Chanakya National Law University Journal

Chanakya National Law University Journal

Vol. 8 **2018–19**

Cite this volume as CNLU LJ (8) 2018-19

2018–2019

Price: Rs. 1000 (Institutional/Individual) Rs. 900 (Student/Law Teacher)

Registration No. : BIHENG/2010/38114
ISSN 0976-805X

Published by:

The Registrar,
Chanakya National Law University,
Patna-800001.

Distributed exclusively by:

Eastern Book Company
34, Lalbagh, Lucknow - 226 001
U.P., India
Website: www.ebc.co.in Email: sales@ebc-india.com

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Vice-Chancellor
National Law School of India University, Bangalore
Visiting Professor
Chanakya National Law University, Patna

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FROM THE EDITORIAL BOARD

"There is on thing one has to have: either a soul that is cheerful by nature or a soul made cheerful by work, love, art, and knowledge"

—Friedrich Nietzsche

The essence of human development lies in the enlightenment of the human soul to the quintessential values that serve the individual and the society simultaneously and which further the goal of a just social order where every person is blessed. Knowledge and art and their expression in the purest form are the most powerful means of illuminating the mankind.

The CNLU Law Journal is serving as a tool as well as a media to explore and answer a series of questions that are strongly intertwined with the contemporary legal issues and the society since 2010. The law journal is a source for the law students as well as professionals to appreciate how academic lawyers have devoted sufficient attention to the study and understanding of prevailing legal issues. This eighth edition of the CNLU Law Journal is a literary endeavour of the Chanakya National Law University, Patna.

Over the passage of time, we have set a remarkably high standard and this edition is also an attempt, with sheer dedication and honesty, to achieve the set standards. The journal is a compilation of ideas and opinions expressed by academicians, professionals and students of the legal fraternity.

ARTICLES

In the article titled "The Philosophy and Reality of Medical Ethics" an attempt is made to analyze and assess the issue of ethics in medical practice from historical foundations to present day concerns.

In the article titled "VIP & Copyright: Indian Perspective" the author has discussed that the establishment and success that people has achieved can and has gone far but indifferent behaviour still laches. This indifferent behaviour is against the visually impaired persons (VIPs). The author has given briefs and accounts of the limited approaches to the copyrighted works in needed formats. This article lays down the widened scopes for VIPs after

the ratification of the Marrakesh VIP treaty along with the copyright law to enable them to be accessible to complete copyright works.

In the article "Unravelling the Impediments to National Security: The Need to Reconcile Security and Human Rights" the author has focused on the laws executed to curb terrorism, its implementation and the consequences. The author has discussed that time and again new severe measures have been taken but these legislations have diverted from the main agenda of curbing terrorism and has rather concentrated on the severity of the measures to be applied. The author mentions the impact of the various policies of the legislature and also that this defeats the basic purpose of human rights and stands in conflict with the grundnorm i.e. the Constitution.

In the article "Intensifying Domain of Tortious Liability in Environmental Litigation: A Critical study of Judicial Response", the authors have discussed the increasing ambit of the tortious liability and the take of Indian Judiciary. The authors have focused on the point that the range of the tortious liability has spread as it is evolving. The authors have even mentioned about the historical derivation of the tortious liability and its precedence. The uncodified statute follows the English Common law and the authors have explained the applicability along with its liability and remedies through various case laws.

In the article titled "Role of Election Commission in Electoral Reforms", the author has discussed the concept of free and fair electoral system and the body to conduct such elections i.e. the Election Commission. The roles of the Commission has been extensively discussed by the author including prior preparations and later responsibilities. The roles and functions have been explained under the various headings by the author and that it has even helped in curbing the role of the money power during the time of elections. The author has mentioned that under the flagship of the Indian Constitution, the Commission has taken care and has to continue the same role by upholding the strongest power, vested to the citizens of the country through a fair process.

In "Rule of Law and Indian Constitution", the author has mentioned the concept of rule of law and i.e. that the State is governed by the law and not by the nominated representative of the people. The author has discussed that the Indian Constitution is the law of the land, is the Supreme power and the Legislative and the Executive derive their authority from the Constitution. Rule of law and the natural law keeps a check on the government and that the executive arbitrariness is kept at bay. The author has introduced the paper through Dicey's three pillars on what the government must be based on and how the Constitution fulfils these requirements and any rule made by the legislature must be in conformity with the Constitution. The author later also discusses the theoretical and practical application of the Rule of law in India.

In the article "Succession on Intestacy: A Comparative Analysis of Selected Intestacy Rules and Islamic Law", the author has discussed the concept of law of succession. According to the author, it involves the transmission of the rights and obligations of the deceased person in respect of his estate to the heirs and successors. The author has discussed about what happens to the property of the deceased. The author writes up that succession on intestacy on intestate succession is the mode or method of distribution or devolution of the property or estate of a person who dies without making a valid will. The author in this article has analysed the relevant laws and rules governing succession on intestacy in selected areas. A comparative analysis of the intestacy rules and Islamic law is made by the author as in that amongst the universality under various aspects of law of succession, some variations exists based on religious and cultural background.

In the article titled "'Ageism' & the International Rights Regime for the Older Cohorts: A Compelling Exigency for a Specialised Framework", the author has explained the concept of 'Ageism'. Ageism, according to the author, encompasses biases against the 'old age per se'. In this article it has been discussed that a perception is set and it operates on the basis that considers older adults as incompetent, unworthy and a burden on the resources. The author device it as against basic human rights. In this article, the author has deliberated on the phenomena of demographic ageing, 'ageism', the peculiar socio-legal issues concerning the elderly, and it needs to be protected by providing a specialised international framework for safeguarding the interests and rights of the older cohorts.

In the article titled "One Nation One Election Question of Desirability or Feasibility", the authors, has discussed the concept that frequent elections are also an ever increasing administrative burden for Election Commission of India. Simultaneous elections can be seen an option to resolve it which basically mean conducting elections at all the tiers together at a fixed period of time. However it is regarded as a little difficult idea to implement. This article analyse various legal issues relating to simultaneous elections. For this the amendment in the Constitution is needed to be done provided it does not hamper the basic structure of the Constitution. The authors further have discussed its effect which raises the questions of feasibility. The article includes all the commissions and committees and the question of desirability along with the need of bringing simultaneous elections and the issue relating to legality and impracticability in Indian scenario.

In the article "Juvenile Injustice: A Critique on the Constitutionality of deeming 16-18 year old Juveniles as Adults under the Juvenile Justice (Care and Protection of Children) Act, 2015, the authors has discussed the concept of Juvenile Justice and the Juvenile Justice Act of 2015. The Juvenile Justice (Care and Protection of Children) Act of 2015 has introduced a system of trial process wherein juveniles aged between 16 to 18 years have a

possibility of being tried as adults for heinous offences in a Sessions Court. This article analyses in detail whether the provisions of this Act that eventuate this system is constitutionally valid. The article includes the tests on the constitutionality of the provisions. The implications of this system of treating juveniles in this particular age group as adults under various statutes have also been discussed. The authors has concluded in this paper that the impugned provisions of the Act are in violation of the Constitution of India as well as various International Conventions; thereby warranting its invalidation by law at the earliest.

In the article titled "Algo-Trading: Analysing the new Frontiers", the author has dealt with the concept of algorithm trading. As defined, it means any order that is generated using automated execution logic. Further the article has stated that such idea existed even before the advent of algo-trading, however the impact varied. Certain merits and demerits has also been discussed by the author. The concept has dealt with the cases of algo-trading as adjudicated upon by SEBI'S adjudicating bodies. The author has mentioned that due to the slow proliferation of algo-trading in India and lack of aby high-profile cases, this area has been completely neglected.

In the article "Customary Exclusion: Needless and Unjustified", the authors has discussed the concept of exclusion which further takes the shape of customary exclusion based on customs and traditions against a particular gender. While on one hand, women have become independent, strong-willed, the entrenched stereotypes revolving around women is still in the picture. While many countries are making efforts to make sure that men and women enjoy equal opportunities in the workplace, in India, even now, the ostracization of women is restrained on the basis of safeguarding customs from various places. The authors have concluded that the customary exclusion of women which is carried out in the garb of preserving traditions and practices relating to a particular religion is not only deplorable but also conjectural.

In "Domain Names and Cybersquatting in IP Laws", the author has discussed the concept of domain names and cybersquatting under the trademark law. Information technology has rapidly increased their presence in the online markets to attract consumers with the help of the trademark. Therefore, trademarks play a very important role and it is crucial to protect the trademarks. The domain names and Cybersquatting's are also a part of the trademark and they need protection too. The registration of domain names is granted on a first come, first serve basis. Loophole under this is that, this leads to reserving of the trade names, company names etc., with a view of ill-will to the genuine buyers which is called Cybersquatting. The protection of which is not given by the Indian Trademark law. It can be only protected by passing off. And the consequences to which will be further explained in this article.

In the article titled "The Dynamics of Lynching in India: Is it a New Normal?", the author has discussed a new trend of normalizing lynching, a hate crime, that has become a language of indoctrinating vigilantism, through organised hate campaigns. This article has discussed how religion as a tool is used in it and people are under a constant threat of getting killed or beaten up on mere grounds of suspicion that they belong to a particular community, religion or caste. This article analyses the cause and effect of such incidents of mob lynching that catalyses the rise of mobocracy and to give solutions for the same. This article is concluded on the ground that the present scenario demands stringent laws to be made against lynching which can deter such grave propagandas affecting people at large.

The article "Fan Fiction Stuck in the Quagmire of Intellectual Property Law", the authors has laid down the concept of fan fiction as a budding literary creation wherein vital ingredients of an original work, like characters and settings, are extracted by a fan, to beget another creative piece of fiction involving a new arrangement of sequence and events. The article has stated that due to the advent of digitization, these amateur fan fiction writers publish their work online thereby being recognized considerably. The article further highlights the legal issues revolving around copyright law. This article has analysed elements which are independently. This article further enshrines upon the controversy regarding conflict of trademark law with fan fiction. The article is concludes about the right to publicity given to famous individuals possessing the right to protect their identity which may be taken away by fan fiction writers.

The article titled "Examining the Good Samaritan Protection of Law and Policy Framework in India: the need for Introspection", the authors has discussed about the need to bring forth the good Samaritan laws in India. The author aims to highlight the legal trepidation and thereby suggest measures which would bolster confidence among passerby's or witnesses of accidents to come to the rescue of the victim. The primary focus of the article aims at effectuating laws for protection of 'good Samaritans'. The article has been supported through case laws as well. Medical Professional (Protection and Regulation during Emergency situations) Bill, 2016 has also been discussed by the authors. The authors recommend enforcement of such laws in India.

In the article titled "*Independent Directors and Kotak Committee Report: The Changing Dynamics*", the author has discussed the roles of the independent directors. The need of independent directors has increased and its role in corporate India has become extremely significant. The author has discussed about the Kotak report formed by the SEBI. The report constitutes one of the most comprehensive measures to regulate and amend corporate governance framework in India. This article undertakes to analyse of the rationale of the amendments and their impact on the working of the companies.

In the article "*Uniform Civil Code: Panacea or a Problem*", the authors has discussed regarding the uniform civil code with a understanding that uniformity in personal laws is possible only through a comprehensive Code and not through devising sole legislations dedicated to a single or few areas put together. The authors has detailed about the governance with special reference to the existing legislations. This article highlights on desirability, feasibility, relative strength and success of two pronged strategy approach, i.e. reforming personal laws and simultaneously enacting uniform personal laws, rather than that of fixation at enactment of UCC, under present socio-political ethos.

In "*Human Trafficking on High Seas: Is Interdiction of Vessels a Solution*", the author has concentrated on human trafficking on high seas spurred on by abject poverty in certain parts of the world making the people flee, risking their lives, for better prospects across the high seas. These people then end up in exploitative situations owing to their status of illegal migrants which makes them vulnerable to deportation if detected and thus making them susceptible to human trafficking. The author has dealt with certain sections of the law regarding the trafficking and also has investigated the present laws to appreciate whether a solution of interdiction on high seas be presented as a solution for preventing human trafficking in high seas.

The article titled "*Patenting of Seeds and Complexities*", the author has focused on how and what changes are brought about in seeds law in respect of patentability of seeds. A remarkable development, as stated by the author is that non trade elements like agriculture and services also fall within the ambit of WTO and thus are regulated by international law. This has direct consequences to India being a party to the WTO charter. It is mandatory for India to make amendments to its existing law in order to harmonise it with WTO charter. The author has laid down the issues revolving around the invention of gene-technology and widespread application of bio-technology in order to produce new varieties of seeds and plants.

CASE COMMENT

The journal provides a commentary on the judgment delivered in *Nabam Rebia and Bamang Felix* v. *Speaker, Arunachal Pradesh Legislative Assembly*, (2016) 8 SCC 1, inclusive of the diminishing role and authority of the governor in the light of this case of Arunachal Pradesh. The author has stated that no institution or Constitutional office has suffered greater erosion than the office of the Governor. The recent fiasco in Uttarakhand and Arunachal Pradesh has brought nothing but vicious disparagement to this much esteemed constitutional office. Certain provisions of the Constitution

has been discussed in detail. This case inspite being a second judgment has, in its own capacity, diluted the powers of the Governor.

NOTES

In "*the Illicit Import, Export and Transfer of Ownership of Cultural Property- Legislative developments"* discusses the international developments pertaining to the Illicit Import, Export and Transfer of Ownership of Cultural Property in context with the domestic laws of India. The note evaluates the international conventions of the UNESCO and UNDROIT beside the national legislation along with the Antiquities and the Art Treasures Act, 1972 and draws out the issues like the sale of which exists and aggravates the current problem of Illicit Import, Export and Transfer of Ownership of Cultural Property. The note has discussed the differences in the legislative mechanisms and the impact of the legislative provisions of the international community as well as the national community. The note has laid down the contemporary problems in the said domain and suggests suitable recommendation to resolve the same.

In "*The Soul has no Gender then why should the Law*", the author discusses in detail that use and misuse of law are two sides of a coin and can never be ignored. This note highlights the need of gender neutral law on protection against Sexual Harassment at Workplace along with effective measurements against false allegations of the Sexual Harassment at Workplace. The author mentions that it becomes the duty of the Constitutional Machineries to consider the fact while framing and enforcing laws, that the prospective offenders can be victims too. Hence, equal protection must be provided to tackle misuse of the law against the innocents

ACKNOWLEDGMENT

We, at Chanakya National Law University, are jubilant, and at the same time humbled by the growth and augmentation of the CNLU Law Journal which attracts contributions from the legal luminaries stationed in different parts of the country and is now a storehouse of a number of enlightening articles, notes and comments on law and legal issues. It is only through discussion, deliberation and debate that law grows and develops, and the eighth volume of the CNLU Law Journal celebrates this spirit of enquiry and the faculty of critical thinking which has been amply exhibited by our contributing scholars and students.

No good work is the result of an endeavour of a sole entity. Hard work of a lot of people has gone into the making of this illustrious journal. We

extend our gratitude to our faculty advisors Shri Manoranjan Prasad Srivastava, Dr. B.R.N. Sharma, Dr. P.P. Rao and Dr. Manoranjan Kumar for their invaluable insight and participation in bringing out this journal regularly. We owe a lot to our Vice Chancellor, Hon'ble Justice Smt. Mridula Mishra (Retd.), for her indispensable guidance and encouragement.

We believe that the only purpose of this journal is to delve the curiosity and inquisitiveness in the minds of our readers. So that, they may develop and discover some new ideas and techniques which fit for our legal system.

THE PHILOSOPHY AND REALITY OF MEDICAL ETHICS

—*Justice Smt. Mridula Mishra*[*]

Abstract — Medical ethics is generally pluralistic and multidisciplinary in its approach. Its main function is to identify and characterize the component elements of a given medical situation and to provide an analytic process for assessing and applying the relevant values and principles of ethics.

Ethics at times may conflict with the law. Many situations in medicine are not "covered" by the law and their resolution is decided solely on ethical grounds. Implementation of ethical principles in medical practice is the biggest challenge, which needs a very pragmatic approach along with well-structured machinery to keep strict vigilance. Medical ethics in the modern sense refers to the application of general and fundamental ethical principles to clinical practice situations, including medical research. Individuals from various disciplines may author these principles.

In recent years, the term has been modified to biomedical ethics which includes ethical principles relating to all branches of knowledge about life and health. Thus, fields not directly related to the practice of medicine are included, such as nursing, pharmacy, genetics, social work, psychology, physiotherapy, occupational therapy, speech therapy, and the like. In addition, bioethics addresses issues of medical administration, medical economics, industrial medicine, epidemiology, legal medicine, treatment of animals, as well as environmental issues.

Though there are certain efforts have been made for the strict adherence to ethics in medical practice and related areas by the concerned sections, the results are not so satisfactory. In the back drop of this situation an attempt is made in this paper to analyze and assess the issue of ethics in medical practice from historical foundations to present day concerns.

[*] Vice-Chancellor, Chanakya National Law University, Patna.

Ethics is the branch of philosophy which deals with moral aspects of human behaviour. Some differentiate between ethics and morals. Ethics[1] deals with the theories and principles of values and the basic perceptions and justifications of values, whereas morals[2] includes the customs, and normative behaviour of people or societies. Nevertheless, these terms are often used interchangeably, their meanings how overlap and they are becoming virtually synonymous.

Medical ethics in the narrow historical sense refers to a group of guidelines, such as the Oath of Hippocrates, generally written by physicians, about the physician's ideal relationship to his peers and to his patients. Medical ethics in the modern sense refers to the application of general and fundamental ethical principles to clinical practice situations, including medical research. Individuals from various disciplines may author these principles. In recent years, the term has been modified to biomedical ethics which includes ethical principles relating to all branches of knowledge about life and health. Thus, fields not directly related to the practice of medicine are included, such as nursing, pharmacy, genetics, social work, psychology, physiotherapy, occupational therapy, speech therapy, and the like. In addition, bioethics addresses issues of medical administration, medical economics, industrial medicine, epidemiology, legal medicine, treatment of animals, as well as environmental issues.

This section discusses general ethical principles, developments of basic principles of medical ethics, and ethics teaching in medical schools. The practical applications of these principles in specific medical situations are found in different sections of the medical halachic encyclopaedia.[3]

Since the beginning of human history, concern for medical ethics has been expressed in the form of laws decrees, assumptions and "oaths" prepared for or by physicians. Among the oldest of these are the Code of Hammurabi in Babylonia (Approximately 1750 BCE), Egyptian papyri, Indian and Chinese writings, and early Geek writers, most notably Hippocrates (lived between 460 and 377 BCE). Early medical ethical codes were written by individuals or by small groups of people, usually

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1 The Greek word *ethike* means habit, action, character.

2 The Latin word *mos* means habit or custom.

3 This is taken from the *Medial Halachic Encyclopaedia* by Prof. A. Steinberg. This section discusses secular ethical-philosophical issues. Medical ethical principles are found in many religions, some of which are discussed in B.A. Body *et al*. (eds.): *Bioethics Yearbook*, vol. I. Theological developments in Bioethics, 1988-1990, Kluwer Acad Pub, 1991; B.A. Lustig et al. (eds.): *Bioethics Yearbook*, vol. 2, 1990-1992, Kluwer Acad Pub, 1993; E.D. Pellegrino *et al*. (eds.): *Transcultural Dimensions in Medical Ethics*, 1992. Specifically for Islam, *see* A.A. Nanji, *J Med Philos* 13: 257, 1988 and *J Med Ethics* 15: 203, 1989. For Buddhism, *see* P. Ratanakul, *J Med Philos* 13:301, 1988. For Confucianism, *see* R.Z. Qiu, *J Med Philos* 13: 277, 1988.

physicians. The Oath of Hippocrates is considered historically to be the first such code written in an organised and logical way which describes the proper relationships between physician and patient. During the middle Ages, other medical codes were written. In recent times, Thomas Precival's writings, disseminated in 1803, represent one of the first ethical codes in the United States and the Western world.[4] In the second half of the nineteenth century medical organisations began writing codes of medical ethics. The first ethics code of the American Medical Association (AMA) was published in 1848.[5] This was the first ethical code of a professional organisation which outlined the rights of patients and caregivers. Over the years many revisions and additions to this original code have been made. The latest edition of the AMA Code of Medical Ethics (1997) contains four parts, which include general principles, opinions on specific issues and special reports. The AMA established the Council on Ethical and Judicial Affairs to advise it on legal an ethical issues and to prepare position papers on these issues for the AMA. The British Medical Association published its first code of Medical Conduct of Physicians in 1858. The code has subsequently undergone numerous changes.[6] The World Health Organisation (WHO) issued the Declaration of Geneva in 1949. This is the first worldwide medical ethical code and is modelled after the Oath of Hippocrates. Many other medical organisations throughout the world, including those in Israel, have issued medical ethical codes.

The Nuremberg code is considered as one of the initial international documents on medical ethics. The Nuremberg Code has not been officially accepted as law by any nation or as official ethics guidelines by any association. In fact, the Code's reference to Hippocratic duty to the individual patient and the need to provide information was not initially favoured by the American Medical Association. The Western world initially dismissed the Nuremberg Code as a "code for barbarians" and not for civilized physicians and investigators. Additionally, the final judgment did not specify whether the Nuremberg Code should be applied to cases such as political prisoners, convicted felons, and healthy volunteers. The lack of clarity, the brutality of the unethical medical experiments, and the uncompromising language of the Nuremberg Code created an image that the Code was designed for singularly egregious transgressions.[7]

However, the Code is considered to be the most important document in the history of clinical research ethics, which had a massive influence on global human rights. The Nuremberg Code and the related Declaration of

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4 C.B. Chapman, *N Engl J Med* 301:630, 1979.

5 R. Baker, JAMA 278:163, 1997.

6 From time to time, the British Medical Association's view is summarised. *See* British Medical Association: *Handbook of Medical Ethics*, BMA, London, 1981.

7 https://enwikipedia.org/wiki/Nuremberg_Code accessed 28.11.2018.

Helsinki are the basis for the Code of Federal Regulations Title 45 Part 46, which are the regulations issued by the United States Department of Health and Human Services for the ethical treatment of human subjects, and are used in Institutional Review Boards (IRBs). In addition, the idea of informed consent has been universally accepted and now constitutes Article 7 of the United Nations' International Covenant on Civil and Political Rights. It also served as the basis for International Ethical Guidelines for Biomedical Research Involving Human Subjects proposed by the World Health Organisation.

I. INDIAN PERSPECTIVES ON MEDICAL ETHICS:

Ancient Indian legal thought, philosophy and ethics developed with a rational synthesis and went on gathering into itself, new concepts. The fundamental basis of ethics arises from the Hindu belief that we are all part of the divine *Paramatman*. The ultimate aim is for our atman to coalesce with *Paramatman* or *Brahman* to become one. According to *Vedas*,[8] the call to love your neighbour as yourself is "because the neighbour is in truth the very self and what separates you from him is mere illusion". Closely allied to Hinduism are Jainism and Buddhism. These religions proclaim *ahimsa* as *Paramodharma,* the most important of all our action is ahimsa, non-violence. Patanjali defined ahimsa as *Sarvatra Sarvada Sravabutanam anabhidroha*[9] a complete absence of ill-will to all beings. *Ayurveda* is the ancient science of life. It lays down the principle of management in health and disease and the code of conduct for the physicians. Charaka has described the objective of medicine as twofold: preservation of good health and combating disease[10]. *Ayurveda* emphasized the need for a healthy life style, a teacher of *Ayurveda* who established the science on the foundation of spirituality and ethics was *Vagbhata*, the author of *Astanga Hridaya*[11]. *Vagbhata* says, "Sukarthah *Sarvabutanman, Matah Sarvah Pravarthayah, Sukham Cana Vina dharmat, thasmaddharmaparo bhavel*" (All activities of man are directed to the end of attaining happiness, whereas happiness is never achieved without righteousness. It is the binding duty of man to be righteous in his action).

Charak Samhita prescribes an elaborate code of conduct. The medical profession has to be motivated by compassion for living beings

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8 Vedas (400 BC to 1006 BC).

9 Radhakrishnan, S., *Indian Philosophy*, Oxford University Press, Oxford, 1929 p. 234, Bhattacharya Rao, *Encyclopaedia of Indian Medicine*, Bombay; Popular Book Prakashan, 1987, p. 123.

10 *Ibid*.

11 Srinivasa Murthy R., "Informed Consent for During Trial: A Systematic Study", NIMHANS Journal, vol. 2, 1988, pp. 145-149.

(*Bhutadaya*)[12]. Charaka's Humanistic ideal is evident in his advice to the physician. He who practices not for money or for caprice but out of compassion for living beings is the best among all physicians. It is hard to find a conferrer of religious blessings comparable to the physician who snaps the snares of death for his patients. The physician who regards compassion for living beings as the highest religion, fulfils his mission and obtains the highest happiness. Brace Jennings j. has observed that mora decision making within medicine is becoming increasingly institutionalised and subject to formalised procedures and constraints across a broad range in the landscape of contemporary medicine, such as human subject's to research, organ procurement and transplantation, assisted reproduction, the rationing of health care and the forgoing of life sustaining treatment[13].

