Police Surgeon 29, 30, 38 (1979) ; Jaising P. Modi, *Modi's textbook of medical jurisprudence and toxicology* (Lexis Nexis 2016).

[38] *Supra* note 36.

[39] *Tukaram v State of Maharashtra*, AIR 1979 (SC) 185; *Pratap Mishra v State of Orissa*, AIR 1977 SC 1307

[40] Elizabeth Kolsky, "The Rule of Colonial Indifference: Rape on Trial in Early Colonial India 1805-57" 69 *The Journal of Asian Studies* 4 (2010).

[41] *Raja and Ors. V State of Karnataka*, Criminal Appeal No. 1767 of 2011.

such knowledge got embedded in the law. Scientific and medical discourse was shrouded in the name of lying, imagining, hysterical and malicious rape complainant. In trial after trial, the judge focused on the looks, size and social status of the victim to determine the likelihood of whether she could have been raped by the defendant.[42] Even her own statements were tested on the backdrop of her caste and social standing.

That the character of the rape victim was given immense importance can be seen from this report Charles Hay Cameron and Daniell Elliot.[43] Suggesting creation of degrees in the offence of rape, the author of the report argued for a separate category for "chaste high caste woman who would sacrifice her life to save her honor from an unknown man" and "woman of lower caste, without character, without any pretension of purity, easy to access"[44] . This way caste and respectability also became entwined in colonial imagination.

In addition to the British existing jurisprudence on rape victims, there was prevalent colonial conception about the untrustworthiness of the native witness. In the British legal landscape India was seen as a land of perjurers, forgers, professional witnesses and general population that did not value truth.[45] Native folly in the form of perjury emerged as a quasi-legal, cultural category. In his code of Gentoo law, Halhead assures that no European form of word existed for perjury. Talking about Indians involving in perjury, Halhead refers as 'madness', 'completely wild and unconscious of itself'. It was stated at various times that because of notorious problem of false evidence in India, the petitioners suggested that the Europeans in the mofussil would become victim to false charges that would "expose them and their property to utter ruin from error of judgment, incompetence, prejudice, corruption and injury.[46] This popular and suitable reading of the

[42] *Government v Mussumaut Monee v Jeenaram*, NAR 1853, Vol 3; *Meessonyoung and Government v Gnayen*, NAR 1855, vol 5; *Dokuree Kulloo v Rajoo Chung*, NAR 1851, Vol 1.
[43] "Report on the Indian Penal Code" PP XXVIII, (1847-48).
[44] *I.d.*
[45] Elizabeth Kolsky, "The Body Evidencing the Crime: Rape on Trial in Colonial India, 1860–1947" 22 Gender & History 1 (109–130) (2010).
[46] *Supra* Note 14, at 77.

native culture became ambivalently incorporated in the colonial knowledge.[47] In such a scenario when the natives were made to speak the British truth, the native's truth led to perjury, since there was no common page for truth between the British and the natives.

Even before the codification of the criminal law in 1860, English common law presumptions about frequency of false charges and suspicion of woman's claims combined with colonial insistence on peculiarity of Indian culture made it difficult for Indian rape victims to prevails in colonial courts. Convictions rates in rape cases continued to decline in the twentieth century as the defence of the victim raising a false case was prevalent. Hence, Indian women faced two-fold challenges in colonial courtroom'[48], first was a result of British stereotype of women lying in case of rape. And the second about the unreliability of native witnesses.

Even in the Indian medical jurisprudence[49] above presumption and stereotype about the Indian rape victims being untrustworthy were prevalent. It stated that most rape cases were either concocted for blackmail or to deny consensual sex. Now repealed section 155(4) of the Indian Evidence Act also stated that the general immoral character of a prosecutrix can be taken into account when a man is accused of rape. Not just the provision, but a plethora of cases have confirmed the existence of this stereotype within the law of the land.[50]

There were various other detestable provisions which were subsequently amended. Colonial theories about the early age at which the females in the tropical environment 'ripened' were used to justify this difference between the Indian and English laws.[51] As a result, the 1828 Parliamentary act set the age of consent in India at mere eight years. This meant that girls as young as 9 years old could be raped under the façade of

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[47] *Supra* Note 12, at 197.

[48] *I.d.*

[49] Jaising P. Modi, *Modi's textbook of medical jurisprudence and toxicology* (Lexis Nexis 2016).

[50] *Tukaram v State of Maharashtra* AIR 1979 SC 185; *Premchand v State of Haryana* AIR 1989 SC 937.

[51] *I.d.*

consensual sex. The origin of marital rape can also be traced in Sir Mathew Hale CJ stating that "*The husband cannot be guilty of a rape committed by himself upon his lawful wife"*[52] if there was a mutual matrimonial agreement. This irretrievable idea of consent was the main crux behind the above law. Treatises and cases applied Hale's words, throughout the nineteenth century, often as the only explanation they offered for the exemption.[53]

These policies existed despite the known cases of violence on women during the British rule. Even today, the discursive residue of colonialism runs as an undercurrent in the opinion of media and public. Such discourse in homogeneity treats Indian women as victims of oppression and men as violent, misogynistic and culturally backward. There is also a civilized West who is looked up to be followed as an example for women's safety and upliftment. Hence, rape narratives, even in today's times have been divided on the lines of the "self" and the "Others".

Section 124A

Sedition is derived from Latin word '*seditio*' which means "*a going aside*".[54] Added by way of amendment in the Indian Penal Code in 1870, the provision on sedition, as it stands currently, makes spreading hatred, contempt and exciting disaffection against the government established by law in India or attempting to do so a punishable offence.

The history of the application of this law is long and complicated. Sedition and criminal libel evolved from some of Britain's oldest laws, such as the Statute of Westminster 1275, when the divine right of the King and the principles of a feudal society were not questioned. Truth was no defence and intention or actual harm were irrelevant. Punishments for the crime varied from death penalty to imprisonment and the loss of the offenders' ears.

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[52] *Supra* note 19.
[53] Hasday, Jill Elaine, "Contest and Consent: A Legal History of Marital Rape" 88 California Law Review 5 (2002).
[54] Webster New Internationals Dictionary, 2nd Ed. (1956).

In Indian Criminal Laws, the clause of sedition was incorporated as Section 113 of Draft Indian Penal Code of 1837 made by Lord Macauley. When the Indian Penal code was enacted in 1860, the clause on sedition was omitted. It was inserted 10 years after the formation of IPC despite the 1857 revolt. The main reasons for the same are assumed to be that the provision was inserted to oppress the Wahabi uprising that gained momentum between 1863 and 1870. The provision of sedition was an easy way to deal with the rising nationalist agitation. Since the character of British political life, in theory atleast prohibited any wholesale use of military force or of terrorism against Indian nationalism even if such a course had any chance of success, sedition came as a successful weapon to quell the uprising. [55]

The first case under this law was the Bangobasi case[56] in 1891 where the newspaper Bangobasi was booked for criticizing an 'Age of Consent Bill'. Charges were dropped since the jury could not reach a unanimous verdict. The case of Bal Gangadhar Tilak of 1897 changed the effect of Section 124A. Through this case[57], Justice Strachey enunciated that if an individual develops "feeling of enmity" towards the government, she can will be liable for sedition irrespective of whether it actually led to any disturbance, mutiny or rebellion. The section was repeatedly used against nationalist leaders by colonial government. In post-independence India, the Kedar Nath case[58] changed the course which the law of sedition was designed to take. It laid down guidelines specifying that only those acts which involve 'incitement to violence' or 'violence' constitute seditious act.

However even though the law seems to settled with the principles laid down in the Kedar Nath case to be the benchmark, the current provision is still misused to a great extent. Some of the most absurd cases include charging men for sedition for allegedly celebrating Pakistan's victory

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[55] *Supra* Note 9, at 133.
[56] *Queen Empress v Jogender Chunder Bose*, (1892) ILR 19 Cal. 35.
[57] *Queen Empress v Bal Gangadhar Tilak*, 11 Ind. Dec. (N.S.) 656.
[58] *Kedar Nath Singh v State of Bihar*, AIR 1962 SC 955.

during Champion's Trophy,[59] an actress booked for sedition for praising Pakistan in her comments after returning from the country[60], booking of JNU students for holding protest for showcasing dissatisfaction with the government[61] etc. Though the final rate of conviction is not as high, nothing stops the police bodies from booking people on even the slightest of indication of actions against the will of the government. This law has been prone to misuse since its inception, whether by the colonial British government or the bureaucracy of the democratic Indian government. In such a scenario, it becomes imperative to trace the evolution of this law and to introspect the reasons for its continuity despite the horrific implementations.

The British argument for sedition rested on the stereotype that Indian nature and population get effective excitable. Books, plays, cartoons the common discourse portrayed Indians as law breaking, impatient and anarchist people who thrive to create terror in the otherwise lawfully existing state of British administration in India. The characters of the uprising and the revolution were depicted as evil. The literature around such character was melodramatic appearing to reveal ethical consideration of the characters indicating a providential design.[62] In 1912 novel by Edmund Candler, the character and act of the revolutionary was shown as arising out of their social and cultural background rather than displeasure from the policies of the government.[63] In this way, the British administrator always portrayed itself as peace loving administration who needed to control the terror that the uprising created. The fault for the uprising and chaos was shifted to the nationalist rather than being on the colonialists.

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[59] Gaurav Vivek Bhatnagar, "As Police continue to abuse sedition law, Lawyers say Courts, Parliament must find solution" The Wire, 25 June 2017.

[60] Jagat Narayan Singh, "Ramya doesn't deserve sedition; India must throw the law out", DailyO, 23 August 2016. http://www.dailyo.in/politics/sedition-law-kanhaiya-kumar-jawarharlal-nehru-amnesty-international-gandhi/story/1/12537.html last assessed on 25.06.2018.

[61] Peter Ronald de' Souza, "JNU, and the idea of India", The Hindu, February 2016 < http://www.thehindu.com/opinion/lead/JNU-and-the-idea-of-India/article14084214.ece> last assessed on 25.06.2018.

[62] Neil Hultgren*, Melodramatic Imperial Writing: From Sepoy rebellion to Cecil Rhodes, Athens* (Ohio University Press, 2014).

[63] Edmund Candler, *Siri Ram - Revolutionist* (Constable &Co 1914).

One of the instances of portraying the easily excitable nature of the Indian population is a cartoon published in Hindi Punch entitled 'down with the monster' in 1908 wherein Indian Viceroy, Lord Minto is depicted as Hercules killing twin headed Hydra of Indian anarchism. The cartoon signified moral authority of the British government's counter terrorism strategy in the early twentieth century colonial Bengal. While the Herculean figure was accompanied with the words 'Law and Order', the Hydra was accompanied with Terrorism, Sedition, Lawlessness. The cartoon suggests a stable moral opposition between the rule of law of the colonial government and violent anarchy donated to Bengal Uprising.[64] The remark of E. Eden, Secretary, Judicial Department, Government of India is further indicative of the fact. He stated that "There is no doubt that where the population is at once is ignorant and fanatical as the mohammedans in India, seditious teachings are to be made a substantive offence".[65]

In the garb of Indian's being inherently easily excitable, even non-injurious acts like writing appeared to be seditious. In one of the earliest cases of sedition, Bal Gangadhar Tilak was tried for publishing an article about Maharashtra's military chief Shivaji's Coronation festival in his newspaper Kesari. In the eyes of the British government, Tilak had used the context of Shivaji to attack the administration of the British.[66] However, various historians have countered that narration stating that such an opinion was an exaggeration which was added to by Imperialist Anglo-Indian Press and non-Marathi knowing, European dominated jury and judges.[67]

In this way, the law of sedition was justified to protect the excitable, ignorant and indiscriminate majority from its own worst tendencies. The result was a flagrantly self-serving and elitist discourse.[68] In this discourse,

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[64] Stephen Morton, *State of Emergency: Colonialism, Literature and Law*, 61-86 (Oxford University Press 2013).
[65] *Supra* Note 15.
[66] Sedition Committee Report [1918: 2-3].
[67] Aravind Ganachari, *Nationalism and Social Reform in Colonial Situations*, 61 (Kalpaz, 2005).
[68] William Mozarella, Raminder Kaur, "Between Sedition and Seduction: Thinking censorship in South Asia" (unpublished).

the colonial state emerged as a rational and neutral arbiter of emotionally excitable subjects prone to emotional injury and physical violence.[69] This colonial legacy assumes affection for the state as a natural condition. This was supported by the concept of 'excess' as Bhabha stated, that Indians are criminals, liars, immoral, and excited in an abnormally high proportion.

Sedition law was widely used in India to suppress the nationalist uprising and with each judicial decision the ambit of law became wider and wider. The law is clear example of colonial morality and colonial governance imposed on the Indian subcontinent by creating a stereotypical discourse of the Indian population which suits the application of this law. The bureaucracy aimed to maintain a legal fiction of easily excitable Indian population while using every means to suppress nationalist agenda.[70]

The continuance of this law in the post-independence India is a contestable question. In 1922, Mahatma Gandhi stated "Sedition is the prince of all the laws to curtail liberty."[71] During the constituent assembly debates, even Nehru questioned the law stating "Section (section 124A of the IPC) is highly objectionable and obnoxious and it should have no place both for practical and historical reasons, if you like, in any body of laws that we might pass. The sooner we get rid of it the better." Even after doubting the credibility of the provision, Nehru found it appropriate to continue with the law and his successors carried his legacy. There have been many appeals by politicians, lawyers, policy tanks etc. to eliminate this provision.[72] However, this effort has not been able to get the desired success. To add to the demand of eliminating this provision, it should be

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[69] Sujit Chowdhary, Madhav Khosla and Pratap Bhanu Mehta, *The Oxford Handbook of Indian Constitution*, (Oxford University Press 2016)

[70] *Supra* Note 68

[71] Atul Dev, "A History of the Infamous Section 124 A' Feb 2016", The Caravan Magazine, 25 Feb 2016. < http://www.caravanmagazine.in/vantage/section-124a-sedition-jnu-protests> last accessed on 30-04-2018.

[72] Indian Penal Code(Amendment) Bill, 2016 < http://www.prsindia.org/mptrack/shashitharoor> last assessed on 25.06.2018; Report on "Sedition Laws and Death of Free Speech in India", National Law School of India University.

noted that countries Britain[73] who guided the insertion of this law in our criminal code have done away with these laws.

3. CONCLUSION

As historian Eric Stokes puts it, the aim of the British was to 'annihilate' the difference between the east and the west by transplanting genius of English laws in the Indian administration and the most representative figure of this attitude was Macaulay. Macaulay drafted a penal code for India which institutionalized English laws and English stereotypes in the Indian criminal justice system. Imperial discourses became "masks of conquest" to pull Indians into ideological project of British domination and such discourses got institutionalized in the law. Even though IPC is appreciated for being a comprehensive and progressive legislation, it cannot be ignored that various provisions were made as a tool to exercise power over the natives. The process of exercising this power through the creation of discourse was elaborate, unique and systematic. The result was a widespread erasure of identity and culture of a population. Natives were seen from the eyes of the powerful rulers who could portray them according to their own convenience.

The oddness lies in the fact that these stereotypes of the colonial imaginations as discussed in the paper still continue to exist in Indian laws and inform its present. The callous assumptions of the colonial era are still subsisting because they were hegemonized in our cultural lives until now. The power- knowledge discourse created by the British was carried forward as the Orient started conceding to those laws. As Foucault would say, here, the law itself became a concretized discourse.[74] Through blindly accepting these laws, we as a people had agreed that the West was superior to its subjects. However, the mere realization of the fact that our laws may be influenced by dominant discourse of the West is a goal enough that has been objectively tried to be achieved by the above analysis.

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[73] Coroners and Justice Act, 2009.
[74] *Supra* Note 32.

RECONCILING THE RIGHT TO PRIVACY WITH FUNDAMENTAL RIGHT TO LIFE

Dr. Faizanur Rahman*

Abstract

The right to privacy has been interpreted as an unarticulated fundamental right under the Constitution of India. However, through various judgments over the years, Indian courts have interpreted the other rights in the Constitution as giving rise to a (limited) right to privacy primarily through Article 21, the right to life and liberty. In 2015, this interpretation was challenged and referred to a nine-judge bench of the Supreme Court in the Justice K.S Puttaswamy & Another v. Union of India and others[1] categorically held that the right to privacy is a fundamental right enshrined under Article 21 of the Constitution of India. It will be accorded the same protection as other fundamental rights under Part III of the Constitution.

Judiciary in India enjoys a significant position since it has been made the guardian and custodian of the Constitution. It is not only a watch-dog against violation of fundamental rights guaranteed under the Constitution but protects all persons, Indian and aliens alike, against discrimination, abuse of state power, arbitrariness etc. Liberty and Equality have well survived and thrived in India due to the pro-active role played by the Indian Judiciary. The Supreme Court has, over the years, elaborated the scope of fundamental rights upholding the rights and dignity of individual, in true spirit of good governance. The great contribution of judicial activism in India has been to provide a safety value and a hope that justice is not beyond doubt.

Right to Privacy in India has been a contentious issue in recent years and it concerns the lives of many people around the world. Right to privacy is not a constitutionally but a judicially recognized right. In our country, the sole

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[1] (2017) 10 SCC 1.

credit goes to the Judiciary for recognizing the concept of privacy because neither the constitution nor any other statute in our country defined this concept. Still a lot more has to be done for the recognition and protection of privacy by law in India. As a matter of fact, this concept is quiet in primitive stage of its development. The present paper endeavoured to focus on the impact of declaring privacy as a fundamental right, the impact on private entities (non-state parties) and the potential impact on the anticipated privacy law.

1. INTRODUCTION

The Constitution of India does not explicitly guarantee the right to privacy as a fundamental right. For accrediting right to privacy as fundamental right, the credit goes to the judiciary for recognizing and interpreting the concept of privacy in its widest amplitude because neither the Constitution of India nor any other statute in our country defined this concept. Still a lot more has to be done for the recognition and protection of privacy by law in India. As a matter of fact this concept is quiet in primitive stage of its development. But its development is bound to have tremendous effect on the individual's living. However, if we go through various statutes of our country to understand the position of the concept of privacy, then we would find several provisions which have been enacted for protecting privacy. Not only had this, ancient law in *Dharmashastras* also recognized the concept of privacy. The law of privacy has been well-expounded in the commentaries of old Law. *Kautilya* in his *Arthashastra* has prescribed a detailed procedure to ensure right to privacy while ministers were consulted to hold off possible leakage of the State policies in the administration as akin to the present provisions of the Official Secret Act, 1923. But neither in ancient law nor in the present law has the term 'privacy' anywhere been defined explicitly or any judicial pronouncement so far comes to make the position clear. It is only due to the emerging trend of the new constitutionalism by our judiciary that justifies the need of a law trenching on one's privacy.

2. JURISPRUDENTIAL DIMENSION TO RIGHT TO PRIVACY

It is only during the last half century that the law has recognized the "right to be let alone" *i.e.*, the right under certain circumstances to protect one's name and physiognomy from becoming public property.[2] No mention of such a right will be found in the works of the great political philosophers of the seventeenth and eighteenth centuries such as Hobbes, Locke, Rousseau, Montesquieu, Spencer, Paine and many more. In discoursing on 'natural rights', 'the state of nature', 'social contract', and 'the inalienable right of man', they were concerned only with the power of the state to abridge the liberties of the people. It is therefore argued that society had not yet become as complex that the individual's privacy was in danger of encroachment.

Plato, the Greek philosopher of the 4th century B.C. cautioned that a citizen's private life was a proper subject for legislation. But today most nations recognize various aspects of individual's right of privacy. English courts, for example, have held that if no common law remedy for an invasion of privacy exists, then courts of equity may be invoked for protection.

The idea of privacy could be found in the political philosophy of John Locke as well as that of Thomas Jefferson and others of the Founding Fathers. Federalist papers[3] 10 and 51 laud the idea of privacy, and the liberty embedded in the constitution was that of liberty from the government. Whatever else it may mean, the Fourth Amendment to the US Constitution clearly protect the privacy of the individual in his or her home against unwarranted governmental intrusion. As for the failure to mention privacy by name, it was not the only right that is implicitly rather than explicitly protected, and to make sure that people did not misunderstand, US President James Madison in the Ninth Amendment to the US

[2] Samuel D. Warren and Louis D. Brandies, 'The Right to Privacy', 4 *Harvard Law Review*193 (1890)

[3] The Federalist Papers were a series of essays published in newspapers in 1787 and 1788 by James Madison, Alexander Hamilton, and John Jay to promote the ratification of the Constitution.

Constitution pointed out that the listing of certain rights did not in any way mean that the people had given up other rights not mentioned.

The social need which became crystallized in the right of privacy did not grow insistent until the age of great industrial expansion, when miraculous advances in transportation and communication threatened to annihilate time and space, when the press was going through the growing pains of yellow journalism when business first became big. In the era marked by the triumph of the strong man, esoteric concepts such as the right of privacy were spectacularly flouted.

Although the right of privacy is of recent origin, its roots go back into the ancient principle of Common law. In earliest times the law afforded only bare protection against physical interference with life and property, but the trend has been steadily towards a fuller recognition of more intangible, incorporeal, spiritual values. The right to life includes the right to enjoy life.[4] The right of privacy, in essence, is anti-social. It is the right of an individual to live a life of seclusion and anonymity, free from the prying curiosity which accompanies both fame and notoriety. It presupposes a desire to withdraw from the public gaze, to be free from the insatiable interest of the great mass of men in one who has risen above or fallen below-the mean. It is recognition of the dignity of solitude, of the sacred and inviolate nature of one's innermost self.

3. DEVELOPMENT OF PRIVACY LAW IN USA

The right of privacy cannot be found in the constitution of the United States. Yet Americans have tended to believe in a constitutional right to privacy-the right to be secure against unlawful intrusion by government into certain protected areas of life. Ever since the founding era, most American have recognized public and private domain of society. The public domain is open to regulation by government. For example, the people expect their police officers to keep order on the street of a community, a function that involves certain limits on the free movement of

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[4] *Louis Nizer*, '*The Right of Privacy: A Half-Century's Development', 39 Michigan Law Review* 527 (1941).

people. The private domain, by contrast, is generally closed to invasion and control by government and can be entered and regulated by police officers only for a compelling public purpose and according to due process of law.

In 1890, Louis D. Brandeis co-authored with Samuel D. Warren in their famous article in the Harvard Law Review originated the phrase "the right to be let alone'. Thirty eight years later, Justice Louis D Brandeis argued for a general constitutional right to privacy was first referred in a famous dissenting opinion in *Olmstead* v. *United States*[5] where he expounded on the meaning of the Declaration of Independence's famous phrase, "life, liberty and the pursuit of happiness", "The makers of our constitution," he said, "…sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men."

Nearly three decades after the *Olmstead* case, the court avoided serious discussion of a constitutional right to privacy. Then in *Poe* v. *Ullman*[6], Justice John Marshall Harlan and Justice Williams O. Douglas argued in dissent for the individual's right to privacy against a law of Connecticut banning the use of birth control devices, even by married couples. Harlan pointed out the Fourteenth Amendment to the US Constitution that 'no state shall make or enforce any law which shall… deprive any person of life, liberty, or property, without due process of law.' According to Justice Harlan, the state law at issue unconstitutionally deprived individuals of their liberty, without due process of law, to use a birth control device which was 'an intolerable and unjustifiable invasion of privacy.' Thus, Justice Harlan linked the Fourteenth Amendment's guarantee of liberty to the right to privacy.

However, the US Supreme Court has ruled that several of the Bill of Rights guarantees protect the privacy interest and create a penumbra or zone

[5] 277 U.S. 438 (1928).
[6] 367 U.S. 497 (1961).

of privacy. *Griswold* v. *Connecticut*[7] was one of the earliest privacy cases before the US Supreme Court involving a challenge to the constitutionality of a state law forbidding the use of contraceptives. In this historic case the court found that even if the right to privacy is not expressly mentioned in the Constitution, it emanates from the Fourth Amendment's ban on unreasonable searches as well as the protections under the First, Third, Fifth and Ninth Amendments.

In *Katz* v. *United State*[8] the Supreme Court overturned the decision of *Olmstead* case and held that the fourth and fifth Amendments protect an individual's right to privacy against electronic surveillance and wiretapping by the government agents, even in place open to the public, such as telephone booth on a city street. The newly acknowledged right of privacy led to another landmark decision on the Supreme Court in *Roe* v. *Wade*[9] which upheld a woman's right to an abortion during the first three month of pregnancy and a number of cases stemming from that decision. Expanding on *Griswold* in a case in which Massachusetts law prohibited the distribution of contraceptives to unmarred persons, Justice William J. Brennan declared in *Eisenstadt v. Baird*[10] that if 'the right of privacy means anything, it is the right of individual, married or single to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'

While continuing to recognize the constitutional right to privacy, the court has acted to set limits on it. In *Skinner* v. *Railway Labor Executive Association*[11] and *National Treasury Employees Union* v. *Von Raab*[12], the court upheld federal regulations that provide for drug testing of railroad and customs workers, even without warrants or reasonable suspicion of drug use. In these cases the court decided that the need for the public safety was

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[7] 381 U.S. 479 (1965).
[8] 386 US 954 (1967).
[9] 410 US 113 (1973).
[10] 405 U.S. 438 (1972).
[11] 489 U.S. 602 (1989).
[12] 489 U.S. 656 (1989).

compelling reason for limiting the individual's right to privacy against the government regulation. In recent decades, the court recognized in *Cruzan v. Director, Missouri Department of Health*[13]that individuals have a liberty interest that includes the right to make decisions to terminate life-prolonging medical treatments (although the court accepted that state can impose certain conditions on the exercise of that right). An individual's right to privacy was reinforced in *Reno* v. *Condon*[14]in which South Carolina challenged a Federal Law, the Driver's Privacy Protection Act, 1994 (DPPA) that prevents states from releasing personal information in motor vehicle records without consent. The South Carolina Attorney General claimed that the DPPA violated the constitutional powers and rights of a state within the federal system of the United States. The court rejected the claim and upheld the DPPA as a constitutional means of protecting the privacy of licensed drivers. In this case, an individual's privacy rights were upheld over states' rights. Further, in *Lawrence* v. *Texas*[15] the court, overruling a *Cruzan's case* and found that Texas violated the liberty clause of two gay men when it enforced against them a state law prohibiting homosexual sodomy. Writing for the court in *Lawrence case*, Justice Kennedy reaffirmed in broad terms the Constitution's protection for privacy in the following words:

> "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."

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[13] 497 U.S. 261 (1990).
[14] 528 U.S. 141 (2000).
[15] 539 U.S. 558 (2003).

4. PRIVACY LAW IN INDIA

The concept of privacy is not new in India, the ancient Indian theory of knowledge, based on the *Upanishadic* Literature, prescribes meditation, which is to be done without any outside disturbances. The policy underlying the rules regulating construction of houses and the places, found in the *Grihya Sutras*, the Ramayana, the Mahabharata and the Arthashastra manifest ample consideration and respect for one's privacy. The use of curtains as described in the Ramayana and other classical literatures is pointer in the same direction.[16]

For framing the Constitution of India, the Constituent Assembly of India met in the Constitution Hall, New Delhi on 4th January, 1949 where Mr. Kazi Syed Karimuddin had proposed addition of a proposed clause to the Draft committee Article 14 of the constitution (at present Article 20) which was intended to serve the purpose of the Right of Privacy. The Resolution provided that the right of the people to be secured in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated and no warrant shall issue but upon probable cause supported by oath and affirmation and particularly describing the place to be searched and the persons or things to be seized.[17]

Though there was nothing novel in Karimuddin's suggestion as the Cr. P.C. as a law of the land contained such procedural safeguard, yet Dr. Ambedkar, as the chairman of the Drafting Committee, has expressed his concurrence to the desirability of its incorporation. But the Constituent Assembly after a postponement of this question, issue of a party whip and to calls for division voted against the adoption of the Karimuddin's resolution. Therefore, the right of privacy akin to the 4th Amendment to the US Constitution was denied, the constitution guaranteed the second right akin to the Fifth Amendment to the US Constitution i.e. right against self-incrimination in clause (3) of Article 20 of the Constitution of India.

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[16] G. Mishra, *Right to Privacy in India* 17-18(Preeti Publications, Delhi, 1994)

[17] H.M. Seervai, *Constitutional Law of India* (Universal Law Publishing, Delhi, 2015).

Therefore, the right of privacy against the arbitrary arrest, search and seizure of a person by police or by any agency of the state having similarity with the Fourth Amendment could not become essential part of the person's fundamental rights. Therefore, the Constituent Assembly has failed to rise to the occasion.

In modern times 'the right to let alone' is being given fresh thought in view of invention of new means and methods to outrage one's personal domain. Right to Privacy is not a specific and distinct fundamental right under the Constitution of India, however the Supreme Court has recognized it by creative interpretation of the 'right to life' and 'right to freedom'. It is noteworthy that the right to privacy is not one of the 'reasonable restrictions'[18] to the fundamental right to freedom of speech and expression under Article 19 (1) (a) of the Constitution. The fundamental right to life and liberty guaranteed by Article 21 'has been interpreted to include the right to be let alone. The constitutional right to privacy flowing from Article 21 must, however, be read together with the constitutional right to publish any matter of public interest, subject to reasonable restrictions.'[19]

Being an essential part of freedom, the concept of privacy raises many difficulties of definition. The continuous conflict between the state and the individual is self-generating. The state's interests are served by the need to know as much about us as possible, our own by reticence about ourselves. In recent times there has been much concern with the issue of privacy. The right to one's protection is as old as the inception of civilization on this planet. In primitive society, individual was himself responsible for his own protection but now it is the duty of the state to protect its citizens in a politically organized society,

In India, there is no comprehensive or sectoral privacy legislation, or any independent oversight agency. The Constitution of India does not expressly recognize the right to privacy. In fact, curiously enough, scholars

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[18] The Constitution of India, art. 19 (2).

[19] Madhavi Davine, 'The Right to Privacy in the Age of Information and Communications', 4 *SCC (J)* 18 (2000).

have even questioned whether privacy is, after all, a value somewhat alien to Indian culture.[20] Upendra Baxi has expressed doubts about the evolution of privacy of a value in human relations in India. Every day experiences in the Indian setting (from the manifestation of good neighbourliness through constant surveillance by next-door neighbours, to unabated curiously at other people's illness or personal vicissitudes) suggests otherwise.

In India, the right to privacy gained recognition mainly through judicial activism. It is not a fundamental right but still an essential ingredient of fundamental right. The right is incorporated under Article 21 through various judicial pronouncements. Though there are certain legislations which have traces of right to privacy in it such as sections 28, 29, 164 (3) and 165 of Cr. P.C., 1973; Section 509 of IPC 1860; Section 18 of Easements Act, 1882 and also there are certain provisions under the Information Technology Act, 2000 which provided for the data protection and privacy.

5. JUDICIAL RECOGNITION TO RIGHT TO PRIVACY

The first step in recognizing the independent existence of the concept of privacy was taken by the Allahabad High Court in the case of *B. Nihal Chand* v. *Bhawan Devi*[21] it was held that the right to privacy is according to social customs and traditions besides being a statutory right. Thus, this right should not be exercised in an oppressive way.

The 'right to life' has been interpreted as the 'right to live with human dignity'[22]. It is by virtue of his dignity that every individual has a right to a private life free of interferences and hindrances. The Supreme Court has developed the 'right to privacy' over a period of time with the help of creative interpretation. Subba Rao, J. in *Kharak Singh* v. *State of*

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[20] Upendra Baxi, *Introduction to K. K. Mathew's Democracy, Equality and Freedom*, 73-75 (Eastern Book Company, Lucknow, 1978).

[21] AIR 1935 All 1002.

[22] *Francis Coralie Mullin v.* The Administrator, *Union Territory of Delhi*, *AIR 1981 SC 746*.

Uttar Pradesh[23], his minority opinion laid the foundation for the development of the right to privacy in India. He observed that the concept of 'liberty' under Article 21 was comprehensive enough to include privacy and that a person's house, where he lives with his family is his castle and that nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy.

In *Govind* v. *State of Madhya Pradesh*[24] the Supreme Court, while upholding the regulation in question which authorized domiciliary visits by security personal, also held that 'Depending on the character and antecedents of the person subjected to surveillance as also the objects and the limitation under which surveillance is made, it cannot be said surveillance by domiciliary visits would always be unreasonable restriction upon the right of privacy. Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right must be subject to restriction on the basis of compelling public interest.'[25]It further held that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior.

The Supreme Court in *Smt. Maneka Gandhi* v. *Union of India*[26] explained the expression 'personal liberty' in Article 21 is of widest amplitude and covers a variety of rights and any law interfering with personal liberty of a person must satisfy a triple test namely that (i) it must prescribe a procedure; (ii) the procedure must with stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation; and (iii) must be liable to be tested with reference to Article 14. As Article 14 was also involved, the Supreme Court pointed out that the law and procedure authorizing interference with personal liberty and right to privacy must also be right just and fair and not arbitrary, fanciful or oppressive. Subsequently, in *Prabhu Dutt* v. *Union of*

[23]AIR 1963 SC 1295.
[24] AIR 1975 SC 1378.
[25] *Id*. at 1386.
[26] AIR 1978 SC 597.

India[27] and *Sheela Barse* v. *State of Maharashtra*[28], the privacy issue was not directly dealt but the court implicitly recognized the right to privacy and held that the press had no absolute right to interview or photograph a prisoner. The press must first obtain the consent of the person sought to be interviewed or photographed.

In *Rajagopal* v. *State of Tamil Nadu*[29] which is watershed in the development of the law of privacy of India, it held 'right to be let alone' as a constitutional right. It was also observed that a citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters. None can publish anything concerning the above matters without his consent weather truthful or otherwise and whether laudatory or critical. The court held that the state or its officials have no authority in law to impose prior restraint on publication of defamatory matter. The public officials can take action only after the publication if it is found to be false. Yet another dimension was added to the privacy in *Sharda* v. *Dharampa*l[30] the Supreme Court even directed a party to divorce proceedings to undergo medical examination. This was a case where right of privacy pleaded in case where the case in ordered medical examination by a spouse. It may become necessary in case of matrimonial disputes where divorce is sought on ground of impotency, schizophrenia or for some other disease to refer the party to a medical examination and the Supreme Court upheld such power of the courts on the ground that such a course would be necessary to be adopted for the purpose of reaching to a correct conclusion. But at the same time, the Supreme Court held that even if such an order was passed against a party, he cannot be forced to undergo the medical examination. The conclusion which the Supreme Court drew were (i) that a matrimonial Court has the power to undergo medical test; (ii) passing of such an order by the court was not violation of personal liberty under article 21; & (iii) the respondent can refuse to submit himself to medical examination and in such a case, the

[27] AIR 1982 SC 6.
[28] AIR 1983 SC 378.
[29] AIR 1995 SC 264.
[30] AIR 2003 SC 3450.

court will be entitled to draw an adverse inference against him. Therefore, this judgment will not in any way help the respondent in the case. Similarly, in *Padala Kaniki Reddy* v. *Padala Sridev*i,[31] it deals with referring to medical examination of a party in a matrimonial matter on which there is a direct judgment of the Supreme Court which has been quoted hereinabove. In *B. Vandana Kumari* v. *P. Praveen Kumar,*[32] it also relates to reference to medical expert for establishing the parentage of a child in a matrimonial dispute. For all these reasons in *Rayala M. Bhuvaneswari* v. *Nagaphanender Rayala,*[33] it was held that the act of tapping itself by the husband of the conversation of his wife with others was illegal and it infringed the right of privacy of the wife.

In *Mr. 'X'* v. *Hospital 'Z'*[34] the Supreme Court pointed out that right of privacy was an essential component of 'right to life' envisaged by Article 21 of the Constitution but the right was not absolute and could be lawfully restricted for prevention of crime, disorder or protection of health or morals or protection of freedom of others. In *District Registrar and Collector, Hyderabad* v. *Canara Bank*,[35] the Supreme Court observed that the right of privacy deals with persons and not places. It was pointed out that the Andhra Pradesh Amendment[36] in the Indian Stamp Act, 1899 permitted inspection to be carried out by the collector and thus empower invasion of the home of the person in whose possession the document is without any safeguards. This would clearly violate the right to privacy of both the house and the person.

The importance of fundamental rights was highlighted by the Constitution Bench of the Supreme Court in *M. Nagaraj* v. *Union of India*[37] and the relevant portion is as follows:

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[31] 2006 (5) ALD 322.
[32] 2006 (6) ALD 548.
[33] AIR 2008 AP 98.
[34] (1998) 8 SCC 296.
[35] AIR 2005 SC 186.
[36] Andhra Pradesh Act No. 17 of 1986.
[37] AIR 2007 SC 71.

It is a fallacy to regard fundamental rights as gift from the state to its citizens. Individuals possess basic human rights independently of a constitution by reason basic fact that they are members of human race. These fundamental rights are important as they possess intrinsic value. Part III of the constitution does not confer fundamental rights. It confers their existence and gives them protection. The expression 'life' in Article 21 does not connote merely physical or animal existence. The right to life includes right to live with human dignity. This court has in numerous cases deduced fundamental features which are not specifically mentioned in part III on the principle that certain unarticulated rights are implicit in the enumerated guarantees.

The Scheme of Article 19 shows that group of rights are listed as clauses (a) to (g) and are recognized as fundamental rights conferred on citizen. Article 19 (1) (a) of the Constitution protects the freedom of speech and expression. A fundamental right, unlike a statutory right, cannot be taken away by legislation and legislation can only impose reasonable restrictions on the exercise of the right. Reasonable restriction can be imposed by the state under Article 19 (2) on the exercise of the said right in the interest of the sovereign and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

In ***R.*** *Sukanya* v. *R. Sridhar*[38] it was observed that freedom of speech and expression includes the right not only to speak but includes right to print, publish, distribute, receive information. But whether this right in unrestricted, unlimited and the journalist and the media are not given a total free hand to publish or telecast anything they desire? Whether right of freedom of speech and expression guaranteed under Article 19 (1) (g) of the Constitution of India can simply be exercised to invade into the privacy of life, which is exclusively reserved to an individual? Whatever transpires in between the litigants to a matrimonial dispute in a court of law it can be made public. The answer to all the questions would be that rights

[38] AIR 2008 Madras 244.

guaranteed under Article 19 (1) (g) are subject to reasonable restrictions imposed in the Constitution of India and the laws framed thereunder.

Right of Privacy *vis-à-vis* Right of Information to be furnished to the general public, in other words, the right of the media, should be with reference to the kind of information which the law permits. We all know that constitution does not guarantee absolute freedom or absolute protection to the media. Provisions of certain enactments would amply demonstrate the inherent restrictions on freedom of speech and expression, like the one prescribed under Article 19 (1) (g) of the Constitution of India.

6. REDEFINING RIGHT TO PRIVACY

On 24th August 2017 in the case of *Puttuswamy v. Union of India*,[39]the Supreme Court overruled *M.P. Sharma and Ors*. v. *Satish Chandra, District Magistrate, Delhi*[40] and *Kharak Singh* v. *State of U.P. and Ors*.[41]that there is no such fundamental right to privacy and has declared that the right to privacy is a fundamental right protected under Part III of the Constitution of India. In declaring that this right embedded from the fundamental right to life and liberty, the Court's decision has far-reaching consequences.

The Supreme Court confirmed that the right to privacy is a fundamental right that does not need to be separately articulated but can be derived from Articles 14, 19 and 21 of the Constitution of India. It is a natural right that subsists as an integral part to the right to life and liberty. Privacy is a natural right, inherent to a human being. It is thus a pre-constitutional right which vests in humans by virtue of the fact that they are human. The right has been preserved and recognized by the Constitution, not created by it. Privacy is not bestowed upon an individual by the state, nor capable of being taken away by it. It is thus inalienable. Therefore, any action by the State that results in an infringement of the right to privacy is subject to judicial review.

[39] (2017) 10 SCC 1.
[40] 1954 SCR 1077.
[41] AIR 1963 SC 129.

The Supreme Court was at pains to clarify that the fundamental right to privacy is not absolute and will always be subject to reasonable restrictions. It held that the State can impose restrictions on the right to privacy to protect legitimate state interests but it can only do so by following the three-pronged test summarized below:

(i) The need for an existence of a law; and

(ii) The law should not be arbitrary; and

(iii) The infringement of the right by such law should be proportional for achieving a legitimate state aim.

Consequently, all State action that could have an impact on privacy will now have to be measured against this three-fold test. This is likely to have an impact on several on-going projects including most importantly, the Aadhaar identity project.

The recognition of privacy as fundamental constitutional value was a part of Commitment to International Obligations to safeguard human rights under international law under the International Covenant on Civil and Political Rights (ICCPR) which found reference in domestic law under the Protection of Human Rights Act, 1993. The ICCPR recognizes a right to privacy. The Universal Declaration of Human Rights too specifically recognizes a right to privacy. The Judgment has held that constitutional provisions had to be read and interpreted in a manner such that they were in conformity with international commitments made by India.[42]

The other implications of the privacy judgment on matters incidental to the principal issue is that (i) privacy allows each individual/person to be left alone in a core which is inviolable. The judgement is therefore likely to have an impact on the de-criminalisation of homosexuality in India by expressly recognising an individual's right to privacy regarding his sexual

[42] For Details, *available at*: http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/supreme-court-holds-that-the-right-to-privacy-is-a-fundamental-right-guaranteed-under-the-constituti.html?no_cache=1&cHash=20a55bbdd5982515a6720b0514e544d7 (last visited May 25, 2018).

choices; (ii) this autonomy is conditioned by their relationships with the rest of society; (iii) those relationships pose questions to autonomy and free choice. The judgement will have an impact on the various cases protesting the ban on beef imposed by certain States as it is stated that the State cannot interfere in the food choices of an individual; and (iv) privacy is required to be analysed in an interconnected world and the SC has to be sensitive to the needs of and the opportunities and dangers posed to liberty in a digital world. It has also recognized the impact that non-State actors can have on personal privacy particularly in the context of informational privacy on the Internet. While fundamental rights are ordinarily only enforced against actions of the State, interpreting the content of the judgement with reference to informational privacy, there is positive and constructive concern amongst law experts that outcome of the judgement will extend to the private sector as well.

Recognising the complexity of all these issues, the Court highlighted the need to enact a comprehensive legislation on privacy and it is to be noted that the government has set up committee under Justice B. N. Srikrishna to look into these matters to enact comprehensive privacy legislation.

7. CONCLUSION

The right to privacy judgment is one of the most landmark judgments of independent India. It is not wrong to say that the right to privacy judgment not only learns from the past but also sets the wheel of liberty and freedom for the future. The Supreme Court of India has once again emerged as the sole guardian of the Constitution of India.[43]The instant effect of the privacy case on businesses is likely to be limited. As the probable outcome of the case was to set at rest an unsettled position in law that had a bearing on a number of cases pending before various courts of the land, each of those cases will be decided on their merits relying on the principle laid down in the judgement. Therefore, in the near future, are likely to receive a series of judgements on different aspects of privacy

[43] *Available at*: https://thewire.in/law/justice-chandrachud-judgment-right-to-privacy (last visited May 25, 2018).

which will exhorts greater clarity on the manner in which judiciary will look at these issues.

REGULATION OF UNMANNED AIRCRAFT SYSTEMS (UAS) UNDER INTERNATIONAL CIVIL AVIATION LAW

Dr. Mohd Owais Farooqui*

Abstract

For centuries flying was unfeasible and then in a flicker, the dream became a reality. Aircraft were invented and this technological revolution may be the closest thing human kind will have to a time machine, as it is able to compress long distance into minutes and hours.[1] However, humankind's curiosity and thirst to reach overwhelming progress is insatiable. Machines are consequently in constant coevolution with humankind's new ideas and activities. As aviation has evolved, a new generation of aircraft has emerged; sophisticated civil UAS. This new technological innovation has ignited 'imaginations, creating possibilities where things once seemed impossible. As manned aircraft once did, UAS are changing life on Earth forever; nevertheless, the progress and sustainability of UAS industry is facing legal challenges. While the civil uses of UAS increase and the technology matures, legal questions remain unanswered by the aviation-legal regimes. Also, legal literature to address these questions is not abundant. The questions become more obvious when UAS accidents or incidents occur.[2] Such questions include: how are UAS regulated under the International Law, do the provisions of the Chicago Convention and its Annexes apply to the UAS, which are the legal gaps for the operation of UAS, what is the correlation between the Chicago Convention and the national aviation regimes with respect to the civil operations of UAS and does the Chicago Convention and its Annexes require modernisation for the incorporation of UAS?

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[1] John Wensveen, *Air Transportation: A Management Perspective* 154 (Ashgate Publishing Ltd., UK, 2011).

[2] US FAA, FAA UAS Accident and Incident Preliminary Reports, *available at*: http://www.asias.faa.gov/pls/ apex/f?p = 100:446: 0:NO:446: (Last accessed on 22nd August, 2017).

In order to answer these questions, the analysis of public international air law with special emphasis focusing on the legal regimes of aircraft and their safe operation will be necessary. In this process, the researcher expects to contribute to the legal thinking in the field of air law for the civil uses of UAS. As a preliminary conclusion, the adoption of new aviation rules and the modernisation of the existing ones may be necessary. Furthermore, States shall harmonise their fragmented aviation rules on UAS to the international ones for the safe operation of these aircraft. In this endeavour, all of them shall help the UAS industry to thrive without decreasing the already achieved high levels of safety and security of the whole civil aviation system.

Hence, it is the purpose of this paper, in light of the growing civil use of UAS and the fragmented regulations, to critically address the current legal situation regarding the regulation of UAS. Certain entities are beginning to look into the regulation of civil UAS and because of this, this paper will also explore the regulatory proposals coming out of international legal systems.

1. INTRODUCTION: INTERNATIONAL REGULATORY REGIME ON UAS

Law is a highly sophisticated human construct that is constantly changing. A large part of the legal research therefore, consists of formulating hypotheses to give meaning to detailed legal rules already created, whether by statue or judicial decision, and projecting these hypotheses so as to create new patterns of rule-making. Often, the most profound discoveries are in fact those that give new coherence to familiar legal phenomena. For this reason, the process of ascertainment and synthesis of existing legal principles constitutes original research, as also does coming to terms with the dynamic of past, present and future legal development.[3] This section addresses the history and the foundations of the international regulatory framework on UAS.