Thus science and medicine are increasingly drawn and driven into ethical debate which raises the clash between scientific method (small, step by step approaches and trial and error and answering small questions) and philosophical, mental, physical and ethical questions. Such rules are increasingly institutionalised; they are embedded in statutes, regulations, directives, court opinions, administrative mandates and institutional protocols. In decisions regarding terminal care, the rules inform about counselling and educational mechanisms, encouraging patients and their families to engage in treatment and discussions[14] and to give prior statements about wanted and unwanted treatment[15]. This 'embedded' quality has important relationships with the kind of that ethical concerns and the way in which they are expressed. Jennings agrees there has been an important recent shift away from epistemological relations about the relationship between a rational, knowing subject and a rationally knowable, objective morality as the primary focus of ethical theory, towards an approach which aims to understand orality "as a sociality embedded practice." These transformations have important consequences for the ways in which we conceptualise and even describe the setting of a legal frame work and the establishment of ethical standard for regulating scientific and technical societies.

Medical field which separates a legal obligation from a moral obligation and the relationships expect the confidence of fiduciary duty of the doctor to his patient. The reasons underlying the need for confidentiality are complimentary. First, if those who are sick do not trust doctors to maintain the information they disclose in confidence, they will not be approach for treatment. It is particularly important in case of an infectious disease like

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[12] Derek Morgan, *Issues in Medical Law and Ethics*, Cavendish Publishing Limited, London, 2000, p. 18.

[13] Sen, A., *The Quality of Life*, Oxford Clarendon Publication, London, 1993, pp. 303-35.

[14] The Discussion of Laws J. at first instance in *R. v. Cambridge HA ex p B (A Minor)*, (1995) 23 BMLR 1, p. 16.

[15] *AK, In re*, (2001) 58 BMLR 151 .

infection with the *Human Immunodeficiency Virus* (HIV). The doctor must also believe that the patients has given the whole history of their disease, otherwise, risks may arise, as the doctor may reach a wrong diagnosis and prescribe a wrong treatment[16]. The legal duty is not absolute and is subject to modification On analysis of the cases which help to shape and delimit the law in this area shows the importance of the patient's disclosure of full information of the patients in the public interest. The individual's private interest is given comparatively little prominence.

II. MEDICAL ETHICS

From the date of creation of the Hippocratic Oath ethics has played an important role. By dealing with the beginning, and end process of human life, medicine and medical law are rendered ineluctably ethical in nature. Law is connected to medical law and medical ethics. Morality is sometimes explicitly incorporated into legal doctrine and it is unavoidably incorporated with the law in the ethical controversial issues raised by medical care system[17]. Medical law is inseparable from medical ethics. We will not be able to understand medical law without understanding the ethical tensions in play.

The main theories of Medical Ethics are Moral relativism, Moral objectivism and Moral pluralism, Utilitarianism, Right – based theories and duty based theories, Virtue Ethics, Compromise Positions. The knowledge in philosophy of Medical Ethics and the detailed analysis of these theories are necessary. The first theory is moral relativism moral objectivism, and moral pluralism. There are two diametrically opposed views about the validity of moral beliefs. On one hand the moral objectivists, who hold that moral beliefs are capable of being objectively valid in the sense of being true or false, or capable of being rational or irrational. On the other hand the moral relativists, who hold that moral beliefs are not capable of being objectively valid. According to moral relativists all moral theories are based on truth or rational relativity. Denials of moral values can be objectively true or rational when made by those who deny all moral knowledge and those who wish to claim that moral values are relative to a particular culture or individual. Moral beliefs do, in fact, differ from person to person, culture to culture, and generation to generation. Some issues seem to attract almost as many ethical views as view holders. Moral objectivism holds that many beliefs are wrong. It does not imply that every moral question must have a single uncontroversial answer[18]. The relating of pluralism need not be over emphasised. Even in large secular societies moral consensus is quite common. If

[16] Adler M.W., "HIV Confidentiality and a Delicate Balance", Journal of Medical Ethics, 1991, vol. 17.

[17] http://www.jme in/124hl/126htm/ accessed 25.10.2018.

[18] *Ibid*.

it were not, no stable polity could exist. English legal doctrine encompasses many moral values shared by the majority of the population. In the developed-world, consensus can be seen in international instruments such as the Helsinki declaration[19] and the innumerable human rights instruments that pepper the international arena. These instruments proclaim the universal nature of moral values such as respect for patient autonomy and the democratic process. There is no universally accepted ethical theory, and no consensus on the underlying ethical principles or their application. It is better to examine the five major groups of moral theories. Utilitarianism, Duty-based theories, and Right based theories, Virtue ethics and Compromise positions[20]. The second theory is Utilitarianism. Utilitarianism is a collection of moral theories that are morally required to seek the best possible balance of utility over disutility[21]. Classical or hedonistic utilitarianism is the most famous version that requires seeking of maximum pleasure over pain. All forms of utilitarianism invoke a calculus in which the relevant interest of all individuals count equally. This commitment to equality has led to the common association of utilitarianism with the phrase "the greatest benefit to the greatest number". Utilitarian are unified by acceptance of at least four tenets. First, utility is nor itself a moral property. Utility is defined as something non-moral (such as pain or preferences), rather than something that is itself inherently moral (such as rights or duties). Second, principle is to achieve the best balance of utility over disutility. It is the supreme principle of morality. Third, individual interest can be meaningfully added together (for aggregation or averaging) and compared. Utilitarianism holds that it makes sense for A, B, and C's interest to be added in some way and weighed against the interest of D. In classical (pain/pleasure) utilitarianism, it is possible to aggregate the suffering of the four patients in need of life saving tissue to outweigh the suffering of the unwilling donor patient. Fourth, what matter are the predicted consequences to the utility balances and nothing is intrinsically good irrespective of its consequences[22]. The third theory is right based theories and duty based theories.

Both right based and duty-based theories are based on the interest of individuals rather than the collective. Unlike utilitarianism, they do not allow aggregation or averaging of individual interest. They are distributive rather than aggregative. What matter is the weight of the relevant right or duty, not the number of persons involved? It follows that, unlike

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[19] The Helsinki Declaration is a set of principles for medical research on human subjects issued by the World Medical Association (WMA). The latest version was agreed by the General Assembly of the WMA in Edinburg, 2000, with subsequent notes of classification. *See* http://www wma.net/e/policy/b3 htm. (accessed 18.11.2018).

[20] *Ibid*.

[21] Gandyour and Lauterbach 2003 for a brief summary of many popular versions of utilitarianism.

[22] Harris 1975 and Thomson 1985 and 1976. Thomson considers situations where numbers also cause initiative difficulties for right and duty-based theories.

many versions of utilitarianism, if everything else is equal, the combined moral claims of a large number in need of wart removal cannot outweigh the claim of someone dying of heart disease. The difference between right based and duty based theories rest on the availability of the benefit of any moral obligation. Right based theory hold that all m oral obligations reduce to the moral rights, understood as justifiable claim imposing correlative duties, the benefit of which are available to the rights-holder[23]. Right are justifiable claims against unwanted interferences (negative right) or justifiable claims for wanted assistance (positive rights), or both. In contrast, duty-based theories are do not automatically entitle the recipient of the duty to waive its benefit, in the sense of releasing the duty-bearer from his obligation. Duty-based theories are thus more compatible with paternalism. For some this distinction is one within right-theories a distinction between the will (or choice) conception of rights and the benefit (or interest) conception. This is simply a matter of terminology. Care must be taken with labels. All right and duty-based theories must deal with conflicting between rights and duties. There can be only one absolute right or duty. The conflict between them creates as insurmountable impasse. A patient confides to his physician that he has an overwhelming desire to kill his girlfriend[24]. If the physician has a duty to keep the confidence of his patient and a duty to protect innocent people from being harmed by a dangerous patient (i.e., there is a conflict between the right of the patient and the right of the patient's girlfriend) both duties (rights) cannot be of equal weight. This means that all such theories require a hierarchy of rights or duties, which is in turn requires an objective criterion ranking those rights or duties. The fourth theory is Virtue Ethics.

Virtue ethics rejects all action based on moralities – including utilitarian, rights based and duty based theories in favour of character – based values[25]. Such positions reject the idea that of judgment of duty and obligation to perform the right action, or moral rules and principles are the most basic moral concepts. Instead, ethics is understood to be primarily concerned with character and virtuous traits. Virtuous traits are held to be intrinsically good and, typically, linked with human flourishing (assessed according to some "objective" criterion). In this, way virtue ethics contrasts with action based moralities, for which a virtuous character is simply one predisposing

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[23] Some theorist equate waving the benefit of a right (i.e. the duty that is correlative to the right) with waiving the right itself. There is, however a conceptual difference. The difference turns on whether it is possible to waive one's claim to being a right-holder (which waiving one's right would imply). Thus, used the narrower expression to allow for those theories holding that individuals cannot possess the properties of a right-holder without possessing rights. *See* e.g. the theory of Gewirth (1978).

[24] This was the situation faced by the psychotherapist in the California case of *Tarasoff* v. *Regents of the University of California*, (1976) 131 Cal Reptr 14.

[25] John Harris, *The Value of Life: An Introduction to Medical Ethics*, Routledge Publication, London, 1985, p. 343.

towards actions consistent with one's moral obligations. For virtue theory, virtuous character traits are not dispositions that are merely instrumental to compliance with moral rules or principles, and are dispositions about feeling, reaction, and acting that are in some sense intrinsically valuable or linked to human flourishing. Virtue theories need to tell us how to recognise virtuous person or virtuous traits. Even then, virtues ethics do not aim to provide universal rules or principles like the principles of utility (the aim is not to maximize virtuous conduct) or those associated with rights and duty based theories. The fifth theory is compromise positions theory.

Compromise Positions, is a collection of moral positions drawing elements from the other four. These positions are rarely foundationalist and usually adhering more closely to the ethical reasoning of a layperson. It is essentially a miscellaneous category, capturing almost innumerable moral positions, nor all of which are coherent. Some consider rule – utilitarianism to be a compromise position because of its reliance on general rules even where the strict application of the principle of utility requires a different conclusion. The classical compromise position in medical ethics is represented by the 'principlism' of Beauchamp and Childress[26]. These two authors advocate four principles of biomedical ethics. Their position explicitly seeks a compromise between overarching deep moral theory and practical ethics by adopting element of utilitarianism, right and duty-based theory, and virtue ethics, Beauchamp and Childress make no claims to foundationalist grounding for these principles. Nonetheless, 'very few critics argue that any one of the four principles is incompatible with his or her preferred theory or approach to biomedical ethics[27].

There are some conflicting areas relating to medical ethics like Informed consent, Disclosure of information, Confidentiality, Patient's autonomy, Euthanasia and Organ transplantation. The study of ethical theories provides a logical framework for the understanding of the ethical dimensions of human conduct, helps one to recognize ethical dilemmas and provides tools for their resolution. Ethics examines and measures human conduct. Accepted practices of human conduct in a given country are termed normative behaviour. Ethical standards are used to evaluate and ensure the appropriateness and desirability of such practices. A value usually denotes the good, the beneficial in ethics, the truth in cognition, and the holy in religion. A value is not determined objectively. It is not a scientific term and cannot be scientifically defined. Therefore, science is neutral with respect to most bioethical values. A value represents a subjective assessment and may be measured by what a person is willing to sacrifice for it and not by what it gives to him. Ethical dilemmas are created only in relation to human

[26] Beauchamp, Tom L. and Childress, James F., *Principles of Biomedical Ethics*, Oxford University Press, Oxford, 2001, p. 268.

[27] *Ibid*.

beings, within the framework of relations between one human being and another. They arise when two or more alternative actions, each of which is inherently good, yield conflicting outcomes. Or an action that benefits one person may cause harm to another. In such situations, one must find the ethical justification for each course of action and have a system of prioritization to select the most appropriate one. Ethics asks what should be done, not what one ordinarily does and not what one could do.

The two central questions in ethical theories are:

- What is the good for which we strive or should strive, and what is the evil that we would like to or must avoid?

- What is the proper or desired course of action, and what is the inappropriate or forbidden course of action? Some people believe the two questions are interrelated and debate which comes first and which the corollary is. Others totally separate the two questions.

Sometimes the dilemma is factual and not one of values. In such cases, debates and discussions may result from imprecise knowledge about the facts related to the dilemma either due to lack of actual information or lack of clarity or understanding of positions and views about the issues. Often mere clarification of the facts may resolve the ethical question. Good ethics starts with the correct facts. A decision is inherently unethical if it is based on erroneous or incomplete data. Therefore, the first step in adjudicating a concrete medical ethical issue is to gather the pertinent facts. Proper clarification of the facts often avoids futile ethical debates. Sometimes debates result from differences in the fundamental positions of the people involved. Even in such cases, a clear and precise presentation of the various positions may achieve mutual respect, precision of ethical focus, and sometimes even resolution of the ethical dilemma, even if a consensus is not reached. Ethical dilemmas would not exist if ethical principles were like parallel lines which never intersect. However, in reality values do not function in that way. Rather they go in different directions and involve situations where values conflict with each other. Then, one must choose between good and bad values or between values of greater or lesser utility. Sometimes, resolution of an ethical problem is easy with a single, unanimous agreed upon course of action. At other times, the resolution is a compromise between opposing interests, with no one totally satisfied. Theoretically, ethics should decide between good and bad, between proper and improper, between correct and incorrect. But the proverb says: A wise person is not the one who knows how to choose good from bad, but he who chooses the lesser of two evils. The goals of medical ethics include the analysis of the relative merits of alternative actions in medical ethical dilemmas. Definite and absolute decisions are not always attainable or implementable. Therefore, medical

ethics is satisfied with decisions defining the relationship between what is desirable and what is practical or in the choice of the lesser of two evils. Medical ethics is generally pluralistic and multidisciplinary in its approach. Its main function is to identify and characterize the component elements of a given medical situation and to provide an analytic process for assessing and applying the relevant values and principles of ethics. In general, modern medical ethics does not see its function as providing definitive ethical directives in every case. In this respect, ethics differs from law or Jewish halacha. The latter establish specific guidelines, whereas ethics provides pluralistic approaches and clarification and precision of understanding of the ethical aspects of medical questions.

With respect to the relationship between ethics and the law – law by its very nature in contrast to ethics, demands that it be followed precisely. Ethics at times may conflict with the law. Many situations in medicine are not "covered" by the law and their resolution is decided solely on ethical grounds[28]. Implementation of ethical principal in medical practice is the biggest challenge, which needs a very pragmatic approach along with well-structured machinery to keep strict vigilance. It seems that we have to travel a long distance to conceptualise the basic idea of medical ethics in practice.

[28] Concerning the relationship between ethics and law, *see* E.D. Pellegrino, *Am J Med* 96:289, 1994.

"VIP & COPYRIGHT: INDIAN PERSPECTIVE"

—Dr. Ashish Kumar Srivastava[*]

Abstract — "Kindness is the language which the deaf can hear and the blind can see."

—Mark Twain

"The world is becoming humane day by day but still discrimination against visually impaired persons (VIPs) continues as they have no accessibility to the outer world and their life is still dark, doom and disastrous. Their share in common heritage of knowledge through which they can connect to other world is like a drop-in ocean as only 7% of the whole published books are available in the needed formats for VIPs. The United Nation Conventions on Rights of Persons with Disabilities, 2006 and Marrakesh VIP Treaty of 2013 are pioneer steps in this regard to bring the VIPs in the mainstream of society by making them accessible in their formats the copyrighted works through change in municipal copyright laws. India was first Country which ratified the Marrakesh VIP treaty. This paper attempts to find out the roadmap of exceptions and limitations which we have made in our national copyright law to synchronise it with Marrakesh VIP Treaty."

I. INTRODUCTION

The world is divided between two groups i.e. might and vulnerable. The might and powerful group has always oriented society in such a way

[*] Assistant Professor, Faculty of Law, University of Lucknow.

that maximum exploitation of resources are made for their benefits while the vulnerable do not get their due. This discrimination is not unknown in the matter of physically challenged persons. The discrimination against them has been opulent in the matter of distribution of resources. When free nations started taking shape after the Second World War the best result was that world witnessed best form of governance in 'democracy'. Democracy is the type of government which is meant for development of everyone. Therefore we started making our governance more humane by elimination of all sorts of discrimination against everyone. UDHR, ICCPR, ICEPR laid down the foundation of humanity by at least agreeing to various civil and political rights for individual.

Physically challenged persons or differently abled persons especially the visually impaired persons (VIPs) have to face the discrimination in every walk of life, therefore the need was felt that world community should recognise their rights and make every attempt to realize them what they deserve. In this connection the United Nation Conventions on Rights of Persons with Disabilities, 2006 is a pioneer step wherein the world community recognised the rights of disables and casted an obligations on member nation States to make them realize.

II. INTERNATIONAL PERSPECTIVE TO VIPS

International community has always shown interest in marginalized groups specially the VIPs. The UDHR under its preamble accepts that 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.'[1]

Under its thirty articles the UDHR identifies all those important rights which makes life more beautiful. Recognising life, liberty, equality as pivotal the UDHR very firmly establishes that these rights must be available to all when it says that, "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."[2] Liberty of expressing oneself is the most important right which one can have in a democracy therefore the UDHR says that, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold

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1 Preamble of UDHR http://www.un.org/en/documents/udhr/.

2 Art. 2 of UDHR.

opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[3]

ICCPR under Article 19 holds the freedom of opinion as an important right[4]. Even Indian Constitution also hold the same as an important right under Article 19. But if we now come to ground realities regarding the VIPs we find a paradoxical situation as we failed to appreciate that the VIPs other rights would be meaningless until they are connected to the rest of the world through the information by making it them available in needed formats. We felt strongly the need of bringing the VIPs in the mainstream of society so we ended up in new convention.

III. UNITED NATION CONVENTIONS ON RIGHTS OF PERSONS WITH DISABILITIES, 2006 & VIPS

In its preamble the 2006 convention (CRPD) recognises the rights set forth in UDHR, ICCPR, ICEPR, CEDAW and other like conventions and recognises that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others[5]. This convention under its fifty Articles recognises the various rights of disabled which are required to be realized by them for mainstreaming them in society.

Article 1 sets forth the basic objective of making this convention in these words, "The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

Among all other civil and political rights this convention highlights the need of education, health, work and employment, enjoyment of social and cultural life. The disabled person can enjoy all their rights only when the system is customized to their needs and bring them in the mainstream of society but there are economic implications of it. Taken together, the

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[3] Art. 19 of UDHR.

[4] ICCPR http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

[5] Preamble of CRPD <http://www.un.org/disabilities/convention/conventionfull.shtml> accessed 19th February, 2017.

provisions in the Convention impose a strong positive obligation on member States to ensure that persons with disabilities enjoy access to culture and knowledge on an equal basis, including to material protected by copyright.

IV. COPYRIGHT: VIPS AND MARRAKESH TREATY 2013

In the previous section of this paper we tried to find the justifications of elimination of discrimination against VIPs in the international documents. Having done so I would now make an attempt to highlight the conflict of interests among the VIPs and authors of copyright works.

Before we start discussion about the VIP Treaty we need to understand the 'Book Famine' as the 7% of published works are accessible in accessible formats for VIPs and process of converting the published works in accessible formats is very bulky, tiring and expensive works[6]. This problem is more acute in developing nation as 90% of blind people are living in developing nations[7]. Most of the publishers are releasing e-books but even those are not being released in accessible formats.

As we all know that copyright is essentially a right which is generated by intellect and the creator i.e. the author is guaranteed commercial rights of exploitation of the work by municipal copyright law. Section 14 of Copyright Act identifies the communication of work to public as an essential right. However it nowhere mentions about making them available in the needed formats to the VIPs. I would like to quote one more relevant section in this regard which is section 52 known as fair use however this section is also silent about this issue.

The problem in this regard is that neither the author nor the VIPs are authorised to covert the normal copies of work in needed formats suited to VIPs. Marrakesh Treaty 2013 (**Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled**) on the foundation of non-discrimination, mainstreaming of VIPs, freedom of expression, accessibility to information moves forward for full and effective participation in society of VIPs to create an egalitarian and inclusive society. VIPs have limitations of choices and this treaty says that "Many Member States have established limitations and exceptions in their national copyright laws for persons with visual

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6 Paul Harpur and Nicolas Suzor, "Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm" (2013) 36 University of New South Wales Law Journal 3 (33), 745-778.

7 World Health Organisation, Visual Impairment and Blindness (October 2013) <http://www.who.int/ mediacentre/factsheets/fs282/en/> accessed 19th February, 2017.

impairments or with other print disabilities, yet there is a continuing shortage of available works in accessible format copies for such persons, and that considerable resources are required for their effort of making works accessible to these persons, and that the lack of possibilities of cross-border exchange of accessible format copies has necessitated duplication of these efforts[8]." This treaty wants to create a balance by providing incentive to copyright owners and at the same time wants to recognize that member States shall have to customize their municipal copyright laws by way of limitations and exceptions so that VIPs may have access to works in accessible formats.

Under its 22 Articles the Marrakesh treaty identifies the rights of beneficiary[9], details out about limitation and exceptions to be made in municipal copyright laws[10], cross border exchange of accessible formats[11], importation of accessible formats[12], respect for privacy[13] and the half part[14] of the treaty deals with monitoring and implementation of this treaty by Assembly and International Bureau.

V. MARRAKESH TREATY, 2013

Marrakesh Treaty was signed on 23rd June 2013. India has become the first country to ratify the Marrakesh Treaty to facilitate access to published works for persons who are visually impaired, or otherwise print disabled. The Treaty was adopted by 79-member countries of the World Intellectual Property Organisation (WIPO) on June 27, 2013, and India ratified it on June 24, 2013[15]. The most powerful country i.e. USA has still not signed it which shows its indifference to issue of VIPs. The need in USA has been felt like others. "At the 37th UNESCO General Conference in Paris in November 2013, a parallel resolution passed overwhelmingly. Endorsed by the Governing Board of the International Federation of Library Associations and Institutions (IFLA) and developed by its Libraries Serving Persons with Print Disabilities (LPD) section, the "Manifesto for Libraries Serving Persons with a Print Disability" (the LPD Manifesto) is an expression of the political will to include everyone in the information stream. It urges libraries worldwide to "improve and promote accessible library and information services" to the estimated 285 million blind and visually impaired people on

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8 Preamble of Marrakesh Treaty, 2013.
9 Art. 3, Marrakesh Treaty, 2013.
10 Art. 4, Marrakesh Treaty, 2013.
11 Art.5, Marrakesh Treaty, 2013.
12 Art. 6, Marrakesh Treaty, 2013.
13 Art. 8, Marrakesh Treaty, 2013.
14 Arts. 10-22 Marrakesh Treaty, 2013.
15 "India Ratifies Marrakesh Treaty for Visually Impaired", *The Hindu*, July 3, 2014 <http://www.thehindu.com/news/national/india-ratifies-marrakesh-treaty-for-visually-paired/article6171554.ece> accessed 19th February, 2017.

the planet. Nearly 21 million reside in the United States, not including millions more with print disabilities due to physical or organic reading impairment such as dyslexia."[16]

The treaty promotes sharing of books in any accessible format for the blind or visually impaired and is expected to alleviate the "book famine" experienced by many of the WHO-estimated 300 million people suffering from such disability in the world. According to the World Health Organisation (WHO), India has more than 63 million visually impaired people, of whom about 8 million are blind[17].

In order to be operational the treaty needed ratification by at least twenty countries[18] and till now 50 countries have ratified it[19]. The most important part of the treaty is that this treaty holds visually impaired persons as beneficiary[20] and provide for National Law limitations and exception for provision of accessible formats of works to VIPs[21]. Article 4 says that Contracting Parties shall provide in their national copyright laws for a limitation or exception relating to the rights regarding reproduction, distribution, and making available to the public as provided by the WIPO Copyright Treaty (WCT), to facilitate the availability of works in accessible format copies for beneficiary persons. Contracting Parties may also provide a limitation or exception to the right of public performance to facilitate access to works for beneficiary persons. A Contracting Party may fulfil its obligation under this treaty by authorizing authorized entities or beneficiary or caretaker of beneficiary to make an accessible format copy of a copyright work with all necessary and ancillary powers.

A Contracting Party may fulfil its obligation by providing other limitations or exceptions in its national copyright law pursuant to Articles 10 and 11 of this treaty which essentially is about using the flexibilities of TRIPS and Berne Convention. To make a balance between rights of beneficiary and author of copyright the treaty provides that a Contracting Party may confine limitations or exceptions under this Article to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms

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16 Mike L. Marlin, "Promoting Access for Blind and Visually Impaired Patrons", *American Libraries*, vol. 45, no. 11/12 (November/December 2014), pp. 21-22 <https://www.jstor.org/stable/24603535> accessed 25th July 2018 02:36 UTC.