[3] Michael Pendleton, *Non-Empirical Discovery in Legal Scholarship-Choosing, Researching and Writing a Traditional Scholarly Article* 161 (Edinburgh University Press, Edinburgh, 2014).

2. PARIS CONVENTION 1919 AND ITS PROTOCOL 1929

The development of the regulatory framework for UAS started ten years after the adoption of the Convention Relating to the Regulation of Aerial Navigation (Paris Convention 1919).[4] At its first stage, this legal instrument had no specific Articles pertaining to UAS. It was not until 1929, when the Protocol of 15 June 1929 amending the Paris Convention 1919 (Protocol 1929)[5] incorporated a legal provision regarding 'pilotless aircraft'. The second paragraph of Article 15 was modified to read as follows:

> No aircraft of a contracting State capable of being flown without a pilot shall, except by special authorization, fly without a pilot over the territory of another contracting State.

WWI revitalized the military development of UAS, and by the time States adopted the Protocol 1929, UAS were increasingly applied in international military operations. Consequently, the referred subparagraph of Article 15 constitutes the first international legal effort to regulate the use of UAS. It is noteworthy to say that pilotless aircraft might also fall within the definition of 'state aircraft'. Article 31 of the Paris Convention 1919 defines 'state aircraft' as follows: The following are deemed to be State Aircraft:

(i) Military Aircraft;
(ii) Aircraft exclusively employed in State service, such as post, customs, police.

Every other aircraft is a private aircraft. All State aircraft other than military, customs, and police aircraft shall be treated as private aircraft and

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[4] Signed on 13 Oct. 1919 by twenty-seven states, this is the first multilateral instrument of international law relating to air navigation. Although the Paris Convention 1919 is no longer in force, its contribution to the formulation of basic principles in the field of aviation law maintains its relevance today. The concepts of air sovereignty, freedom of innocent passage on non-discriminatory basis, prohibited zones, provisions on nationality and registration of aircraft, certificates of airworthiness and competency, establishment of international airways, cabotage, special regime for state aircraft and the creation of an international organisation specialised in civil aviation are some examples of its influence in modern civil aviation legal regimes.

[5] The Protocol Concerning Amendments to Arts 3, 5, 7, 15, 34, 37, 41, 42 and the final provisions of the Convention Relating to the Regulation of Aerial Navigation 13 Oct. 1919, cited as the Protocol of 15th Jun. 1929 amending the Paris Convention 1919 entered into force on 17 May 1933.

as such shall be subject to all provisions of the present Convention. Yet, and in order to make sure that pilotless aircraft do not jeopardise the aviation safety and security of a nation, contracting States agreed to establish a specific norm for such aircraft, aimed to limit its operation within their airspace, through the mechanism of a special authorisation, as per Article 15. In other words, a contracting State, having complete and exclusive sovereignty in the airspace above its territory and territorial waters, may choose to authorise or forbid the flight of an UAS, if considered a threat. The Paris Convention 1929 is no longer in force. However, it made a ground-breaking contribution to the basic concepts of air law, which still survive nowadays, particularly the one pertaining to pilotless aircraft.

3. THE CHICAGO CONVENTION 1944

It took twenty-five years and another world war to replace the Paris Convention 1919. The new international legal instrument, the Chicago Convention 1944, was concluded on 7 December 1944 and it is presently the primary source of international air law.[6] It gave legal existence to the International Civil Aviation Organization (ICAO), a United Nations (UN) specialised agency, as a means to develop the principles and techniques. The context for the adoption of the Chicago Convention 1944 deserves consideration. Generally, but regrettably speaking, military conflagration accelerates the development of technology. Throughout WWII, aviation technology improved rapidly. It was crucial for every nation involved in the war to have aircraft with tactical capabilities and strategic weapons of destructive accuracy and effectiveness.[7] UAS for example, were used considerably during WWII. Only between June 1944 and March 1945, some 10,500 German V1s UAS were launched against England from coastal ramps or from bombers, with just over 2400 reaching their targets, predominantly London.[8] The raise of military aircraft during the two World Wars, the dropping of bombs while flying in what had become foreign national airspace, caused the need for strict control. Nevertheless, the

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[6] Michael Milde, *International Air Law and ICAO* 17 (Eleven International Publishing, Hague, 2012).
[7] *Id.*, at 13.
[8] Laurence R. Newcome, *Unmanned Aviation: A Brief History of Unmanned Aerial Vehicles* 51 (American Institute of Aeronautics and Astronautics 2004).

military importance of aviation during the two wars had equally demonstrated the enormous potential for civil aviation, both economic and for political purposes.[9] Aviation became the most effective and primary available means of transport in the world of destroyed rail lines and road networks.[10] Therefore, there was an urgent need to regulate the post war air transport.

The Chicago Convention's purpose is to develop international civil aviation in a safe and orderly manner, and that international air transport services may be established on the basis of equality and opportunity and operated soundly and economically. This purpose includes the full integration of civil UAS into non-segregated airspace, which will allow them to fly into foreign airspaces. To this end, ICAO adopts and amends from time to time, as may be necessary, rules known as international standards and recommended practices and procedures (SARPs).

Then, such questions are raised as to how these rules may be applicable to UAS; are international civil operations of UAS possible and can an UAS operator based in one State get approval to operate in another State? To answer these questions this chapter will begin with the analysis of the work performed by ICAO followed by the perusal of the aircraft legal regime, within the scope of the referred international treaty.

The international operations of civil UAS still remain in early stages. Non-flight of civil UAS into non-segregated airspace of another nation has not taken place yet. Currently, only military UAS are flying into foreign airspaces, but state aircraft or state UAS, to be more precise, are out of the scope of the Chicago Convention's principles and rules. Unintentional or unlawful interference such as data link spoofing, hijacking, and jamming are one of the major security concerns currently facing civil UAS command and control (C2) and air traffic control (ATC) communications. Also, specific regulations on topics such as licensing, medical qualification of remote pilots, DAS, separation standards are needed. While technological advancements continue to develop, ICAO, states and the industry are

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[9] Isabella Henrietta, PhilepinaDiederiks-Verschoor & Pablo Mendes De Leon, *An Introduction to Air Law* 11 (Kluwer Law International, Netherlands 2012).

[10] *Id*., at 14.

working to understand, define and integrate UAS as new component of the aviation system.

4. INTERNATIONAL CIVIL AVIATION ORGANIZATION & UAS

ICAO has initiated actions to harmonise the current international regulatory framework through SARPs,[11] with supporting Procedures for Navigation Services (PANs)[12] and guidance material, to support routine operation of UAS, throughout the world in a safe, harmonised and seamless manner comparable to that of manned operations.[13]In order to assist ICAO in fulfilling the identified aims, the Air Navigation Commission (ANC)[14] at the Second Meeting of its 175thSession on 19 April 2007, approved the establishment of the Unmanned Aircraft System Study Group (UASSG). The first tangible product of this Study Group was the Unmanned Aircraft System (UAS) (Circular 328) published in March 2011. Issues that would have to be addressed for the compliance of the Chicago Convention

[11] ICAO SARPs are grouped into 'Annexes' of the Chicago Convention. According to Michael Milde: "The Convention does not provide a definition of the 'standards' and 'recommended practices'." Michael Milde, *supra* note. 6, at 159. A definition was formulated in several subsequent Resolutions (Resolution A36-13, Appendix A) of the ICAO Assemblies, the current text being: 'a) Standard-any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Contracting States will conform in accordance with the Convention; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38 of the Convention; and b) Recommended Practice -any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity or efficiency of international air navigation and to which Contracting States will endeavour to conform in accordance with the Convention. '

[12] PANs are documents produced by ICAO, in addition to the SARPs, with a lower legal status than the SARPs. PANs are designed for 'world-wide application' and comprise operating practices as well as material considered too detailed for SARPs. PANs often amplify the basic principles in the corresponding SARPs contained in Annexes to assist in their application. Michael Milde, *supra* note 6 at 174.

[13] ICAO, Manual on Remotely Piloted Aircraft Systems (RPAS), Doc 10019 AN/507 (2015), at v.

[14] The Air Navigation Commission considers and recommends, for approval by the ICAO Council, SARPs and PANs for the safety and efficiency of international civil aviation. The Commission is composed of nineteen persons who, as outlined in the Chicago Convention, have 'suitable qualifications and experience in the science and practice of aeronautics'. Commission Members, who act in their personal expert capacity, are nominated by Contracting States and are appointed by the Council of ICAO.

provisions and its Annexes[15] were included in this document. Subsequently, the first SARPs related to UAS were adopted on March 2012 for Annex 2 Rules of the Air and Annex 7 Aircraft Nationality and Registration Marks.

On 6 May 2014, the ANC, at the Second Meeting of its 196th Session, agreed to the establishment of the Remotely Piloted Aircraft System Panel (RPASP), which was tasked with progressing the work begun by the UASSG. Over a period of three years with input from many groups and experts on UAS, a guidance manual was elaborated. On April 2015, the Secretary General of ICAO,[16] under its authority, approved the publication of Manual on Remotely Piloted Aircraft Systems (RPAS) Doc 10019 AN/507, which provides direction on technical and operational issues consistent with the already adopted standards, applicable to the integration of UAS in non-segregated airspace and at aerodromes.

5. APPLICATIONS OF AIRCRAFT REGULATIONS ON UAS

The Chicago Convention applies solely and exclusively to 'civil aircraft'. Other aircraft, generally designated as 'state aircraft', are explicitly excluded.[17] Article 3 stipulates:

(a) This Convention shall be applicable only to civil aircraft and shall not be applicable to state aircraft.

(b) Aircraft used in military, customs and police services shall be deemed to be state aircraft.

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[15] ICAO has produced nineteen Annexes to the Chicago Convention. SARPs are the essential part of each Annex. They have been arranged in numbered chapters, subchapters and paragraphs and subparagraphs.

[16] The Secretary General of ICAO is head of the Secretariat and chief executive officer of the Organisation responsible for general direction of the work of the Secretariat. The Secretary General provides leadership to a specialised international staff working in the field of international civil aviation. The Secretary General serves as the Secretary of the Council of ICAO and is responsible to the Council as a whole and, following established policies, carries out the duties assigned to him by the Council, and makes periodic reports to the Council covering the progress of the Secretariat activities. The Secretariat consists of five main divisions: the Air Navigation Bureau, the Air Transport Bureau, the Technical Co-operation Bureau, the Legal Affairs and External Relations Bureau, and the Bureau of Administration and Services. The Secretary General is also directly responsible for the management and effective work performance of the activities assigned to the Office of the Secretary General relating to Finance, Evaluation and Internal Audit, Communications, and seven Regional Offices.

[17] Michael Milde, *supra* note 6, at 11.

(c) No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorisation by special agreement or other-wise, and in accordance with the terms thereof.

(d) The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.

Based on this declaration, another question appears: do the provisions of the Chicago Convention include UAS? The term 'aircraft', being the core device of aviation and subject to extensive international regulation, is not defined in any primary source of International Law.[18] However, the following definition is provided in Annex 7-Aircraft Nationality and Registration Marks to the Chicago Convention:

> Any machine that derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface.

On March, 2012, the Sixth amendment to Annex 7 was adopted. This revision included the term 'RPA' defined as an unmanned aircraft, which is piloted from a remote pilot station.[19] Accordingly, section 2 of the Annex provides the classification of aircraft. There are UAS that do not allow pilot intervention in the management of the flight, in which case they are called 'autonomous aircraft'.[20]However, for those UAS piloted from a remote pilot station the name granted is 'RPA'.[21] Moreover, when the RPA, its associated remote pilot station (s), the required command and control links and any other components as specified in the type design are integrated, they are called 'RPAS'.[22] The data link between the remotely piloted aircraft and the remote pilot station for the purposes of managing the flight is defined as the 'C2 link'.[23] The C2 link connects the RPS and RPA for the purpose of managing the flight. The link may be simplex or duplex. Also, it may be in direct radio line-of sight (RLOS) or beyond radio line-of-

[18]*Id*., at 61.
[19]*See*, Chicago Convention, Annex 7 - Aircraft Nationality and Registration Marks, at Definitions.
[20]*See*, ICAO, Manual on Remote Piloted Aircraft System (RPAS), Doc 10019 AN/507 (2015), at xiv.
[21]*Id*., at xviii.
[22]*Ibid*.
[23]*Id*., at xv.

sight (BRLOS).Given the fact and due to its versatile nature, UAS might be employed in a variety of situations, both as state or civil aircraft. Under these circumstances, Article 3*bis* shall be taken into consideration, particularly if the UAS is engaged in civil operations.

(a) The contracting States recognize that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority. It may also give such aircraft any other instructions to put an end to such violations.

(b) Every civil aircraft shall comply with an order given in conformity with paragraph b) of this Article.

In other words, a pilot of an UAS shall comply with the instructions provided by the State, including through electronic or visual means, and have the ability to divert to the specified airport of the requesting State. UAS in order to comply with this requirement, which traditionally is made through visual means, may place significant needs on certifications of UAS DAS technologies[24] systems for international operations.

6. PILOTLESS AIRCRAFT

With regard to pilotless aircraft, the Chicago Convention incorporated a new and independent provision in Article 8, which replaced the old Article 15 of the Paris Convention 1919:

> No aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting State without special authorization by the State and in accordance with the terms of such authorization. Each contracting State undertakes to ensure that the flight of such aircraft without a pilot in regions open to civil aircraft shall be so controlled to obviate danger to civil aircraft.

Article 8 is similar to the second paragraph of the Article 15 of the Paris Convention. It was proposed by the Indian Delegation (Doc. 348), was included by the drafting committee of the Subcommittee 2 in its second report (Doc. 414) and was approved with one minor amendment at the final

[24] Detect and Avoid is defined by ICAO as '[t] he Capability to See, Sense or Detect Conflicting Traffic or Other Hazards and Take the Appropriate Action.' ICAO doc 10019 AN/507, Definitions.

meeting of the Subcommittee.[25] As per the factual finding, UAS were in existence at the time of WWI and WWII. However, no explicit definition of 'pilotless aircraft' was built either in the Chicago Convention or in its Annexes until the Eleventh Air Navigation Conference[26] endorsed the Global Air Traffic Management (ATM) Operational Concept with the following text:

> An unmanned aerial vehicle is a pilotless aircraft, in the sense of Article 8 of the Convention on International Civil Aviation, which is flown without a pilot in-command on-board and is either remotely and fully controlled from another place (ground, another aircraft, space) or programmed and fully autonomous.[27]

This understanding was endorsed by the 35th Session of the ICAO Assembly in 2004.[28] Later on, the 6th amendment to Annex 7 included the term RPA which is defined as 'an unmanned aircraft, which is piloted from a remote pilot station'.[29] In other words, ICAO considers that an 'aircraft flown without a pilot' refers to the situation where there is no pilot on board the aircraft but controlled by a pilot from a remote station. Legal certainty is a general principal of International Law. It means that the law must be certain, in that it shall be clear and precise, and its legal implications foreseeable.

Consequently, jurist must be very accurate and specific when understanding and interpreting the law. It seems to be that the interpretation of the concept of 'pilotless aircraft' within the scope of Article 8 of the Chicago Convention, specifically in the term without a pilot in command on board the aircraft, is inconsistent within the text of Article 8. The word 'on board' is not expressly prescribed in Article 8 of the Chicago Convention. Pilotless simply means without a pilot. In other words, Article 8 could indeed be applied to those unmanned aircraft that can fly autonomously

[25] *See*, Appendix 2 Commentary on the Development of the Individual Articles of the Convention on International Civil Aviation, at 1382, prepared by Virginia C. Little of the International Conference Secretariat and issued by the Provisional International Civil Aviation Organization as document 2996, IC/8 (25 Mar. 1947).

[26] Eleventh Air Navigation Conference, ANConf./11, Montreal, (22 Sep.-3 Oct. 2003).

[27] ICAO, Global Air Traffic Management Operational Concept, Doc 9854 AN/458 (2005), at 82.

[28] See, ICAO, Manual on Remote Piloted Aircraft System (RPAS), Doc 10019 AN/507 (2015), at 1-2.

[29] Chicago Convention, Annex 7 - Aircraft Nationality and Registration Marks, at Definitions.

without a pilot operating the aircraft, but not to those that are being operated remotely by pilots.

Second, emphasis was placed on the significance of the provision that aircraft flown without a pilot 'shall be so controlled as to obviate danger to civil aircraft', indicating that the drafters of the Chicago Convention recognised that 'pilotless aircraft' are not civil aircraft and must have a measure of control being applied to them in relation to a so-called 'due regard' obligation similar to that of State aircraft. In order for an UAS to operate in proximity to other civil aircraft, a remote pilot is therefore essential. The question that this raise is if a pilotless aircraft is not a civil aircraft because it is treated differently according to Article 3, then how can the Chicago Convention Regime and the SARPs be applied to the UAS engaged in civil uses? The word 'use' must be highlighted as it is regardless of the design, markings or remote controllers. It is clear that all these uncertainties create legal gaps, in terms of applying the Chicago Convention rules and SARPs to those UAS remotely piloted engaged in civil operations.

Article 3 (a) stipulates that the Chicago Convention is only applicable to civil aircraft, and not to state ones. As per Article 3, a police search and rescue aircraft for instance, in order to fly over or land in other State requires a previous special authorisation and shall comply with special conditions. Pilotless aircraft of Article 8 receives the same treatment of state aircraft in Article 3(c). A pilotless aircraft, even if engaged in civil operations requires a special approval and shall comply the conditions of such approval before it can fly in a foreign airspace. Furthermore, the State to be overflown commits to take all necessary steps to ensure that the over-flight does not affect the safety of civil aircraft.

Was really the intention of the drafters of the Chicago Convention 1944 to include in Article 8 a situation where there is no pilot on board the aircraft, but instead remotely controlled by a person? If a pilotless aircraft receives the same treatment of state aircraft as per the analysis of Articles 3 and 8, how can the rules of civil aircraft apply to UAS? To answer this question further research is required. However, a good starting point is the application of the principles and rules of interpretation of the Vienna Convention on Law of the Treaties 1969 (VCLT). The purpose of treaty interpretation is to establish the meaning of a text that the parties intended it

to have in relation to circumstances with reference to which the question of interpretation has arisen. The VCLT Article 31(1) provides:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The International Court of Justice (ICJ) has acknowledged this to constitute international customary law.[30] The rule of interpretation is a procedure consisting of three elements: the text, the context, and the object and purpose. Article 31 reflects the principle that the determination of that ordinary meaning of term is undertaken in the context of a treaty and in the light of its object and purpose. There is no hierarchy between the various elements of the Article 31; rather they reflect a logical progression. The context for the purpose of a treaty is set out in some detail in Article 31(2) and embraces any instrument of relevance to the conclusion of a treaty, as well as the treaty's preamble and annexes. Article 31(3) provides what should be taken into account together with the context. It includes subsequent agreements between the parties, subsequent practice in the application of the treaty, and any relevant rules of international law applicable in the relations between the parties.[31] All these three elements of interpretation are not mutually exclusive but are of extreme importance for the interpretation of Article 8 of the Chicago Convention 1944. Finally, what seems to be the most difficult and controversial task for the pilotless clause interpretation is the reconciliation between the objective and the textual approaches. In this author's opinion, the starting point to be applied in this particular case should be the textual approach rather than the purpose of the parties, since it is presumed that the text represents a real expression of what the parties did in fact intend.

7. RULES OF THE AIR

Pursuant to Article 12, the rules of the air apply to all aircraft; this includes manned and unmanned aircraft. It also states that Contracting States shall maintain national regulations uniform to ICAO standards, to the

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[30] Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, ICJ Reports 1994, at 6, para. 41

[31] Malcom Evans, *International Law* 179 (Oxford University Press, Oxford, 2014).

greatest possible extent, and to prosecute all persons violating those rules. Additionally, Article 12 encloses the foundations of international harmonization and interoperability, which is essential for the safe operations of manned and unmanned aircraft.

Each contracting State undertakes to adopt measures to ensure that every aircraft flying over or manoeuvring within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and manoeuvre of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention. Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable.

On 7 March 2012 amendment to Annex 2 Rules of the Air to the Chicago Convention was adopted. Annex 2 stipulates that a remotely piloted aircraft shall be operated in such a manner as to minimize hazards to persons, property or other aircraft. In this context, Appendix 4 incorporates specific rules to UAS in the following categories:[32]

(i) General Operating Rules;
(ii) Certificates and Licensing; and
(iii) Request for Authorisation.

The transcription of all the rules of Annex 2 applicable to UAS is out of the scope of this work; however, it is noteworthy to make one remark. Once the broad range of SARPs is adopted for each of the applicable Annexes, Contracting States will be able to facilitate and foster operations of UAS to a similar extent as that being enjoyed by manned aviation.[33]

7. DOCUMENTS CARRIED IN AIRCRAFT

Chapter V of the Chicago Convention, which refers to the conditions to be fulfilled with respect to aircraft, begins with Article 29: Every aircraft

[32] *See*, Chicago Convention, Annex 2 - Rules of the Air, at xii.
[33] *See*, ICAO, Manual on Remotely Piloted Aircraft Systems (RPAS), Doc 10019 AN/507 (2015), at 1-5.

of a contracting State, engaged in international navigation, shall carry the following documents in conformity with the conditions prescribed in this Convention:

(i) Certificate of Registration;
(ii) Certificate of Airworthiness;
(iii) Appropriate Licenses for each member of the crew;
(iv) Journey Log Book;
(v) Aircraft Radio Station License, if it is equipped with radio apparatus;
(vi) If it carries passengers, a list of their names and places of embarkation and destination;
(vii) If it carries cargo, a manifest and detailed declarations of the cargo.

Pursuant to this provision, every, aircraft of a contracting State engaged in international navigation shall carry the specified documents on board the aircraft. However, how can this provision be applicable to UAS? Currently, the carriage of original documents described in Article 29 on board of UAS may be simply unpractical in such type of aircraft. To solve this problem, ICAO has proposed the use of electronic versions of the referred documents, which must be acceptable to the State of the Operator and all other States involved in the operation.[34] However, no specific procedure has been either agreed by Contracting States or proposed to accomplish this mandate.

8. CERTIFICATE OF AIRWORTHINESS

Annex 8 to the Chicago Convention contains international regulation pertaining airworthiness. Even though it contains minimum standards for the purposes of Articles 31 and 33; it does not replace the national legislation of Contracting States. Article 31 prescribes:

Every aircraft engaged in international navigation shall be provided with a certificate of airworthiness issued or rendered valid by the State in which it is registered.

Another important statement is that the above-mentioned provision begins with the words 'every aircraft'. Thus, it means with no doubt, that it

[34] *Id.*, at 6-9.

applies equally to manned and unmanned aircraft engaged in international navigation. However, it is not clear how the certification process of an UAS, which include separate components such as a remote station is to be carried out. ICAO states that it is assumed that existing process and procedures applied to traditional, manned aircraft type design approval, production a royal, continuing airworthiness and modifications/alterations of aero-nautical products are also applicable to UAS, to the maxim extent possible.[35] The unmanned aircraft is the component of the UAS, and the latest must hold a Certificate of Airworthiness (CofA). Therefore, the CofA corroborates that an UAS, as a whole, is in a condition for safe operation. ICAO provides neither specific guidance nor procedures for type design and airworthiness certification. The main reason is the lack of sufficient operational service history and certification experience in UAS. As the industry matures, it is expected that States will establish their own procedures, which may be used by ICAO in future certification guidance as new SARPs are adopted.