17 India's Closing Statement at Marrakesh on the Treaty for the Blind <http://cis-india.org/a2k/blogs/india-closing-statement-marrakesh-treaty-for-the-blind> accessed 19th February, 2017.

18 Art. 18 of Marrakesh Treaty, 2013.

19 Over 50 Countries Sign Marrakesh Treaty on Copyright Exceptions and Limitations for the Blind <http://www.ip-watch.org/2013/07/01/over-50-countries-sign-marrakesh-treaty-on-copyright-exceptions-and-limitations-for-the-blind/> accessed 19th February, 2017.

20 Art. 3 Marrakesh Treaty, 2013.

21 Art. 4 Marrakesh Treaty, 2013.

for beneficiary persons in that market. The treaty also provides that it shall be a matter for national law to determine whether limitations or exceptions under this Article are subject to remuneration.

If we see this Article the primary conclusion is that world community is ready to leave no stone unturned for making the copyright works in accessible formats to VIPs. There may be a confusing among contracting parties that by being signatory of VIP treaty they shall also have sigh WIPO Copyright Treaty (WCT). However one need to understand that minutes after closure of meeting made it clear that It is understood that nothing in this Treaty creates any obligations for a Contracting Party to ratify or accede to the WCT [WIPO Copyright Treaty] or to comply with any of its provisions and nothing in this Treaty prejudices any rights, limitations and exceptions contained in the WCT[22].

The treaty also provides for importation[23] and cross border exchange of accessible formats[24] for accessibility of copyright works to VIPs. This treaty removes barriers to access, recognizes the right to read, establishes equal opportunities and rights for blind, visually impaired and otherwise print disabled persons who are marginalized due to lack of access to published works. We are happy to note that this treaty strikes an appropriate balance between copyright and exceptions and limitations to it.

This treaty is meant to promote cross border exchange of accessible formats for VIPs of published works and will not deprive the author of commercial benefits of the work. As we have discussed above that most of the publishers and authors do not release their works in accessible formats so the VIPs shall have to depend upon the limitations and exceptions provided by municipal copyright law as suggested by VIP treaty. These limitation are based on Berne Convention which talks about Three Step Test. It permits exceptions of copyright work only 'in certain special cases' that 'do not conflict with a normal exploitation of the work', and 'do not unreasonably prejudice the legitimate interests of the author[25]. VIPs constitute special cases for which exceptions and limitations may be created. The Berne Convention provides for balancing the conflicts of VIPs with authors by giving them an incentive for conversion of their works in accessible formats by compensating them adequately[26] or providing a free use clause where no compensation shall be paid to owners. The three step test of Berne

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[22] Over 50 Countries Sign Marrakesh Treaty on Copyright Exceptions and Limitations for the Blind <http://www.ip-watch.org/2013/07/01/over-50-countries-sign-marrakesh-treaty-on-copyright-exceptions-and-limitations-for-the-blind/.> accessed 19th February, 2017.

[23] Art. 6 of Marrakesh Treaty, 2013.

[24] Art. 5 of Marrakesh Treaty, 2013.

[25] Berne Convention, Art. 9(2).

[26] Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford University Press, 2nd edn., 2006) [13.11].

Convention provides for enough flexibilities for member States to create small accessible repositories.

In a copyright work which shall be converted to accessible formats the cost shall be met especially in developing nations by Government agencies and then the authors need not to be compensated for such accessible formats otherwise if the authors with the help of publishers create accessible formats that can be acquired by compensation and compulsory licenses as the Australia has done[27]. A very surprising instance is worth quoting the Amazon issued E-book reader Kindle which was initially utile for low vision people but due to pressure of authors and publishers subsequently it has to remove those accessible formats[28].

The exceptions that already exist for digitising and disseminating copyright works for the benefit of people with disabilities are generally considered to be compliant with the *Berne* three-step test. Similarly, international copyright law does not require countries to prohibit the unlicensed importation of accessible books. Nation States are free to make changes to domestic law to permit the cross-border flow of accessible books for the blind.

Marrakesh Treaty has been opposed vehemently by international copyright lobbyist which advocated strong rights of owners and limited exceptions like Association of American Publishers, the Independent Film and Television Alliance, the Motion Picture Association of America, the National Music Publishers' Association, and the Recording Industry Association of America. Copyright industry groups fear any changes that threaten to weaken the basic presumption that any exceptions to the copyright monopoly must be limited and strictly optional.

Google book project, Bookshare etc. are some voluntary and non-profit initiatives which are making the works in accessible formats with the help of scanners and OCR software. Western countries are providing for compulsory licensing if the works are not made available in accessible formats for a reasonable period. Others are also providing it in their Fair Use clause, but municipal legislative framework has often been found to be confused regarding the fair use.

"Despite perceptions to the contrary, the rise of internet availability and mobile communications technology does not mean automatic accessibility for blind or vision-impaired persons. The logistics of practical access and integration with educational opportunities remains challenging. Reducing barriers to the creation and dissemination of published works, including

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[27] Australian Copyright Act, S. 135-ZP.

[28] "National Federation of the Blind, Make Kindle E-Books Accessible" (2013) <https://nfb.org/kindle-books> accessed 19th February, 2017.

across borders, would help make the promises of accessibility for blind and vision-impaired persons a reality. In this context, the Marrakesh Treaty allows for easier and more uniform cross-border access to, and sharing of, reading materials in accessible formats such as Braille, large print, and accessible digital files. Conversion of books to Braille, large print, audio, or electronic files requires political will, time, and resources that not all international bodies, governments, and private actors have been willing to support. Broad ratification of the Marrakesh Treaty, however, may raise awareness and assist local and international DPOs in advocating for their right to accessible information."[29]

VI. INDIAN COPYRIGHT ACT & VIP TREATY

In 2009 India proposed to amend the Copyright Law in perusal of CRPD, 2006 and if we must have a clause of making accessible formats available to VIPs in fair use clause and should also have a compulsory licensing clause. The physically challenged need access to copyright material in specialized formats, e.g. Braille text, talking text, electronic text, large print etc. for the visually challenged and sign language for the aurally challenged. Currently the cost of production of material in such formats is very high. With additional requirement of royalty payments the price of such material to the target groups would be even higher.

In 2012 Clause (zb) was added in section 52 in the Copyright Act, 2012 by 2012 amendment. This provides for fair use. And section 31B was provided for Compulsory Licenses for disabled. According to it the Copyright Board may, on receipt of an application, inquire, or direct such inquiry as it considers necessary to establish the credentials of the applicant and satisfy itself that the application has been made in good faith. If the Copyright Board is satisfied, after giving to the owners of rights in the work a reasonable opportunity of being heard and after bolding such inquiry as it may deem necessary, that a compulsory licence needs to be issued to make the work available to the disabled, it may direct the Registrar of Copyrights to grant to the applicant such a licence to publish the work.

Every compulsory licence issued under this section shall specify the means and format of publication, the period during which the compulsory licence may be exercised and, in the case of issue of copies, the number of copies that may be issued including the rate or royalty. Copyright board may also extend the period of compulsory licence.

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[29] Hope Lewis, "Introductory Note to Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled" *International Legal Materials*, vol. 52, no. 6 (2013), pp. 1309-1320 Published by Cambridge University Press Stable URL: <https://www.jstor.org/stable/10.5305/intelegamate.52.6.1309> accessed 25th July, 2018 02:35 UTC.

These amendment show that we had already brought those changes which we negotiated in Marrakesh VIP treaty. But challenges are still very acute as the appropriate government under Rights of Person with Disabilities Act, 2016 is the only authorized entity which can, and which shall promote the issues of VIPs. In this Act the duty has been casted on multiple authorities for promotion of various issues pertaining to 'divayngjans' however, the Act is silent about issue of VIPs in terms of accessibility to books.

If we analyze the adoption of VIP treaty by India, we find that we had amended our law well in advance, so we could readily ratify the treaty on next day of its conclusion 23rd June 2013 but still a lot must be done.

The biggest and the most crucial challenge is that if we convert the medium to make the materials more accessible to VIPs then how could we stop these modified copies to come for other able people and this can substantially mar the profits of Intellectual property owners, assignee and licensee. We could not evolve any protection mechanism till date.

VII. CONCLUSION

The VIPs have been deprived of all civil, political and cultural rights due to Book Famine and CRPD, 2006, Copyright Amendment 2012 and Marrakesh VIP treaty are robust legislative framework which create a balance between the rights of copyright owners and VIPs. However the real issue is economic that who shall bear the cost of conversion of works in accessible formats. Collectively Chief Commission for Disabled, Indian Government, NGO, Software Companies, Charitable Association with help of technology and software can do the miracle and make the world more egalitarian with reference to VIPs.

UNRAVELLING THE IMPEDIMENTS TO NATIONAL SECURITY: THE NEED TO RECONCILE SECURITY AND HUMAN RIGHTS

—Ms. Priyanka Anand[*]

Abstract — Indian parliament has passed a variety of a typical measures intended at countering terrorism. In this article, I would analyse these major security legislation of India and what has ensued from it, i.e. the departure of this action to new contexts in the states and territories. This has occurred to the point that this course, once considered extreme, has now become a conventional feature of the criminal justice system, and has in turn given rise to even more stringent legal measures. This article explores the dynamic by which once exceptional measures has now become normalised and then extended to new extremes and the ramifications that come with it. I examine the ways in which these security laws depart from the general criminal law standards and contend that the usual constitutional limits on the executive have failed to bridle the executive's power and actions. Even the Indian legislature and judiciary have approved executive powers in principle, and failed to check them in practice which in turn has abraded constitutional constraints.

I. INTRODUCTION

"Law is made not to be broken but to be obeyed and the respect for law is not retained by demonstration of

[*] Assistant Professor of Law National Law University, Odisha.

> *strength but by better appreciation of the reasons, better understanding of its reality and implicit obedience. It goes without saying that the achievements of law in the past are considerable, its protection in the present is imperative and its potential for the future is immense. It is very unfortunate that on account of lack of respect, lack of understanding, lack of effectiveness, lack of vision and lack of proper application in the present day affairs, law sometimes falls in crisis."*[1]
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> *—S. Ratnavel Pandian, J.*

In *Kartar Singh* v. *State of Punjab* Terrorism has become a universal issue confronted by both developed and developing economies. The roots of terrorism can be traced back to the 1st Century depending on how one defines terrorism. It is as old as man's willingness to use violence to affect politics. From the Sicarii[2] in the 1st Century to the modern day Al-Qaida[3], Al-Shabaab[4] or Boko Haram[5], the effects of terror activities have been frightful and widespread.

Several stratagems worldwide have been taken to counter-terrorism such as coming up with Anti-Terrorism laws, schemes, defence strategies, technology, and law enforcement, intelligence all with the aim to combat or prevent terrorism. Nonetheless, these schemes and policies have had certain blemishes as far as respect to human rights is concerned. It is worth noting that the war against terror or rather war on terrorism waged without the rule of law undermines the very values that it seeks to uphold.

India's age old struggle to fight politicized violence has created what we may say as a *"chronic crisis of national security"* that has become part of the very *"essence of India's being."*[6] Many have lost their lives and been

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1 *Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569 at para 36, p. 11.

2 Sicarii is a Latin word for dagger. The Sicarii carried out murder and assassinations using short daggers. They were led by descendants of Judas of Galilee to revolt against Roman Rule of the Roman Governor Quirinius in Syria so that they could tax them.

3 Al-Qaeda is a militant Sunni Islamist multi-national organization founded in 1988 by Osama bin Laden, Abdullah Azzam, and several other Arab volunteers who fought against the Soviet invasion of Afghanistan in the 1980s.

4 The Harakat Shabaab al-Mujahidin commonly known as Al-Shabaab is based in East Africa. It describes itself as waging jihad against the enemies of Islam and the Federal Government of Somalia and the African Union Mission to Somalia (AMISON).

5 Its Official Arabic name is Jama'atu Ahlis Sunna Lidda'awati wal-Jihad meaning "People Committed to the Propagation of the Prophet's Teachings and Jihad." It is fighting to create an Islamic State and opposing Western education.

6 K.P.S. Gill, "The Imperatives of National Security Legislation in India", Seminar, April 2002, at 14 available at http://www.india-seminar.com/2002/512/512%20k.p.s.%20gill.htm (accessed 3rd May, 2018).

wounded in this violence, whether terrorist, insurgent, or communal, and in the subsequent responses of security forces. Terrorism, in particular, has affected India more than most countries. As required by the times, India has also retorted back by enacting special antiterrorism laws, part of a broader array of emergency and security laws that periodically have been enacted in India over the last few decades, since Independence.

"National Security Laws" avowedly concerned not with ordinary crime, but with acts that ostensibly pose more enduring threats to common life. These laws seek to check and reprimand terrorism, organized crime, separatism, and public disorder. In addition to national security laws, many Indian States have State laws simultaneously regulating these harms. These "security laws" operate alongside India's ordinary substantive and procedural criminal codes on the pretext that ordinary criminal law cannot address certain threats, and therefore these particularly grave dangers require a customized response. This bespoken response is also an exaggerated response, giving the law and order machinery more power than ordinary criminal law allows[7].

All these counter-terrorism policies have mostly violated human rights. This is due to the reason that these methods have precipitated waning of civil liberties and individual privacy, extend sequestered detention without judicial intervention, torture, and extradition of persons and generally subvert and sabotage the rights and freedoms of citizens and other persons. The Universal Declaration of Human Rights was actuated after the Second World War as a reply to the contraventions of human rights by some States on their own Citizens or perceived enemy Countries during that war. *"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."*[8] This study emphasizes that human rights belong to all by the virtue of being human beings.

Human rights are often depicted as a prospective impediment to effective immunity from terrorists' acts rather than a necessity for genuine security.[9] Every State has an obligation and a right to guard its citizens from terrorism and other criminal acts; nevertheless such course of action must be implemented within a structure of human rights protection that do not weaken legitimate dissent. *"Some rights may not be derogated from under*

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[7] Anil Kalhan et al., "Colonial Continuities: Human Rights, Terrorism, and Security Laws in India", 20 Columbia Journal of Asian Law, [2006], vol. 20 no. 1 (Fall Issue) 97, available at http://www.nycbar.org/pdf/ABCNY_India_Report.pdf (accessed 4th May, 2018).

[8] Art. 1 of the Universal Declaration of Human Rights.

[9] Amnesty International EU Office, "Human Rights Dissolving at the Borders? Counter-Terrorism and EU Criminal Law", (White Paper IOR 61/013/2005) 31 May, 2005 available at http://www.amnesty.eu/static/documents/2005/counterterrorism_report_final.pdf accessed 13th May, 2018.

any circumstances. These include the right to life, freedom of thought, conscience and religion, freedom from torture or cruel, inhumane or degrading treatment, and the principles of precision and non-retroactivity of criminal law except where a later imposes a lighter penalty. For other rights, any derogation is only permitted in the special circumstances defined in International human rights law"[10] Such statements reaffirm the need for States to come up with counter-terrorism legislation and policies that protect human rights and not those that undermine fundamental rights and freedoms.

Indian parliament has sanctioned a variety of atypical measures intended at preventing terrorism. These measures encompass control orders, which were not intended for use outside of the terrorism milieu. In this article, I would analyse these major security legislation of India and what has ensued from it, i.e. the departure of this action to new contexts in the states and territories. This has occurred to the point that this course, once considered extreme, has now become a conventional feature of the criminal justice system, and has in turn given rise to even more stringent legal measures. This article explores the dynamic by which once exceptional measures become normalised and then extended to new extremes and its ramifications. It explores these issues in the context of the role that constitutional values have played in this process. I examine the ways in which these security laws depart from the general criminal law standards and contend that the usual constitutional limits on the executive have failed to bridle the executive's power and actions. Even the Indian legislature and judiciary have approved executive powers in principle, and failed to check them in practice which in turn has abraded constitutional constraints.

The issue discussed in this article, though is premised in the Indian context, is germane universally. It's because this century began with the United Nations Security Council exhorting Member States to pass counter terrorist legislation.[11] Very few countries in the developing world have been constitutional democracies for as long as India has.[12] Legislations and jurisprudence generally draw profoundly on Indian precedent across South Asia. The

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[10] Joint Statement issued by Mary Robinson, the UN High Commissioner for Human Rights, Walter Schwimmer, Secretary General of the Council of Europe and Ambassador Gerard Stoudmann, Director of the OSCE's Office for Democratic Institutions and Human Rights on 29 November 2001 available at http://www.osce.org/odihr/54035, accessed 19th May, 2018.

[11] United Nations Security Council Resolution 1373, United Nations (September 28, 2001), available at https://www.un.org/sc/ctc/resources/databases/recommended-international-practices-codes-and-standards/united-nations-security-council-resolution-1373-2001/, accessed 4th May, 2018.

[12] India gained independence from British rule in August 15, 1947, adopted a national constitution on November 26, 1949, which came into force on January 26, 1950, and held its first national elections in 1951.

Indian experience with security laws might help to understand the vulnerabilities of other post colonial, developing democracies, and guard against these vulnerabilities when crafting counter terrorist legislation.

This article shall proceed by first, introducing the significant security legislations passed, since India gained independence in 1947. Then, in the next part of the article, I shall examine the ramifications that these extraordinary laws have had because of the deviation from ordinary criminal law and the grant of exceptional powers to the executive. Lastly, I shall conclude my article by reflecting on the lessons that can be learnt from the ramifications of these laws.

II. PART I - NATIONAL SECURITY LAWS: SCOPE AND INFRINGEMENT

The Indian Penal Code (IPC) proscribes the general types of violent crimes and property crimes. It provides for provisions for investigation and prosecution of established crimes such as murder, injury to another person, public or private property. In addition, the IPC includes security and public order crimes,[13] such as sedition,[14] the offense of "promoting enmity between different groups" based upon identity, and "doing acts prejudicial to the maintenance of harmony."[15] Committing any of these prohibited acts deliberately is a criminal offense. It is also an offense under Indian law to help another person to commit them, encourage another person to commit them,[16] attempt unsuccessfully to commit them,[17] or plan to commit them.[18] All the extraordinary security laws have operated in conjunction with the IPC, which defines substantive offenses, and the Code of Criminal Procedure (CrPC), which sets down rules of criminal procedure.

With the spurt in terrorism in recent years, India enacted appropriate and stringent anti-terrorism laws for dealing with terrorism in the past. Now I shall trace out some of these significant security legislations that were

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[13] Indian Penal Code, 1860 (Act 45 of 1860), Ss. 121-130, 141-160.

[14] Indian Penal Code, 1860 (Act 45 of 1860), S. 124-A.

[15] Indian Penal Code, 1860 (Act 45 of 1860), S.153-A.

[16] Indian Penal Code, 1860 (Act 45 of 1860), Ss.107-120.

[17] Indian Penal Code does not define what it means, in general, to attempt an offense. However, common law principles on liability for an attempt apply in India, and are reflected in the IPC. Indian Penal Code, 1860 (Act 45 of 1860), S. 511 lays down the general rule for punishment for attempting an imprisonable offense. In addition, the IPC creates some offenses of attempting to commit a particular offense, such as the offense of attempted murder and the controversial offense of attempted suicide. See, Indian Penal Code, 1860 (Act 45 of 1860), Ss. 307-309. The IPC places some attempts on the same footing as the completed offense, and specifies the same sanction for the attempt as for the full offense. See, e.g., Indian Penal Code, 1860 (Act 45 of 1860), Ss. 124-126.

[18] Indian Penal Code, 1860 (Act 45 of 1860), Ss.120-A–120-B.

developed and expanded since the time when India became independent in the year 1947.

A. Preventive Detention

The Preventive Detention Act[19] (PDA) was passed in 1950 which sanctioned the government to detain individuals without charge for up to a year. Initially, the PDA was passed as a provisional, twelve-month measure to tackle the issues of administration after the devastating violence and displacement that accompanied the partition of India.[20] However, the Act was renewed repetitively for almost two decades before finally being allowed to lapse in 1969.

In 1971, two years after the Preventive Detention Act expired, the Maintenance of Internal Security Act[21] (MISA) was passed, and it revived most of the preventive detention powers under the PDA which was further widened in 1975, when the government declared a state of national emergency, and procedural safeguards originally incorporated into MISA were removed.[22] Prime Minister Indira Gandhi's government used the iniquitous MISA aggressively against political opponents, trade unions, and civil society groups who challenged the government and in 1977, it was repealed by the new government.

Two years later, the National Security Act of 1980[23] (NSA) created preventive detention powers similar to those in the PDA and MISA, which continues to be in force till date.

B. Military Deployment Within The Country

Armed Forces (Special Powers) Act[24] (AFSPA) was passed in September 1958, which increased the powers of the armed forces significantly. AFSPA empowered the military to act parallel to the police in designated "disturbed areas," while giving military greater power to use force against civilians

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19 The Preventive Detention Act, 1950 (Act 4 of 1950) (hereinafter "PDA").

20 *Supra* note 1 at 93 & 135.

21 The Maintenance of Internal Security Act, 1971 (Act 26 of 1971) (hereinafter "MISA").

22 A state of emergency was formally declared on 25 June 1975 by the Indian President, Fakhruddin Ali Ahmed under Art. 352 of the Constitution of India, on the request of the then Prime Minister Indira Gandhi. This period, described in India simply as "the Emergency," lasted from June 25, 1975 to March 21, 1977. During this time, constitutional rights were suspended, judicial review restricted, and the media heavily censored. For a historical account of "the Emergency," see Ramachandra Guha, *India after Gandhi: The History of the World's Largest Democracy* (Picador 2007) 488-521.

23 The National Security Act, 1980 (Act 65 of 1980) (hereinafter "NSA").

24 The Armed Forces (Assam and Manipur) Special Powers, 1958 (Act 28 of 1958) (hereinafter "AFSPA").

than the police were allowed to use. Initially, the Indian government enacted the AFSPA in response to separatist movements in Nagaland[25]. By 1972, it was extended to all seven states in India's northeast.[26] From 1983 to 1997, the government implemented an iteration of the law to the state of Punjab,[27] and in 1990, a similar iteration to the northern state of Jammu & Kashmir, where it continues to be in force.[28]

C. Proscribing Organizations

In 1967, the Unlawful Activities (Prevention) Act[29] (UAPA) was enacted which empowered the government to declare organizations "unlawful" and then curb their activities and scrutinize their members. Under this law, organizations could now be designated suspect, without the state having to prove those suspicions to a criminal standard of proof in a court of law and this in turn was the foundation for criminalizing membership or support of the organization.

D. Anti-Terrorism Laws

i. TADA

The Terrorist Affected Areas (Special Courts) Act[30] was passed in 1984, which empowered the national government to designate parts of the country as "terrorist affected" and set up special courts in those areas to prosecute defendants accused of being terrorists. A year later, this law was integrated into the Terrorist and Disruptive Activities (Prevention) Act[31] (TADA). TADA also created new criminal offenses related to terrorist activity, enhanced procedural powers for the police, and significantly reduced procedural protections for defendants. TADA imbibed a sunset clause—Parliament had to review and renew the Act every two years.[32] Evidence of human rights abuses under TADA increased over time[33] and TADA was

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[25] Human Rights Watch, "Getting Away with Murder: 50 Years of the Armed Forces (Special Powers) Act", (2008), available at https://www.hrw.org/legacy/backgrounder/2008/india0808/p. 13, accessed 4th May, 2018.

[26] These include the States of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, and Tripura.

[27] The Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983 (Act 34 of 1983). This State-specific iteration has the same provisions as AFSPA 1958.

[28] The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 (Act 21 of 1990). This State-specific iteration has the same provisions as AFSPA 1958.

[29] The Unlawful Activities (Prevention) Act, 1967 (Act 37 of 1967) (hereinafter "UAPA").

[30] The Terrorist Affected Areas (Special Courts) Act, 1984 (Act 61 of 1984).

[31] The Terrorist and Disruptive Activities (Prevention) Act, 1987 (Act 28 of 1987) (hereinafter "TADA").

[32] TADA, *Supra* note 31, S. 1(4).

[33] South Asia Human Rights Documentation Centre, Alternate Report and Commentary to the United Nation Human Rights Committee on India's Third Periodic Report under Art.

allowed to lapse when it lost the support of opposition parties in Parliament in 1995.

ii. POTA

The Prevention of Terrorism Act[34] was passed in 2001, to meet international obligations and cross border terrorism,[35] which incorporated TADA's enhanced police powers, limits on the rights of the defense, and special courts, with many of POTA's provisions reproducing verbatim the equivalent provisions in TADA[36]. POTA enhanced the government's power to detain individuals and forfeit the proceeds of terrorism and had a sunset clause of three years.[37] POTA had a fractious journey through Parliament and was opposed vehemently by the opposition for the enhanced powers which were being misused. As a result, it was, repealed in September 2004.

iii. The Amended UAPA

In response to the multiple, brutal terrorist attacks in Mumbai on November 26, 2008, the UPA led national government proposed and Parliament agreed to amend the Unlawful Activities (Prevention) Act of 1967 (UAPA).[38] This amendment inserted into the UAPA many provisions from POTA and TADA, with some addition, alteration, and dilution.