9. LICENSING OF PERSONNEL

The safe operation of UAS requires qualified remote pilots. Pursuant to Annex 2 on Rules of the Air, remote pilots have the same responsibilities as pilots of manned aircraft. Consequently, their competencies must be assessed carefully to ensure that their knowledge, skills and attitude are appropriate to these new types of operations. Article 32(a) of the Chicago Convention also states:

The pilot of every aircraft and the other members of the operating crew of every aircraft engaged in international navigation shall be provided with certificates of competency and licenses issued or rendered valid by the State in which the aircraft is registered.

Furthermore, Appendix 4 of Annex 2 incorporates Standard requiring remote pilots to be licensed in a manner consistent with Annex 1 on Personal Licensing, which has not been modified yet to include specific Standards for UAS.

10. RECOGNITION OF CERTIFICATES AND LICENSES

[35] *Id.*, at 4-1.

The legal heart for mutual recognition of certificates and licenses is Article 33. Certificates of airworthiness and certificates of competency and licenses issued or rendered valid by the contracting State in which the aircraft is registered, shall be recognized as valid by the other contracting States, provided that the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may be established from time to time pursuant to this Convention.

The application of this Article on UAS is consistent with Article 31, which deals with Certificates of Airworthiness, but not yet with Article 32 with regard to licenses of personnel, since it specifically applies for those individuals who conduct their duties while on board aircraft. Certification and licensing Standards are not yet developed. Consequently, any certification and licensing need not be automatically deemed to comply with the SARPs of the related Annexes, including Annex 1, 6 and 8, until such time as the related UAS SARPs are developed. Despite Assembly Resolution A38-12, Article 8 of the Chicago Convention assures each Contracting States of the absolute sovereignty over the authorisation of UAS operators over its territory.[36]

11. CONCLUSION

Technological advancements are continuously changing lives and behaviours. Simultaneously, legal questions arise. It is a cycle that repeats itself over and over again since the beginning of modern societies and UAS are not the exception in this course. Currently, an appropriate and specific international regulatory framework for the civil uses of UAS needs to be developed.

UAS are, indeed, aircraft; therefore, existing SARPs apply to a great extent. The complete integration of UAS at aerodromes and in the various

[36] According with ICAO, Assembly Resolution A38-12 Consolidated statement of continuing ICAO policies and associated practices related specifically to air navigation, Appendix C-Certificates of airworthiness, certificates of competency and licenses of flight crews (clause 2), resolves that pending the coming into force of international Standards respecting particular categories of aircraft or flight crew, Member States shall recognise the validity of certificates and licenses issued or rendered valid, under national regulations, by the Member State in which the aircraft is registered.

airspace classes will, however, necessitate the development of UAS-specific SARPs to supplement those already existing.

The emergence of UAS, as cutting-edge technology, has outpaced the ability of ICAO and States to produce timely, adequate and harmonised rules with regards to the civil operation, certification, registration, safe management, licensing and airworthiness of UAS with the main purpose to integrate them into non-segregated airspace. An UAS operator based in one State might find it difficult to get approval to operate in another State.

Finally, the integration of UAS into the aviation system is not an easy task. It requires contributions from States, aviation specialised agencies, academia representatives, air lawyers, operators, manufactures, pilot representatives, air navigation providers, air traffic control agents, accident investigation bureaus, human performance specialists, surveillance, communication and insurance experts. The policy and rule making process has been gradual and it is expected to be a long-term activity. Efforts to produce regulations and harmonise the aviation-legal regimes for the civil uses of UAS are underway at international, regional and domestic level, but still remain basic and more needs to still be done.

ELECTIONS: WHO HOLDS THE REINS?

Isha Khurana*
Shagun Khurana**

Abstract

Elections are considered to be unique milestones in the political development of the country. They have become an integral part of our political system. With mushrooming of various regional and national parties, India has witnessed an unprecedented growth in the realm of competitive electoral practice in the recent times. In the highly charged atmosphere experienced during elections, universal standard of 'free and fair elections' has to be adhered to. As per the mandate of the election commission, the voters are supplied with sufficient knowledge about their prospective legislators. Indian Constitution has accorded the right to vote to citizens of India and has supplemented it with various other rules and regulations to effectuate a well-informed decision by the ballotters of the country.

Unfortunately, at times, even an intelligent choice acts in an adverse manner. Currently, India is witnessing something similar and a constant rise in unethical and irresponsible behaviour on the part of the elected legislators is being experienced. In a world where globalisation of democratic electoral process is a reality, we need to empower our voters with the 'Right to recall'.

Right to recall is basically a power to 'de-elect' the representatives from the legislature through a direct vote, which is initiated with a minimum number of voters. Right to recall is a mean to achieve certain end term objectives and not the end itself. It is quintessentially a 'post-election' measure to constantly monitor the working of the elected representatives. The electorate's right to recall legislators will be instrumental in ensuring the latter's accountability towards the people. The damage caused to the 'democratic institutions' by the errant or non-performing elected representatives should be checked by the democratic process only and hence

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this right should vest in the citizens. The right to recall can act as wake up call for the legislators.

This research paper would delve in the unexplored area of right to recall and its exercise by electorates at different occasions in India. It would also highlight the debate around the 'excessive democracy' being granted to citizens by this right. A comparative study with the similar right in various jurisdictions will also be conducted.

1. INTRODUCTION

The Preamble to the Constitution of India reads as:

"WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a
SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC…"

The people of India have declared their sovereignty and have proclaimed India as a Democratic nation at the very outset. Democratic principles have been recognized by the citizens making India the largest democracy in the World. The modern Indian nation State along with the present electoral process came into existence on 15th of August 1947.

Democracy has been held to be a part of doctrine of basic structure[1] meaning thereby that democracy is the very fabric of the Indian society. The principle of democratic decision making requires a method of group decision where every member of the group is treated equally. The mandate of the electorate is reflective of the majority will.

Many complex political societies have adopted the democratic principle as a legitimate method of decision making and institutional design in the political sphere. Gradually, in many flourishing economies,

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[1] *His Holiness Kesavananda Bharati Sripadagalvaru and Ors.* v. *State of Kerala and Anr.* (1973) 4 SCC 225

democracy has emerged as a pre-emptive normative form of decision making.

India is a constitutional democracy with a parliamentary system of government, and at core of the system lays the commitment to hold regular, free and fair elections. The word Election finds its origin from the Latin word *'eligere'*, which means to choose, select or pick. In other words, it means to elect, or vote, to select or to make a choice. Election is a process through which the citizens of the country demonstrate their collective will.

These elections are responsible for determining the composition of the government at various Centre, State and Municipal levels. The membership of the two Houses of Parliament, the State and Union Territory Legislative Assemblies, the Presidency and Vice-Presidency are elected through various methods of choosing our own representatives.

2. OUR THRUST WITH DEMOCRACY

Indians have always more or less committed to a democratic future ever since pre-independence. The experience of colonialism reinforced this desire for democracy. Of course, as was to be expected, there were considerable differences in the understanding of the meaning and functioning of democracy and development in post-independence India. This indicated a vibrant and democratic political ethos in the making.

The aim of the democracy was to challenge social and economic privileges that were entrenched in India. In reality, however, the nation soon forgot the intertwined nature of the democracy agenda and hoped that somehow the fruits of development would seep downwards without any concrete and institutional changes being made in this regard.

The whole concept of democracy came into picture in order to ensure that India acts as a 'Welfare State' which can be achieved by development and economic reforms. The same was the objective when the democratic principles were incorporated in the *grundnorm* of our country.

Eligible to be Inked Electorates

The democratic system in India is based on the principle of Universal Adult Suffrage[2]; meaning thereby that any citizen over the age of 18 can vote in an election. This right to vote is irrespective of caste, creed, religion or gender. This is not an absolute right as it is qualified by soundness of mind and also restricts people convicted of certain criminal offences from exercising their right to vote. Guarantee of right to vote is found in Part XV of the Constitution titled "Elections". The Electoral Law in the country is supplemented by The Representation of People Act, 1950.

The onus of registering electors in India lies on the election commission. It sends officials enumerators, from house to house, to collect data about eligible electors, on the basis of which electoral rolls are prepared for each constituency, polling station wise. Registering of names in the electoral rolls is a mandatory requirement to be allowed to vote. The electoral rolls are revised every year to add names of new eligible electorates and remove the names of people who have passed away or moved out of the constituency on the 1st January of that year.[3]

Electoral Reforms

(a) The Need for Reforms

The electoral process in various assembly elections, across different states, has been initiated which has in turn commenced our journey towards general elections 2019. This electoral process is witnessing participation of a large-scale electorate. What is disheartening to whole process of democracy is that even 69 years post-independence 25.96[4] the citizens of India are illiterate, making meaningful democracy impossible but making it easily possible for politicians to have a vested interest in illiteracy and public ignorance.

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[2] The Constitution of India, 1950, Art. 326

[3] M.S. Gill, 'The Electoral System in India' *available at* http://eci.nic.in/eci_main/eci_publications/books/miscell/ESI-III.pdf (last accessed on 7th May, 2018).

[4]Literacy And Level of Education, 2004 Census Report *available at* http://censusindia.gov.in/Census_And_You/literacy_and_level_of_education.aspx (last accessed on 23rd May, 2018).

Conventional avenues and structures of democratic politics have become progressively more corrupt. The distance between these structures and the democratic aspirations of the people has grown considerably. The reality at the ground level is that people are engaged in democratic struggles for livelihood, water, city space, education to name a few and these struggles are a consequence of the limited success of India's democracy.

Time and again the politicians have used these basic struggles for sustenance as a tool to garner positive electoral votes. The populist policies used by a few of them have distorted the very fabric of democracy. Supreme Court and Election Commission have tried to uphold the sanctity attached to elections and this has led to enactment of various electoral reforms in the country.

(b) *Reforms through the Years*

There is no denying that governments in India are voted in and voted out, elections are by and large free and fair, and the media is open and powerful. However, this does not complete the score card of democracy in India. Electoral process in India has also picked up pace with the changing time and has undergone a sea change ever since its conception, post-independence.

The Election Commission is considered to be the guardian of free and fair elections in the country. It was in 1971, Election Commission of India came out with Model code of conduct for the first time.[5] Ever since then, prior to elections, model code of conduct comes into operation. With 61st amendment[6] to the Constitution of India, the age of adult suffrage was reduced from 21 to 18 years. Under the directions of Supreme Court in 2002, Election Commission issued an order under the broad ambit of Article 324

[5] Electoral Laws Compendium (II) *available at* http://eci.nic.in/eci_main/ElectoralLaws/compendium/VOL-II_24022014%20.pdf (last accessed on 1st June, 2018).

[6] 61st Constitutional Amendment Act, 1988.

mandating the disclosure of assets, movable and immovable, and qualifications by the candidates filling their papers for nominations. The Commission has fixed legal limits on the amount of money which a candidate can spend during the election campaign. These limits have been revised from time to time.

Further, making use of Information Technology for efficient electoral management and administration, the Electronic Voting Machines (EVM) were introduced which replaced the ballet paper voting. Initially in 1999, in order to check impersonation all the electoral rolls were made electronic and subsequently by 2009, photo electoral rolls for proper verification of voters were introduced across the country.[7]

Supreme Court[8] read the right of not to vote as an integral aspect of right to vote and directed that the EVM machines should contain the option of None of the Above (NOTA). Supreme Court went a step further and also laid down the directive that advertisement for governmental schemes should not have pictures of ministers on it except Prime Minister, President or Chief Justice[9]. Subsequently, the introduction of electoral bonds for giving donation to the political parties and the cap of cash donations per individual are efforts to weed out the black money infused in the political campaigning.

Unfortunately, in spite of laudable efforts to weed out the virus of malpractices in the electoral process, the core objective for which we incorporated the democratic system is not being achieved. Efforts have been made to incorporate better methods and systems which utilize the advanced scientific technologies for maintaining the high reputation of the Indian elections there have been instances

[7]Sumandeep Kaur, Electoral Reforms in India: Proactive Role of Election Commission *available at* https://www.mainstreamweekly.net/article1049.html (last accessed on 15th May, 2018).

[8] *People's Union for Civil Liberties* v. *Union of India* (2013) 10 SCC 1.

[9] *Common Cause* v. *Union of India* W.P.(C) No. 21 of 2013.

where elected representatives have themselves been instrumental in faulting the ethos of democracy. Nation is witnessing a constant rise in unethical and irresponsible behaviour on the part of the elected legislators. Instances which demonstrate the lackadaisical attitude of legislators have been on a constant rise.

Our legal system has made life too easy for criminals and too difficult for law abiding citizens. A touch here and a push there and India may become ungovernable under the present constitutional set up. The quality of our public life has reached the nadir. Politics has become tattered and tainted with crime. The moral standards of our politicians, policemen and criminals are indistinguishable from one another.[10] In a world where globalisation of democratic electoral process is a reality, we need to empower our voters with the "Right to recall".

3. RIGHT TO RECALL

Right to recall is a process whereby the electorate is empowered to make conscious decision to remove the legislator before the expiry of the fixed tenure. This is basically a power to "de-elect" the representatives from the legislature through a direct vote, which is initiated with a minimum number of voters.[11]

The Right to recall is a mean to achieve certain end term objectives and not the end itself. It is quintessentially a "post-election" measure to constantly monitor the working of the elected representatives.[12] The electorate's right to recall legislators will be instrumental in ensuring the

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[10] Nani A. Palkivala, *We the People* (UBS Publishers' Distributors Pvt. Ltd., New Delhi, 1999)

[11] Rahul Mehta, *Right to Recall – An Indian Perspective*, *available at* https://apnabhaarat.wordpress.com/2011/07/01/right-to- recall-an- indian-perspective/comment- page-1 (last accessed on 3rd June, 2018)

[12] Sonika Bajpeyee, *Right to Recall Elected Representatives: Whether viable in the Indian Scenario?, Indian Law Journal*, *available at* http://www.indialawjournal.org/archives/volume6/issue_1/article8.html (last accessed on 5th April, 2018)

latter's accountability towards the people. The damage caused to the "democratic institutions" by the errant or non-performing elected representatives should be checked by the democratic process only and hence this right should vest in the citizens. The right to recall can act as wake up call for the legislators. It is in this backdrop we advocate "Right to Recall".

Locke has advocated that the government is a servant to the people, a beneficiary or trustee and adds on that good governance can only be achieved with the legislators being accountable to the citizens. Supreme Court also acknowledged the need to have a corruption free government and 'de-election' of delinquent representatives would be one way of achieving that. The *raison d'etre* to introduce right to recall is to ensure "good governance" by eliminating the corrupt, unworthy officials.

Presently, India has not read right to recall as a part of universal democracy but a few states like Madhya Pradesh, Chhattisgarh, Rajasthan have taken a lead in this and have acknowledged the right to recall in local bodies. The first recall election in India was witnessed in year of 2001 in Anuppur Nagar Panchayat, Shahadol, Madhya Pradesh when electorates exercised their right to recall[13]. In 2008, three local body chiefs were de-elected by the people in accordance with the Chhattisgarh Nagar Palika Act, 1961[14].Recently Mangrol Municipality area of Baran District, Rajasthan witnessed the application of right to recall against the municipality representative[15].

The recall procedure which has been formulated and penned down in a few state specific legislations and have been followed thereafter raises various interesting issues and concerns. These concerns are profound when one tries to import the right to recall in the general elections both at centre

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[13] Voters exercise right to recall, The Hindu *available at* http://www.thehindu.com/2001/04/12/stories/14122123.htm (last accessed on 23rd April, 2018)

[14] Vinod Bhanu, Right to Recall Legislatures: The Chhattisgarh Experiment, *Economic & Political Weekly*, 15-16, (4th October 2008)

[15] Rajasthan witnesses its first ever right to recall vote, The Hindustan Times *available at* http://www.hindustantimes.com/india/rajasthan-witnesses-its-first-ever-right-to-recall-vote/story-kjEvblZ3Lp28IoRMqjoKWN.ht (last accessed on 23rd May, 2018)

and state level. It also pertinent to analyse whether are we advocating "excessive democracy" in the garb of right to recall or is it a legitimate extension of our right to vote which has been granted to citizens.

(i) Is it a move towards direct democracy?

The representative parliamentary democracy in India gives the power to remove an elected representative to the Parliament alone. On the other hand, the freedom to choose their representatives is given to the people directly. However, the people do not choose their candidates in the literal sense. The choice of candidates is determined by the leaders of political parties, which need not always follow principles of inner party democracy.[16]Therefore, people are constrained to vote for a party politician‖ and not just a candidate. They are elected not because of their personality, personal achievements or personal policy preferences, but because they are party's candidates. Thus, the electorate faces a restricted choice.

Right to Recall can be touted as a step towards direct democracy, here the power to recall an elected representative lies directly with the electorates. On a motion passed by the minimum number of the electorates the elected representative can be removed. This will ensure greater accountability and transparency in their words and actions.

Former Lok Sabha speaker, Somnath Chatterjee, in his address at the plenary session on Right to Recall as a Strategy for Enforcing Greater Accountability of Parliaments to the People at the Commonwealth Parliamentary Conference, 2007, vehemently supported the subject as an integral part of the democratic process.[17] He emphasized that the members of the Parliament have a duty to conform to the accepted behaviour and conduct both inside and outside the walls of the Parliament. They must maintain high standards of morality, dignity, decency and values in the

[16] Vinod Bhanu, Recall of Parliamentarians: A Prospective Accountability, *Economic and Political Weekly available at* http://www.epw.in/system/files/pdf/2007_42/52/Recall_of_Parliamentarians_A_Prospective_Accountability.pdf (last accessed on 13th April, 2018)

[17] *Available at* http://speakerloksabha.nic.in/speech/SpeechDetails.asp?SpeechId=239 (last accessed on 3rd May, 2018)

public sphere. Through their votes, the common people place their confidence in their representatives and it is the latter's responsibility henceforth, to deliver their duties with complete dedication and commitment.

However, over the last few years, numerous incidents of shirking from their roles and unethical and unacceptable behaviour of the democratically elected representatives have come to light. For example, the Coalgate scam; the 2G spectrum case; former BCCI Chairman's involvement in IPL match-fixing; Sexual Harassment allegations; offering rewards on slicing of nose of actresses; passing off comments on the caste that one hails from; major financial scams; allegation physical assault of Chief Secretary of NCT of Delhi to name a few. Such instances are not a recent development in our society, but it is the need of the hour to bring about mechanisms to eliminate such vices. Direct democracy can be explored as an alternative to eradicate them.

(ii) Horizontal accountability vs. Vertical accountability

Horizontal accountability is brought about by regulatory and supervisory bodies which are composed of officials acting on behalf of the public. On the other hand, vertical accountability is mandated by the public directly through a variety of mechanisms like elections, complaint procedures, legal routes, civil society organizations, etc. Recall is quintessentially a "post-election" measure to ensure vertical accountability, however, there are already in existence various neglected "pre-election" measures which aim to achieve the same purpose. These pre-election measures are comprehensive enough to realise the cherished goal of "good governance", however, there is a serious problem with the implementation of the same.[18] However, it is typically accepted that effective accountability can be ensured only by a combination of both horizontal and vertical accountability measures.

The current system is seriously flawed because voters have to wait for five years for electoral sanction to remove a person from office even if he shirks accountability. The Right to Recall can be an effective method by

[18] *Supra* note 12.

which accountability is ensure in a democratic state. Recall elections will send a strong message to delinquent legislators.[19] It is only fair to de-elect such elected representatives who do not fulfill the purpose of them being elected.

(iii) Potential hurdles

(a) Lack of Political alertness?

Right to Recall has been considered unviable for India. It has been a concern that voters might not always have the capacity or information to make informed decisions about the issue at stake, and instead may make ill-informed decisions based on partial knowledge.[20] It has been thus, argued that sound functioning of Right to Recall can be warranted only when the electorate are "politically alert". This opposition might not have been completely unjustified. Right to Recall involves increased and informed participation of people during and after the election process. The average adult literacy rate in India is 74.04% - much lower than the world average of 86.3%. That there is a positive correlation between "being literate" and "being politically alert" is almost incontestable.

(b) *Concern of being misused*

One of the major arguments against the Right to Recall is the possibility of potential abuses of this power. It can be misused by special interest groups with money power and influence, and genuine politicians may become victims of this power.[21] In states like Madhya Pradesh, Rajasthan and Chattisgarh, people have been exercising their Right to Recall, granted at the Panchayat level by their respective State governments. Between 2000 and 2011, Madhya Pradesh witnessed as many as 27 recall motions out of

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[19] Anup Sahu, Recall the Lawmakers Who Are Lawbreakers, *Economic and Political Weekly, available at* http://www.epw.in/system/files/pdf/2011_46/17/Recall_the_Lawmakers_Who_Are_Lawbreakers.pdf (last accessed on 10th June, 2018)

[20] An Electoral Processes Team Working Paper, Issues relating to the referendum mechanism, International IDEA *September 2004* available at http://www.oldsite.idea.int/news/upload/ddemocracy_referendums.pdf (last accessed on 13th May, 2018)

[21] *Supra* note 19.

which 14 of the previously elected representatives were replaced.[22] It is definite that the Right to Recall is in people's interest but there is scope of its misuse.

One such case surfaced in Patiala, Punjab in 2008. The panchayat in Dewangarh had one place reserved for a male candidate from the Scheduled Castes. Jaswinder Singh, a brick kiln worker was elected Sarpanch that year. The other four panchs boycotted the Panchayat meetings completely during the course of two and half years. The people of the village were also not accepting of an SC Sarpanch — being committed to the members of the affluent Jat-Sikh community. As soon as the mandatory half-term was over, the other four Panchayat members passed a no-confidence motion against Jaswinder Singh and removed him. Many people have opposed Right to Recall stating that it is against the poor and will only serve the influential calling it against the spirit of democracy

(c) Further Challenges

Being the largest democracy in the world, the election process in India is a grand affair at all levels of the government. The amount of money, time and effort consumed throughout the process of elections is immense. This raises questions about the feasibility of recall elections throughout the nation as the cost of elections is very large. Acknowledging this problem, the Right to Recall can be defended by arguing that over the longer period of time, the number of recall motions are expected to decrease assuming that the recall mechanism is implemented efficiently and is successful in achieving the desired ends transparency and accountability in the governance of our country to some extent.

The most vital argument against direct democracy is that it can result in excessive democracy. This applies to the Right to Recall as well since this might threaten the independence of the representatives as they will be under the perpetual fear of being recalled. This would lead to undermining the role and importance of the elected representatives. In order to stay in office and

[22] Right to Recall?, Hindustan Times Delhi, *available at* http://www.hindustantimes.com/delhi/right-to-recall/story-OiDOYf01s3zuHGIYIAesAL.html (last accessed on 23rd May, 2018)

avoid getting recalled, the representatives might be coerced to put in place populist policies to keep their electorates happy. Thus, this right would be a hindrance to policy changes necessary for development if such policies are tough and unpopular. This would discourage the representatives from using their own judgement and tying up of representatives to their electorates is inherently detrimental to the larger public interest.[23]

4. ROLE OF MEDIA

The Right to Recall might seem to be a pre-mature move for India to certain people but the rationale and the objectives that it proposes to achieve are justified and important for the smooth functioning of the government. There is a need to address the delinquency and misconduct of the people in power and Right to Recall, being successfully exercised at the local government level in a few states, proves that it might be successful in achieving the same, provided certain important plugins are made in the system. One of the major plugs in required in this system is the Information gap, owing to the literacy rate and to political alertness of the citizens.

This information gap can be tapered by the presence of a sensible, powerful, reliable and responsible media. Media plays a crucial role in keeping the people informed about the functioning of the government and its members. This is important because the general public should not be at the behest of being misguided due to lack of correct and complete information during both, pre-election and post-election periods. A major inadequacy in our country's democratic exercise is that people or groups that get directly affected by any policy or reform measure, do not express their hardships in order to make their voices heard, and even if they want to, there are no proper redressal or compliant mechanism which can be resorted to, and challenge the policy step. Media, as rightly called the fourth pillar of democracy, has made significant progress during the last decade, but still has a long way to go in order to achieve the aforementioned qualifications.

[23] *Supra* note 12.

Excerpting from a recent interview of Josh Earnest, White House Press Secretary (2014-17), in which he talks about the importance of efficient and responsible journalism. Our (United States of America) democracy benefits from having a professional, independent Press Corps that covers the White House and holds people in positions of authority accountable for what they are doing and demands transparency. Those are all good things and those are things that we should be looking to invest in and augment, not looking for ways to undermine it. There was never a situation in which the briefing room could not accommodate all of those people who were there to attend a White House briefing, even on the very first day. Reporters are going to think carefully about what they write if they know they have to look me in the eye the next day. And I certainly, and my staff, who work at the White House are going to be careful, to be accurate and to be honest and to be factual if they know they are going to be looking at journalists in the eye the next day. So that's a good thing and I think continuing to facilitate that kind of interpersonal face to face interaction on a daily basis is a good thing and something that's worth investing in. White House journalists have a responsibility to show up every day, demand accountability, demand transparency and to never be satisfied with what they're given.[24]

There is a widening disconnect between public interest and governance, which in turn leads to erosion of our faith in the institutions of democracy. Right to Recall will add new dimension to the concept of transparency and accountability which will restore our faith in the institutions. Media, The Four Estate of Democracy can play a very vital role in ensuring that the public is politically updated. Legislators will always be vigilant about their actions and activities and ensure that they are involved in the working for the benefit of public.

5. CONCLUSION

Accountability is a very important tool in ensuring that a democracy functions smoothly, the representatives elected through the democratic process have power and thus must be held responsible if they indulge in

[24] Josh earnest on the Future of The Press/White House Relationship, NowThis Politics, *available at* https://www.facebook.com/pg/NowThisPolitics/videos/?ref=page_internal (last accessed on 23rd May, 2018).

misuse of their power or are non-performing in their responsibilities. India is a developing country plagued with various numerous problems like any other developing nation. Corruption, crime and injustice hinder the potential development of our nation.

It should be our endeavour to establish Government which is limited- limited not in responsibility, but limited by the rule of law, by the discipline of the constitution and limited in its capacity.

Dr. Ram Manohar Lohiya once remarked:
"A lively nation does not wait for five years."

Reading of Right to Recall as an intrinsic part of the Right to Vote is an attractive idea in theory but we do understand that Right to Recall being advocated by us is not flawless but there is a need to consider 'out of box' alternatives[25] as these would encourage us to brainstorm on solutions to the existing problems.

25 Vikram S. Mehta, "The Fourth Political Revolution?", 5th March 2018, Indian Express

OFFENCES AGAINST STATE WITH SPECIAL REFERENCE TO SEDITION LAWS IN INDIA

Dr. Mohammad Azvar Khan*

Abstract

The law of sedition in India has assumed controversial importance largely because of change in body politic and specially because of constitutional provision of freedom of speech and expression guaranteed as a fundamental right under Article 19(1)(i) of the constitution. The law of sedition is contained in section 124A, I.P.C. and 153A, I.P.C. and in other Statutes. However, the general statement of law is similar in all the provisions and can be well understood from looking at the provisions given in section 124A, I.P.C.[1] Section 124A of the Indian Penal Code, which defines the offence of "sedition", is a colonial-era relic. It was enacted by the British to repress India's independence struggle. Mahatma Gandhi, who was imprisoned under the law, called it the prince among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen. Courts have ruled that any expression must involve incitement to imminent violence for it to amount to sedition. But the law has been used again and again to arrest journalists, activists and human rights defenders simply for expressing critical views. The present paper aims to assess the colonial era sedition law in the present scenario.

1. INTRODUCTION

The sedition law is excessively vague and broad, making it an easy tool to stifle dissent and debate. There is no good way to apply Section 124A. It does not comply with international human rights law. And it goes against India's tradition of tolerance.[2] If we need to analyse sedition in details, we need to take accounts of various factors to look into the problem. The factors responsible for sedition include socio-economic status,

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[1] K.D Gaur, *The Indian Penal Code*, 226 (2009).

[2] https://amnesty.org.in/take-action/demand-repeal-sedition-law/ (Last visited on 31-10-2019).

education, moral values, cultural influence, and religious practices & preach by religious heads and a combination of all these factors. We also need to examine the meaning of various words, various rights vested on the citizens of the country and various duties imposed on us by our Indian constitution in the light of sedition. Now, let’s try to analyse sedition from various perspectives as mentioned.

But on July 03, 2019, the Ministry of Home Affairs through a written statement informed the Rajya Sabha that the present Government has no plans on amending the laws on sedition in the country so as to ensure that the Government has effective means to combat anti-national, secessionist and terrorist elements. In an election, where national security was a huge factor for the political parties, a stance that was taken by certain political parties was that they would like to amend the present sedition laws in our country, whereas, the ruling party’s stand was that they would like to toughen the existing sedition laws.[3]

2. MEANING AND INTERPRETATION OF SEDITION LAW

Sedition’ in its simpler meaning is any act or speech that leads to insurrection against the State. According to Section 124A, Indian Penal Code, 1860, sedition is a cognizable offence against the State by any individual whoever, by words or by signs or by visible representation or otherwise brings or attempts to bring into hatred or contempt or excites or attempts to excite disaffection (includes disloyalty and all feelings of enmity) towards the Government established by law in India and such offence is punishable maximally by imprisonment for life and fine. The Indian Penal Code defines sedition (Section 124A) as an offence committed when "any person by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the government established by law in India". Disaffection includes disloyalty and all feelings of enmity. However, comments without exciting or

[3]http://www.mondaq.com/india/x/833078/Constitutional+Administrative+Law/Tracing+the+history+of+sedition+in+India (Last visited on 31-10-2019).

attempting to excite hatred, contempt or disaffection, will not constitute an offence under this section.

Punishment for the offence of Sedition is a non-bailable offence. Punishment under the Section 124A ranges from imprisonment up to three years to a life term, to which fine may be added. A person charged under this law is barred from a government job. They have to live without their passport and must produce themselves in the court at all times as and when required.

3. HISTORY OF SEDITION LAW IN INDIA

Section 124A did not make it into the IPC until 1870 (although a section corresponding to it was present in Thomas Macaulay's Draft Penal Code in 1835). It was brought in 10 years after the IPC was introduced, possibly, to counter the surging Wahabi activities in the subcontinent. At that point, it was a law against "exciting disaffection." The first case was registered, in 1891, when the editor of a newspaper called Bangobasi was booked for publishing an article criticising an "Age of Consent Bill." The jury could not reach a unanimous verdict and the judge, in that case, refused to accept any verdict that was not unanimous. The editor was released on bail and after he issued an apology, charges against him were dropped.

The trial that changed the effect of section 124A was that of Bal Gangadhar Tilak in 1897. The British government claimed, according to an article in the Economic and Political Weekly, that Tilak's speeches on the killing of Afzal Khan by Shivaji, had prompted the murder of two British officers in Pune. Newly promoted Justice James Strachey presided over this trial, and broadened the scope of section 124A in the proceedings by equating "disaffection" to "disloyalty." He interpreted that the term "feelings of disaffection" meant hatred, enmity, dislike, hostility, contempt, and every form of ill will towards the government. Tilak was charged with sedition. He was released a year later, following German economist and jurist, Max Weber's intervention. But on the basis of Strachey's interpretation, the section was used repeatedly against nationalist leaders by the colonial government. Tilak himself went on to face the same charge

again, twice and ended up spending six years in prison for an editorial published in his newspaper, Keasari.

In 1922, Mohandas Karamchand Gandhi was brought to court for his articles in Young India magazine. Gandhi famously denounced the law against sedition in the court: "Section 124A under which I am happily charged is perhaps the prince among the political sections of the IPC designed to suppress the liberty of the citizen." The issue of sedition was anxiously discussed during constituent assembly debates.

4. SEDITION LAW IN INDIA AFTER INDEPENDENCE

On 29 April 1947, when laying out the Rights of Freedom, Vallabhbhai Patel who went on to become the home minister of India made an exception for "seditious, obscene, blasphemous, slanderous, libellous or defamatory" language. The Communist Party of India leader, Somnath Lahiri opposed the use of the word seditious. "As far as I know, even in England, a speech, however seditious it may be, is never considered a crime unless an overt act is done," Lahiri said. The members continued debating, coming back to the question of sedition intermittently. Finally, an amendment was moved to drop the word and not allow it to infringe upon the freedom of speech and expression. On 2 December 1948, senior Congress leader, Seth Govind Das spoke jubilantly in the house:

> The restriction imposed later on in respect of the extent of this right, contains the word 'sedition.' An amendment has been moved here in regard to that. It is a matter of great pleasure that it seeks the deletion of the word 'sedition.' I believe they remember that this section was specially framed for securing the conviction of Lokamanya Bal Gangadhar Tilak. Since then, many of us have been convicted under this section. In this connection many things that happened to me come to my mind. I mean to say that there must be many Members of this House who must have been sentenced under this article to undergo long periods of imprisonment. It is a matter

> of pleasure that we will now have freedom of speech and expression under this sub-clause and the word 'sedition' is also going to disappear.

The word did indeed disappear from the constitution when it was adopted on 26 November 1949, but section 124A stayed in the Indian Penal Code. Then, in 1950, two Supreme Court judgements led the government to introduce the much-maligned first amendment. The first case involved objectionable material in Organiser, a magazine run by the Rashtriya Swayamsevak Sangh, the second was against a magazine called Cross Roads, for criticising the government. In both the cases, the Supreme Court sided with the government. It asked the editor of organiser to clear provocative content with a regulating authority, and banned Cross Roads. In light of these judgements, Jawaharlal Nehru brought in the first amendment.

Later, speaking in the parliament, Nehru specified that the amendment does not validate laws such as sedition. “Take again Section 124-A of the Indian Penal Code. Now so far as I am concerned that particular section is highly objectionable and obnoxious and it should have no place both for practical and historical reasons, if you like, in any body of laws that we might pass. The sooner we get rid of it the better,” he said. Even as the section stayed in the IPC, these words of Nehru guided the courts. Three judgements regarding section 124A were passed in the 1950s in high courts, and all of them acquitted the accused.

In post-independence India, however, the judgement with the most impact came in January 1962. In the case of *Kedarnath v. State of Bihar*[4] the constitutional bench of the Supreme Court defined the scope of sedition for the first time and this definition has been taken as precedent for all matters pertaining to Section 124A since. Until Independence, there were broadly two views on Section 124A that of the judgements given by the Federal Court, and that of the judgements passed by the Privy Council (the highest court of appeal for commonwealth countries, they were abolished in India following the passing of abolition of privy council jurisdiction act, in 1949). The former asserted that public disorder or the reasonable anticipation or likelihood of public disorder is the gist of the offence; the latter said that the speech itself, irrespective of whether or not it leads to an

[4] AIR 1962 SC 955.

incident, could be an offence. Taking in account Article 19A (the freedom of speech and expression) of the constitution, the bench observed in the judgement's headnote, "If the view taken by the Federal Court was accepted, Section 124A would be constitutional but if the view of the Privy Council was accepted it would be unconstitutional." Later, it states that it stands with the Federal Court, and the constitution.

Kedarnath Singh was convicted by the high court for his speech that lampooned the Crime Investigation Department and the Congress party. "To-day the dogs of CID are loitering around Barauni. Many official dogs are sitting even in this meeting. The people of India drove out the Britishers from this country and elected these Congress goondas to the gaddi." He accused the Congress of corruption, black-marketing and tyranny and talked about a revolution that would overthrow capitalists, zamindars and Congress leaders. The constitutional bench upheld the punishment given to Kedarnath by the high court but at the same time limited the section's scope. Towards the end, the judgement states that the section penalises words that reveal intent or tendency to disturb law and order or that seem to incite violence. And then, it draws a line: "It has been contended that a person who makes a very strong speech or uses very vigorous words in a writing directed to a very strong criticism of measures of Government or acts of public officials, might also come within the ambit of the penal section. But, in our opinion, such words written or spoken would be outside the scope of the section." With this case, the court upheld the constitutionality of the sedition law, but also curtailed its scope in its application.[5] In *Dr. Binayak Sen v. State of Chhattisgarh*[6] Dr. Binayak Sen was charged for sedition, amongst other things, for allegedly aiding naxalites, and sentenced to life imprisonment at the Session Court in Raipur. He was accused of helping insurgents, who were very active in the region at the time, by passing notes from a Maoist prisoner that was his patient to someone outside the jail. Denying all charges against him, Dr. Sen stated he was under the constant supervision of prison officials during

[5] https://caravanmagazine.in/vantage/section-124A-sedition-jnu-protests (Last visited on 1-11-2019).

[6] Criminal Appeal No 20 of 2011 & Criminal Appeal No. 54 of 2011.

his treatments so such an action would not be possible. It was his criticism of the killings committed by a vigilante group that prompted his arrest and subsequent accusations, Dr. Sen stated to The Wall Street Journal. Salwa Judum, is the group he's referring to, designed and supported by the state government of Chhattisgarh to curb the insurgency in the villages of indigenous tribes where it thrived, according to them. But Dr. Sen, who's a human-rights activist apart from being a paediatrician, claims that the groups real jobs to clear village land that's rich in iron ore, bauxite and diamonds for it to be quarried.

In *Aseem Trivedi v. State of Maharashtra*[7] Controversial political cartoonist and activist, Aseem Trivedi, best known for his anti-corruption campaign, Cartoons Against Corruption, was arrested on charges of sedition, in 2010. The complaint, filed by Amit Katarnayea who is a legal advisor for a Mumbai-based NGO, condemns Trivedi's display of 'insulting and derogatory' sketches, that depicted the Parliament as a commode and the National Emblem in a negative manner having replaced the lions with rabid wolves, during an Anna Hazare protest against corruption, as well as posting them on social networking sites.

As reported by India Today, members of India Against Corruption (IAC) claimed that the cases were foisted on Trivedi by the government, as the government was angry with their anti-corruption crusade. Mayank Gandhi of the IAC said, "The case has been registered simply because Aseem had participated in the BKC protest organized by Anna Hazare and had raised his voice against corruption. So the government is trying to scuttle his protest in this manner." Trivedi's case seriously questioned freedom of speech and expression in the country we a young man got arrested for lampooning evident corruption in the country. It's acceptable that some may find his cartoon offensive and in bad taste, but sentencing a person to life in prison for such an act is too extreme.

In *Shreya Singhal v. Union of India*[8] This case is monumental in India's jurisprudence as its judgement took down Section 66A of the IT Act, sought to be in violation of Article 19 (1) of the Constitution of India that guarantees the right to freedom of speech and expression to all citizens.

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[7] Criminal, Public Interest Litigation No. 3 of 2105 (Bom.).
[8] Writ Petition (Criminal) No.167 of 2012.

A student of law at the time, Shreya Singhal filed a petition in 2012 seeking an amendment in the section 66A, triggered by the arrest of two young girls in Mumbai, for a post on Facebook that was critical of the shutdown of the city after the death of Shiv Sena leader, Bal Thackeray; one of them posted the comment, the other merely 'liked' it.

What's critical about this judgement is the court's ruling that a person could not be tried for sedition unless their speech, however, "unpopular," offensive or inappropriate, had an established connection with any provocation to violence or disruption in public order. The Supreme Court distinguished between "advocacy" and "incitement", stating that only the latter is punishable by law. The Supreme Court judgement came after three years of the petition's filing in 2015, but Shreya did not deter. "I did feel saddened in between but never lost hope. I was also hurt to see that despite the matter pending before the SC, police continued to arrest people under section 66A of the IT act. What was heartening was that the arrests did not deter people from posting comments," Shreya told Hindustan Times.[9] The "anti-nationalism" that the three JNU students are accused of may be perceived as such, but as Fali Nariman, the constitutional jurist and senior advocate to the Supreme Court, points out, "mere expressions of hate, and even contempt for one's government, are not sedition."[10]

[9]https://homegrown.co.in/article/47919/5-landmark-cases-that-changed-the-way-we-look-at-indias-sedition-law (Last visited on 3.12.2019).

[10] Supra note 5.

Table 1.1

Offence against the State- 2014-2016

[Source: National Crimes Record Bureau report 2016]

S. No	**State/UT**	**2014**	**2015**	**2016**	**Percentage State Share to All–India (2016)**	**Rank Based on Incidence/ % share (2016)**	**Mid-Year Projected Population (in Lakhs) (2016) +**	**Rate of Total Cognizable Crimes (2016) ++**	**Rank Based on Crime Rate (2016)**
1	2	3	4	5	6	7	8	9	10
1	Andhra Pradesh	18	44	40	0.6	18	517.4	0.1	26
2	Arunachal Pradesh	1	7	10	0.1	25	13.2	0.8	10
3	Assam	264	212	343	4.9	4	325.8	1.1	7
4	Bihar	98	202	207	3.0	7	1043.0	0.2	18
5	Chhattisgarh	14	16	9	0.1	26	259.9	0.0	30
6	Goa	38	19	11	0.2	24	19.9	0.6	13
7	Gujrat	30	46	44	0.6	17	630.8	0.1	27
8	Haryana	1051	536	1286	18.4	3	276.1	4.7	2
9	H P	71	70	58	0.8	15	71.2	0.8	9
10	J&K	54	77	185	2.6	8	124.6	1.5	5
11	Jharkhand	108	159	106	1.5	11	338.0	0.3	15

12	Karnataka	49	87	148	2.1	10	625.7	0.2	17
13	Kerala	281	343	317	4.5	6	357.6	0.9	8
14	Madhya Pradesh	21	14	21	0.3	22	782.6	0.0	31
15	Maharashtra	237	162	178	2.5	9	1205.9	0.1	20
16	Manipur	640	548	335	4.8	5	26.0	12.9	1
17	Meghalaya	48	32	51	0.7	16	27.8	1.8	4
18	Mizoram	1	7	0	0.0	-	10.7	0.0	-
19	Nagaland	0	12	15	0.2	23	23.9	0.6	12
20	Odisha	13	37	25	0.4	20	425.9	0.1	28
21	Punjab	44	29	32	0.5	19	292.0	0.1	23
22	Rajasthan	116	113	82	1.2	14	732.8	0.1	21
23	Sikkim	4	1	0	0.0	-	6.5	0.0	-
24	Tamil Nadu	1612	1674	1827	26.2	1	695,2	2.6	3
25	Telangana	24	63	90	1.3	13	368.5	0.2	16
26	Tripura	2	9	7	0.1	28	38.4	0.2	19
27	Uttar Pradesh	429	1346	1414	20.2	2	2192.4	0.6	11
28	Uttarakhand	5	8	4	0.1	28	38.4	0.2	19
29	West Bengal	99	148	102	1.5	12	938.3	0.1	24
Total States		5372	6021	6947	99.4		12476.2	0.6	

Union Territories									
30	A& N Islands	1	3	7	01	29	5.5	1.3	6
31	Chandigarh	0	0	2	0.0	31	18.0	0.1	22
32	D& N Haveli	0	0	0	0.0	-	4.3	0.0	-
33	Daman & Diu	0	0	0	0.0	-	3.3	0.0	-
34	Delhi UT	11	14	22	0.3	21	214.9	0.1	25
35	Lakshadweep	0	0	0	0.0	-	0.8	0.0	-
36	Puducherry	12	2	8	0.1	27	16.8	0.5	14
Total UTs		24	19	39	0.6		263.7	0.1	
Total All India		5396	6040	6986	100.0		12739.9	0.5	

The table 1.1 shows that the highest number of cases registered in the years of 2014, 2015 and 2016 in state of Tamil Nadu in all over India. The table also shows that lowest number of cases registered 0 in the year of 2014 in Nagaland. In the year 2015 the lowest number of cases registered 7, 7 in states of Arunachal Pradesh and Mizoram respectively. Although none of the case registered in the year of 2016 under the state of Mizoram. As far as union territories are concern the highest number of cases registered in these years was in Delhi. The lowest number of cases 0 registered in these years under the union territories of Chandigarh, D & N Haveli, Daman& Diu and Lakshadweep.

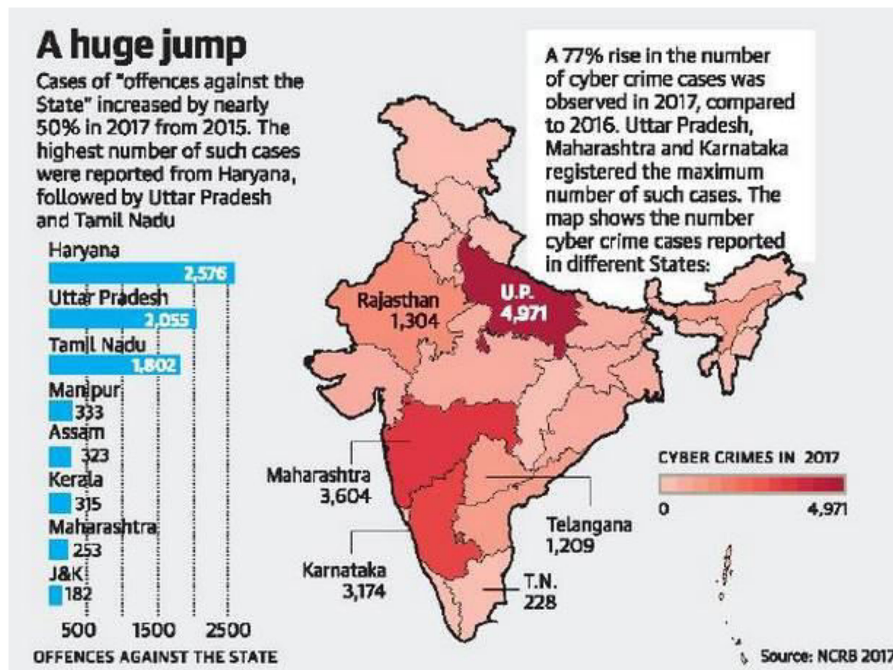
5. OFFENCES AGAINST STATE REGISTERED IN THE YEAR OF 2017

The 2017 Crime in India report, released by the National Crime Records Bureau (NCRB), saw a 30% jump in cases recorded as "offences against the State." The total number of cases registered in 2017 stood at 9,013 compared to 6,986 cases registered in 2016. The maximum number of these cases were reported from Haryana (2,576), Uttar Pradesh (2,055) and Tamil Nadu (1,802). While 51 cases of sedition were reported in 2017, there were 24 cases related to imputation and assertions prejudicial to national

integration. Under the Official Secrets Act, 18 cases were reported and 901 cases were registered under the Unlawful Activities (Prevention) Act.