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40 of the International Covenant on Civil and Political Right (SAHRDC, 1997) available at http://www.hrdc.net/sahrdc/resources/alternate_report.htm accessed May 7, 2018.

34 The Prevention of Terrorism Act, 2002 (Act 15 of 2002) (hereinafter "POTA").

35 The Ministry of Home Affairs, in its press briefing on the Prevention of Terrorism Ordinance, speaks of "an upsurge of terrorist activities, intensification of cross-border terrorism" and says "terrorism has now acquired global dimensions and become a challenge for the entire world." Quoted in Prevention of Terrorism Ordinance 2001: Government Decides to Play Judge and Jury, South Asia Human Rights Documentation Centre, 2001, p. 16 available at https://bookofrax.tech/download/Prevention%20of%20Terrorism%20Ordinance%202001%20Government%20Decides%20to%20Play%20Judge%20and%20Jury%20By%20South%20Asia%20Human%20Rights%20Documentation%20Centre accessed 4th May, 2018.

36 See the following provisions dealing with defining terrorism offenses and specifying punishment for these offenses: TADA S. 1(2) and POTA S. 1(2); TADA S. 3(1) and POTA S. 3(1)(a); TADA S. 3(2) and POTA S. 3(2); TADA S. 3(3) and POTA S. 3(3); TADA S. 3(5) and POTA S. 3(5); TADA S. 6 and POTA S. 5. See also the following provisions related to the operation of special courts: TADA Ss. 9-10 and POTA Ss. 23-24; TADA S. 12 and POTA S. 26; TADA S. 13 and POTA S. 28. See also the substantial overlap between the following provisions related to the admissibility of confessions made in police custody during trial: TADA S. 15 and POTA S. 32.

37 POTA, *Supra* note 34, S. 1(6).

38 The Unlawful Activities (Prevention) Act, 1967 (Act 37 of 1967) was amended by the Unlawful Activities (Prevention) Amendment Act, 2008 (Act 35 of 2008) (India), which was passed on 31 December 2008, soon after the terrorist attacks in Mumbai on November 26, 2008.

Parliament also passed the National Investigation Agency Act,[39] creating a federal agency that can investigate and prosecute terror related crime across the country without permission from the governments of individual states.

III. PART II - RAMIFICATIONS OF SECURITY LAWS: EXCESS, OVERLAP, AND ABUSE

Some people contend that ordinary criminal law, in the form of the Criminal Procedure Code and Indian Penal Code, gives governments adequate tools to control and prosecute terrorist and separatist violence,[40] and that special security legislation is unnecessary. This counter-factual stance is difficult to evaluate, given that security laws have been a consistent part of independent India's legal landscape, with new security laws drawing heavily upon their predecessors. We can, therefore, trace the consequences of security laws. India's security laws enlarge the executive's power to use force, detain, investigate, arrest, and try individuals. These procedural powers rest upon loosely drafted criteria, and accompany sprawling substantive offenses of indeterminate scope. Laws are designed to shield government actors from criminal or civil suit, and to dilute judicial review. Below, I discuss in more detail the consequences that flow from the distinctive features that have been reproduced in successive generations of security laws.

A. Human Rights Abuses

Human rights groups argue that India's security laws are incompatible with international human rights law and the Indian Constitution.[41] They point out that security laws currently in force place excessive, unnecessary restrictions on the rights to a fair trial, freedom of association, freedom of speech, and freedom of movement, as guaranteed by the International Convention on Civil and Political Rights, to which India is a party.[42] They also argue that AFSPA, which bestows generous "shoot-to-kill" powers on the military in "disturbed" areas, disproportionately restricts the right to life.[43]

Expansive executive discretion created by legal provisions that fall far short of human rights standards creates ample room for abuse of power. Over the years, journalists, academicians, and human rights groups have documented a multitude of serious human rights abuses committed by state

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[39] National Investigation Agency Act, 2008 (Act 34 of 2008), India Code (2008), Ss. 11-21, http://indiacode.nic.in (hereinafter "NIAA").

[40] SAHRDC, *supra* note 33, at 17-19.

[41] *Ibid.*

[42] *Ibid.*

[43] *Ibid.* at 6.

functionaries using powers granted by security laws. Credible accounts abound of torture in custody and coerced confessions.[44] Defendants charged with crimes under TADA and POTA have received unfair trials.[45] The military has used gravely, often fatal, disproportionate force against civilians in "disturbed" areas under the Armed Forces Special Powers Act.[46] Arbitrary detention and extrajudicial execution are frequent, and persist despite criticism from United Nations human rights mechanisms.[47] A 2013 petition before the Supreme Court claimed that, in one small north-eastern state alone, an estimated 1528 people have been extra-judicially killed by security forces since May 1979.[48] Women have faced sexual violence from state actors using security powers, particularly in areas where the military has powers under AFSPA,[49] but also in other Indian states such as Jharkhand and Chhattisgarh[50]. Gendered violence against women by the police and military is often neglected, but the limited documentation that exists should cause serious disquiet.[51] A less visible effect of such laws is on the families of individuals who are detained or prosecuted. Past experience has shown that trials can last a long time, as can preventive detention, with detention orders being renewed year after year. Families of detainees and defendants lose an earning member, while having to defray lawyers' fees and navigate the legal system. This would strain most families, but be potentially ruinous for those who are poor.

B. Caulking from Accountability

It is highly likely that we do not have the full measure of abuses committed by government actors or agents using security laws. Enhanced powers to detain and interrogate are, by their nature, wielded behind closed doors. Targets of torture and inhumane treatment in custody might conceal abuse entirely. Victims of sexual violence in custody – both men and women – might hide such abuse. Affected individuals might speak out within their families, wider communities, or to civil society groups, but

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[44] Asian Centre for Human Rights, Need for a National Law for Prevention of Torture (25 June 2007) available at http://www.achrweb.org/ncpt/ncpt0107.pdf accessed 20th May, 2018.

[45] Amnesty International, *The Terrorist and Disruptive Activities (Prevention) Act: The Lack of "Scrupulous Care"* (Amnesty International, 1994).

[46] United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Civil Society Coalition on Human Rights in Manipur and the UN, Manipur: A Memorandum of Extrajudicial, Arbitrary or Summary Executions (2012) (Submitted to Christof Heyns).

[47] Civil Society Coalition on Human Rights in Manipur and the UN, *supra* note 46.

[48] *Extra-Judicial Execution Victim Families Assn.* v. *India*, (2013) 2 SCC 493.

[49] Surabhi Chopra, "Dealing with Dangerous Women: Sexual Assault under Cover of National Security Laws in India", 34(2) B.U. INT'L. L.J. Forthcoming (2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2654538 accessed 11th May, 2018.

[50] *Ibid*.

[51] *Ibid*.

may not be willing to file a formal complaint. This is particularly likely in remote areas where the official who would investigate the complaint might work closely with the officials who are the subject of the complaint. Individuals willing to seek redress have to persuade the police and prosecution to pursue their complaint, who in turn need special permission from the central government to press criminal charges.[52] The limited information available suggests that permission has rarely been granted.[53]

Even where victims would like to seek redress, they may not know that the government's actions can be formally challenged, or *how* to pursue such a challenge, because it requires more than a complaint to the police. As an example, AFSPA has applied to Assam and Manipur continuously since 1958, and to the other five northeastern states since 1972, but there are very few reported *habeas corpus* cases in the relevant High Court until 1981, after which the High Court was petitioned more frequently by individuals alleging arbitrary detention, torture, or the unlawful killing of a loved one.[54] It is possible that abuses by the armed forces were rare in the first two decades of AFSPA's existence. But it is also quite likely that victims of abuse simply lacked the information and experience to seek redress.

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[52] Criminal Procedure Code S. 197 provides that government officials belonging to a government service administered by Central Government cannot be criminally prosecuted unless the Ministry of Home Affairs permits such prosecution. Members of the armed forces are shielded from arrest for actions performed as a part of their official duties by Criminal Procedure Code S. 45. AFSPA, *supra* note 24, S. 6 bars any legal proceedings, criminal or civil, against members of the armed forces without prior permission from the Central Government. For a discussion of jurisprudence on Criminal Procedure Code S. 197.

[53] There are no publicly available statistics on the number of applications for permission to prosecute government officials, civil or military. A report by SAHRDC on AFSPA states that, as of 1995, no individual from the north-east States had applied for permission to file a civil suit or writ petition against the armed forces. *See* SAHRDC, *supra* note 33. A research study that used India's Right to Information Act, 2005 to seek information about applications and permission to prosecute under Criminal Procedure Code S. 197 in relation to mass violence recorded that the Ministry of Home Affairs refused multiple requests to disclose the information requested.

[54] There is no comprehensive review of writ petitions by individuals challenging abuses by the armed forces in states where AFSPA applies. However, published judicial decisions suggest that such petitions began to appear in the early 1980s, increased in frequency in the 1990s and continue to be used by individuals in states where AFSPA applies. India's north-eastern States (where AFSPA applies) come under the jurisdiction of the Gauhati High Court. Legal databases indicate that the Gauhati High Court made final decisions in response to one writ petition about AFSPA-related abuse in 1982 (*Basi Singh* v. *State of Assam*, 1981 SCC OnLine Gau 66 : 1982 Cri LJ 229), one in 1983 (*Naosam Ningol Chandam Ongbi Nungshitombi Devi* v. *Rishang Keishing*, 1982 SCC OnLine Gau 61 : 1983 Cri LJ 574), five such petitions between 1984 and 1989, eighteen petitions between 1990 and 1999, and seventeen petitions between 2000 and 2013. It is worth noting firstly that High Court decisions are not comprehensively reported, and secondly that these numbers reflect final disposal by the court, not the number of petitions filed by individuals. Nevertheless, these numbers suggest that individuals began actively petitioning courts after suffering abuse in the 1980s and did so in greater numbers from the early 1990s onwards.

C. Prejudicial and Cliquish Use of the Law

The Indian experience so far suggests that once security laws create expansive executive power, empowered governments are not cautious about using that power. In 1985, TADA gave every State in India the power to prosecute terrorist offenses in special courts. Over time, human rights groups documented that the highest number of TADA cases was registered not in States with a history of violent insurgency, but in Gujarat, a State that saw little terrorist or separatist activity during the time TADA was in force.[55] Expansive security offenses *potentially* render criminal a wide sweep of non-violent speech and activity that criticizes the government or challenges existing security policies, even though it does not on any reasonable assessment actually endanger public order or national security.

Security laws have lent themselves to religious and ethnic discrimination. Singh traces how POTA prosecutions relied heavily upon religious profiling, and describes the Act as "creating suspect communities."[56] Individuals who are Muslim, Sikh, or from India's northeastern states have been disproportionately investigated, detained and prosecuted under security laws.[57] The government of Jharkhand used POTA very heavily in parts of the state that are poor and have a high proportion of people from tribal groups.[58] Violent far-left groups were active in these areas, but rather than targeted investigation, human rights reports record scatter-shot violence, and wholesale arrest and detention of people from particular tribal communities.[59]

Security laws have also been used by those in political office against opponents and critics. Mrs. Indira Gandhi deployed MISA aggressively against political opponents during the Emergency. More recently, the Chief Minister of the State of Tamil Nadu used POTA against an uncooperative member of the State legislature, as did the Chief Minister of Uttar Pradesh.[60] In 2007, the UAPA was used to prosecute a senior member of a national civil liberties organization who criticized civilian militias organized by the State government of Chhattisgarh to counter insurgent groups.[61] Media reports revealed that these individuals posed no threat to the nation, and publicized the State's lack of cogent grounds for acting against them.

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55 SAHRDC, *supra* note 33 at 33.

56 Ujjwal Kumar Singh, *The State, Democracy, and Anti-Terror Laws in India* (Routledge, 2007) 165, 219.

57 SAHRDC, *supra* note 33.

58 Singh, *supra* note 56 at 195-203.

59 Sabrang Communications, "People's Tribunal on the Prevention of Terrorism Act (Pota): Background Document" (Sabrang Communications 2004) at 3 and 20, *available at* http://www.sabrang.com/pota.pdf. accessed 19th May, 2018.

60 Singh, *supra* note 56 at 220-260.

61 Malavika Vyawahare, "A Conversation with: Human Rights Activist Binayak Sen", *NY Times* (India, 10 December, 2012).

However, in a technical sense, it is arguable that arrests and prosecution in these instances fell squarely within the ambit of widely defined POTA and UAPA offenses. While legal action against public figures has garnered headlines and drawn criticism, it illustrates the likelihood of similar action, free of media scrutiny, against individuals who are not politically influential.

D. Security Laws as a buttress facade

Publicly available official statistics on security laws are scant. India's National Crime Records Bureau used to report arrests and convictions under TADA annually, but has not released similar information related to POTA or the UAPA. The national government reports the number of individuals in preventive detention, but does not break this down by State, or report reasons why or for how long people have been detained.[62]

The limited statistics that are available seem to validate documentation by human rights groups and journalists. The national government's information suggests that security laws are used excessively, without due care and sufficient justification. Statistics reported by the government in October 1993 showed that since TADA came into force, central and State governments arrested and detained 52,268 individuals under the law, but only 0.81 percent of these individuals were eventually convicted of any offense.[63] In Punjab, only 0.37 percent of the 14,557 individuals detained under TADA had been convicted.[64] Central government figures from 1994 show that of 67,059 people detained under TADA since its enactment, only 8,000 people – less than 12% of those arrested and held in custody - were put on trial.[65] Of these 8000, 725 people – less than 1% of total TADA detainees - were eventually convicted.[66]

These statistics suggest that people arrested under TADA were held for long periods and eventually released without charge, or charged and tried, but acquitted after protracted trials. Low rates of indictment indicate arrests based on weak evidence and poor investigation. High rates of acquittal despite the pro-prosecution tilt of special courts, in turn, suggest trials founded on scant evidence and lackadaisical prosecution. It seems

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[62] The National Crime Records Bureau, Ministry of Home Affairs reports the number of individuals in preventive detention on an annual basis. These statistics are available at https://ncrb.gov.in.

[63] Government of India, Ministry of Home Affairs, Memorandum to the Full Commission of National Human Rights Commission, Annexure I, 19 December 1994, cited in Ram Narayan Kumar et. al. *Reduced to Ashes: The Insurgency and Human Rights in Punjab*, Final Report (vol. I) (South Asia Forum for Human Rights, 2003) at 99.

[64] *Ibid*. at 99.

[65] SAHRDC, *supra* note 33, citing a statement by the Minister for Internal Security when speaking to the Press Trust of India on 28 August 1994.

[66] SAHRDC, *supra* note 33; Ram Narayan Kumar et. al., *supra* note 63, at 100.

that security laws – even those that create criminal offenses - serve largely to preventively detain individuals and proscribe organizations based upon suspicion rather than proof to the criminal standard. Kalhan *et al.* point to structural weaknesses in India's criminal justice system to explain this phenomenon.[67] They argue that poorly trained police personnel and strained, inefficient courts cannot meet the actual demands of investigating and prosecuting serious crime; security laws help governments to paper over these weaknesses.[68]

On this view, security laws have enduring appeal not because they make it easier to investigate and punish terrorist and separate violence, but because they allow the state to pull individuals and groups out of circulation without having to prove wrongdoing beyond reasonable doubt. Security laws that create terrorist offences and special courts add to the state's preventive powers by allowing easier arrests and long periods on remand. In addition, overlap and intersections between preventive detention and anti-terror laws, as well as between security law and ordinary criminal law, can be used in concert to further enhance the state's preventive and procedural powers. For example, prosecutors can charge the same individual with crimes under security laws and under the IPC, and place evidence before the court that under ordinary evidential standards would be tainted or inadmissible. Human Rights reports as well as court decisions show that preventive detention laws are used to detain people before they are prosecuted for a crime, and detainees are arrested as criminal suspects as soon as they are released from administrative detention.[69]

Thus, expansive security powers can, and evidently have, facilitated human rights abuses. Thus limited official data on criminal justice strongly indicates that security laws are used wantonly as a matter of course. In addition, the enhanced ability to arrest, detain, prosecute, and use force has allowed serious abuses by official actors to proliferate. Considerable room for manoeuvre, reproduced in one law after another, accompanied by official tolerance for the police, prosecution, and military abusing such power can shift institutional culture so that disproportionate force or harsh interrogation become routine rather than exceptional. The occupation of Oinam village, Manipur by paramilitaries in July, 1987 is one of several infamous examples of extreme abuse.[70] The Assam Rifles launched a combating

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[67] Anil Kalhan, *et al.*, *supra* note 7.

[68] *Ibid.* at 192-196.

[69] Amnesty International, *supra* note 45 at 61-62. Several decisions by the High Court of Jammu & Kashmir on writ petitions challenging detention under the Jammu & Kashmir Preventive Detention Act reveal that petitioners were in prison on remand or on bail when an order of preventive detention was passed against them. *See* for example, *Vijay Kumar* v. *State of J&K*, (1982) 2 SCC 43 : AIR 1982 SC 1023, *Mohd. Iqbal Sheikh* v. *State of J&K*, (2003) 3 JKJ 534 and *Zakir Hussain* v. *J&K*, (2006) 2 JKJ 672.

[70] Surabhi Chopra, *supra* note 49 at 28-29.

operation in Oinam after separatist group raided one of their posts, and over a period of four months were brutally violent towards residents of the village. The Assam Rifles hung people upside down, administered electric shocks, and buried people alive in order to extract information from them. Women were subjected to sexual assault and rape.[71] The Rifles allegedly forced two women who went into labor to give birth in front of the soldiers.[72] They used force not to control an actual perceived threat, but to humiliate or subdue people subject to such force. While the events in Oinam in 1987 were particularly serious, they lie on a spectrum of state abuse aided by security powers, and remind us that security laws can render the individual citizen insecure.[73]

IV. CONCLUSION

> *"An avidity to punish is always dangerous to liberty. It leads men to stretch, to misinterpret, and to misapply even the best of laws. He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."*
>
> *—Thomas Paine (On First Principles of Government, 1795)*

It is always necessary for the rulers in a democratic country to be reminded of the words of American Jurist Schaefer *that "[T]he quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law"*[74] The administration of criminal law, unlike the personal laws, makes its impact directly and profusely on the society and thereby it marks its reflection on the civilization of the nation. Human rights in the current context are threatened by many pervasive factors including terrorism.

Internationally the law of terrorism is a developing subject of law. Parallel to its development, its misuse also has been in the limelight for long. We can say, from the above discussion, that in India, at times, fair investigation is an oxymoron to those, who are termed as terrorist. *There are many anti-terror laws that are made in India but these are disputed on the ground of contravention of fundamental rights of the people.*

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[71] *Manipur Baptist Convention* v. *Union of India*, 1988 SCC OnLine Gau 41 : (1988) 1 Gau LR 433.

[72] Surabhi Chopra, *supra* note 49 at 28-29.

[73] Laura Donohue, "Terrorism and Counter-Terrorist Discourse", in Global Anti-Terrorism L. & Pol'Y (V. Ramraj, et al. eds., 2005).

[74] Federalism and State Criminal Procedure, as reproduced in *Nandini Satpathy* v. *P.L. Dani*, (1978) 2 SCC 424 : 1978 Cri LJ 968.

When the anti terror laws are put to implementation, the notion of human rights by which every citizen of India is bound takes a side step. The national constitution guarantees that human rights in the country will be appreciated. Taken into a broader context, the undermining of human rights as well as other physical violations as forms of counter terror strategies has triggered continuous debate on how to balance between law enforcement on terrorism and the acknowledgement of human rights. Abduction, torture and violation are indeed against human rights though these are considered an 'effective' model dealing with terrorists. This paper argues then the effort of combating terrorism in India will only deepen the undermining of human rights. Until the time the anti-terror laws are not regulated. The accession to international conventions such as UDHR and ICCPR is only a 'window dressing' act to show that the country participates in the global agenda of preserving human rights even in its act of war on terrorism, but in reality it dampens the human rights aside from critical considerations.

These laws have also been hailed by many on the contention that it has been successful in ensuring the speedy trial of those accused of indulging in or abetting terrorism but it cannot be denied that over the time, these laws have been abused and have violated human right. Many have argued against these laws on the pretext of constitution, constitutional provisions, and equality before law and civil rights. I understand that though there are provisions in the constitution where reasonable restrictions can be enforced, even upon the liberty of people and there is need to have stringent law to tackle present day terrorism as terrorist are keeping apace with emerging technology, but I would suggest that the national security laws should be redrafted in such a manner that it does not neglect the fundamental human rights of human beings. India needs to fine tune and adopt their anti terror legislation to fight terrorism of the changing time but equally endorsing human rights on the other. In the view of the misuse of power, we need to develop a system to stop it misuse. As Lord Denning said: "The freedom of individual must take second place to the security of the State". Thus, there is a need to make stringent law to tackle terrorism but not neglecting the appreciation for basic human rights of the people.

INTENSIFYING DOMAIN OF TORTIOUS LIABILITY IN ENVIRONMENTAL LITIGATION: A CRITICAL STUDY OF JUDICIAL RESPONSE

—Shoaib Mohammad[*] *& Divya Singh Rathor*[**]

Abstract —The law of torts in India, which remains uncodified till date, followed the English law in almost all aspects in its field. It is notable that common law, originally introduced into India by the British, continues to apply here by virtue of Article 372(1)[1] *of the Indian Constitution unless it has been modified or changed by legislation in India. The law was modified and departed from the English law only when the peculiar conditions that prevailed in India required this. The remedies of modern environmental torts have their roots in these common law principles of nuisance, negligence, strict liability and trespass and other remedies for tort.*

In evaluating the potential of tort law in matters related to environment protection as a compensation and risk control mechanism, we need to attend not only to the rules and principles according to which tort liability is imposed, but also to the institutional structure through which these rules and regulations are given practical effects.

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[*] (Research Scholar, SSJ Campus, Kumaon University, Almora).

[**] (Assistant Professor, Law National Law University, Cuttack, Orissa).

[1] Art. 372(1) of the Constitution of India states: "Notwithstanding the repeal of this Constitution of the enactments referred to in Art. 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority."

The Indian judiciary has played a remarkable role in implementing principles of tort law in environmental issues. The credit goes to the Supreme Court in interpreting the same old principles of tort with wider meaning to encompass the new challenges of the environmental damage. Wherever and whenever necessary, the Supreme Court has evolved new principles of tort and given a new shape to tortious liability in environment protection.

The Bhopal Catastrophe has been proved eye-opening for the environmentalist, social workers and government institutions as well as general public. It brought new awareness in India.

The liberal interpretation of Articles 32 and 226 have further added to the development of remedies for environmental tort in India. A new method of awarding compensation for constitutional tort has been developed by Indian Judiciary in environmental cases. The dynamic interpretation of Article 21 by the judiciary has served twin purpose of protecting the rights of the citizens to clean and wholesome environment and awarding damages for the violation of their private rights.

The judicial craftsmanship is clearly seen in the use of private law remedies for the public wrong in environmental cases. The High Courts have also shown dynamic approach in interpreting the principles of tortious liability to protect the environment. Thus the judiciary has innovated new methods to enforce tortious liability to protect the environment.

I. INTRODUCTION

The present legal system in India is formed, for all practical purposes on the basis of the English common law brought into India by the Britishers. From the 18th Century, the British colonial rulers, who were eager to have a legal system that could maintain law & order and secure property rights, gradually imposed on India a general system of law. The foundation of this Anglo-Indian judicial system was laid by the Judicial Plan of 1772 adopted by Warren Hastings on which later administrations built a superstructure.[2]

In the second half of the 19th century the Indian legal system was virtually revolutionized with a spate of over-legislation, which was influenced by

[2] M.P. Jain, *Outlines of Indian Legal and Constitutional History* 77 (Nagpur: LexisNexis Butterworths 1972).

a desire to introduce English law and to shape that system from an English lawyer's viewpoint.[3] The structure and powers of the court, the roles of judges and lawyers, the adversarial system of trial, the reliance on judicial precedent and the shared funds of concepts and techniques, brought the Indian legal system into the mainstream of the common law systems. It is said that the common law in India, in the widest meaning of the expression, would include not only what in England is known strictly as the common law but also its traditions and some of the principles underlying English statute law. The equitable principles developed in England in order to mitigate the rigours of the common law and even the attitudes and methods pervading the English system of administration of justice[4].

The early charters, which established the courts in India under the British rule, required the judges to act according to "Justice, Equity and Good Conscience in deciding civil disputes if no source of law was identifiable".[5] In the historical development of civil laws in India by English judges and lawyers, the notion of justice, equity and good conscience, as understood and applied by the then Indian courts, was basically in line with the development of English common law. The English-made law used to dominate all major areas of civil laws in India, which mostly took the form of a codified legal order. The law of torts in India, which remains uncodified till date, followed the English law in almost all aspects in its field. It is notable that common law, originally introduced into India by the British, continues to apply here by virtue of Article 372(1)[6] of the Indian Constitution unless it has been modified or changed by legislation in India. The law was modified and departed from the English law only when the peculiar conditions that prevailed in India required this.

The remedies of modern environmental torts have their roots in these common law principles of nuisance, negligence, strict liability and trespass and other remedies for tort.

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3 A.C. Banerjee, *English Law in India* 189 (New Delhi: Abhinav Publications 1984).

4 M.C. Setalvad, *Common Law in India* 3 (London: Stevens and Sons Ltd. 1960).

5 J.D.M. Derrett, *3 Essays in Classical and Modern Hindu Law* 129-138 (Leiden: Brill 1976).

6 Art. 372(1) of the Constitution of India states: "Notwithstanding the repeal of this Constitution of the enactments referred to in Art. 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority."

II. POTENTIAL OF TORT IN CONTROLLING ENVIRONEMENT POLLUTION

Majority of environment pollution cases of tort in India fall under four major categories—Nuisance, Negligence, Strict liability and trespass.

Tort law deals with remedy for invasion of private rights. It talks about compensating a person for violation of his private right. A question arises about potential of tort law in controlling pollution as it focuses on remedy for violation of private right. According to Stephan Shavell "tort law should be assessed in terms of the contribution it can make to the control of environmental and other risks. The reason is that compensation can be achieved independently of tort law by other (and he implies, equally good and better) means.[7] Compensation goals can be pursued independently of tort law, as can risk control goals, but in tort law these two goals are harnessed together. Tort liability for harm rests on risk-creators. It is in the link between compensation and risk control that the distinctiveness of tort law resides. Tort law is two sided, "looking both to harm and to the compensation of harm"[8]. Because of its bilateral structure the tort law is best suited in the environmental law context. It is responsibility based mechanism for repairing harm. Its potential as a risk control is limited by its focus on harm. Actually the close study of the characteristics of tort law reveals its true potential in protecting the environment.

(*a*) Tort law comes onto the scene when something has gone wrong. So in cases of environment, the tort law will play role when there is environmental damage.

(*b*) It is much more concerned with cure rather than prevention.

(*c*) It is concerned primarily with reparation and not punishment.

(*d*) Tort law focuses on bad outcomes affecting persons (both human beings and corporations) and property. The term "property" does not refer to the things, but to things that are subject to legal regime. The earth's atmosphere for instance, is not subject to any legal property regime and so is not within the scope of tort law. In this way, tort law can be seen exclusively concerned with persons because only persons can have property.

(*e*) The rights protected from interference by tort law are property rights[9] and dignitary rights such as reputation and personal

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7 Stephan Shavell, *Economic Analysis of Accidental Law* 279 (Harvard University Press, 1987); See also, Richard B. Stewart, "Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual-Track System", GEO L.J. 88 (2000) 2183-83.

8 Peter Cane, *The Anatomy of Tort Law* 427-467 (Oxford: Hart Publishing 1997).

9 Rights in land, chattels, intellectual property, such as trade mark, patent, etc.

freedoms. The archetypal harms recognized by tort law are injury to the human body and mind, damage to tangible property and financial loss. More marginal are tangible harms to the person such as grief, fear and insult. Significantly for present purposes aesthetic harms resulting from bio-diversity damage, for instance, are not as such recognized by tort law.

(*f*) It is said that tort law focuses on harms not risks. It is not absolutely true. For instance, an important component of negligence calculus is the probability of the harm. The core-idea of foreseeability is also related to risk.

(*g*) In cases where an injunction may be awarded to prevent harm occurring in future, an injunction will be issued only if the court is satisfied that harm is imminent or very likely and not merely on the basis that the defendant is involved in a risky activity. Here it differs from precautionary principle, which considers risk involved in the activity and proposes prevention rather than cure. So the precautionary principle is increasingly finding favour as an approach to environment protection.

(*h*) Tort liability is predominantly fault based liability and in tort fault typically means negligence. The pre-condition of foreseeability of harm is pre-condition of liability under the principle of *Rylands* v. *Fletcher*10. The polluter pays principle is usually assumed to dictate strict liability.

(i) Private law remedies in tort may require payment to individuals for environmental damage if that environmental harm constitutes harm to certain individual interests. There is absence of any liability to the environment, and absence of any doctrine compensating the environment for the harm caused to it. It is yet to be developed.

(*j*) In some of the cases it is difficult to prove any causal links between the emission of a pollutants and increased incidence of disease. In some of the cases the victims are passive victims in such cases it is difficult to prove the causes of harm. It is simply impossible in many cases to distinguish the pollution effects and the general background of disease, that is between the individually tortuously injured as distinct from individuals with same disease brought about by background factors. In addition multiple sources of pollution together with non environmental factors can combine to create complex links to the extent that it may not even be meaningful to ask what causes an ailment. As well as creating difficulties for individual claimants, any deterrent effects of tort will be lessened by the reduced likelihood of a successful claim.

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[10] 1868 UKHL 1 : (1868) LR 3 HL 330.

In evaluating the potential of tort law in matters related to environment protection as a compensation and risk control mechanism, we need to attend not only to the rules and principles according to which tort liability is imposed, but also to the institutional structure through which these rules and regulations are given practical effects. In other words, we need to assess tort law in action i.e. the interpretation of the tortious liability rules by the judiciary in cases related to environment protection.

III. JUDICIAL SKILL IN SHAPING TORTIOUS LIBILITY IN ENVIRIONMENT PROTECTION

The Indian judiciary has played a remarkable role in implementing principles of tort law in environmental issues. The credit goes to the Supreme Court in interpreting the same old principles of tort with wider meaning to encompass the new challenges of the environmental damage. Wherever and whenever necessary, the Supreme Court has evolved new principles of tort and given a new shape to tortious liability in environment protection.

A. Evolving New Principles of Tortious Liability

The Bhopal Catastrophe has been proved eye-opening for the environmentalist, social workers and government institutions as well as general public. It brought new awareness in India. The Government and the judiciary started thinking about new ways and means of preventing similar tragedies in future. Compensation to the victims of Bhopal disaster raised an enigma in Indian torts law. There was paucity of litigation in the field of torts. The proverbial delay, exorbitant court fee, complicated procedure and recording evidence, lack of public awareness, the technical approach of the bench and the bar and absence of specialization among lawyers are stated to be reasons for such a condition.[11] It is also argued that the alleged paucity is myth and not reality, as thousands of cases are settled out of court through negotiations and compromises and unreported decisions of subordinate courts.[12] It is not disputed that Indian courts do not award punitive damages in civil cases to deter the wrongful conduct.[13] But it does not mean that tort law has not played any effective role in the environment protection. The judicial pronouncements clearly show the recent trends in the Indian torts law as an instrument of protection against environmental hazards.

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[11] B.M. Gandhi, *Law of Torts* 63-69 (Eastern Book Company, 1987).

[12] J.B. Dadachandji, "J.B.'s affidavit before US District Court in the Bhopal Litigation: Inconvenient Forum and Convenient Catastrophe: the Bhopal Case", Indian Law Institute, 81-82 (1986).

[13] Stephan L. Cummings, "International Mass Tort Litigation: Forum Non Conveniens and the Adequate Affirmative Forum in Light of the Bhopal Disaster", 109 (16) GA J. of Int'l & Comp. L., 136-142.

The judicial vigil is seen in the interpretation of principles of tort law in the age of science and technology. Absolute liability for harm caused by industry engaged in hazardous and inherently dangerous activities is a newly formulated doctrine free from exceptions to the strict liability in England.[14]

The judicial activism and craftsmanship is clearly seen in its new-fangled approach in providing tort remedies in public interest litigation. In *M.C. Mehta* v. *Union of India*[15] the court entertained the public interest litigation where the damage was caused by an industry dealing with hazardous substance like oleum gas. The Supreme Court could have avoided a decision on the affected parties' application by asking parties to approach the subordinate court by filing suits for compensation. Instead, the Court proceeded to formulate the general principle of liability of industries engaged in hazardous and inherently dangerous activity. Not only this, Chief Justice Bhagwati declared that the court has to evolve a new principle and lay down new norms, which would adequately deal with the new problems which arise in a highly industrialized economy.[16] The Court evolved the principle of absolute liability and did not accept the exceptions of the doctrine of strict liability for hazardous industries. The Court did not stop here; it proceeded a step further and held that the measure of compensation must be co-related to the magnitude and capacity of the enterprise.

The Chief Justice Bhagwati said: "The large and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on the hazardous or inherently dangerous activity by enterprise."[17] This is found necessary because of its deterrent effect on the behaviour of the industry. The Indian Supreme Court was developing indigenous jurisprudence free from the influence of English law. Here the scope of the owner conferred on the Court under Article 32 was so widely interpreted as to include formulation of new remedies and new strategies for enforcing the right to life and awarding compensation in an appropriate case.[18] The court gives clear message in the case that one who pollutes ought to pay just and legitimate damages for the harm one causes the society. It opened a new path for later growth of the law and accepted the polluter pays principle as part of environmental regime. The principle requires an industry to internalize environmental cost within the project cost and annual budget and warrants fixing absolute liability on harming industry. The judiciary woke up with a new awareness and laid down legal norms in clear terms. This was accompanied

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[14] P. Leelakrishnan, *Environmental Law in India* 126 (Butterworths 1999).
[15] (1987) 1 SCC 395 : AIR 1987 SC 1086.
[16] *Ibid.*
[17] *Ibid.*
[18] (1987) 1 SCC 395 : AIR 1987 SC 1086 at 1089.

by invoking the technique of issuing directions under Article 32 of the constitution of India.

In *Consumer Education & Research Centre* v. *Union of India*[19] the court designed the remedies following the Mehta dictum.[20] The Court's attitude shows certainty of the court that direction can be issued under Article 32 not only to the State but also to a company or a person acting in purported exercise of powers under a stature of licence issued under a statute for compensation to be given for violation of fundamental rights.

In this case, the doctrine of absolute liability has not been referred but a different species of liability was formulated in respect of hazardous industries, like those producing asbestos. The compensation payable for occupational diseases during employment extends not only to those workers who had visible symptoms of the diseases while in employment, but also to those who developed the symptoms after retirement.

In *Indian Council for Enviro-Legal Action* v. *Union of India*[21] the Supreme Court supported Mehta case and pointed out the rationale for fixing the absolute liability on the hazardous industry. In this case the polluter pays principle was applied. The Court directed the Government to take all steps and to levy the costs on the respondents if they fail to carry out remedial actions.

Socio-economic transformation is a challenge to a developing country. As Chief Justice Bhagwati has rightly observed, law has to grow in order to satisfy the needs of fast changing society and keep abreast with the developments taking place in the country.[22] It is absolutely true. The Indian judiciary has evolved the new doctrines of tortious liability through the effective tool of public interest litigation.

Some of the public interest litigation cases involved flagrant human rights violations that rendered immensely inadequate traditional remedies, such as the issuance of prerogative writs by the courts. Without any hesitation the Indian Judiciary has forged unorthodox remedies. Where the peculiarities of case prompted urgent action, the Court gave immediate and significant interim relief with a long deferral of final decision as to factual issues and legal liability.

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[19] (1995) 3 SCC 42 : AIR 1995 SC 922.
[20] (1995) 3 SCC 42 : AIR 1995 SC 922.
[21] (1966) 3 SCC 212 : AIR 1996 SC 1446.
[22] *M.C. Mehta* v. *Union of India*, (1987) 1 SCC 395 : AIR 1987 SC 1086.

In cases of personal injuries[23] and unlawful confinement[24], the court has refused to limit the victim to the usual civil process. Petitions are allowed directly to the Supreme Court under Article 32 and damages are awarded to compensate the victim and deter the wrongdoer. In cases of gross violations of fundamental rights, the damages are awarded by the court. It is a new approach. The court has not dealt with only violation of individual's right but has taken serious note of the environmental harm along with violation of human rights. In such cases the court has also imposed the cost of repairing the environmental damage on the polluters.[25] Perhaps more importantly, the courts have shown a willingness to experiment with remedial strategies that require continuous supervision and that appear significantly to shift the line between adjudication and administration. Just as the court will appoint socio-legal commissions to gather facts, so will it create agencies to suggest appropriate remedies and to monitor compliance. The final orders in PIL matters are often detailed, specific and intrusive.[26]

In *Bandhua Mukti Morcha* v. *Union of India*[27] the Court had endorsed the true scope and ambit of Article 32 of the Constitution and has held: "it may now be taken as well settled that Article 32 does not merely confer power on this Court to issue a direction, order or writ for the enforcement of the fundamental rights but it also lays a constitutional obligation on the Court to protect the fundamental rights of the people and for that purpose this Court has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce fundamental rights"[28].

In M.C. Mehta v. *Kamal Nath*,[29] the Supreme Court held: "Pollution is a civil wrong. By its very nature, it is a tort committed against the community as a whole. A person, therefore, who is guilty of causing pollution, has to pay damages (compensation) for restoration of the environment and ecology. He has also to pay damages to those who have suffered loss on account of the act of the offender. The powers of this Court under Article 32 are not restricted and it can award damages in a PIL or a writ petition as has been held in a series of decisions. In addition to damages aforesaid, the person guilty of causing pollution can also be held liable to pay exemplary damages so that it may act as a deterrent for others not to cause pollution

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23 *M.C. Mehta* v. *Union of India*, (1987) 1 SCC 395 : AIR 1987 SC 1086.

24 *Rudul Sah* v. *State of Bihar*, (1983) 4 SCC 141 : AIR 1983 SC 1086.

25 *Vellore Citizens' Welfare Forum* v. *Union of India*, (1996) 5 SCC 647 : AIR 1996 SC 2715; *Indian Council for Enviro-Legal Action* v. *Union of India*, (1996) 3 SCC 212 : AIR 1996 SC 1446.

26 Jamie Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" AM J of COMP L, 37, 506 (1989).

27 (1984) 3 SCC 161.

28 *Ibid.*

29 (2002) 3 SCC 653 : AIR 2002 SC 1515.

in any manner. The considerations for which "fine" can be imposed upon a person guilty of committing an offence are different from those on the basis of which exemplary damages can be awarded."[30]

IV. CONCLUSION

Thus the judiciary has resorted to fundamental rights, directive principles of State policy and the fundamental duties of citizens in the constitution for the development of environmental jurisprudence. The new interpretation of these provisions has developed a judge made law in the field of environmental law in India. The expansive interpretation of Article 21 is the remarkable development in the human rights to clean and wholesome environment in India. Article 21 has been used by judiciary to implement the principles of sustainable development, protecting the right to clean air, water and environment; right to livelihood etc. the analysis of the case laws shows that the judiciary has widened the scope of Article 21 and implemented an international law in a domestic law. Articles 48-A and 51-A(*g*) have been interpreted to substantiate this development.

The liberal interpretation of Articles 32 and 226 have further added to the development of remedies for environmental tort in India. A new method of awarding compensation for constitutional tort has been developed by Indian Judiciary in environmental cases. The dynamic interpretation of Article 21 by the judiciary has served twin purpose of protecting the rights of the citizens to clean and wholesome environment and awarding damages for the violation of their private rights.

The judicial craftsmanship is clearly seen in the use of private law remedies for the public wrong in environmental cases. The High Courts have also shown dynamic approach in interpreting the principles of tortious liability to protect the environment. The judgments in *Ram Baj Singh* v. *Babulal*[31], *Ram Lal* v. *Mustafabad Oil and Cotton Ginning Factory*[32], *Krishna Gopal* v. *State of M.P.*[33], *Dhannalal* v. *Chittarsingh Mehtapsingh*[34], *V. Lakshmipathy* v. *State of Karnataka*[35] , *Ved Kaur Chandel* v. *State of H.P.*[36], *Bijayananda Patra* v. *Disrict Magistrate, Cuttack*[37], clearly establishes that the conduct of a person (on his property) becomes a private nuisance when the consequences of his acts no longer remained confined to his

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30 (2002) 3 SCC 653 : AIR 2002 SC 1515.
31 1981 SCC OnLine All 556 : AIR 1982 All 285.
32 1968 SCC OnLine P&H 347 : AIR 1968 P&H 399.
33 1985 SCC OnLine MP 188 : 1986 Cri LJ 396.
34 1957 SCC OnLine MP 190 : AIR 1959 MP 240.
35 1991 SCC OnLine Kar 189 : AIR 1992 Kant 57.
36 1999 SCC OnLine HP 5 : AIR 1999 HP 59.
37 1999 SCC OnLine Ori 65 : AIR 2000 Ori 70.

own property, but spill over in a substantial manner to the property belonging to another person.

Thus the judiciary has innovated new methods to enforce tortious liability to protect the environment. The Supreme Court and the High Courts have laid down and are in the process of broadly laying down the legal framework for environmental protection. A public law realm, based on the Constitution of India, has brought about great inroads into the civil and criminal laws of the country within the last three decade or so. These new developments in India by the extraordinary exercise of judicial power have to be perceived as just one of the many ways to meet the social and political needs of the country. The new approach of the judiciary in developing the concept of constitutional tort has proved really helpful in protecting the environment and the rights of people to clean and healthy environment.

The Supreme Court's role is noteworthy in developing tortious liability in environmental cases in India, still we feel that there is a great paucity of tort litigation in India, which makes the ideological credibility of Indian tort law a debatable issue. Several reasons could be given for the scanty litigation in India in this field:

(1) the institutional character of the legal system fails to encourage the pursuit of remedies of a civil nature for reducing inter-personal tensions in the community;

(2) the very technical approach adopted by judges and lawyers without taking into account the growing needs of Indian society;

(3) the tendency, noticed in most eastern societies in general, to prefer the process of mediation to that of the judicial process;

(4) the prohibitive cost of a lawsuit, the time, labour and money expended at every stage of litigation;

(5) the delays attendant on litigation;

(6) the unsatisfactory condition of the substantive law on certain topics, for example the liability of the State for torts of its servants;

(7) the anomalies created in the minds of litigants by the co-existence of several statutory provisions;

(8) the low level of legal awareness among the general public;

(9) the difficulty of gaining access to law, since a large portion of the tort law remains uncodified; and

(10) the bureaucratic attitude of government officers dissuading legitimate claims of citizens even though they are legally enforceable.

In the light of such hurdles, which obstruct the natural growth of tort law in India, the recent development in combining tort law with the constitutional right to personal liberty and its remedy through compensation is a good step. The present state of the law of torts in India is characterized by rapid recent developments within the public law domain that have also perceptibly created a new legal framework for environmental protection in India.

PATENTING OF SEEDS AND COMPLEXITIES

—Dr. P. P. Rao[*]

Globalisation and trade liberalisation have effected corresponding changes in the ambit of International Law. Regulation and liberalisation of trade institutionalised by the World Trade Organisation (WTO). A remarkable development is that, now, hitherto non-trade elements like agriculture and services also fall within the ambit of WTO and thus are regulated by international law. This has direct consequences to India being a party to the WTO charter. It is mandatory for India to make amendments to its existing law in order to harmonise it with WTO charter. The present focus is on how and what changes are brought about in seeds law in respect of patentability of seeds.

This issue has arisen because of the invention of gene–technology and widespread application of bio-technology in order to produce new varieties of seeds and plants. This is seen by some corporate entities as a good opportunity to make profit. Plant breeding, varietal development and transgenic seeds, etc., all of a sudden, became business opportunities for seed companies. Apprehensions are expressed that these developments may-

a) adversely affect Indian food security and employment in agricultural sector[1]

b) increase food prices

c) create seed monopolies in favour of big multinational seed companies

d) adversely affect country's bio-diversity and may

e) ultimately violate the political sovereignty of the State.

What is lamentable is that the technological developments are not used for the development of products as "common heritage", but a substantial "technology fee" is charged from the farmers, for growing the transgenic

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[*] Assistant Professor of Law, CNLU.

[1] Dr. Nagarajan, S.N. "Several Policy Initiatives in Place", The Hindu Survey of Indian Agriculture, 2006, p. 46.

crops1. The farmers who, over the millennia conserved, selected, evaluated and stored superior plant types, which were used by plant breeders to develop transgenic crops were seldom recognised for the substantial role they played.

Communities of farmers in India are the rightful owners of the cultivated resources and therefore have a claim on the land races that their predecessors developed. The difficulty is in identifying these communities as they, over millenniums have spread over a large geographic area and even the ownership claims have become very difficult to resolve.

The story of granting patent to seeds and plant varieties begins from the point of giving priority to intellectual property. Protection of intellectual property and the protection of inventions by means of patents have evolved in the last 200 years though it existed in antiquity and middle ages in initial forms.

I. PATENTS FOR WHOM AND WHY:

The purpose of patents is to protect invention against unauthorised use of the invention by third parties. It primarily safeguards the results of industry's research and development. This protection is for a certain period and the patent law requires every invention should be published after specific periods. This forms foundation for further invention based on the new knowledge and can be freely used by the others once the protection has expired. Different theories[2] give different reasons for protection of patents.

A patent is a property right granted by the State to a patentee excluding others for a limited period from using the patented invention without the proper authorisation of owner of the same. After the expiry of the term of the patent, the invention passes on to the public domain. The purpose of the patent is to provide an incentive to the inventor or to the promotion of inventive activity and commercialisation of invention. Another purpose is to encourage the disclosure of the invention. It is the monopoly granted by the State to an inventor in an exchange for the disclosure of the invention so that others may profit from the invention. The disclosure of the invention is considered very important in any patent granting procedure. The grant of patent carries with it no positive right but it is a negative right excluding others from making, using, selling the patented invention.

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[2] Ownership, Reward, Incentive, Disclosure theories: See: Patent Law and European Patent Convention, Documents on Politics and Society in the Federal Republic of Germany, published by Inter Nationes. C.V. D-5300 Bonn 2, 1991, pp. 5-6.

The issues of patenting of seeds and plant varieties in India and the transformation from welfare to laissez faire through the recent legislations, Indian commitment to the international agreements and the complexities around it are discussed under the following heads.

Primarily the issue of patenting of seeds and plant varieties can be classified into two basic areas.

A. International Developments in Patent Law and;

B. India's Patent Regime.

Referring to the first aspect i.e., International Developments in Patent Law, the discussion and analysis is presented under the following heads.

(i) History and Significance of Intellectual Property and its Protection.

(ii) UPOV Act.

(iii) World Trade Organisation and Intellectual Property Rights.

(a) TRIPs Agreement and;

(b) TRIMs Agreement.

With regard to second aspect i.e., Indian Patent regime of seeds and plant varieties, the discussion and analysis is presented under the following heads.

(i) Evolution of Patent Law in India.

(ii) Law relating to 'Seed and Plant Varieties' Patents.

(iii) Impact and Implications of TRIPs on Indian Seed Regime.

C. INTERNATIONAL DEVELOPMENTS IN PATENT LAW

i. History and Significance of Intellectual Property and its Protection:

The significance of Intellectual property has long been appreciated in most of the economies of the world. However, the approach towards the protection of the property varies from country to country. In developed countries, the protection of intellectual property has been recognised as the basis for promoting invention so as to ensure dynamism in their economies through new commercial, industrial enterprises, which produce their own cascading effects on economic growth and employment therein. In the post-second world war period, many countries including Germany, Japan and Korea encouraged and protected Intellectual Properties. Small

inventions known as utility models in the parlance of intellectual property rights were encouraged by these countries so as to protect their domestic industries from the onslaught of Multi National Corporations [MNCs].

Intellectual property protects applications of ideas and information that are of commercial value. The subject is growing in importance to the advanced industrial countries in particular, as the fund of exploitable ideas becomes more sophisticated and as their hopes for a successful economic future come to depend increasingly upon their superior corpus of new knowledge and fashionable conceits. There has recently been a great deal of political and legal activity designed to assert and strengthen the various types of protection for ideas. There has been a succession of campaigns for new rights[3].

International Trade in Goods (ITG) has increased substantially during the nineteen eighties. A number of industrialised countries felt that inadequate patent protection in technology had eroded their advantage in competition in the high technology area. Although trade in counterfeit goods had been around for some time, technologies for duplication facilitated production of counterfeit goods, which became cheaper with some of the countries indulging in the counterfeit trade. This issue became very contentious and was sorted out bilaterally, trade sanctions being used as a stick[4].

With the expansion of international trade, several countries, especially, the developed ones have been placing lot of emphasis on protection of Intellectual Property Rights. "The Uruguay Round of GATT negotiations went well beyond the area of international trade. It entered fields not within the jurisdiction of GATT and extended to areas, which were essentially part of domestic policies of a nation. New issues such as intellectual property rights, agriculture, investments, services, etc., were deliberately brought on the agenda of multilateral trade negotiations"[5] that have resulted in the establishment of World Trade Organisation (WTO).