In 2017, the police across India was investigating 16,170 cases of crimes against the State, of this 7,154 were pending since 2016. As many as 105 cases of sedition and 3,550 cases registered under UAPA were pending investigation from the previous years.

The total number of such cases committed by northeast insurgents stood at 421, with the maximum 317 reported from Manipur. Those by Left Wing Extremists stood at 652 and that committed by "jihadi terrorists" was 377.



Source: National Crimes Record Bureau report 2017

More than 21,000 incidents of cyber-crimes were reported in 2017, a jump from the 12,317 such cases reported in the previous year. Of these, cyber-crimes reported against women stood at 4,242.

The NCRB report, published after a delay of two years, included 88 new categories including sexual harassment of women at the workplace/public transport, offences relating to elections, obscene acts at public places, circulation of fake news, chit funds, cases under the

Prevention of Corruption Act and Mental Health Act, noise pollution and defacement of public property. A new category called "anti-national elements" has been added which includes details of jihadi terrorists, Left Wing Extremism and North East insurgents.[11]

6. CONCLUSION

Notably, those charged and convicted under the law include a number of nationalists like Bal Gangadhar Tilak, Annie Besant, Mahatma Gandhi, Maulana Abul Kalam Azad, Jawaharlal Nehru and several others. Given the rampant misuse of the law during the colonial era, one would have thought that the makers of independent India would have struck it down from the statute book. Unfortunately, that was not to be. And not only does it continue to be in our statute book, but it has also frequently been used against dissenting citizens.

Sedition has become a convenient legal tool to stifle any voice or perspective that goes against what the State perceives as nationalism or patriotism. An act is seditious if your act results in people feeling hatred or contempt towards the government. The Supreme Court has held in various judgements that the law of sedition is only applicable when (i) a person causes violence, or (ii) a person encourages people to create violence. So, for sedition, it's very important to make a distinction between genuine criticism of the government and statements which seek to overthrow the government. As discussed in *Romesh Thapar v State of Maharashtra*,[12] this is a distinction that the framers of the Constitution were keen to clarify. As given in the case, the deletion of the word "sedition" from the draft Article 13(2) which finally became Article. Article 19, which gives the right to freedom of speech, shows that mere criticism of the government was not to be regarded as a ground to restrict freedom of speech and expression, unless it could lead to issues related to public order, security and the existence of the government. India is the largest democracy of the world and the right to free speech and expression is an essential ingredient of democracy. The

[11] https://www.thehindu.com/news/national/30-jump-in-crimes-against-state-ncrb/article29771116.ece (Last visited on 2-11-2109).

[12] AIR 1962 SC 955.

expression or thought that is not in consonance with the policy of the government of the day should not be considered as sedition. The Law Commission has rightly said, "An expression of frustration over the state of affairs cannot be treated as sedition". If the country is not open to positive criticism, there would be no difference between the pre- and post-Independence eras. Of course, it is essential to protect national integrity. Given the legal opinion and the views of the government in favour of the law, it is unlikely that Section 124A will be scrapped soon. However, the section should not be misused as a tool to curb free speech. The SC caveat, given in Kedar Nath case, on prosecution under the law can check its misuse.

PERMANENT ESTABLISHMENTS: THE CURIOUS CASE OF AMALGAMATED COMPANIES

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Abstract

Permanent Establishments ("PE") form a part of the discourse on Double Taxation Avoidance Agreements ("DTAA"). The concept encapsulates an interesting shift of tax liabilities from the source to the resident country and vice versa. Loosely defined, a PE is of such a nature that it would amount to a virtual projection of a foreign enterprise of one country into the soil of another country.[1]

According to the OECD Articles of the Model Convention with respect to Taxes on Income and Capital[2] ("the Convention"), a PE takes a plethora of forms.[3] However, the paper shall be restricted to agency PE's, primarily, amalgamated agency PE's. Pursuant to a scheme of amalgamation after transacting with the foreign enterprise, the grounds for agency PE and exceptions for the same merit attention. Neither does the OECD convention nor do majority of the DTAA's provide a comprehensive text for reference to conclusively define an agency PE in this regard.

Part 1 of the paper provides the definition of a PE and its domestic corollary; business connection. *Part 2* deals with the jurisdiction of taxation with respect to the taxation of the profits of the foreign enterprise. *Part 3* analyses the relationship between the ordinary course of business of amalgamated PEs and the activities it performs on behalf of the foreign enterprise, and the evaluation of commercial independency on the basis of profits and gross receipts. *Part 4* evaluates the implications of the General Anti Avoidance Rules ("GAAR") which seeks to provide resolve to

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[1] *CIT* v. *Visakhapatnam Port Trust*, (1983)144 ITR 146, ¶53.

[2] Organization for Economic Cooperation and Development, Model Tax Convention on Income and on Capital, (January, 2003).

[3] See, *Id* at art. 5.

arrangements of tax evasion and avoidance. *Part 5* provides certain points of recommendations for effective implementation of the GAAR.

1. DEFINING AGENCY PERMANENT ESTABLISHMENTS

A joint reading of Article 5 (5)[4] and Article 5 (6)[5] of the convention maintains four primary grounds for establishment of an Agency PE. *Firstly*, when a person is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts on behalf of the enterprise, excluding the activities mentioned in paragraph 4. The OECD Base Erosion and Profit Shifting ("BEPS") Action 7[6] extends the aforesaid to "concludes contracts or plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise" as the test of establishing a PE.[7] Thus, a country that chooses to be bound by BEPS Action 7, the mere formality of signing of the contract would no longer serve as the sole criterion for the conclusion of contract that establishes a PE.

Secondly, Paragraph 4 (f) of Article 5 maintains that the overall activity of the fixed place of business resulting from the combinations enumerated under subparagraphs (a) to (e) must be of a preparatory or auxiliary character. It is well settled in *TVM Ltd.* v. *Commissioner of Income-Tax*[8]that when an "agent" fails to come up to the standard of independence referred to in paragraph 5, the issue regarding permanent establishment is not closed but has to be resolved in terms of paragraph 4. Thus, the activities of the agent must be proved to be not of a preparatory or auxiliary character. BEPS Action 7 maintains exceptions (Paragraph 4.1) to Paragraph 4 of Article 5 as a new anti-fragmentation paragraph.[9]

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[4] *Id* at art. 5 ¶ 5.
[5] *Id* at art. 5 ¶ 6.
[6] Organization for Economic Cooperation and Development, Additional Guidance on the Attribution of Profits to Permanent Establishments, BEPS Action 7, *available at*: www.oecd.org/tax/beps/additional-guidance-attribution-of-profits-to-a-permanent-establishment-under-bepsaction7.htm, (last visited on June 10, 2018).
[7] *Id* at ¶28.
[8] (1999) 237 ITR 230 AAR, ¶18.
[9] See, *supra* note 6 at ¶7.

Thirdly, if Article 5 (4) applies to the activities of an agent too, Article 5 (1)[10] necessitates that the business of an enterprise be carried out wholly or partly by the agent. *Lastly*, a broker, general commission agent, or any other agent of an independent status, must prove to have not acted in its ordinary course of business. [11]

Agents under the Income Tax Act, 1961

Section 163 of the Act defines the grounds for an "agent" in relation to a non-resident.[12] Section 163 (b) maintains that an agent shall include a person who has a business connection with the non-resident.[13] The term "business connection" under the said section is the attracting provision that brings the agent under liability of the Act for income deemed to accrue or arise through or from a business connection with the foreign enterprise u/s 9 (1) (i) of the Act.[14]

The Act enumerates a list of activities that establish a business connection between the Indian resident and the non- resident under Explanation 2 of Section 9 of the Act.[15] A person is not deemed to be an statutory agent with respect to a business connection if ; (i) he acts in the ordinary course of business,[16] (ii) does not work wholly or mainly on behalf of the non-resident,[17] and (iii) does not have a controlling interest in the principal non-resident.[18]

Burden of Proof on the Revenue Authorities

> It is settled law that where there is no liability under the Indian law, there is no need for considering the further question, whether the same set of facts could justify the inference of permanent

[10] See, *supra* note 2 at art. 5 ¶1.
[11] *Id* at art. 5 ¶6.
[12] Income Tax Act, 1961 (Act 43 of 1961), s. 163 (1).
[13] See, *Id* at Explanation to s. 163.
[14] *Id* at s. 5 (1) (b) r/w s. 9 (1) (i).
[15] See, *Id* at Explanation 2, s. 9.
[16] *Id* at Proviso 1, Explanation 2, s. 9.
[17] *Id* at Proviso 2, Explanation 2, s. 9.
[18] *Ibid.*

establishment.[19] Thus, the revenue authorities first bears the burden of proof for an agent u/s 163 of the Income Tax Act, 1961 ("the Act") and then under the Articles of the convention or the relevant DTAA's for the establishment of a PE, if the latter is necessary.

However, in *Deputy Director of Income Tax, International Taxation, Range 2 (1)* v. *Set Satellite (Singapore) (Pte.) (ltd.)*[20] it was held that if a dependent agent is itself a PE, one cannot have a PE as a result of having a dependent agent. The commentary on the Articles of the Model Tax Convention[21] ("the commentary") also maintains that it would not be in the best interest of international economic relations to deem any dependent person as a PE for the enterprise.[22] A representation of the argument is maintained under Article 5 (7) of the OECD of the convention. It holds *inter alia* that the fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State shall not of itself constitute a permanent establishment of the other.[23] In other words, the mere existence of a principal-agent relationship is not enough to establish a PE.

Thus, the revenue authorities in establishing a business connection with the non-resident u/s 163 of the Act or a degree of dependence[24] illustrating such a connection, also have to satisfy the existence of a PE under the Articles of the convention or the relevant DTAA's. The inference to be drawn here is that an agent dependent on the foreign enterprise is not conclusive enough to prove the existence of a PE. The degree of such dependence is of paramount importance.

2. THE JURISDICTION OF TAXATION

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[19] *Western Union Financial Services* v. *Department Of Income Tax* IT A nos. 1572 to 1574/D/2010, ¶21.

[20] (2007) 106 ITD 175 Mum, ¶8.

[21] OECD Model Treaty and Commentaries (Condensed and Full Versions), Commentaries on the Articles of the Model Tax Convention., *available at*: https://www.oecd.org/tax/treaties/1914467.pdf (last visited on June 15, 2018)

[22] *Id* at Art.5 ¶5, ¶32.

[23] *Supra* note 2 at art 5 ¶ 7.

[24] See, *R.D. Agarwal* v. *Commissioner of Income Tax* (1965) 56 ITR 20.

This OECD Convention applies to persons who are residents of one or both of the Contracting States.[25] The terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State respectively.[26] Article 7 (1) of the OECD Convention Reads:

> *"The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment."*[27]

It is thus through a PE and the profits attributable to such a PE that the profits are taxable to the resident of the other contracting State. When the term "may be taxed" is used in a treaty, there is an automatic exclusion of other State. [28] The exclusion here is the rate of taxation, in the resident or non-resident soil, at which the relevant transactions between the agent and the foreign enterprise are to be taxed.

What is taxable under Article 7 is the profits earned by the foreign enterprise. Under Act, the taxable unit is the foreign enterprise, but the quantum of income taxable is income attributable to the PE of the foreign enterprise in India.[29] The implication here is that if the income is not attributable to the PE, the foreign enterprise is taxed for the said income in its resident soil, and if it is attributable, the foreign enterprise is taxed for the said income in the soil where the PE is established. Explanation 3 of Section 9 of the Act further clarifies that where a business is carried on in

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[25] *Supra* note 2 at art.1.
[26] *Id* at art. 3 cl (d).
[27] *Id* at art. 7 ¶ 1.
[28] *Apollo Hospital Enterprises Ltd.* v. *Deputy Commissioner of Income Tax* (2013) 158 TTJ Coch.786, ¶ 16.
[29] *DIT (International Taxation), Mumbai* v. *Morgan Stanley and Co. Inc*., Civil Appeal No. 2914 of 2007 and Civil Appeal No. 2915 of 2007, ¶16.

India through a person referred to in Explanation 2 of Section 9, only so much of income as is attributable to the operations carried out in India shall be deemed to accrue or arise in India.

Thus, the final burden of taxation always falls upon the foreign enterprise even if a PE exists. In this case, the agent is taxed as a representative assesse and is thus entitled to recover the amount so paid from the foreign enterprise.[30] For the foreign enterprise, the establishment of a PE may be beneficial or detrimental depending on the jurisdiction that provides the most lucrative rate of taxation. For the agent, the establishment of a PE could prove to be a detriment as the tax is collected as if the income had accrued or was received by the agent itself.[31] Recovery from the principal could also prove cumbersome if the foreign enterprise is reluctant to pay as it wants the transaction to be taxed on its own soil. For the revenue authorities, it is beneficial to prove a PE and collect tax at a higher rate than disregard the PE and collect tax according to the rate at which the foreign enterprise is subject to. This, however, is subject to the Indian tax rate being higher than that which is applicable abroad.

3. COMMERCIAL INDEPENDENCY IN CASE OF AMALGAMATIONS

The grounds to test the commercial independency of the agent from the foreign enterprise are as follows; (i) the legal and economic independence of the agent, (ii) whether the agent acts in the ordinary course of business when acting on behalf of the enterprise,[32] (iii) the agents commercial activities for the enterprise are subject to instructions or comprehensive control of the enterprise, and (iv) he does not bear the entrepreneur risk of the enterprise. [33]

The commentary indicates a cohesive reading of (i) and (iii) where legal dependence of the agent is tested on the degree of control exercised by the enterprise.[34] In case of (iv), the test is the extent of the use of entrepreneurial skill and knowledge invested by the agent for the enterprise

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[30] See, *supra* note 12 at s. 162 (1).
[31] *Id* at s. 161 (1).
[32] *Supra* note 21 at art. 5 ¶6, ¶ 37.
[33] *Id* at ¶ 38.
[34] See, *Id* at ¶ 38.1 & ¶38.6.

which enables him to bear risk and receive reward.[35] The bone of contention arises in case of economic independence of amalgamated companies and their ordinary course of business.

Economic Independence of the Agent and their Ordinary Course of Business

Article 7 (2) of the convention makes it abundantly clear that once a PE is grounded in the resident soil, the profits that the PE would be expected to make would be taxed as if it were a distinct and separate entity engaged in same or similar activities/conditions and wholly independent of the foreign enterprise. The authorized OECD approach is that the profits to be attributed to a PE are the profits that the PE would have earned at arm's length.[36] If transactions are carried out at arm's length[37] between the agent and the enterprise from inception on a principal to principal basis, no profits can be deemed attributable to the PE.[38] However, in absence of the an arm's length arrangement, the profits of the PE are taxed as; (i) a distinct and separate entity, (ii) engaged in same or similar activities/ conditions, and (iii) wholly independent of the enterprise.

(i) *A Distinct and Separate entity*

Upon amalgamation, the erstwhile company ceases to exist and a separate and distinct entity is formed.[39] The Act maintains that upon amalgamation, the assets, liabilities, and shareholders holding 3/4th value in the shares of the amalgamating company become that of the amalgamated company.[40] In case the amalgamating company functioned on behalf of the enterprise as a PE, the question arises whether upon amalgamation, the

[35] *Id* at ¶ 38.6.
[36] Organization for Economic Cooperation and Development, Report on the Attribution of Profits to Permanent Establishments, (July, 2010) ¶ 8.
[37] See, *supra* note 12 at s. 92.
[38] PSA Legal, "Permanent Establishments: Attribution of Business Profits", *E-Newsline*, July, 2013.
[39] *Saraswati Industrial Syndicate* v. *CIT*, Civil Appeal No. 91 of 1976. See, *Infra* note 56 at 856.
[40] *Supra* note 12 at s. 2 (1B).

transactions of the newly formed amalgamated company, as a whole, can be gauged for commercial independency?

It is a matter of settled law in *Vodafone International Holdings B.V.* v. *Union of India & Anr*[41] ("*Vodafone case*") that the Revenue may invoke the "substance over form" principle test only after it is able to establish that the impugned transaction is a sham or tax avoidant. It is the task of the Revenue/Court to ascertain the legal nature of the transaction and look at the entire transaction as a whole and not adopt a dissecting approach.

As far as assessment is concerned, the term "through" with respect to business connection in Section 9 (1) (i) of the Act does not refer to a "look through" provision and that the transaction has to be "looked at" holistically.[42] The implication of a "look at" provision is that the Revenue department is under a mandate to look at the transaction holistically i.e. the form over substance, to ascertain commercial independence. This is subject to an absence of a *prima facie* sham or tax avoidant scheme.[43]

In effect, the revenue authorities assessing the agent, after amalgamation, must continue to gauge the commercial independence of the agent as an amalgamated company. On the contrary, if the agent is assessed for commercial independency only for its transactions pertaining to the amalgamating company, which is non-existent upon amalgamation, the said assessment is deemed void.[44]

(ii) *Engaged in Same or Similar Activities/Conditions*

Post amalgamation, even if the nature of activities of the agent change to the effect that there is no correlation with the activities conducted on behalf of the enterprise and those independently conducted, the ordinary course of business of the agent is now different. Article 5 (6) of the OECD convention does not mandate that the ordinary course of business of the agent must pertain to the activities it conducts on behalf of the enterprise.

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[41] (2012) 6 SCC 613, ¶68.
[42] *Id* at ¶¶ 73 & 265.
[43] *Id* at ¶ 152.
[44] *CIT* v. *Dimension Apparels Pvt. Ltd.* ITA No. 327, 328, 329, 330, 332 of 2014), ¶14.

The commentary clarifies that if the agent conducts activities that economically belong to the enterprise over his own activities, it cannot be said that he is acting in the ordinary course of business.[45] Effectively, post-amalgamation, the amalgamated company can deviate from the nature of the activities that pertained to the enterprise and enhance its independent operations which have no relation to the enterprise. In this case, it would be deemed to be acting in its ordinary course of business. The amalgamated company would satisfy the exception under Article 5 (6) of the convention and could not be assessed for activities of the erstwhile amalgamating company that are same/ similar to the enterprise, as such an assessment would be void.[46]

(iii) *Wholly Independent of the Enterprise*

It is well settled that the word 'wholly' means entirely, completely, fully, totally; 'almost wholly' would mean very near to wholly, a little less than whole, In terms of percentage 'almost wholly' would mean anything less than 90 per cent.[47] Again, the question here is whether "wholly independent" is to be seen in terms of activities conducted by the agent on behalf of the enterprise or independent activities of the agent?

It is well settled in *B4U International Holdings Ltd.* v. *DDIT (IT)*[48] ("*B4U case*") that wordings of Article 5 (5) in the OECD convention and in case of DTAA's refer to the activities of an agent and its devotion to the foreign enterprise and not the other way round. Thus, the perspective of dependence is from the angle of the agent. However, in the *B4U case*, commercial independency viewed from the agent's perspective was restricted to the activities it carried out for the foreign enterprise and the income thereby attributable to the same.

However, upon amalgamation, if the ordinary course of business of the agent has changed to an extent that does not pertain to the activities carried out by the foreign enterprise; then going by the *Vodafone case*

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[45] *Supra* note 21 at art. 5 ¶6, ¶ 38.7.
[46] *Supra* note 44.
[47] *In Re: Specialty Magazines (P) ...* v. *Unknown*, (2005) 194 CTR AAR 108, ¶13.
[48] I.T.A.No.880/Mum/2005, ¶30.

profits accruing from such independent operations could be a consideration for commercial independency if the transaction is looked upon holistically.

In essence, in case of amalgamated companies acting as agents, the commercial independence or "wholly independence" of the amalgamating company from the foreign enterprise would not *ipso facto* exclude the revenue/activities of the amalgamated company.

Assessing the *Economic Independence of the Agent by Profits or Gross receipts*

The Convention and the DTAAs mandate that the profits of the foreign enterprise are taxable in the resident soil or the non-resident soil depending on the extent of operations carried out by the agent on behalf of the foreign enterprise. The "activities approach" is an evaluation of the activities of the agent carried out on behalf of the foreign enterprise to ascertain commercial independence of the agent. On the other hand, the "revenue approach" evaluates commercial independence of the agent on the revenue accrued to the same by virtue of the activities it conducted on behalf of the foreign enterprise. Here, any revenue accrued to the agent from the foreign enterprise is not to be viewed as the ground for determining commercial dependency, but the extent that such revenue economically binds the agent to the foreign enterprise is to be gauged.

Tough the convention and majority of the DTAAs deemed such revenue as profits; commercial independency of the agent is not necessarily restricted to profits only. In *DIT (International Taxation), Mumbai* v. *Morgan Stanley and Co. Inc.*[49], the term "profits" was held to include income derived from any trade or business including income from the furnishing of services other than included services in Article 12 (Royalties and Fees for Included Services) and including income from the rental of tangible personal property other than property described in paragraph 3 (b) of Article 12. From a taxation perspective, income includes profits which are thereby taxable.[50]

[49] *Supra* note 29 at ¶ 7.
[50] See, *supra* note.12 at s. 2 (24) (i).

However, commercial independency is an evaluation of the independency of the agent from the foreign enterprise on the basis of its activities and income attributable to such activities. To ascertain commercial independency from profits instead of gross revenue is a commercial fallacy on three counts.

Firstly, certain companies acting as agents for a foreign enterprise may be deemed to be dependent on the latter merely due to its capability to break even. Agents that possess the commercial viability of reducing costs would show a higher sum of profits which would not entirely indicate commercial dependency on the foreign enterprise. Further, as it is the extent of profits and not mere profits that determine the commercial independency of the agent, greater the propensity the agent possesses to earn such profits, greater will be the likelihood that it would be deemed as a PE.

Secondly, gross revenue is exclusive of cost deductions. Thus, it would represent a higher value than profits. Such a value is more indicative of the dependency of the agent on the foreign enterprise as the revenue thus derived does not pre-suppose that the agent will make profits. Commercial Independency is based on a degree of dependence and not only on the profits that the agent accrues from the foreign enterprise.

Thirdly, given that profits are taxed, companies are incentivized to raise costs to show a lower profit, thus purportedly indicating commercial independency from the foreign enterprise. Thus, using gross revenue to evaluate commercial independency could prove feasible for revenue collection.

4. IMPLICATIONS OF GENERAL ANTI-AVOIDANCE RULES

GAAR under Chapter XA[51] of the Act, effective in respect of any assessment year beginning on or after the 1st day of April, 2018, has a sweeping effect on international taxation jurisprudence as not only does it enhance the powers the assessing authorities but severely hampers any arrangement entered into by the agent for a tax benefit.

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[51] *Id* at s. 95 (2).

Tax Avoidance and Tax Evasion

The Act maintains that in case of DTAA's, in relation to the assesse to whom such agreement applies, the provisions of the Act shall apply to the extent they are more beneficial to that assesse.[52] It is long settled that every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be.[53] This is the basic premise of legality afforded to tax avoidance over tax evasion.