The scientific advancement in the field of biotechnology and tissue culture has ushered in an agricultural revolution. Development of new plant varieties and better quality of seeds has accelerated the agricultural development. It has, therefore, been internationally recognised that rights of plant breeders should not only be recognised but a sui generis legal mechanism be evolved to protect their rights as well. At global level the international Convention for protection of New Varieties of Plants (UPOV means – Union

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3 Cornish, W.R. "Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights" (Second edition – 5th Indian Re-print) 1999, p. 5.

4 Jayanta Bagchi, *World Trade Organisation: An Indian Perspective*, pp. 47, 48.

5 Nilima Chandiramani, "Legal Factors in TRIPs", Economic and Political Weekly, January 5-11, 2002, p. 200.

Internationae Pour Law- Protection Des obtention vegetable) was concluded in 1961. The WTO-TRIPs also recognised the need to develop legal system for protection of plant varieties either through patent or an effective sui generis system.

ii. International Convention for the Protection of New Varieties of Plants (UPOV ACT)

The International Union of Protection of New Varieties of plants was established in1961 through the conclusion of International Convention for the Protection of New Verities of Plants (UPOV Act). The Act was subsequently amended in 1972, 1978 and 1991. At present, 1991 Convention binds all the Contracting Parties (member States) to the Convention. India has also become a member of the Union. The purpose of the International Convention is to recognise and to ensure to the breeder of a new plant variety or to his successor in title a right. The State parties to this Convention constitute a Union for the protection of new varieties of plants. The seat of the Union and its permanent organs situated at Geneva.

a. UPOA Act, 1961

Originally when UPOV Act was concluded in 1961, Contracting Parties to the Convention convinced of the importance attached to the protection of new varieties of plants not only for the development of agriculture in their territory but also for safeguarding the interests of breeders and conscious of the special problems arising from the recognition and protection of the right of the creator in this field and particularly of the limitations that the requirements of the public interest may impose on the free exercise of such a right felt to resolve these problems by each of them in accordance with uniform and clearly defined principles. The Convention stipulates, "Each member State of the Union may recognise the right of the breeder grant either of a special title of protection or of a patent. Nevertheless, a member State of the Union whose national law admits of protection under both these forms may provide only one of them for one and the same botanical genus or species"[6]. According to this Convention the word 'variety' applies to any cultivar, clone, line, stock or hybrid which is capable of cultivation and which satisfies the provisions of sub paragraphs (1)(c) and (d) of Article 6, which says that the new variety must be sufficiently homogeneous, having regard to the particular features of its sexual reproduction or vegetative propagation and the new variety must be stable in its essential characteristics, that is to say, it must remain true to its description after repeated reproduction or propagation. Referring to national treatment the Convention stresses that irrespective of nationality and natural or artificial person should have the

[6] Art. 2 of UPOV Act, 1961.

same treatment and his rights as a breeder are to be protected by the member States[7].

This Convention would apply to all botanical genera and species. Further, the member States agreed at the time of conclusion of the Convention to adopt all measures necessary for the progressive application of the provisions of this Convention to the largest possible number of botanical genera and species. And also agreed that each member State of the Union must, on the entry into force of this Convention in its territory, apply the provisions of the Convention to at least five of the genera named in the list annexed to the Convention. Each member State further agreed to apply the said provisions to the other genera in the list, within the following periods from the date of the entry into force of the Convention in its territory:

a) within three years, to at least two genera;

b) within six years, to at least four genera;

c) within eight years, to all the genera named in the list.

Any member State of the Union protecting a genus or species not included in the list must be entitled either to limit the benefit of such protection to the nationals of member States of the Union protecting the same genus or species and to natural and legal persons resident or having headquarters in any of those States, or to extend the benefit of such protection to the nationals of other member States of the Union or of the member States of the Paris Union for the protection of Industrial Property and to natural and legal persons resident or having headquarters in any of those States[8]. The effect of the right granted to the breeder of a new plant variety or his successor in title is that his prior authorisation is compulsory for the production, for purposes of commercial marketing, of the reproductive or vegetative propagating material, as such, of the new variety, and for the offering for sale or making of such material. Vegetative propagating material must be deemed to include whole plants. The breeder's right also extends to ornamental plants or parts thereof normally marketed for purposes other than propagation when they used commercially as propagating material in the production of ornamental plants or cut flowers. The authorisation given by the breeder or his successor in title may be made subject to such conditions as he may specify. Authorisation by the breeder or his successor in title is not required for the utilisation of the new variety as an initial source of variation for the purpose of creating other new varieties or for the marketing of such varieties. Such authorisation is required, however, when the

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7 Art. 3 of UPOV Act, 1961.

8 Art. 4 of UPOV Act, 1961.

repeated use of the new variety is necessary for the commercial production of another variety[9].

The breeder of a new variety or his successor in title would be benefited from the protection provided for in this Convention when the following conditions are satisfied:

(a) Whatever may be the origin, artificial or natural, of the initial variation from which it has resulted, the new variety must be clearly distinguishable by one or more important characteristics from any other variety whose existence is a matter of common knowledge at the time when protection is applied for. Common knowledge may be established by reference to various factors such as: cultivation or marketing already in progress, entry in an official register of varieties already made or in the course of being made, inclusion in a reference collection or precise description in a publication and a new variety may be defined and distinguished by morphological or physiological characteristics. In all cases, such characteristics must be capable of precise description and recognition.

(b) The fact that a variety has been entered in trials, or has been submitted for registration or entered in an official register, should not prejudice the breeder of such variety or his successor in title. At the time of the application for protection in a member State of the Union, the new variety must not have been offered for sale or marketed, with the agreement of the breeder or his successor in title, in the territory of that State, or for longer than four years in the territory of any other State.

(c) The new variety must be sufficiently homogeneous, having regard to the particular features of its sexual reproduction or vegetative propagation.

The new variety must be stable in its essential characteristics - that is to say- it must remain true to its description after repeated reproduction or propagation or where the breeder has defined a particular cycle of reproduction or multiplication, at the end of each cycle. The new variety must be given a denomination in accordance with the provisions of Article 13 of this Convention.

Further, the breeder or his successor in title must comply with the formalities provided for by the national law of each country, including the payment of fees. The grant of protection in respect of a new variety may not be made subject to conditions other than those set forth in this Convention (Article **6**). Granting of protection to a new plant variety only after official

[9] Art. 5 of UPOV Act, 1961.

examination, fixing the period of protection granted to a breeder or his successor in title i.e., fifteen years and in cases of plants such as vines, fruit trees and their root stocks, forest trees the minimum period eighteen years are some other important provisions of this Convention. As per Article 9, the free exercise of the exclusive right accorded to the breeder or his successor in title may not be restricted otherwise than for reasons of public interest. More so, any such restriction is made in order to ensure widespread distribution of new varieties, the member State of the Union concerned must take all measures necessary to ensure that the breeder or his successor in title receives equitable remuneration. The right accorded to the breeder in pursuance of the provisions of this Convention must be independent of the measures taken by each member State of the Union to regulate the production, certification and marketing of seeds and propagating material.

b. UPOV Convention, 1991

But, the UPOV Convention, 1991 introduced far reaching changes to the structure of protection, significantly strengthening Plant Breeders Rights. As per Article 2 of this Convention basic obligation lies with each Contracting Party to grant and protect breeders' rights.

States already members of the Union and each Contracting Party, which is bound by the previous Act of 1961/1972 or the Act of 1978 and the new members of the Union are to apply the provisions of this Convention. This Convention imposes an obligation on the State parties who became the members of the Union under the Act of 1961/1972 or the Act of 1978 are to apply the provisions regarding protection of plant genera and species agreed upon at the date on which it becomes bound by this Convention, to all plant genera and species to which it applies, on the said date. And at least by the expiration of a period of five years after the said date, to all plant genera and species.

New members of the Union at the date on which it becomes bound by this Convention are to provide protection to at least 15 plant genera or species and, the latest by the expiration of a period of ten years from the said date, to all plant genera and species.

This Convention imposes an obligation of national treatment on each Contracting Party while protecting the rights of the breeders of other Contracting Party nationals either natural or legal entities as of its own nationals[10].

[10] Art. 4 of UPOV Convention, 1991.

As per Article 5 of the Act the criteria to grant protection in the form of a right to a breeder is that the variety must be -

New,

Distinct,

Uniform and

Stable.

The grant of the breeder's right shall not be subject to any further or different conditions, provided that the variety is designated by a denomination in accordance with the provisions of Article 20, and that the applicant complies with the formalities provided for by the law of the Contracting Party with whose authority the application has been filed and that he pays the required fees (Article .**5**(**2**)).

The criteria envisaged for Novelty (Article.**6**) under the Act that the variety must be deemed to be new if, at the date of filing of the application for a breeder's right, propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety in the territory of the Contracting Party in which the application has been filed earlier than one year before that date and in a territory other than that of the Contracting Party in which the application has been filed earlier than four years or, in the case of trees or of vines, earlier than six years before the said date.

Referring to varieties of recent creation the Act says that, where a Contracting Party applies this Convention to a plant genus or species to which it did not previously apply this Convention or an earlier Act, it may consider a variety of recent creation existing at the date of such extension of protection to satisfy the condition of novelty defined above even where the sale or disposal to others took place earlier than the time limits prescribed.

The Act says Distinctness as the variety should be deemed to be distinct if it is clearly distinguishable form any other variety whose existence is a matter of common knowledge at the time of the filing of the application. In particular, the filing of an application for the granting of a breeder's right or for the entering of another variety in an official register of varieties, in any country, should be deemed to render that other variety a matter of common knowledge from the date of the application, provided that the application

leads to the granting of a breeder's right or to the entering of the said other variety in the official register of varieties, as the case may be[11].

Uniformity means that the variety must be deemed to be uniform if, subject to the variation that may be expected form the particular features of its propagation, it is sufficiently uniform in its relevant characteristics[12].

Stability means that the variety must be deemed to be stable if it is relevant characteristics remain unchanged after repeated propagation or, in the case of particular cycle of propagation, at the end of each such cycle[13].

Article 14 of the Act speaks about the rights of the breeder primarily in three areas i.e., acts in respect of the propagating material, harvested material and certain products. These rights are available to a breeder, subject to Articles 15 and 16 of this Convention. These Articles provide for 'Exceptions to the breeder's right' and 'Exhaustion of breeder's right' respectively. The following acts in respect of the propagating material of the protected variety shall require the authorisation of the breeder:

(i) production or reproduction (multiplication),

(ii) conditioning for the purpose of propagation,

(iii) offering for sale,

(iv) selling or other marketing,

(v) exporting,

(vi) importing,

(vii) stocking for any of the purposes mentioned in (i) to (vi), above.

Further, the breeder may make his authorisation subject to conditions and limitations.

Acts in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorised use of propagating material of the protected variety must require the authorisation of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

Acts in respect of products made directly from harvested material of the protected variety through the unauthorised use of the harvested material are also required the authorisation of the breeder, unless the breeder has had

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[11] Art. 7 of UPOV Convention, 1991.
[12] Art. 8 of UPOV Convention, 1991.
[13] Art. 9 of UPOV Convention, 1991.

reasonable opportunity to exercise his right in relation to the said harvested material.

Possible additional acts, other than those that of production or reproduction (multiplication), conditioning for the purpose of propagation, offering for sale, selling or other marketing, exporting, importing, stocking for any of the purposes mentioned in the Act are also require the authorisation of the breeder.

The above said provisions would also apply in relation to varieties, which are essentially derived from the protected variety, where the protected variety is not itself, an essentially derived variety, varieties which are not clearly distinguishable (in accordance with Article 7, Distinctness) from the protected variety and varieties whose production requires the repeated use of the protected variety.

A variety must be deemed to be essentially derived from another variety ("the initial variety") when it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety, it is clearly distinguishable from the initial variety and except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.

Essentially derived varieties may be obtained for example by the selection of a natural or induced mutant, or of a somaclonal variant, the selection of a variant individual from plants of the initial variety, backcrossing, or transformation by genetic engineering.

Further, the Convention imposes a restriction that except where expressly provided in this Convention, no Contracting Party may restrict the free exercise of a breeder's right for reasons other than of Public Interest. Also there is an obligation on the Contracting party that when any such restriction has the effect of authorising a third party to perform any act for which the breeder's authorisation is required, the Contracting Party has to take all measures necessary to ensure that the breeder receives equitable remuneration[14]. With regard to the period of protection the Act specifies that the breeder's right should be granted for a fixed period and the minimum period should not be shorter than 20 years. In cases of trees and vines the prescribed period is 25 years[15].

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[14] Art. 17 of UPOV Convention, 1991.
[15] Art. 19 of UPOV Convention, 1991.

The breeder's right must be independent of any measure taken by Contracting Party to regulate within its territory the production, certification and marketing of material of varieties or the importing or exporting of such material. In any case, such measures should not affect the application of the provisions of this Convention.

The Act also provides for provisional protection (Article.**13**) accordingly, each Contracting Party has to provide measures designed to safeguard the interests of the breeder during the period between the filling or the publication of the application for the grant of a breeder's right and the grant of that right. Such measure should have the effect that the holder of a breeder's right must at least be entitled to equitable remuneration from any person, who, during the said period, has carried out transactions of commercial in nature with such variety which, once the right is granted, require the breeder's authorisation.

The Act imposes the obligation on Contracting Parties to adopt all measures necessary for the implementation of this Convention; in particular they have to provide for appropriate legal remedies for the effective enforcement of breeders rights (Article.**30**). Reservations are not permitted under this Convention, but, accepts that any State which, at the time of becoming party to this Convention, is a party to the Act of 1978 and which, as far as varieties reproduced asexually are concerned, provides for protection by an industrial property title other than a breeder's right should have the right to continue to do so without applying this Convention to those varieties.

c. Disadvantages of UPOV Act:

- In the UPOV System, rights are merely granted to the breeders and not to the farmers.
- UPOV restricts farmers' right, 'save seeds to replant'.
- UPOV aims at plant patents and permits dual protection of varieties. This effectively means that a variety can be protected by Plant Breeders' Right and patents.
- The cost of testing, approval and acquiring an UPOV authorised Breeders' Right certificate could be extremely expensive which Would effectively preclude the participation of small companies, farmers' co-operatives or farmer/breeders, but for the largest seed companies.
- Contrary to Convention on Biological Diversity, the UPOV model does not provide for benefit sharing with the farmers. So they end up paying

royalties for their own germplasm that has been tampered with and repackaged by the Transnational Companies.

- The control of plant varieties in the hands of big seed companies and privatisation of genetic resources can affect research negatively where; research is conducted by public institutions like various agricultural orgnisations. UPOV rules on 'essential derivation' would act as a disincentive to researchers to submit to accusations of plagiarism.

- The Convention has the capability of sharply accelerating genetic erosion in developing nations in particular India and undermining the enormous wealth of traditional knowledge in the bio – diverse country[16].

iii. World Trade Organisation and Intellectual Property Rights:

The WTO has been mandated to provide common institutional framework for the conduct of trade relations in matters related to the agreements and associated legal instruments included in the annexes to the WTO agreement. The agreements and associated legal instruments included in Annexes 1, 2 (also referred to as Multilateral Trade Agreements) are integral parts of the WTO Agreement. As such, these are binding on all members[17] including India[18]. Further, the plurilateral agreements are, however, binding on those Members only that have accepted them. By the same token, Members that have not accepted plurilateral agreements are not entitled to any of the rights emanating from these agreements.

The WTO has allocated a role to facilitate the implementation, administration and operation of the WTO Agreement and Multilateral Trade Agreements like GATT 1994, TRIPs, GATS etc., and promote their objectives. The WTO also provides framework for the implementation, administration and operation of the plurilateral Trade Agreements. The WTO provides forum to the Members for negotiating Multilateral Trade Relations in matters of the Multilateral Trade Agreements. The WTO can also provide a forum for further negotiating issues concerning Multilateral Trade Relations as also a frame work for the implementation of the result of such negotiations decided by the Ministerial Conference[19].

The WTO administers the understanding on Rules and Procedures Governing the Settlement of Disputes (Also referred to as DSU in Annexure

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[16] Rachitta Priyanka, "UPOV and Rights of Farmers — An Indian Perspective". Source: www.intelproplaw.com

[17] Art. II of WTO Agreement.

[18] ILM 33 (1994) p. 1131.

[19] Art. III of WTO Agreement.

2 to the WTO Agreement. The WTO also administers the Trade Policy Review Mechanism. (TPRM) in Annexure-3 to the WTO Agreement.

With the objective of fostering coherence in global economic policy -making, the WTO co-operates with the IMF, the World Bank and its affiliated agencies. To ensure smooth functioning of WTO it has been accorded a legal status. Members are obligated to treat WTO as a legal entity and extend privileges and immunities that may be required by WTO in exercise of its functions. The privileges and immunities extended by Members are similar to those stipulated in the Convention on the Privileges and Immunities of the Specialised Agencies, approved by General Assembly of the United Nations on 21 Nov 1947. The WTO has the authority to conclude a headquarters agreement[20].

The WTO continues the practice of decision making by consensus as followed under GATT, 1947. In case it is not possible to evolve consensus, the matter at issue is decided by voting. Decisions of the Ministerial Conference and General Council are taken by a majority of the votes caste[21]. The Ministerial Conference and General Council have the exclusive authority to adopt interpretations of this agreement and of the Multilateral Trade Agreements. And the agreements may be amended according to the necessity. Amendment to the provisions of Articles IX (Decision Making), X (Amendments) of WTO Agreements, Articles I (General MFN Requirement) and II (Tariff Schedules and Bindings) of GATT 1994, Article II: 1 (MFN Treatment) of GATS and Article 4 (MFN Treatment) of the TRIPs Agreement can take effect only after acceptance by all members[22].

Any Member can withdraw from WTO Agreement. The withdrawal applies to WTO Agreement and Multilateral Trade Agreements. Withdrawal from Plurilateral Agreement is governed by the provisions of that Agreement[23]. The Dispute Settlement system is a new one and the decisions by this body are binding on the Member States[24]. The Dispute Settlement Panels have powers equivalent to those of judicial benches. The power to enforce an international law is a major breakthrough in international affairs. WTO is perhaps the only international institution, which has legal power to enforce rules. The International Court of Justice has similar powers but they come into play only when both sides to the dispute agree to move the court[25]. Rules and procedures governing the settlement of disputes will

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20 Art. VIII of WTO Agreement.
21 Art. IX of WTO Agreement.
22 Art. X of WTO Agreement.
23 Art. XV of WTO Agreement.
24 Art. 2 of Dispute Settlement Understanding.
25 Arun Goyal and Noor Mohd., *WTO in the New Millennium: Commentary, Case Law, Legal Texts* (5th edn., 2001 Academy of Business Studies, New Delhi), p. 585.

apply not only to disputes arising out of the Agreement but also to consultations relating to settlement of disputes between the members concerning their rights and obligations.

As TRIPs agreement and TRIMs agreement form part of WTO Agreement and the WTO Agreement binds all the Member States, thus, Member States when grant patents to seeds and plant varieties must comply with the obligations imposed under the above said agreements.

a. TRIPs Agreement

One of the decisions taken at Marakesh was that the WTO charter is like a package, which must be either accepted or rejected in toto. Thus, TRIPs is an integral part of the WTO system and accordingly, it has to be understood and implemented in the larger context of WTO.

The TRIPs Agreement aims at protecting intellectual property rights and rewarding creativity inventiveness. TRIPs Agreement states its objective, as "the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technology and in a manner conducive to social and economic welfare, and to a balance of rights and obligations[26]. The obligations of member states of WTO under the TRIPs Agreement with regard to protection of plant varieties are reflected in Article 27.3(b). It stipulates that Parties may exclude from patentability inventions… 'plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof'.

Further, the Agreement provides that "Members may, in formulating or amending their laws and regulations, adopt measurers necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement"[27].

The other important provision in the Agreement is that "Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect order,

[26] Art. 7 of TRIPs Agreement.
[27] Art. 8.1 of TRIPs Agreement.

public health or morality, or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law"[28].

The Agreement sets out the minimum protection that must be given for each category of intellectual property rights enforcement. TRIPs is a minimum standards agreement, it encourages countries to provide a higher-level protection for intellectual property and explicitly permits them to do so.

TRIPs Agreement calls upon developed country Members to adopt measures to facilitate transfer of technology[29]. These provisions are however, in the nature of "best effort" clause and do not put any mandatory obligations on developed countries.

National treatment (non-discrimination against foreigners) and Most Favoured Nation Treatment (no discrimination between foreign nationals) in intellectual property protection are obligatory. But subject to the exceptions under the Berne/Paris/Rome Conventions.

TRIPs Agreement classifies micro-organisms, microbiological and non-biological processes as patentable but lacks clear provisions on bio-piracy. This has led to wide spread piracy of genetic wealth from developing countries. As a result, developing countries have asked the WTO to harmonise TRIPs Agreement with provisions of Convention on Biological Diversity. The developed countries like US have opposed such a demand[30].

So, the protection of intellectual property rights including patent rights for innovations of seed and plant varieties, has come under the fold of WTO which is criticised by the Third World as the so called care taker of free trade of Multinational Companies of developed countries. And in the process of protection of Intellectual Property, the traditional knowledge of nation States in various fields is under risk as bio piracy instances have already been experienced for e.g., Indian Basmati rice, Neem, Turmeric etc.

"The TRIPs Agreement did not require us to patent seeds. However, we would have to establish an effective system for the protection of 'Plant Varieties' seeds and other form of propagation material as obligated under the WTO's Plant Breeders Rights (PBR) system. Under PBR system a plant variety would qualify for protection only if it fulfills definite criteria:

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[28] Art. 27.2 of TRIPs Agreement.

[29] Arts. 8 and 65 of TRIPs Agreement.

[30] Arun Goyal and Noor Mohd., *WTO in the New Millennium: Commentary, Case Law, Legal Texts* (5th edn., 2001 Academy of Business Studies, New Delhi), p. 535.

'novelty' and 'uniformity'"[31]. India has chosen to protect plant varieties through the sui generis system by enacting the PPVFR Act, 2001.

II. RELATION BETWEEN UPOV ACT AND TRIPS:

The two very important instruments in this field are the TRIPs Agreement and the UPOV Convention. "TRIPs is a broad-ranging treaty which has had impact at various levels. On the impact of TRIPs on agricultural patents, the TRIPs Agreement provides for the introduction of life patenting; such as patents on microorganisms. This has also introduced a form of intellectual property protection for plant varieties. This has made intellectual property protection a central concern of agricultural policy in the context of the implementation of TRIPs commitments[32].

The UPOV Convention has a much narrower focus and specifically introduces a form of intellectual property rights known as plant breeders' rights, which largely protect commercial breeders of Conventional seeds. In other words, the UPOV Convention and the TRIPs Agreement are largely complementary because the former does not provide specific protection for genetically modified seeds. This does not imply that the two treaties necessarily address separate situations, since a plant variety protected through plant breeders' rights may also include a patented microorganism. In other words, unless double protection is specifically prohibited, plant breeders' rights and patents can coexist in a specific case" [33].

a. TRIMs Agreement

The purpose of the Agreement as spelt out in the preamble is "to promote the expansion and progressive liberalisation of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country Members, while ensuring free competition". To achieve this purpose it was thought necessary to eliminate certain trade related investment measures.

Agreement on TRIMs is one of the GATT Agreements. Therefore, it applies to investment measures related to trade in goods only[34]. The central point in the agreement is that "without prejudice to other rights and

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[31] Panchamukhi, V.R., "World Trade Organisation and India — Challenges and Perspectives", in the book of *WTO and the Indian Economy* , edited by Chadha, G.K. pp. 138-139.

[32] Philippe Cullet, "Seeds Regulation, Food Security and Sustainable Development", Economic and Political Weekly, August 6, 2005, pp. 3607-8.

[33] *Ibid.*

[34] Art. 1 of the Agreement on Trade-Related Investment Measures (TRIMs Agreement).

obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with Article III or Article XI of the GATT"[35].

Governments impose requirements on enterprises that the goods they produce shall incorporate a certain minimum proportion of domestically – produced inputs, or that a certain proportion of their output be exported. The stipulation ensures that the host country benefits from the investment in terms of downstream demand for inputs. The Uruguay Round negotiations on trade related investment measures (TRIMs) identified nearly a dozen such measures in the Annexure to the legal text. TRIMs Agreement deals only with measures that are already prohibited by two GATT articles. Its main importance lies in the clearly identified measures, which were previously widely ignored as contrary to GATT provisions. Four of the five TRIMs identified in the illustrative list belong essentially to two broad categories; they either demand that there be certain local content in the products of the enterprise concerned, or require some degree of balancing of trade between exports and imports. The fifth concerns restriction on exports. The prohibition covers such measures not only if they are a matter of law or government ruling, but also if they are a condition "compliance with which is necessary to obtain an advantage".

TRIMs Agreement specifically provides that "exceptions permitted under the GATT continue to apply[36]". This could mean, for instance, that a TRIM otherwise banned might be justifiable for reasons of national security. The Agreement demands that all TRIMs inconsistent with its provisions be notified, and eliminated over a fixed period. The developing countries have a transitional period of five years that is up to 1-1-2000, to eliminate TRIMs covered by the Agreement, provided they have notified them to WTO when the Agreement became operational[37].

However, the domestic content is an extremely useful and necessary tool from the point of view of developing countries. Such a requirement is often necessary for;

(i) encouraging domestic economic activities in raw material and intermediate input sectors;

(ii) up-gradation of input production;

(iii) prevention of wastage of foreign exchange in the import of raw material and intermediate inputs;

(iv) ensuring linkages of FDI with domestic economic activities;

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[35] Art. 2 of TRIMs Agreement.
[36] Art. 3 of TRIMs Agreement.
[37] Art. 5 of TRIMs Agreement.

(v) encouraging indigenisation in case of FDI; and

(vi) acting in several other ways as an important instrument in the development process.

Developing countries also find export performance requirements to be useful and necessary from the point of view of balanced economic growth and national development.

III. TRIMS AND DEVELOPMENT:

Many experts have argued that TRIMs essentially belonged to a restrictive economy contending that when the economy starts growing, TRIMs become less and less attractive. Some of the developed countries were, however, aiming at different form of competitive policy, which is being brought up in negotiations subsequent to the Uruguay Round. It has, therefore, been everybody's experience that the foreign investors look for an economy which is growing and which is internally having less of restriction. The balance of payment restrictions is very much prevalent in GATT Article XVIII-B, which allows the developing countries to deviate from their obligations under Agreement to the extent that the Article permits them. The balance of payment position is dependent on many important developments, which are not always in the hands of developing countries. It is because of this provision that the countries can impose restriction whenever, in their opinion, the balance of payment position is threatened.

Further, the Agreement has been very much criticised, as it has no provision to deal with the restrictive business practices of foreign investors. Besides some of the other safeguards like balance of payment are not honoured. Sometimes, multinationals steam-roll domestic entities by predatory pricing. It may result in a country's resources being depleted and adversely affect the economic health of the host country in-terms of downgrading its human and technical skills. In future the developing countries will have to try their best to minimise the harmful effect of this agreement.

When the developed countries start taking up the unfinished agenda, it will adversely affect the domestic interests of the country concerned, namely, self-reliant growth, plans drawn up etc. Beyond a point, further relaxation of various facilities to the foreign investors will be harmful to the interests of the developing countries like India. If the foreign direct investment is invited in the seed sector, the consequences would be very drastic. The multinational companies of developed countries which are in a strong position to invest in the field of research on seeds and plant varieties are most likely to bring pressure on the governments to relax further the domestic law in favour of them, particularly of patents etc. It is also feared

that this might lead to monopolies being created in their favour, and thus the entire seed sector could go under their direct control, to the prejudice of the farmers.

The countries concerned should be conscious of this and work out counter proposals to safeguard their interests, even though the balance of payment consideration allows countries to get protection against a number of these obligations[38].

A. INDIA'S PATENT REGIME

i. Evolution of Patent Law in India:

The first Indian legislation on Patent was Act 6 of 1856, which granted exclusive privileges to inventors for new inventions for 14 years. This Act was repealed by Act 15 of 1859 based largely on English Act of 1852. Under this Act, however, the right was more limited, in that only English Patent holders could seek registration in India and not vice-versa.

The Patent and Design Protection Act was passed in 1872. Thereafter the Indian Patents and Designs Act of 1911 was passed. Afterwards, on attainment of independence, the Indian Government decided to amend the Patent Act of 1911 suitably, so as to subserve the national interests. Several committees like Justice Tek Chand Committee and Justice N. Rajagopala Ayyangar Committee were appointed to study and make recommendations on the matter. On the basis of their recommendations, the Patent Act was enacted in 1970.

Until the Indian governments have initiated new economic policy there have been no changes in Indian patent Law particularly in the field of seeds and plant varieties. Later, in the years 1999, 2002 and 2005 Indian patent Law has drastically been changed. Seeds and new plant varieties have also been made subject matters of patent protection. The relevant enactment in this regard is Protection of Plant Varieties and Formers' Rights Act, 2001.

ii. Law relating to 'Seed and Plant Varieties' Patents:

IV. THE PATENT ACT

The Patents Act, 1970 and its Rules 1972 have been regulating the grant, the operative period, the revocation and infringement, etc., of the patents. But granting patents to seeds and plant varieties had not been covered under the Act. Further, in the Act a method of agriculture or horticulture was not

[38] Supra note 3, p. 39.

treated as invention. Thus, the question of granting patents to new plant varieties did not arise.

The original Act permitted granting of patents in respect of inventions. An ' "invention" means any new and useful –

(i) art, process, method or manner of manufacture;

(ii) machine, apparatus, or other article;

(iii) substance produced by manufacture, and includes any new and useful improvement of any of them, and an alleged invention (sec.**2** (**j**) of Patents Act)'.

V. WHAT ARE NOT INVENTIONS -

Section 3 of the Act stipulates that 'the following are not inventions with in the meaning of this Act….

An invention the primary or intended use of which would be contrary to law or morality or injurious to public health – (s.**3** (**b**))

A method of agriculture or horticulture – (s.**3** (**h**))

Any process for the medicinal, surgical, curative, prophylactic or other treatment of human beings or any process for a similar treatment of animals or treatment of plants to render them free of disease or to increase their economic value or that of their products (s. **3**(**i**)).'

Section 5 of the Act says that 'Inventions where only methods or processes of manufacture are patentable. In the case of inventions-

(a) claiming substances intended for use, or capable of being used, as food or as medicine or drug, …….. no patent shall be granted in respect of claims for substances themselves, but claims for the methods or processes of manufacture shall be patentable.'

Thus, granting patent to substance itself on a claim for a patent as of invention is restricted under the Act if, the substance is intended for use or capable of being used, as food or as medicine or drug or substance prepared or produced by chemical processes. But the method or processes of manufacture is patentable.

The invention for which patent is claimed may be a product or an article or a process. In the case of an article, the subject matter of patent is the end

product of the article. In the case of a process, the patent does not lie in the end product but only in the process by which it is carried.

The general principles applicable to working of patented inventions are; "granting of such patent is to encourage inventions and to secure that those inventions are worked in India on a commercial scale and to the fullest extent that is reasonably practicable without undue delay and that they are not granted merely to enable patentees to enjoy a monopoly for the importation of the patented article"[39].

Compulsory licence is another important provision in the Act, which provides to obtain a license by the patentee at any time after the expiration of three years from the date of sealing of the patent on the ground that patented invention is not available to the reasonable requirements of public have not been satisfied and also at a reasonably affordable price[40].

In respect of an invention claiming the method or process of manufacture of a substance, which is intended for use, or is capable of being used, as food or as medicine or as a drug, the term of patent is five years and in other cases it is fourteen years[41].

With a view to increase the agricultural produce, successive Indian governments had encouraged the use of hybrid varieties. But profit mongering transnational corporations and corporations having tie-up with local seed companies tried to catch the Indian seed market by introducing pest-resistant and high yielding varieties. As seeds become tradable commodity, the private seed companies started insisting on the Indian governments to grant patents to their new varieties. Then the Governments had taken quick steps to change the patent law of 1970 and made major amendments to the Act thrice in the year 1999, 2002 and 2005.

Originally methods of agriculture and plants were excluded from patentability in the Act to ensure that the seed, the first link in the food chain was held as a common property resource in the public domain. In this manner, it guaranteed to the farmers the inalienable right to save, exchange and improve upon the seed was not violated.

According to section 3(i) of the Indian Patent Act, 1970 'any process for the medicinal, surgical, curative, prophylactic or other treatment of human beings or any process for a similar treatment of animals or plants to render them free of disease or to increase their economic value or that of their products' is not an invention.

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[39] S. 83 of the Patents Act,1970.
[40] S. 84 of the Patents Act,1970.
[41] S. 53 of the Patents Act, 1970.

But, the word "plants" has been deleted from this definition through the Patent Amendment Act, 2002[42]. This deletion implies that a method or process of modification of a plant can now be counted as an invention and therefore can be patented. Thus, the exclusive rights associated with patents can now cover the method of producing Bt. Cotton by introducing genes of a bacterium thuringiensis in cotton to produce toxins to kill the bollworm. In other words companies like Monsanto can now have Bt. Cotton patents in India. Further the Amendment allows for the production or propagation of genetically engineered plants to count as an invention. Its status as an invention thus deems it. But it excludes from inventions – "plants and animals including seeds, varieties and species and essentially biological process for production or propagation of plants and animals" (sec. **3(j)**). Thus, plants produced through the use of new biotechnologies are not technically considered as "essentially biological". This loophole, couched in the guise of scientific advancement, allows patents on GMOs and opens the floodgate for patenting transgenic plants.

It is commented that the industrialised nations have the technology but they do not have the bio-resources, which are located in the developing countries. The harmonised intellectual regime enables these technology-rich nations to gain access to the bio-diversity and genetic wealth of developing countries and then after minor modification such as 'reshuffling of genes' to convert that bio-diversity into intellectual property over which they can claim exclusive rights.

As far as bio-diversity is concerned, the MNCs and the developed nations claim that there shall be free/open access (under the CBD). But, when it comes to bio-technology, they claim monopoly through securing patents even on life forms.

Omission of Section 5 of the Principal Act, 1970 has further cleared the decks and has given much scope to the multinational companies to acquire patents on new varieties[43]. Section 5 of the original Act imposes a restriction in granting a patent to a substance, which is intended for use or capable of being used as food or medicine or drug. It recognises methods or processes but not the substance as end product. Now, after the repeal of this section, any substance can be patented provided it does not fall under the category of 'inventions not patentable'.

But according to the new amendment provision, the mere discovery of a new form of a known substance is not patentable if it does not result in the enhancement of the known efficacy of that substance. The mere discovery

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[42] Ss. 3(i) and (ii) of the Patents (Amendment) Act, 2002.

[43] S. 5 of the Patents Act, 1970, is repealed by the Patents (Amendment) Act, 2005.

of any new property or new use for a known substance or of the mere use of known process, machine or apparatus, unless such known process results in a new product or employs at least one new reactant, is not patentable[44].

VI. THE PROTECTION OF PLANT VARIETIES AND FARMERS' RIGHTS ACT

Being member of UPOV Convention and WTO India was required to provide legal protection to plant varieties and protect the rights of plant breeders. The main focus of the law is to define plant breeder's rights, extend protection to all categories of plants excluding micro-organism. The Indian law is primarily based on UPOV Convention. But it includes number of provisions, to present in UPOV Convention. For instance, it recognises the role of farmers as cultivators and conservers and the contribution of traditional rural and tribal communities in the country's agro-biodiversity by making provision for benefits sharing and compensation and also protecting the traditional rights of farmers[45]**.** The Act seeks to achieve following objectives:

(a) to stimulate investments for research and development both in the public and the private sectors for the development of new availability of high quality seeds and planting material to Indian farmers; and

(b) to facilitate the growth of the seed industry in the country through domestic and foreign investment, which will ensure the availability of high quality seeds and planting material to Indian farmers; and

(c) to recognise the role of farmers as cultivators and conservers and the contribution of traditional rural and tribal communities to the country's agro-biodiversity by rewarding them for their contribution through benefit sharing and protecting the traditional rights of the farmers.

While providing for an effective system of protection of plant breeders' rights, the legislation seeks to safeguard farmers' and researchers' rights through sections 39 and 30 of PPVFR Act respectively. It also contains provisions for safeguarding the larger public interest. The farmer's rights include his traditional rights to save, use, share or sell his farm produce of a variety protected under this Act provided the sale is not for the purpose of reproduction under a commercial marketing arrangement.

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[44] S. 3(d) of the Patents (Amendment) Act, 2005 (a new clause is added to S. 3 of original Act, 1970).

[45] Verma, S.K., "Access to Biological and Genetic Resources and their Protections", Journal of Indian Law Institute, 2001, p. 14.

The legislation contains provisions to facilitate equitable sharing of benefits arising out of the use of plant genetic resources that may accrue to a breeder from the sale, disposal etc. of seeds/planting material of a protected variety (s.**26**). The village and farming community would be compensated in case their traditional or local variety is used for the development of new varieties (s.**41**).

A provision for the establishment of a National Gene Fund is made in this Act to promote the conservation and sustainable use of genetic resources of agro-biodiversity (s.**45**).

The legislation extends to all categories of plants but would not include micro-organisms. In order to be eligible for protection, a variety must be distinct, uniform and stable. The period of protection is 18 years for trees and vines and 15 years for other plants. Breeder's right envisages that the breeders' authorisation is required for production and commercial sale of the productive or propagating material of a protected variety.

The promotion and development of new varieties of plants and protection of rights of the farmers and breeders, registration of extant and new plant varieties, development of characterisation and documentation of varieties, providing for compulsory licensing of protected varieties if the right holder does not arrange for production and sale of the seeds to ensure that protected seeds are available to the farmers, collection of statistics with regard to plant verities seeds, and germplasm for compilation and publication are the primary functions and duties of the Protection of Plant Varieties and Farmer's' Rights Authority under this Act (s.**8**).

For the infringement of variety registered under this Act or relating to any right in a variety registered under this Act shall be instituted in a District Court only having jurisdiction to try the suit. As per Section 64 of the Act infringement means, " Subject to the provisions of the Act, a right established under this Act is infringed by a person-

(a) who, not being the breeder of a variety registered under this Act or a registered agent or a registered licensee of that variety, sells, exports, imports or produces such variety without the permission of its breeder or within the scope of a registered licensee or registered agency without permission of the registered licensee or registered agent, as the case may be;

(b) who uses, sells, exports, imports or produces any other variety giving such variety, the denomination identical with or deceptively similar to the denomination of a variety registered under this Act in such manner as to cause confusion in the mind of general people in identifying which variety so registered.

The fear of adverse impact on farmers' interest by multi national seed companies and research organisations in the field of agriculture need to be addressed with urgency[46].

A. Impact and Implications of TRIPs on Indian Seed Regime:

The Agreement on Trade Related Aspects of Intellectual Property rights (TRIP's Agreement) imposes several obligations on the Government of India in the area of patent protection. Accordingly substantial changes are brought in the Patent Act, 1970. TRIP's agreement for the first time not only laid down uniform International Norms for an invention to be patentable but also spelt out the exceptions based on which patents could be denied. Article 27 (1) has not defined the term (invention) but only lays down the norms/test to find-out what constitutes an invention whether it is a product or process. For an invention to be patentable as per TRIPs, the invention shall be "new", having "Inventive step" and "capable of industrial application". It is important to note that these terms are not defined in TRIP's. As per the TRIP's agreement there is no obligation to grant patent protection for the inventions; (i) an invention, the commercial exploitation of which is prohibited on the ground of public order and morality. (ii) an invention of plants, animals, plant varieties and biological process. It is true that as per Article 27 (3) India is required to grant patent protection for new micro-organisms.

The TRIP's agreement has spelt-out various rights available to the owner of the product and process patent separately. This includes the new right of importation of patented products.

With regard to the term of protection, the TRIP's agreement mandates uniform term of twenty years from the date of filing of the patent application irrespective of whether the invention is a product or process. But the extension of period of patent protection is going to be disadvantageous to Indian industry and economic growth considering the facts that the majority of the patents taken in India are by foreigners that too in sectors where India has the potential to grow[47].

The TRIP's agreement introduced many restrictions regarding the use of patent by an individual or by the Government without authorisation of the patent owner. One of the important restrictions in TRIP's is that compulsory licence shall be granted only on the basis of individual merits and that

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[46] Dr. Bhandari, M.K. *Law Relating to Intellectual Property Rights* (Central Law Publications First Edition), 2006, p. 196.

[47] Dr. Gopalakrishnan, N.S., "The Patents (Second Amendment) Bill, 1999 — An Analysis",1 Supreme Court Cases, 2001, p. 19.

too after the unsuccessful efforts by the proposed user to get a voluntary licence from the owner on reasonable commercial terms and conditions.

Article 28, expressly recognises importation of the patented products as a right of the patent owner, it is not obligatory on the part of the patent owner to actually manufacture the patented product in the country to satisfy the reasonable requirement of the public. It is possible for the owner to import the patented product and sell it at a reasonable price and satisfy the requirement of the public.

India being a signatory of WTO is bound by TRIP's Agreement and also bound by Paris Convention 1971 to which it became a party in 1998 and also the Patents Co-operation Treaty (PCT) with a view of enable it to make a worldwide search on patent applications. Patents Act, 1970 has been amended in line with the provisions of TRIP's Agreement. The preamble explicitly recognises the underlying public policy objectives of national system for the protection of intellectual property including development and technological objectives. Article 7 of the TRIP's Agreement provides that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and transfer and dissemination of technology to the mutual advantage of the producers and users of technological knowledge in a manner conducive to social and economic welfare and to balance of rights and obligations. The Agreement restricts the freedom of the member States in making laws in the interest of the public health and nutrition only when such laws are consistent with the provisions of the TRIP's Agreement[48].

The TRIP's Agreement will have serious implications for developing countries like India, which includes the adverse effect on the economical and social life of the people especially on the peoples' enjoyment of Rights, Food and Health. The expansion of patent in life forms affects the biotech industries of the developing countries by denying them the access to the new technologies as well as a chance to catch up with many of the existing technologies. This would result in a peculiar scenario in which, bio resources are situated in developing countries and technology is with developed countries. Thus the TRIP's Agreement legitimises a new kind of dependence. This will have an impact on the agriculture sector. In countries like India agriculture is a practice as a livelihood rather than as a profession. Intellectual property regime meant to corporatise the agriculture sector. Therefore it would change the hitherto practice and result in the marginalisation of traditional farmers. A strong intellectual property protection creates monopolies in the seed sector. It not only increases price of food and

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[48] Dr. Krushna Chandra Jena, "Patent Law in India: A Brief Conspectus", 5 Apex Court Expressions, 2003, p. 26 at p. 31.

also the loss of biodiversity, in fact, in the long run results in the denial of availability of food[49].

It is submitted that as rightly pointed out by Rajeev Dhawan and Maya Prabhu, that the "Dunkel Draft lacks any convincing reasons as to why the Indian provisions should be changed, There is neither logic nor equitable experience in favour of the Dunkel Draft on patents. It will enable private global predators an almost uncontrolled scope to rule the world. Both nation States and the peoples of the world will simply have to accept this reality. If the Uruguay Round is concerned with 'free trade' what appears to have been totally overlooked is that patent rights are nothing more than exclusive import and production monopolies. Every time a nation grants a patent right to some one, it virtually takes one part of its economy and hands it over to the patent holder. After all, what are the rights of the patentee? The one right that stands out is the exclusive import monopoly. In the most 'liberal' of patent regimes, there is not even a requirement to manufacture in the State in question. If 'working' the patent is a requirement, some States accept import as satisfying this requirement. Even where production is a requirement, it is given a holiday for a crucial introductory period at the end of which the import monopoly is not taken away but lives with a production requirement. It is only when the patent holder sits over his monopolies and does nothing that State legislation compels compulsory licensing or forfeiture. But, there is no denying that patents create monopolies. The extent of the monopolies are determined by the meaning and value attached, to the concept of "working" where de minimums import satisfies the working requirement, the monopoly is complete and total"[50].

"Free Trade" and "Patent Monopolies" are, thus, inherently antithetical. There is no justification for breaking national barriers to create 'free' trade and simultaneously asking national governments to build and strengthen these barriers by a strong system of patent monopolies to reinforce international monopolies, since it is well known that the large bulk of the significant patents in developing countries are owned by foreigners who simultaneously take out patents in various countries at the same time to protect their monopolistic interest. The argument in favour of creating such monopolies is linked to the cost of research and development without which, it is argued, no cost-intensive technological development will even take place. But, the logic of such an agreement could easily be applied to any form of economic endeavour. If any manufacturer or businessman were told that he would be entitled to a guaranteed import and manufacturing

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[49] Gopakumar K.M. and Sayeed Habiba, "Right to Food and TRIP's; Finding the Balance", Essays in Law, Tridecennial volume, edited by Dr. P. Eswar Bhat, (published by Department of Studies in Law, University of Mysore), p. 197.

[50] Rajeev Dhavan and Maya Prabhu, "Patent Monopolies and Free Trade: Basic Contradiction in Dunkel Draft" , 37 Journal of Indian Law Institute, 1995, p. 208.

monopoly for his venture if he made the requisite capital outlay, the queue of willing takers for such a bargain would be infinitely long. The fact that the formula of 'monopoly to cover-outlay – costs' is available as a part of general law of patent merely necessitates that the basis of the general law of patents before-examined"[51].

The other repercussion of Trips Agreement is monopoly over seed Production and Marketing. In India, research on plant breeding and seed production is not protected by intellectual property rights. Research is done in public domain with public funds. In developed countries, 90 per cent of biotechnological research is taking place in private sector. Farmers in these countries depend on the private seed industry for supply.

The strategy of MNCs is to develop and market seeds with patent protection throughout the world. Most of the patented seeds in India are owned and treated by MNCs. Most of these can be used for one crop only. Ultimately the farmer has to depend on MNCs for the supply of seeds. India, which has a majority of small and marginal farmers, cannot afford to use these seeds on payment. Patented seeds may replace a wide diversity of traditional local varieties and endanger Indian biodiversity.

Either in the new patent regime or in any other law no attempt is made to recognise the huge germplasm stock in the country as its property, and paid for like any other resources of private enterprises. So there should be different IPR systems for different countries than the uniform international IPR system.

TRIPs Agreement was planned, designed and formulated by the US and G-7 countries in conformity with their patent Acts. It will facilitate market for their technological products and increase the flow of royalties from developing countries to the developed countries[52]. Undoubtedly TRIPs and the New Patent (Amendment) laws have far reaching implications for Indian agriculture.

TRIP's model of intellectual property is very much one of Individual Property Rights freely assignable in the market place. Moral Rights were not stressed on this view, it would seem that TRIP's had little to offer secondary producers and end users even independent local inventors, developers and performers who are necessarily antagonistic to the notions of property rights. TRIP's is not directly concerned with the opportunity to

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[51] *Ibid*., pp. 195-196.

[52] Dr. Shetty, N.S. (Former Senior Consultant of FAO), "Intellectual Property Rights" (Keynote address, workshop held in Mangalore, 2004), — Reported in Business Line, March 27, 2004 (Internet edition). Source: http://www.thehindubusinessline.com/2004/03/27/stories/2004032701481700.htm.

sell products competitively. Though, one imagines this concern was one of the rationales behind its provision, rather it is designed to move the market from liberal and free economy towards monopolistic economy[53].

The agreement is markedly silent on the issue, which has divided the United States and other industrial countries as to whether to recognise the first to invent or first to file. This difference complicates efforts to coordinate the processing of applications, just at a time when more inventors are identifying a need to secure their markets across, across range of countries.

Another impact is that now invoking the provision of compulsory licensing on the ground of non-availability of the patented invention to the public at reasonable prices would not be easily possible. Mere allowance for compulsory licensing is of little help.

Another serious impact for every developing country is, how to save its cultural and geographical identity from the clutches of developed countries and their business interest. There is also a hard time ahead for most of small scale industry in India.

Besides its wide – ranging adverse effects on the technological capability, balance of payments and economic growth of developing India, the implementation of TRIPs communities innovation systems is left free for commercial exploitation without any compensation as against intellectual property resulting from formal innovation systems being protected from unauthorised commercial exploitation. This resulted in private enterprises obtaining patents on the traditional knowledge of particular communities and the nation without the prior informed consent of the owners of knowledge[54].

VII. PATENTS AND APPLICATION OF CRIMINAL LAW:

The other issue of concern is application of Criminal Law in case of commission of offences under new provisions of Patent Law. Earlier, patent law was developed as a contractual relationship. The intellectual labour of the inventor is protected by granting patent to him. The main thrust of

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[53] Harjot Singh, "Problems Faced by Developing Countries in Complying with the Agreement on Trade Related Intellectually Property Rights", Souvenir and Conference Papers, *International Conference on International Law in the New Millennium, Problems and Challenges Ahead*, October, New Delhi, 2001, pp. 387-388.

[54] Dr. Nagesh Kumar, *Beyond Cancun: Some Proposals for Reform of the World Trading System* (keynote address, "International Seminar on WTO and Implications for South Asia", Centre for SAARC Studies, Andhra University, Visakhapatnam), 27-28 March 2004, p. XVI.

the patent law is the protection of the rights of the inventor. The changes in Patent Law, which are providing for penalties and imprisonment for the offences like falsification of entries in the official Register, unauthorised claim of patent rights, wrongful use of words "Patent Office", refusal or failure to supply information etc. Offences by companies are also dealt with seriously. In this context, it deserves mention that innocent, illiterate Indians would definitely be penalised instead of multinationals.