However, section 95 (1) of the Act maintains a non-obstante clause overriding anything contained in the Act. U/s 96, the main purpose of an impermissible avoidance agreement is enumerated as obtaining a tax benefit.[54] A tax benefit is defined to include *inter alia* an avoidance of a tax or another amount payable under this Act as a result of a tax treaty.[55] It is unprecedented in the history of tax jurisprudence that the Act has penalized an arrangement that could have potential tax benefits without enumerating any exceptions.

Substance over Form as the Rule

If an arrangement is deemed as an impermissible avoidance arrangement u/s 96, section 98 (1) (g) of the Act permits the "look through" approach on any arrangement completely disregarding the corporate structure. While a plethora of sections[56] under the Company Act, 2013, serve as exceptions to the corporate veil theory, Section 98 (1) (g) does not elaborate in which manner the authorities may "look through" the impugned arrangement and to what extent the corporate structure can be disregarded.

5. CONCLUSION AND RECOMMENDATIONS

In summation, there are two major points of commercial independency that are yet to be statutorily and/or judicially addressed; (i) Post amalgamation, do the activities of the amalgamated company have to

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[52] *Id* at s. 90 cl. 2 & 90 A cl. 2.
[53] *Inland Revenue Commissioners* v. *Duke of Westminster* [1936] A.C. 1.
[54] *Supra* note. 12 at s. 96 (1).
[55] *Id* at s. 102 (10) (c).
[56] See, Dr. G.K. Kapoor and Dr. Sanjay Dhamija**,** *Taxmann's Company Law & Practice* 15-17 (Taxmann Publications Private Limited, New Delhi, 22nd edn., 2017-18).

relate to those carried out by the foreign enterprise or whether the change in the ordinary course of business of the agent can be used as a ground for commercial independency even when the amalgamated business is not same or similar to that of the foreign enterprise, and (ii) whether profits or gross receipts are to be evaluated to ascertain economic independency of the agent taking into account not only tax collection but also commercial feasibility.

In case of (i), GAAR does not view such an arrangement as lacking in commercial substance nor is such an arrangement defined as a tax benefit.[57] In case of (ii), judicial enunciation is required as majority of the judgments on PE deal with legal dependency of the agent i.e. its authority to conclude contracts or play a principal role in the conclusion of contracts on behalf of the foreign enterprise. Further, judgments evaluate economic independency from profits earned by the agent independently from the foreign enterprise and not with respect to gross revenue.

As far as GAAR is concerned, the following recommendations are forwarded;

Firstly, GAAR disregards frivolous arrangements formalized with the sheer purpose of obtaining a tax benefit rather than pre-empting such an arrangement from coming into existence in the first place. At the inception of every arrangement, before convening the meeting with the creditors/ members or any class of them, a copy of a scheme of amalgamation is sent to the Income Tax authorities under Rule 5 (4) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016. Under Rule 5 (6), the mandate of the law clearly empowers the said authority to submit its objections to the scheme to the Tribunal (National Company Law Tribunal) within 30 days upon receipt of the scheme. It is at this stage the said authorities can deem the arrangement as a sham for a tax benefit rather than approving the scheme and disregarding the corporate structure thereafter.

Secondly, guidelines are required for effective control on the extent to which the revenue authorities can disregard a corporate structure. This

[57] Supra note 12 at ss. 97 r/w 102 (10).

may prove to be a serious commercial hindrance as every company that falls under the scanner of the revenue authorities with respect to a PE contention, faces the risk of losing tax benefits[58] provided to amalgamations. This is because GAAR empowers the revenue authorities to treat an arrangement that lacks commercial substance as if it had not been entered into or carried out.[59]

Lastly, exceptions need to be statutorily provided with respect to what arrangements are not included as impermissible avoidance arrangements or what is not deemed to be a tax benefit. Clarity on the same may provide commercial guidance for companies who inadvertently obtain a tax benefit and face the consequences under GAAR.

[58] See, Dr. V. K. Singhania and Dr. Kapil Singhania, *Taxmann's Direct Taxes Law & Practice*, 523-526 (Taxmann Publications Private Limited, New Delhi, 58th edn., 2017-18).

[59] Supra note 12 at ss. 98 (1) (b) r/w 96 (1) (c).

POST-TRAFFICKING ISOLATION AS A FORM OF SOCIAL EXCLUSION: A SOCIO-LEGAL PERSPECTIVES IN INDIA

Dr. Afkar Ahmad*

Abstract

Human Right(s) is an inalienable right of a human being. Trafficking in human beings is one of the worst forms of human rights violation. Virtually all countries of the world are affected from this menace. Human trafficking is a major global issue of contemporary era and is on the rise in an alarming rate. It is a hydra headed problem in the sense that it is a crime, a violation of fundamental human rights, a cross-border security concern, and because of adverse socioeconomic implications for human growth a development issue. Trading in human beings and their exploitation in varied forms by traffickers is one of the most despicable forms of violation of human rights. The present paper highlights the social perspective of exclusion consequential to the trafficking.

1. INTRODUCTION

Trafficking in its widest sense includes not just exploitation of prostitutes but also other forms of sexual exploitation. It also includes forced labour or services, slavery or practices similar to slavery or trade in human beings for removal of organs etc. Trafficking clearly violates the fundamental right to life with dignity. After coming back to trafficked victims from the clutches of touts or middlemen, the victims feel isolation like a form of social exclusion. Social exclusion mainly refers to the inability of a society to keep all groups and individuals within the reach of what we expect as society to realize their full potential. Marginalization of certain groups or classes tends to occur in most societies including developed countries and perhaps it is more pronounced in transient economies like India.

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2. THE LEGISLATIVE APPROACH FOR COMBATING TRAFFICKING IN INDIA

The Constitution of India, the fundamental law of the land, forbids trafficking in persons. Article 23 of the Constitution specifically prohibits "traffic in human beings and beggar and other similar forms of forced labor". Article 24 further prohibits employment of children below 14 years of age in factories, mines or other hazardous employment. Other fundamental rights enshrined in the Constitution relevant to trafficking are Article 14 relating to equality before law, Article 15 that deals with prohibition of discrimination on grounds of religion, race, caste, sex or place of birth or any of them. Article 21 pertaining to protection of life and personal liberty and article 22 is about protection from arrest and detention except under certain conditions. In 1950, the Government of India ratified the International Convention for the Suppression of Immoral Traffic in Persons and the Exploitation of the Prostitution of others. In 1956, India passed The Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA). The Act was amended in 1986, resulting in the Immoral Traffic Prevention Act, 1986 also known as ITPA. The approach of the Act is not very reformative in nature. The focal point of the Act should be on the process of trafficking but this aspect has not been incorporated in the Act. Section 5 of the Act should be more comprehensive and exhaustive in nature to bring in all kinds of trafficking and all associates, financer and promoters within the ambit of the provision. Section 17(5) requires amendment, as it says that a magistrate may summon a panel of five persons. The word "may" should be substituted by the word "shall", by which mandatory involvement of civil society is essential for after care activities. There is no provision of in-camera trial. It provides a safety against publicity of victims, intimidation and hence protects their right to privacy. This Act is very much punitive in nature instead of being protective. Section 8 of the Act makes outward manifestations of sex work such as soliciting or seducing for the purpose of prostitution an offence. The majority of arrests made under it are of women soliciting customers. Traffickers/touts/middlemen are rarely identified and very few are prosecuted. Prosecution requires that sex workers testify against traffickers

and third parties like pimps, brothel owners etc. As the livelihood of these women depends on them, they become reluctant to do so which make their prosecution almost impossible. This section does not address this issue. Apart from that, there are approximately twenty sections in IPC, which deals with the issue of trafficking and related issues. The Indecent Representation of Woman Act, the Bonded Labor (Abolition) Act, 1976 etc. Acts are related to that; still the condition has not changed much so far.

According to the latest National Crime Report Bureau of 2016, released on October 2017, which reveals the offence of trafficking of the year of 2016. Wherein a total 8132 case of human trafficking under IPC were reported but only 2379 were charge sheeted, only 163 were convicted and 424 were acquitted, it includes all types of trafficking as per police and court disposal of cases of human trafficking. As far as the purpose of trafficking is concerned 4941 cases of sexual exploitation for prostitution have been reported, 2590 cases have been reported for other forms of exploitation. The above-mentioned report is revealing the pathetic condition of trafficking in India. Therefore, it may be said that no far-reaching changes have taken place so far as curbing this menace is concerned.

3. NO FAULT LIABILITY OF THE VICTIMS

There are certain traditional reasons like poverty, unemployment, illiteracy, lack of protective environment etc. Apart from the traditional factors, there are certain new factors that have emerged like organ removal, fake marriage etc. which are fueling the touts and pimps to accelerate their heinous act with new avocations. As far as the victim of the trafficking is, concerned difficulty lies in default victimization of women rescued from blemished enslavement network after getting trafficked, and even during being trafficked. Protection of all civil and political rights for individual members including their life with dignity of the society is a pious onus of the society, but the same becomes futile. The woman, who is trafficked, becomes the victim of touts and/or to whom she is given to get exploited and after rescued, then another time oppressed by the society by several ways until her last breath. Hence, a woman faces no fault liability of the innocence. We claim ourselves to be modern in twenty

first century, are reluctant to even listen to the problem of victims, the so-called right-thinking members of the society disown since her reentry in the society after rescue. The rescued woman is considered to be a burden on the society. As far as legal mechanism and execution machinery is concerned, in majority of the cases their conventional approach continues.

The Supreme Court in *Budhadev Karmaskar v. State of West Bengal*[1] had issued notice to all states while noting down the concern on the pathetic conditions of Sex Workers. The court observed that "We strongly feel that the Central and the State Governments through Social Welfare Boards should prepare schemes for rehabilitation all over the country for physically and sexually abused women commonly known as prostitutes as we are of the view that the prostitutes also have a right to live with dignity under Article 21 of the Constitution of India since they are also human beings and their problems also need to be addressed". The Supreme Court in Public *Union for Civil Liberties V. State of Tamil Nadu*[2] directed the District Magistrates to effectively implement Section 10, 11 and 12 of the Bonded Labour (Abolition) Act,1976 and that they expected them to discharge their functions with due diligence, with empathy and sensitivity, taking note of the fact that the Act is a welfare legislation.

The woman becomes the victim of time due to overall haul in the present system of the society. The only Act in India, which directly addresses the problem of trafficking i.e. Immoral Trafficking Prevention Act, 1956 that was amended in 1986, has various provisions taking about punitive approach, but there are very few provisions, which are reformatory in their approach. Post rescue approach is very ineffective and incomplete in its nature, this is one of the vital factors of woman getting victimized after rescued from trafficking network or by touts.

Human Trafficking is a violation of human rights in the worst form, the impacts of which are far-reaching. A huge majority of trafficking

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[1]([2011] 10 SCR 578).
[2](2013(1) SCC585).

victims experience physical and sexual violence. Many victims experience post-traumatic stress disorders, anxiety, depression and disorientation. Inadequate legislation and law enforcement, lack of knowledge and awareness about legislation are challenging issues. There is also an urgent need for the amendment of legislation to ensure that victims of human trafficking are not prosecuted. Trafficking of girls for marriage is prevalent, particularly in the states of Punjab and Haryana. Studies reveal a well-established market in Uttar Pradesh for 'purchased' Bangladeshi wives[3]. As far as the rescue and rehabilitation is concerned, there are certain schemes, which have been initiated by the government to curb this menace of the society. Ujjawala" is a comprehensive scheme for the prevention of trafficking, rescue and rehabilitation of women and child victims of trafficking for commercial sexual exploitation in India. It was launched in 2007 by the Ministry of Women and Child Development, Government of India. It consists of certain mechanisms for the reintegration and repatriation of victims including cross border victims. The objective of the scheme is to prevent trafficking of women and children for commercial sexual exploitation through social mobilization and involvement of local communities, awareness generation programmes, generate public discourse through workshops/seminars and such events and any other innovative activity and to facilitate rescue of victims from the place of their exploitation and place them in safe custody.[4]

The Government of India launched a scheme for recovery and reintegration of trafficked victims called Swadhar in December 2001. The scheme is meant for women in difficult circumstances, including victims of trafficking. The scheme envisages the provision of food, shelter, clothing, counselling, social and economic rehabilitation through education and skill upgradation, medical and legal support, helplines, etc. NGOs are partners in this holistic effort. The Department of Woman and Child Development

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[3]Eira Mishra, Combating Human Trafficking: A Legal Perspective with Special Reference to India Sociology and Anthropology 1(4): 172-179, 2013 http://www.hrpub.org DOI: 10.13189/sa.2013.010402.

[4] Available at: http://www.nmew.gov.in/index1.php?lang=1&sublinkid=125&lid=145&level=1&domid=10<ypeid=1(Last accessed on 30.05.18)

(DWCD) has also formulated a model grant-in-aid scheme for assistance to NGOs to combat trafficking in source, transit and destination areas through prevention, rescue and rehabilitation. Emphasis is placed on counselling, non-formal education and vocational training.

The case studies presented below highlights the post trafficking isolation as experienced by the trafficked victims in the society.

Case Study 1

The author met with one Aasu (name changed) aged about 12-year-old, the rescued survivor of forced labour on 15th July 2015 at Jharia, which is a coal belt area of District Dhanbad. He narrated me the whole story of trafficking which he faced. He said, "I was doing a job in mechanical shop near my home i.e. Qabristan Road, Shamsher Nagar, Jharia. One day one person named Lal Babu came to meet me and said that your two friends Pintu and Saleem are ready to go to Jalandher for good job in a factory. You will get 10,000/ rupee per month. Apart from that you will also get free fooding and lodging. If you are interested then inform me within two days. He asked me inform him on phone and gave me a number. I talked with my parents. They said if you think that is better than you can go. But you should inquire first. I replied that two of my friends are also going with me so, there will be no problem. Finally, I informed him and us all three reached Jalandhar. Lal Babu arranged for us a very small room without electricity. When we asked that this room is very small, he replied that this arrangement is for few days. You will get a well decorated room soon. But the next day we reached a place where a big building was about to be constructed. He asked us for doing the work pertaining to construction. We denied doing the same but Lal Babu said that in factory there is no vacancy, you will get the job after one month. Lal Babu said if you will not do this job for few days then how you will eat? Hence, ultimately, we joined that temporary job. As I was not having mobile, so I was not in touch with my family. We understood that Lal Babu has deceived us but we had no option. Lal Babu had arranged some utensils for cooking food for us. After ten days one morning we sold all utensils in shop and the same night we ran away

and reached Jalandhar railway station. Finally, we reached Jharia" The above narration highlights the pathetic condition of trafficked persons who have been deceived by the mediator and do not get what they were promised, landing them in pitiable working conditions and financial exploitation. Although after coming back from the clutches of traffickers, that boy had approached the owner of a mechanic shop and after asking that where he has worked after replying truly that he was trafficked and he ran away from Jalhander, the owner denied to engage him in his shop. This incidence reveals the indifferent approach of the society.

Case Study 2

Nitu (name changed), was a fourteen-year girl of Haws village of Nawada. She narrated her story, "my father solemnized my marriage with Nimesh of adjacent village. After almost ten days of the marriage, I came to Patna with him. He said to me that he will join a good job here. Nimesh took a lodge for stay near Patna junction. After two days in Patna my husband said to me that I did not get a good job here so we will go to Delhi for better opportunity. We reached Delhi and stayed in a filthy room in a place. I do not know the name of the place. My husband asked me to join the job of house cleaner in a home. I objected but he said that it is a big city and expenses are high. Hence, we both will have to work. I started working in a building in Shakti Nagar Delhi after two days of this job when one evening I came to the room I found that no luggage is there. I narrated the story to my malkin she said to me that your husband had come and had taken four thousand rupees by saying that you will remain house cleaner here until he comes back. Once malkin's son physically harassed me. Since two months of this incident my husband did not come. I came to my village after two months. Now I sew clothes of Ladies and I am self-dependent". However, my neighbors and relatives have ignored me. However, several times, I felt uncomfortable but presently I am comfortable.

Post-Trafficking isolation is indeed a form of social exclusion, which reveals the dark side of so-called modern society.

4. CONCLUSION

In reality, victims of human trafficking are often left voiceless and completely unseen by society.

Elise Stefanik

Life with dignity is of pivotal for every human being. Trafficking of human being is one of the worst forms of undignified life of the human being. It is the third most profitable business of the world after arms and drugs. India is as a source and destination of woman and child trafficking. There is only one direct enactment and plethora of related laws apart from the IPC where the issues pertaining to trafficking is dealt. However, apart from prohibition, women and children are being victimized after rescued from trafficking networks. The rescued fragment of the government is very unsuccessful and incomplete in nature where the government rescues and send the rescued woman and children to their home but which is not the solution, such persons must be attached to some work for their subsistence. Another important aspect of it is that regular vigilance is required for at least one to two years, then only it may be said that this rescue is actually a rescue for such persons. There is urgent need to regulate placement agencies by enactment of law in all states. The reason is that many women and children are trafficked through placement agencies. There should be adequate provision for mandatory registration and periodic inspection of the activities of such agencies who claim to provide job. At present these so-called placement agencies are taking full advantage of legal lacunae. The rescued women and children should be linked to various programmes like *Pradhan Mantri Kaushal Vikas Yojna* launched by Ministry of Skill Development, Vocational Training Progaramme And Entrepreneurship. Such a training/programme will mitigate or minimize many of the causal factors responsible for possible re trafficking of rescued women and children who might become jobless after the rescue operation is over. The author found out that most of the time the rescued women and children are handed over to their family members residing in remote villages. The families are too poor to support the rescued persons and if immediately some kind of job or profitable engagement is not provided then there is high

probability of re trafficking. Hence, there is need of sensitization among the people to understand the true condition of the trafficked victims and government should enact more rehabilitative and job-oriented schemes with pragmatic approach.

CASE COMMENT: NEETU SINGH V. RAJIV SAUMITRA

[Decided on January 27, 2016 by the Delhi High Court in I.A. NO. 17545 of 2015 and CS (OS) No. 2528 OF 2015.]

Abhay Gairola*

1. INTRODUCTION

The present Case **Neetu Singh v. Rajeev Saumitra** is related to the Copyright Act, 1957. This is the case where the dispute between husband and wife aroused over the authorship of the books. The wife (plaintiff) claimed that the writing and authoring of books is the original work of her which is also protected under the Copyright Act, 1957 while the husband claimed that the authoring and writing of books was done by a team which includes the plaintiff as an employee of the educational institute. Therefore, the question of 'first owner of Copyright' was raised which is provided under section 17 of the Copyright Act, 1957.Several arguments were put forward by both the parties to claim the ownership of copyright in the authoring and writing of books.

2. BACKGROUND OF THE CASE

Neetu Singh (Plaintiff) is a renowned author, having business of providing services in relation to 'Education, training and educational consultancy in the field of engineering, medical, marketing, management and many more. The plaintiff also provides coaching services for different competitive exams at central as well as state level. She has an educational qualification in B.Sc. from Vinoba Bhave University and LL.B. from Campus Law Centre, Delhi University. Rajeev Saumitra, i.e. Defendant No1; is the husband of plaintiff, who owns, runs and manages defendant No.2 i.e. 'Paramount Coaching Centre Pvt. Ltd.' and defendant No.3 is the key publishing house of defendant No.1.

The facts of the case are that the plaintiff started an education and training institute namely 'Paramount Caching Centre' in the year 1982. In and around 2006, she (Plaintiff) married the defendant No.1, who was a teacher at the plaintiff's coaching centre at the time of marriage. With the

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purpose of growing the business further, both the plaintiff and defendant No.1 formed and incorporated a company namely ‘Paramount Coaching Centre Pvt. Ltd.’ in the year 2009. Both the plaintiff and the defendant No.1 became as its Directors. Later, the plaintiff began to write books on various subjects after researching and having thorough study on different subjects with the object of helping students to understand the concepts of the relevant subjects including those required for competitive examinations. The plaintiff wrote and authored the books under the titles “English for General Competitions-From Plinth to Paramount Vol-I, Rasayan Vigyan-Samanya Pratiyogita Hetu, Interview for General Competition-where guidance is Paramount” and many other books were authored by the plaintiff. However, the plaintiff later found (after separating from the defendant No.1) that the defendant No.1 has copied several books which were authored by her, as her original work and selling the same in the market without the permission of the plaintiff.

Consequently, the plaintiff filed a civil suit in high Court for granting permanent injunction restraining the defendants, their agents, dealers, distributers, etc. from reproducing, publishing, distributing, selling, offering for sell the literary work “English for General Competitions” and any other artistic work where the copyright license is granted to the plaintiff.

3. CONTENTIONS OF THE PLAINTIFF

- The Plaintiff claimed that the aforesaid literary work is her original work, which is created and authored first time by the Plaintiff only. Infact, she has been granted copyright certificates in literary works after filing application for the same.
- The Plaintiff published books through her proprietary concern ‘Paramount Reader Publication’ and thereafter ‘Paramount Reader Publication OPC Pvt. Ltd.’ was formed. The rights to publish books was never licensed, transferred or assigned to any person including Defendant No.1 and Defendant No.2 by the plaintiff.
- The plaintiff contended that the books authored by her was titled ‘English for General Competitions- From Plinth to Paramount’ in May

2012 and was highly succeeded in the market. The book was further published in the year 2014 and thereafter in 2016 and was rated as the best seller on Amazon.

- In Feb, 2015, the Plaintiff amended the title as 'English for General Competitions' from 'English for General Competitions-From Plinth to paramount.' The books authored by the Plaintiff are now known as 'K.D. Publications Pvt. Ltd.' which was earlier known as 'Paramount Reader Publications OPC Pvt. Ltd.'.
- The Plaintiff further claimed that the books authored by her were marketed, distributed and sold by the Defendant No.2 after purchasing the original books from 'Paramount Reader Publications OPC Pvt. Ltd.'.
- Around December 2015, Plaintiff came to know that the Defendant No.1 is illegally copying and publishing certain books which were authored by the Plaintiff. Consequently, the Plaintiff filed a criminal complaint under section 63 of Companies Act at Mukherjee Nagar Police Station where the Police Seized around 6000 illegal copies of the books from the Defendant No.1. The Plaintiff also filed a complaint u/s 63 of Companies Act read with section 420/485/486 and 120 of IPC with the learned CMM, Mukherjee Nagar.
- Later in June,2016 the Plaintiff found that the Defendant No.1 in collaboration with Defendant No.2 published its first book under title 'English for General Competitions- Plinth to Paramount' which was the exact copy of Plaintiff's book having identical title and slight colour variation in graphic representations. There was no mention of the author and the only difference between the two was the price. Even the mistakes which were there in Plaintiff's books were copied. This caused the misled and confusion among the students regarding the original work of the Plaintiff.
- The Learned counsel for the plaintiff submitted that there was no contract of service between Plaintiff and Defendant No.2 in terms of section 17 of Copyright Act, therefore the ownership of literary work resides with the plaintiff only. He further contended that there is no material with the Defendant to show that the Defendant No.2 was the

employer of Plaintiff, this makes it clear that the plaintiff is the real owner of copyright in terms of section 17(c) of copyright Act.

- The learned counsel for the plaintiff further submitted that the Defendant failed to show the details of any payment made to the plaintiff. Moreover, the defendant also failed to show the details of any assignment of the literary work given to the Plaintiff (author of the book) by the Defendant. Further, as per the section 19 of the Copyright Act, the literary work which is assigned must be in writing.

4. CONTENTIONS OF THE DEFENDANT

- The Defendant No.1 & 2 filed a written statement and a counter claim in response to the claim made by the plaintiff. The Defendant argued that the plaintiff is not the exclusive owner/author of the book because she authored /compiled the books with the help of a team while she was working as a Director of Defendant No.2 from 2012-2014.Moreover, the plaintiff cannot claim copyright because she authored the books by and on behalf of Defendant No.2 who employed its entire team including plaintiff.
- The Defendant No.1 contended that he was running a coaching centre by the name M/s. Paramount Coaching Centre at Mukherjee Nagar, Delhi under his sole proprietorship. The plaintiff came in contact with him in July 2005 to get financial help and subsequently, the Defendant No.1 allowed her to take English classes in his coaching centre.
- The Defendant No.1 further contended that he later, converted 'Paramount coaching centre into a Pvt. Ltd. Company with plaintiff and Defendant No.1 as its two directors because as per the companies Act, 1956 the minimum two directors are required for the same. However, the plaintiff gradually engaged in conspiracy, incorporated companies like Paramount Reader Publication OPC Pvt. Ltd. And thereafter M/s. K.D. Campus Pvt. Ltd. in Early 2015. The plaintiff also started to transfer the business of Defendant No.2 to her individual companies.

- Consequently, the Defendant No.1 and 2 filed Civil Suit in the court wherein injunction was passed in favour of Defendant No.1. Further, the appeal was withdrawn by the plaintiff after the settlement came between both the parties.
- The Learned Counsel for the defendant mentioned the judgement given by the Supreme Court in the case Ram Pershad v. The Commissioner of Income-tax, New Delhi[1] and V.T Thomas and Ors. v. Malayala Manorama Co. Ltd.[2].
- The learned counsel for the defendant further contended that the plaintiff demanded salary from defendant which shows that the plaintiff was an employee of the defendant. Moreover, the defendant cannot author the number of books individually for various competitions as she has the educational qualification of B.Sc., LLB only. Therefore, the plaintiff cannot be the exclusive author of the books as she authored all the books with the team members of the Defendant No.2.
- The Learned Counsel for the defendant submitted that the claim of plaintiff is barred under section 166 of Companies Act.

5. ISSUES

- Whether the literary work was authored as a part of duties and obligations of a director by the plaintiff?
- Whether the plaintiff is entitled absolute ownership of the literary work according to section 17 of the Copyright Act, 1957?
- Whether the selling of copyright books by the defendant comes within the meaning of section 52 of Copyright Act, 1957?

6. JUDGEMENT

In the judgement given by the court, the High Court of Delhi read the Section 17 of the Copyright Act, which defines the first owner of

[1] (1972)2 SCC 696

[2] AIR 1989 Kerala 49

copyright[3]. This section clearly states that the author of a work shall be the first owner of the copyright if no agreement is made under a contract of service in the employment. The court further said that there is no doubt that the plaintiff was working as a Director of defendant No.2 when the literary works were made, however, the defendants failed to show that the literary work was authored as a part of the duties and obligations of a director of defendant No.2. Moreover, the defendants also failed to show any documents regarding any agreement between them and the plaintiff. Therefore, in the absence of any terms and condition describing that the literary work was also a part of the duties and obligations of the plaintiff in her capacity as a Director of the defendant No.2, the plea of the defendants based on the decision of the Supreme Court in Ram Pershad and V.T. Thomas was rejected by the court.

The court held that a director of a company is not a servant but an agent of the company because the company acts through its directors. The court further mentioned the section 52 of the Copyright Act[4] which deals with the concept of fair use of copyright work. The court referred the case, the Chancellors, Masters and Scholars of University of Oxford & Ors. v. Rameshwari Photocopy Service & Ors[5] where the distinction between the use of copyrighted work for the purpose of teaching/studies and commercial purpose was made. In the present case, the defendants sold the books to the students after making the copies of the study material. Thus, the activity of the defendants is commercial and profit making. Therefore, the court disposed of the suit by granting interim injunction in favour of the plaintiff and dismissed the written statement and a counter claim filed by the defendant No.1 and 2.

7. ANALYSIS

In the present case, several facts were put forward by both the parties which were quite different from each other. However, the court consequently granted an interim injunction in favour of the plaintiff since

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[3] Dr. B L Wadehra's Law Relating to Intellectual Property 299(5th Edition 2017)

[4] supra

[5] 2016 (235) DLT 409

the defendants could not show any document to prove that the plaintiff was working as an employee of the Defendants when the literary works were going on. This clearly indicates that the court decision was totally dependent on the facts as well as on evidences of the case. Both the parties were highly successful in bringing the several facts in the case but the defendants ultimately failed to show the evidences or records in front of the judge to make their points stronger.

On studying the present case thoroughly, I found that the only lacuna in the judgment of the case was that of the compensation. The court must grant compensation to the plaintiff for the loss which she caused due to the selling of interim copies of her books by the defendant which created confusion and misled the students about the original work of the author. Secondly, as far as the legislation is concerned, there is need of widening the scope of Copyright Act from just literary and artistic work to all forms of copyright works.

However, on summing up, this is a very interesting case because unique facts were created from both the sides and the questions of copyright law which were put up were extremely important for the employer as well as for employee in an employment. This case clarifies that whenever the dispute arises between the employer and the employee over the ownership of copyright, the terms of employment of the employee has to be seen very specifically. The employer must make sure that to claim ownership of copyright, the work which is created by the employee must be a part of the terms of employment. This case also made it clear that to determine the terms of employment in the case of a Director, it is necessary to see whether it is a subsisting agreement or the Articles of Association/ Memorandum of Association of the company. Thus, this judgment opened the doors for all the cases which are related to employment by simplifying the terms of employment.

8. CONCLUSION

The present case is an interesting case as adequate facts were put forward by both the parties who were present in the case. The decision was given in favour of the plaintiff as the plaintiff succeeded in bringing all the

evidences or records related to her contentions in front of the honourable Judge. This case clarified that the terms of employment of the employee is the essence in deciding the ownership of copyright of any literary work. The decision given in this case also suggest that the registration of any literary work under Copyright Act is the requirement to claim ownership of copyright in any literary work. Moreover, this decision has opened gates for similar cases related to Copyright Act to protect the people for their ownership of copyright and they can move the court if any right of them is infringed by the other person in an employment.

RAJEEV DHAVAN, THE CONSTITUTION OF INDIA: MIRACLE, SURRENDER, HOPE [UNIVERSAL LAW PUBLISHING CO.: AN IMPRINT OF LEXISNEXIS, NEW DELHI, 2017, 173pp. ISBN 9788131250662]

Aadhirai S.*

Rajeev Dhavan's book *'The constitution of India: miracle, surrender, hope'* is an excellent narration of how and why the constitution of India has failed at every stage of writing, inception and performance. The book is not another interpretation of the constitution it narrates the working and performance of Indian constitution and the judiciary which is to protect it. The book has come out at the right time where we face severe crisis of constitutionalism where the higher judiciary-the custodian for the constitution - is miserably failing. The author is a senior lawyer with around fifty years of practice holds firsthand experience in understanding the working of the constitution and the courts. Also being a legal scholar and an activist, the author is a right person to evaluate and comment on the functioning of the constitution.

In short, the book firstly provides a comprehensive account of the framing of the constitution-various pulls and pressures dealt by the framers of with historic instances. It is not merely an analytical text but a reflective voice of a senior advocate. Secondly the book is a definitive and unambiguous study on the working of Indian constitution in reality. It not only tries to prove the failures of the constitution but also appreciates the making and survival of the constitution for such a long period and how it has been a "the cornerstone of the Indian Nation (p.161)". Thirdly the book is eminently readable and written clearly in simple English presented in larger font than any usual book. The author has avoided giving long footnotes that makes the reader feel refreshing. Finally, the author did not use legalistic approach rather he presented several historical events and socio-political realities of the times to substantiate his claims and reflections. He has linked the past and the present throughout.

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The author tests the working of the constitution by examining three significant questions-whether the constitution and the processes set by it have retained their integrity? Whether the constitution has met the promises made to the people of all the levels and classes? In what way the people can redeem the constitution which has been stolen by their rulers? In as many words the author has drafted an appropriate preamble to the Indian constitution based on what has been achieved.

In the first chapter '*The Constitution as Miracle*' he asserts that the constitution of India is a miracle because "if we were called upon to create a new constitution afresh now, we would certainly fail (p. 27)." Further in order to show it is a miracle he narrates how the constitution was framed albeit the environment was not propitious and challenging with instances such as bloody partition, assassination of Gandhi etc. He is very correct because if we ask our legislators to draft a constitution, they would arrive at nothing but might challenge each comma and full stop. The consensus arrived through compromises at that time would never happen again. This chapter also poses provoking questions like whether temporal survival of the text unlike many other constitutions of neighbors is enough to show the constitution has worked well.

In the second chapter '*The Constitution as Surrender*' he tries to substantiate his claim that the constitution has surrendered people's right to the politicians and judges. Here he emphasizes the fictitious contract of "We the people" and makes fun of the social contract theories that they are 'fairy stories' and designed metaphors made by the rulers to setup the greatest surrender. He also questions the representative character of the constituent assembly itself which Granville Austin has appreciated as "highly representative body" in his book "The Indian constitution: cornerstone of a nation."[1] This is convincing because we know the members of the assembly were not elected based on adult suffrage. This has been presented satirically "We the people of India, who had little to say in the

[1]Granville Austin, *The Indian Constitution: Cornerstone of A Nation* (Oxford University Press, 1966).

making of the constitution but were represented by people selected without mandate, have been informed to accept this constitution, lest there be chaos (p 36)." This also helps to reaffirm that the assembly was "an unusual body" as Prof Upendra Baxi puts it in his piece "The little done, the vast undone-some reflections on reading Granville Austin's The Indian constitution" [2]. In many ways, whatever Baxi listed as not done in the sixties is still not done and may never be done according to Dhavan.

In the third chapter '*The Constitution as Text*' he tries to cover the original intent of the framers while drafting the text, how they are interpreted and how they are categorized into democratic, justice and federal texts. The framers didn't want the text to be interpreted in a different way and this is the reason why Indian constitution accommodated every compromise made at the time of drafting itself. He states that the lengthy nature of the constitution makes it a weird constitution. He is right in comparing the interpretation of the constitutional text by the courts to the fixing of the meaning by Humpty Dumpty in Carol's 'Alice in Wonderland'. It is true that the Indian Supreme Court has Humpty Dumptied the constitution at many instances. It is also true that now there are many Humpty Dumpty such as bureaucracy, parliament, media and other influential people.

In the fourth chapter '*The Constitution as Change*' he explains the two major ways (change by constitutional amendment and change by judicial interpretation) in which the constitution has undergone changes and lot of instances like amendment during period of Nehru and Indira Gandhi. His concerns about the courts crossing the line between judicial activism and judicial overreach and becoming the "judicial authoritarianism", "judicial adhocism" and "judicial tyranny" is found across the book. It is depressing to see the digression of the higher judiciary as narrated by a veteran like Dhavan.

[2]Upendra Baxi, "The Little Done, the Vast Undone Some Reflections on Reading Granville Austin's The Indian Constitution" 9 JILI 323 (1967).

In his fifth chapter '*The Constitution as Hope*' he narrates whether the constitution provides hope for everyone in the country? Is it permanent or tentative? Whether it fulfilled the promises made to the people etc. He says in order to answer this one should understand that dissent, revolt, rebellion remain a constant feature of Indian society and the history. He further states the constitution has become the site of struggle and has shifted its goal post from a socialist to a neoliberal perspective. Moreover, it has become a bourgeois constitution failing its promises owed to the poor, disempowered and the disadvantaged. We are in the situation where many instances make us to appreciate the author's assertion. He cautions that the constitution is more than a grand piece of paper which is subjected to hi-jack by the powerful men making the bulk of "We the people" as victims. Dhavan excellently puts this hope as "we promise we will overcome every attempt to oppress us by and through this giant which our leaders have given to themselves to rule over us (p. 37)."

The book ends with some optimism because the author is hopeful that the poor, disadvantaged and disempowered would capture the constitution to redeem the promises made to all Indians. Despite the miserable failure of the constitution he still thinks, "We will overcome (p. 37)". I believe this book would be a great contribution in this field and also an excellent response to many unfound and pseudo literature which praises the constitution and fails to look at its real performance. The author substantiates all his claims in a very convincing way. As already mentioned, the author has avoided giving lengthy footnotes and instead added the list of references to the end of the book. Though this book has many references it feels like reading an extempore piece where the authors arguments are very lively and engaging.

Overall the book is an excellent read not only for the scholars, professionals and academics but also for everyone interested in knowing the performance of the Indian constitution and the institutions interpreting and changing it. The book has been well structured. The chapters are not episodic but the reader can find a continuous flow while reading it. Though this book is engaging throughout and an easy read it leaves so many thought

provoking questions to be answered. It would be mistake to search for the omissions in this type of book which tries to comprehend the whole history of the working of constitution for past 67 years in 173 pages. The author should be appreciated for successfully convincing the reader that the making of constitution of India is a miracle that made the people to surrender their powers to their rulers and still remains as hope despite of its failures.

BIMAL N. PATEL, DHARMISHTA RAVAL & MAMATA BISWAL THE COMPANIES ACT 2013: KEY CONCEPTUAL TRANSFORMATION [UNIVERSAL LAW PUBLISHING CO.: AN IMPRINT OF LEXISNEXIS, NEW DELHI, 2017, 200pp. ISBN 978-8131252215]

Dr. Vidhi Madaan Chadda*

The book[1] under review is a welcome development in the field of corporate law jurisprudence in India. The Preface to the book states that, 'the book is an attempt to highlight and present the transformation as aimed by the Companies Act, 2013…further it intends to map the change brought in the jurisprudence as a result of this new statutory regime'.[2] By far, the book has been successful in the said attempt as it gives a panoramic view of the newly enacted company law by giving a comprehensive understanding of the key and significant changes brought about. The book is aptly segregated into twelve chapters which succinctly give an insight into the key aspects emerging out of the transformation of the regulation governing corporates in India.

Chapter *one* marks an appropriate beginning to the book and is aptly titled as 'The Companies Act 2013: An Overview'. The chapter authored by Dr. Mamata Biswal, succinctly discusses the shift in policy post the enactment of the Companies Act, 2013 (2013 Act). It further enumerates certain new provisions introduced vide the 2013 Act *viz.*, new kinds of companies[3], fast track incorporation process[4], private placement of shares[5], mandatory Corporate Social Responsibility[6], setting up of National

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[1] Bimal N Patel, Dharmishta Raval, Mamata Biswal, *The Companies Act 2013- Key Conceptual Transformation* (Lexis Nexis, New Delhi, 2017).

[2] *Id*, 'Preface'

[3] Namely; Associate Company, One Person Company, Small Company and Dormant Company. *Id* at 2.

[4] Section 3-22 of the Companies Act 2013.

[5] Section 42 read with R. 14 of the Companies (Prospectus and Allotment of Shares) Rules, 2014.

[6] Section 135 of the Companies Act 2013.

Company Law Tribunal and allowance of cross-border mergers[7]. The chapter sums up while observing that the present 2013 Act is premised upon a stringent corporate governance model and is a rule-based law.[8]

Chapter *two* is titled as, 'Corporate Social Responsibility under the Companies Act 2013 is authored by Cyril S. Shroff and Rishabh Cyril Shroff. The chapter begins with tracing the genesis of Corporate Social Responsibility (CSR) as evolved in India. It its second part, the chapter delves into the provisions of the 2013 Act dealing with CSR whilst examining the 'mandatory nature' of the Indian CSR regime. The chapter further conceptualizes the CSR policy in-terms of its implementation and its practical dimension. The authors emphasize that the guiding principle behind the legislative framework of CSR must be the conscious integration of company's economic, environmental and social objectives.[9] The chapter culminates with a hope that the intent of law would be effectively enforced, the only hiccup being the ambiguity in procedure.

The *third* chapter, co-written by Rajiv Luthra, William Vivian John and Anshul Jain is titled as, 'Minority Squeeze-Out'. The chapter begins with introducing the concept of squeeze out as the compulsory acquisition of the shares of the company for money consideration from the minority share-holders by the majority holders with the intent to drive the minority out of the company. The concept of minority squeeze-out has been only explicitly introduced vide the 2013 Act, by introducing section 236 enumerating certain circumstances under which the minority shareholders can be bought out by the majority. The next part of the chapter enumerates the minority squeeze out options provided under the 2013 Act, namely, deduction of capital under Section 66, consolidation of share capital under 61, acquisition of share under section 235, payment of consideration of minority under scheme of management and purchase of minority shareholding under section 236. The authors have cited the judgment of the High Court of Bombay in the *Sandvik Asia Ltd*. v. *Bharat Kumar Padamsi*

[7] Section 234 of the Companies Act 2013.
[8] *Supra* note 1 at 8.
[9] *Supra* note 1 at 22.

and Ors.,[10] as the guiding principle in case of minority squeeze out through reduction of share capital. The authors have also given a sneak view of the provisions pertaining to minority squeeze out in different jurisdictions such as UK, Singapore, USA, EU and Hong Kong. The chapter concludes on a positive note citing section 236, the new provision for minority squeeze out as a welcome step as to balance out the position of both acquiring majority shareholders and minority shareholders.

The next chapter penned by Cyril S Shroff continues the discussion on the rights of minority shareholders and hence it is titles as 'Companies Act 2013: Protection of the Minority Shareholders'. The chapter initiates the discussion on the rights of minority shareholders under the Indian Company Law by stating that although the term minority shareholder has not been defined it is taken to be as a shareholder who doesn't hold more than fifty percent of share capital or voting rights in the company[11]. The author has then pointed out (while citing provisions of the 2013 Act) how the new Act ensures greater transparency and higher standards of checks and balances aimed at safeguarding the interest of minority shareholders. Protection of minority shareholders are ensured under the new Act by giving them participations rights in decisions making, giving them wider avenues of remedies and exit rights, appointment of small shareholder director, inspection and investigation rights and right to requisition an extra-ordinary general meeting. The chapter finally sums up by affirming that the 2013 Act has given teeth to minority shareholders however, it is with course of time that will tell how the minority shareholders embrace such right endowed upon them.

The *fifth* chapter is authored by Prof. Umakanth Varottil, dealing with an intricate issue of Directors' duties and liabilities and is hence titled as, 'Directors' duties and liabilities under the Companies Act, 2013'. The author calls the enactment of the 2013 Act as historic as it has clarified, amplified and redefined the duties and liabilities of the directors. Unlike the Companies Act of 1956, the 2013 Act has codified the duties of the directors which are set forth under section 166 of the 2013 Act. The author

[10] 2009 (3) Bom. CR 57.
[11] *Supra* note 1 at 40.

here has pointed out the duties of the directors' have also been codified under the common law jurisdictions such as the UK, Singapore, of which we can draw learning while interpretation of such provision. The next delves into the nature and scope of the liabilities of the directors as provided under the 2013 Act. The chapter culminates with a caution that the mitigating factors inbuilt in the law must not dissuade the persons to carry out their onerous duties and liabilities as directors are stipulated under the Act.

Chapter *six*, titled as 'Corporate Frauds Genesis-Indian and International Scenario and its mitigation' is contributed by J.K.Jolly, who while tracing the antecedents of corporate frauds has enumerated and analysed few corporate frauds which led to the enactments worldwide. The next section concentrates on the study of major corporate scandals in India and their impact on the economy. It has primarily focussed on the scenario pre- and post Satyam scam. Lastly, the chapter has drawn a legislative road-map for prevention of corporate frauds in India and examines how 2013 Act provides for a comprehensive corporate Governance Model for mitigation of corporate frauds. The 2013 Act defines 'fraud', provides for appointment of independent directors, audit committee, setting up of SFIO and NCLT are all provisions which ensures companies remain answerable towards its stakeholders.

The next chapter is titled as, 'Related Parties under Companies Act 2013- An Analysis' is authored by Sanjaya Kumar Gupta. The chapter traces the concept of 'related parties and their transactions' under the Indian corporate laws. The author points out that the provisions pertaining to related party transactions under the 2013 Act are wider and exhaustive in nature however needs streamlining foe effective implementation.

Eighth chapter is 'Role and Responsibility of Key Managerial Personnel and Independent Directors under the Companies Act 2013' authored by Prof. Kondaiah Jonnalagadda. The author has succinctly analysed the concepts of Key Managerial Personnel (KMP), Officer-in-default and Independent Directors (ID) along with their role, functions and liabilities as stipulated under the 2013 Act. The author concludes, that in the

times, when the corporate scams are on the upsurge (pointing out Satyam and Sahara scams), the need of the hour appointing such (KMP's and ID's) who protect the interests of the investors and company.

Chapter *nine* entitled as, 'Issuance of securities by Indian Companies' is a brief discussion of the types, nature and modes of issuing the securities by the companies as stipulated under the 2013 Act. Next chapter authored by Prof. Divya Tyagi is on the role of auditors and hence captioned as 'strengthening the accountability of auditors through the instrumentality of Companies Act 2013: Mapping the Transformation'. The chapter elucidates the provisions pertaining to the appointment, role and functions of an auditor in a company. The author stresses that the auditors under the 2013 Act is a part of the 'transformational agenda' as premised upon the pillars of transparency and accountability.[12]

Chapter *eleven*, authored by Prof. Vijay Kumar Singh, touches upon the contours of 'Inspection, Inquiry and Investigation under the Companies Act 2013'. The chapter foremost analyses the provisions under 2013 Act pertaining to the said subject and further substantiates them with the judicial pronouncements. The role and importance of Serious Fraud Office (SFIO) has been stressed as significant in the detection and investigation of white collar crimes.

The *last* chapter is on the 'Concept, history and relief from Oppression and Mismanagement' by Sanjay Shorey. The author traces the genesis of the concept of 'oppression and mismanagement' and the reliefs as provided under the Indian Companies Act. He noted as the Indian Companies Act, 1850 was premised on the British Companies Act, 1844. Hence the sections 397- 398 of the Companies Act 1956 embodied the English jurisprudence and rule of majority as per *Foss* v. *Harbottle*[13] subject to certain exceptions was adopted. According to the author, oppression and mismanagement have to be seen through the prism of public interest or prejudicial to the companies' interest as propounded by the

[12] *Supra* note 1 at 149.
[13] (1843) 67 ER 189.

judiciary vide the landmark rulings such as *Shanti Prasad Jain* v. *Kalinga Tubes Limited*[14], *State of Bihar* v. *Kameshwar Singh*[15].

On the whole, the research is a praiseworthy contribution in the times when the jurisprudence and the literature on the new company code is evolving, where there is rarely any work of this kind on this intricate aspect of companies' regulation so far in India. Further, the interesting blend of various aspects highlighting the transformation in the Indian Company law is commendable. The chapters are methodically penned down by the senior officials of the Ministries of Corporate Affairs and Finance, seasoned corporate law practitioners and leading academicians which would invariably of great help for all the stakeholders alike.

The book has been supported by a subject index at the end as well for ease of readers**.** This laudable work carried out, will go a long way in filling the much-needed gap in the literature caused due to the shift in the policy. The book will cater to highlight valuable insights in this aspect of law to the academia, practitioners and the legal fraternity at large.

[14] AIR 1965 SC 1535
[15] AIR 19522 SC 252