The apprehensions regarding the new regime are; Indian Economic Sovereignty has been compromised, agriculture would be ruined, farmers would have to buy their seeds every year from Multi Nationals, Public Distribution System could have to be curtailed, genetic wealth would be lost, market would become a heaven for foreigners. Leaving aside all these apprehensions India has accepted the rights and obligations of an internationally accepted patent protection regime and respect for intellectual property rights as part of her commitment to WTO. The Indian economy is now increasingly focusing itself on productivity and competitiveness. The international economy represents a highly competitive area where only the productive and efficient will survive and grow. But as a matter of fact, most of the poverty in India is due to history of colonial exploitation and continuing feudal structures which are both exploitative and a hindrance to economic and social development. Forgetting this fact, India is running after international IPR's regime to promote development. But TRIP's created confusion among the people across the world, as to whether they promote equitable distribution of benefits or only promote the gap between poor and rich. Being a developing country, India has its own agenda with its constitutional commitment to welfare State and social order. In the light of wide ranging apprehensions, indiscriminate promotion of intellectual property rights may create a situation of chaos and the impact of IPR on poor India would be an irrevocable, irreparable loss, which affects not only present generation but also the future generations. Whatever be the commitments so far made, still there are certain areas in which a strict regulating system should be created, and implemented. The areas in which laws are to be made or amended are; protection of traditional knowledge, conservation of biodiversity and prevention of bio-piracy.

VIII. BIO-PIRACY:

Bio-Piracy is understood as "the appropriation of the knowledge and genetic resources of farming and indigenous Communities, by individuals or institutions seeking exclusive monopoly control over these resources and knowledge"[55]. This bio-piracy usually takes place in the form of

[55] This definition of bio-piracy is given by the Action Group of Erosion Technology and Concentration (E.T.C. Group) and is referred in the Report of Commission on IPRs

'wrong patents', granting of patents to 'inventions' derived from a country's Traditional Knowledge (TK), or lowering the patent standards i.e., allowing patents for inventions which amount to little more than discoveries or alternatively, the national patent regimes not recognising some forms of public disclosure of TK as prior art.

It can be said that the west and the Multi-National Corporations from those countries have been exploiting the TK richly available in the third world countries. The following are some of the instances of Bio-Piracy:

(1) Turmeric controversy

(2) Neem controversy

(3) Hoodia cactus controversy

(4) The case of Ayahuaska

(5) The Basmati case.

The above few examples amply prove that it is the developed countries that mostly indulge in bio-piracy. This has become possible due to many factors like lack of awareness about the importance of TK, absence of necessary and timely legislation, lack of coordination between the National Governments and NGOs, and failure on the part of various traditional people and communities to organise themselves to protect their TK and to share benefits as and when the same is exploited by outsiders.

The traditional forms of Intellectual Property (IP) like patents, trademarks, copyrights and designs fall into the categories of individually created IP where the beneficiaries of the protection of such IP are primarily the individuals; at least during the limited period during which they enjoy monopoly rights. After the expiry of the statutory period of protection, such IP flows into public domain. On the other hand, there are certain other forms of IP, created, owned, managed and continued by the communities for considerable durations of time. Traditional Knowledge (TK) is one such community owned and managed IP.

The TK has been passed on to one generation from the other from time to time immemorial, and most of the times the developments in the field of science and Technology have no bearing on such TK. It is the result of the experience, culture and need based actions of certain communities, which hitherto remained far away from urbanisation and civilisation.

– Integrating IPRs and Development Policy (2002) DFID Government of U.K., London, quoted by Dr. G.B. Reddy, "Protection of Traditional knowledge – An Indian Perspective" (Seminar Paper), "National Seminar on IPR Law and Policy – Emerging Trends and Challenges", July 2005, p. 1.

The unique nature of Traditional Knowledge is that the common property resources are not controlled by a single entity. Access to these resources is limited to members of an identifiable community. Each user has the right to abuse or dispose of it. More often, users of common property are subject to rules and restrictions embedded in cultural or religious customs. The net result of such customs and practices is that the users perceive themselves mainly as possessors of their habitat but not as resource owners. In other words, the members of the Community have only Community rights.

There is a need for effective protection of the Traditional Knowledge in the interest of the nation, which has been at the recurring end of being accused of committing theft of Intellectual property of the developed countries.

IX. CONCERNS OF T.K. HOLDERS:

The World Intellectual Property Organisation (WIPO) in its report[56] on a series of fact-finding missions sought to summarise the concerns of T.K. holders, which constitutes the following –

- Concern about the loss of traditional life styles and T.K., and the reluctance on the younger members of the communities to carry forward traditional practices.
- Concern about the lack of respect for T.K. and holders of TK.
- Concern about the misappropriation of TK including use of T.K. without any benefit sharing, or use in a derogatory manner.
- Lack of recognition of the need to preserve and promote the further use of T.K.

X. INDIAN LAW AND TRADITIONAL KNOWLEDGE:

In India there is no special law that deals with protection of TK. However, the other intellectual property laws have certain relevance to TK.

The Patent Act 1970 as amended by the patents Amendment Act 2002 provides that the applicant must disclose the source and geographical origin of any biological material developed in lieu of a description[57]. Similarly

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[56] WIPO (1999) Intellectual Property Protection and Traditional Knowledge Holders, WIPO Report on Fact-Finding Missions 1998-1999, WIPO, Geneva (Publication No. 768 Source: http://www.wipo.int/globalissues/ek/report/final/index.html.

[57] Cl. (d) of S. 10 of the Patent (Amendment) Act, 2002.

Sec. 25 of the Act deals with the 'opposition to grant of patent' allows for opposition to be filed on the ground that "the complete specification" does not disclose or wrongly mentions the source of geographical origin of biological material used for the invention[58].

The law, which appears to be more relevant for protections of TK, is the Geographical Indications of Goods (Registration and Protection) Act, 1999, which aims at registration and better protection of geographical indications (GIs) relating to goods. The main object of the law is to prevent unauthorised persons from misusing geographical indications and to protect the consumer from deception. For the purpose of the Act geographical indications in relation to goods means an indication which identifies such goods as agricultural goods, natural goods, or manufactured goods as originating or manufactured in the territory of the country, region or locality in that territory where a given quality or reputation is essentially attributable to its geographical origin[59]. Words geographical indications fall into the category of either appellations or origin or indication of source. This Act enables the authorised users who may also include the representatives of the traditional communities to register GIs as well as themselves in respect of a definite territory of a country, or a region or a locality in that territory[60].

India has enacted the Biological Diversity Act, 2002 with a view to provide for conservation of biological diversity and sustainable use of its components, and fair and equitable sharing of benefits. Without prior approval of the National Biodiversity Authority, no person can apply for any intellectual property right in or outside India, for any invention based on research or information on a biological resource obtained from India[61]. Contravention of the provisions of the Act specifically relating to unauthorised use of biological resources and bio-piracy has been made cognizable and non-bailable offence[62]. The Act seeks to impose punishment upto five years and fine up to rupees ten lakhs or even more, if the damage caused exceeds rupees ten lakhs.

Another relevant legislation pertaining to TK in farming is the Protection of Plant Varieties and Farmers' Rights Act 2001 which aims to protect the farmers' traditional rights including the rights to save, use, share or sell his farm produce of a variety protected under the Act. This Act also facilitates equitable sharing of benefits arising out of the use of plant genetic resources that may accrue to a breeder from the sale disposal etc., of the seeds and planting material of protected variety. The village and farming community

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58 Cl. (j) of sub-s. (1) of S. 25 of Patents (Amendment) Act, 2002.
59 S. 2 (1)(e) of Geographical Indications of Goods (Registration and Protection) Act, 1999.
60 Ss. 7 and 8 of Geographical Indications of Goods (Registration and Protection) Act, 1999.
61 S. 6 of Biological Diversity Act, 2002.
62 S. 58 of the Biological Diversity Act, 2002.

will be compensated incase their traditional or local variety is used for the development of new varieties.

Hence, unauthorised persons cannot exploit anything truly forming part of TK commercially. However, the laws are yet to become fully operational and effective. A comprehensive legislation and strict implementation of the same is a need of the day under new challenges. The appropriate governments under statutory obligations shall establish a strong enforcement mechanism. But the attitude of the Governments appears to be lackadaisical and the net result is the indiscriminate exploitation of the TK from India. It was thought that the establishment of the sui generis system of protection through the enactment of PPVFR Act would help in preserving and promoting TK.

XI. TRADITIONAL KNOWLEDGE AND BIO-DIVERSITY:

The TK is very closely related to biodiversity and genetic resources. The Convention on Biological Diversity (CBD), 1992 defines biodiversity as the "variability among living organisms from all sources including inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexities of which they are part, this includes diversity within species between species and ecosystems"[63]. The CBD imposes an obligation on member countries to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation. It also provides that the members must make sustainable use of biological diversity and promote their wider application with the approval and improvement of the holders of such knowledge, apart from encouraging the equitable sharing of the benefits arising from the utilisation of such knowledge, innovation and practices[64].

Even though the efforts to recognise and protect TK started way back in 1980s, with the WIPO and UNESCO adopting a model law for protection of folklore, the concept of farmer's rights was introduced by the FAO in 1989 into its international undertaking on plant genetic resources, the CBD was signed only in 1992 to promote and preserve TK. Another attempt was made by the United Nations through its draft Declaration of Right of Indigenous People, 1994. In which though agreed for 'that prior approval of the community should be obtained before using traditional knowledge, but the claim of ownership was not accepted'. Despite these efforts at the global level, that have spanned two decades, final and universally acceptable solutions for the protection and promotion of TK have not yet emerged. Under

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[63] Art. 2 of Convention on Biological Diversity, 1992.

[64] Art. 8(j) of Convention on Biological Diversity, 1992.

the Indian Biological Diversity Act, 2002 the benefit claimers are the conservers of biological resources, their by - products, creators and holders of knowledge and information relating to the use of such biological resources and innovations and practices associated with such use and application[65]. Beyond the concept of benefit claiming, there is a duty on all the nation States to take up policies and strict laws to conserve the biodiversity of the earth.

[65] S. 2(a) of Biological Diversity Act, 2002.

HUMAN TRAFFICKING ON HIGH SEAS: IS INTERDICTION OF VESSELS A SOLUTION

—*Veer Mayank*[*]

Abstract — Human trafficking has become the bane of modern society today. It has been called by some as the modern form of slavery. While through concerted efforts of the reformers, to the extent of entering a civil war, the scourge of open slave trading disappeared but instead of vanishing it reappeared as human trafficking. People who are trafficked are by definition those who are placed in a position without their consent where they are exploited for economic gains by others and such situations could include forced labour on farms and factories, sexual exploitation, forced marriages etc. On the high seas too, the crime of human trafficking takes place spurred on by abject poverty in certain parts of the World making the people flee, risking their lives, for better prospects across the high seas. Frequently, these people who are voluntary migrants end up in exploitative situations owing to their status of illegal migrants which makes them vulnerable to deportation if detected and thus making them susceptible to human trafficking. Thus human trafficking on high seas gets frequently merged with the crime of migrant smuggling and that presents the tragedy that lack of identification of trafficking from migrant smuggling prevents adequate the creation of adequate response to the problem. In addition the crime of human trafficking is complicated by the fact that on the seas, human trafficking is frequently associated with the fishing industry. The objective of the paper is to investigate the present laws to appreciate whether a solution of interdiction on high seas be presented as a solution for preventing human trafficking on high seas.

[*] Assistant Professor, Department of Law, Sikkim University.

The paper is organized in the following fashion. Section 1 deals with the 'Freedom of navigation on high seas'; Section 2 deals with the 'Suppression of Crime of Human Trafficking', Section 3 deals with the 'Security Council Resolution to tackle Human Trafficking' while Section 4 Concludes.

Keywords: Migrant Smuggling, Human Trafficking, High Seas Regime, Interdiction on High Seas, Sovereignty

I. FREEDOM OF NAVIGATION ON HIGH SEAS

The high seas or the international waters as they are called are open to all or open to navigation for all largely due to the operation of two principles - 'freedom of navigation on high seas' and 'the sovereign equality of all States'. The principle 'freedom of navigation on high seas' is a principle propounded by the Hugo Grotius in his seminal work '*Mare liberum*'[1]. He based his proposition on a fundamental principle that nature has endowed mankind with resources that are open for all to be used productively and that such use should not be restricted. He articulated it in the form that freedom to use the resources effectively incorporates "freedom of communication" which is a right open to everyone and no one can interfere in the free exercise of that right; another aspect of such freedom is that private property and public property are distinguishable and no one has the right to appropriate public property and pelagic resources are public property; the third aspect that was outlined in his treatise was that private property is a distinct concept as private property was not the creation of nature. Private property can be enjoyed to the extent as to what may be protected by an individual or a state and kept under one's control. Therefore so long as an individual is not able to safeguard or protect a demarcated piece of property, it is open for all and hence being open for all, it cannot be used in a fashion to destroy that public property. From this was also derived that the use of public property is open for all and therefore it cannot be used in a fashion that such use is extinguished or restricted[2]. The support for the argument for freedom of navigation on high seas developed as a result of

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[1] Hugo Grotius, *Mare Liberum*, (Ralph Van Deman Magoffin, tr, Ralph Van Deman Magoffin and James Brown Scott, ed., Oxford University Press, American Branch, 1916), available at https://books.google.co.in/books/about/Mare_liberum.html?id=XbAMAAAAYAAJ&redir_esc=y.

[2] For a study of the principles that were propounded by Hugo Grotius read Peter Borschberg, "Hugo Grotius, Theory of Trans-Oceanic Trade Regulation: Revisiting Mare Liberum (1609)", IILJ Working Paper (Rev. August 2006) History and Theory of International Law Series National University of Singapore, < http://ssrn.com/abstract=871752> accessed 23rd January, 2018.

Grotius work and has the backing of customary international law[3] as well as treaty made law. The mention of freedom of navigation is present under Article 2[4] of the High Seas Convention[5]; Article 87[6] of the United Nations Convention on the Law of the Seas[7]. The UNCLOS text also codifies the law related to the freedom of navigation in waters other than the 'high seas or international waters'. Article 36 of the convention provides freedom of navigation through the straits[8]; Article 58 provides freedom of navigation to all States whether coastal or landlocked, through the Exclusive Economic Zone[9]. Beyond this the international law guarantees to all the ships right

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3 Tanaka citing Brierly writes that the concept of "freedom of high seas" was established in the early 19th century. Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press 2012) 150.

4 The text of Art. 2 of the High Seas Convention provides: "The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, inter alia, both for coastal and non-coastal States: (1) Freedom of navigation; (2) Freedom of fishing; (3) Freedom to lay submarine cables and pipelines; (4) Freedom to fly over the high seas. These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas."

5 Convention on the High Seas, (1958) 13 UST 2312; 450 UNTS 11. (This convention was the codification of the law of high seas after the Second World War and detailed the rights and duties of the "sea faring nations". The United Nations Convention on the Law of Sea (UNCLOS), 1833 UNTS 3; 21 ILM 1261 (1982), is however the most recent treaty that prescribes the framework of rights and duties of the sea faring nations.)

6 Art. 87 provides under cl. (1) "The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States: (a) freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines, subject to Part VI; (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI; (e) freedom of fishing, subject to the conditions laid down in S. 2; (f) freedom of scientific research, subject to Parts VI and XIII." It provides under cl. (2). "These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area."

7 The United Nations Convention on the Law of Sea (UNCLOS), 1833 UNTS 3; 21 ILM 1261 (1982).

8 The text of Art. 36 provides: "High seas routes or routes through exclusive economic zones through straits used for international navigation. This Part does not apply to a strait used for international navigation if there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics; in such routes, the other relevant Parts of this Convention, including the provisions regarding the freedoms of navigation and overflight, apply."

9 The text of Art. 58 provides in cl. (1) "In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in Art. 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention". In cl. (2) it provides "Arts. 88 to 115 and other pertinent rules of international law apply to the

of innocent passage when the ship is traversing the territorial waters of the coastal State. By virtue of Article 18 of the LOS convention, ships have a right of innocent passage through the territorial waters of the coastal state so long as that passage is not prejudicial to the peace, good order and security of the coastal state (Article 19 of the LOS Convention). Such passage has to be continuous and expeditious save in circumstances where stopping or anchoring are rendered necessary as incidental to ordinary navigation or due to *force majeure* or distress or for rendering assistance (Article 18 of the LOS Convention)

The freedom of navigation on high seas necessarily produces the corollary that the jurisdiction on the sea faring vessels on the high seas shall belong to the flag states and hence where interdiction of such a vessel has to be carried out the principle on which such jurisdiction can be exercised becomes important. The question of jurisdiction assumes importance because if the interdicting party lacks the authority to board and search the vessel under international customary or treaty law, such interdiction becomes illegal in the eyes of law, even if the ship was being used for human trafficking. The primary jurisdiction on a sea going vessel is that of the flag state subject to certain exceptions. The coastal State acquires jurisdiction over vessels flying a flag different from that of the coastal State under certain conditions and depending upon the location of the foreign flagged vessel. For the purpose of exercise of jurisdiction by the coastal state, the UNCLOS demarcates the adjacent waters into three regions - territorial waters, contiguous zone, exclusive economic zone. The coastal States exercises plenary jurisdiction in the territorial seas which extends upto 12 nautical miles under the UNCLOS and is subject to the limitation imposed by the 'right of innocent passage' doctrine which provides that the states should not exercise jurisdiction on vessels that are merely passing through their territorial waters. While the jurisdiction of the coastal States is plenary yet the states avoid enforcing jurisdiction in the interest of the comity between nations[10]. The only exception to the comity between nations is when the activity on the vessel affects the good order and peace on the port; where the master of the vessel requests assistance; where the national of the coastal State is involved and where the activity on the vessel has its effect beyond the internal economy of the vessel such as environmental pollution or oil spill. However such jurisdiction can be exercised only in the case of commercial vessels and it cannot be exercised in the case of

exclusive economic zone insofar as they are not incompatible with this Part" while in the last cl. (3) it provides "In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law insofar as they are not incompatible with this Part."

[10] Arts. 27-32 of the UNCLOS Convention, *supra* note 7.

foreign flagged public vessels on non-commercial service[11]. Such vessels are however required to comply with the coastal State regulations and where they do not they may be required to leave the coastal waters[12]. Similarly in cases where the crime was committed prior to the ship entering the territorial seas and the vessel is merely crossing the territorial waters under the innocent passage principle, the coastal state doesn't acquires jurisdiction[13]. The extent of jurisdiction in the case of contiguous zone is slightly different. Contiguous zone extends a further of 12 nautical miles from the limits of the territorial sea[14] or 24 nautical miles from the baseline from which the outer limits of the territorial sea are determined. The jurisdiction of the coastal state in the case of the contiguous zone is limited to control to prevent and punish infringement 'of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea'[15]. In the case of the exclusive economic zone, the agreement grants the coastal States the sovereign right of exploring and exploiting conserving and managing the natural resources, and right to conduct activities for the purpose of economic exploitation of the zone, such as utilization for the purpose of producing electricity. It has jurisdiction for the purpose of establishment and use of artificial islands, installations and structures, for conducting marine research activities and for the purpose of protection and preservation of marine environment[16]. Beyond the EEZ, the coastal State has the sovereign right to exploit the resources in its continental shelf which stretches to the extent of 200 nautical miles from the shore and thereby it has jurisdiction over fixed structures in the continental shelf. They further have the right to regulate, authorize and conduct marine scientific research in their exclusive economic zone and on their continental shelf[17]. Thus in the case of EEZ or the contiguous zone, the jurisdiction of the coastal State extends to the extent upto which it is authorized to the use the particular stretch of waters, that is to enforce its rights granted by the UNCLOS.

After discussing the question of jurisdiction in the case of waters where the coastal state has some rights and jurisdiction by virtue of its being adjacent to such waters, the question arises as to who has jurisdiction on vessels which are not in such waters and are as it is commonly referred to in 'the high seas'. International law provides absolute jurisdiction of the flag state on the vessels that are in international waters and where they are at places with limited jurisdiction, on all matters that do not fall within the jurisdictional competence of the coastal state. It is a different matter that

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[11] Art. 32 of the UNCLOS Convention, *supra* note 7.
[12] Art. 30 of the UNCLOS Convention, *supra* note 7.
[13] Art. 27 (5) of the UNCLOS Convention, *supra* note 7.
[14] Art. 33 (2) of the UNCLOS Convention, *supra* note 7.
[15] Art. 33 (1)(a) of the UNCLOS Convention, *supra* note 7.
[16] Art. 56 (1)(b) of the UNCLOS Convention, *supra* note 7.
[17] Art. 246 of the UNCLOS Convention, *supra* note 7.

the coastal state my refrain from exercising such jurisdiction in the interests of comity of nations. As far as the international waters are concerned, the principle of exclusive jurisdiction of the flag state has been codified under the UNCLOS[18]. The principle has emerged from the need of States to maintain respect for the rules and regulations protecting their shipping and economic interests and this can be achieved by providing mutual respect and recognition to the rules and regulations of the foreign governments on their flagged vessels.

Thus from the above discussion it is evident that in the case of coastal States, the exercise of jurisdiction on ships flying a foreign flag can result from crimes or violations of the coastal State laws as referred to in the UNCLOS convention that were committed in their territorial sea, contiguous or exclusive economic zone or on the continental shelf and where a right of hot pursuit has occurred due to it. The other case where any State may acquire jurisdiction on a vessel which is not flying its flag is the case of stateless vessels - vessels that are not flying the flag of any nation or are flying flags of different nations based on convenience[19]. With respect to the question of exercise of jurisdiction on such stateless vessels two different aspects of jurisdiction has to be taken in to consideration - one where the State has the right to board and inspect the vessel and second the proscription and punishment of a criminal activity apprehended after such interdiction. While the UNCLOS grants states the right to board and search a stateless vessel, the corresponding right to proscribe and punish is not provided very clearly in the convention[20]. One view is that the State inspecting a stateless vessel acquires jurisdiction over it[21]. The other view is that there should be some additional nexus for a State to claim jurisdiction over such stateless vessels[22]. The issue of acquisition of jurisdiction is thus not very clear in the case of stateless vessel and acquires increased complication when interdicting a foreign flagged vessel in international waters where the jurisdiction in the first instance is of the state the flag of which the vessel is flying. While universal jurisdiction is granted for the suppression of piracy international law provides for assumption of limited jurisdictional powers for the suppression of narcotics trade[23] and for the suppression of

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[18] Art. 91 of the UNCLOS Convention, *supra* note 7.

[19] Art. 92(2) of the UNCLOS Convention, *supra* note 7.

[20] Art. 110 of the UNCLOS Convention, *supra* note 7.

[21] Allyson Bennett "That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act", [2012] The Yale Journal of International Law, 37:433 p. 434.

[22] Maarten Den Heijer cites Robin Rolf Churchill, Alan Vaughan Lowe, "The Law of the Sea", (Manchester University Press, 1999) in Maarten Den Heijer, *Europe and Extraterritorial Asylum*, (Bloomsbury Publishing, 2012) at Para 6.3.1.4 on the aspect of jurisdictional nexus and stateless vessels where he is of the opinion that such a nexus is necessary if jurisdiction has to be exercised over stateless vessels.

[23] Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/CONF.82/15; 28 ILM 493 (1989).

unauthorised broadcasting[24]. UNCLOS article 110 lists five events where a State is authorized to visit and search a vessel. These events are suspicion of crimes of piracy, slave trade, unauthorised broadcast, vessel being stateless and vessel nationality being that of the pursuing state, but which is flying a foreign flag or not flying any flag. Article 110 thus nowhere lists human trafficking as a crime in which the powers of interdiction can be exercised. There appears to be an anomaly as to why there is universal jurisdiction for suppressing the crime of piracy but there is an absence of treaties authorising even a minimal search in case of human trafficking. While slave trade and human trafficking are conceptually different and different in respect of legal implications but looking from the purely humanist point of view not much difference can be made out when we look at the sufferings undergone by the individuals and when we can say that slave trade would be a crime very rare in these days. The question then arises as to what has been the response of international community to human trafficking especially in the light of various treaties requiring States to undertake measures for the suppression of cross border human trafficking.

II. SUPPRESSION OF CRIME OF HUMAN TRAFFICKING

Human trafficking has elements of slave trade and migrant smuggling. A trafficked person can be sold into slavery and similarly a migrant can be trafficked into bondage. Trafficking has been defined under the 2000 Protocol to Prevent, Suppress and Punish Trafficking[25] in Persons Especially Women and Children to mean where a person is rendered into bondage for exploitation without his or her consent which would imply that the rendering has been under force or because of the position of influence[26]. At a

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[24] Art. 109 of the UNCLOS Convention, *supra* note 7.

[25] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, UN Doc. A/55/383 at 25 (2000); UN Doc. A/RES/55/25 at 4 (2001); 40 ILM 335 (2001).

[26] The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children defines the term "trafficking in persons" as follows: (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in sub-paragraph (a) of this article shall be irrelevant where any of the means set forth in sub-paragraph (a) have been used; ... (Art. 3). The three key elements that must be present for a situation of trafficking in persons (adults) to exist are therefore: (i) action (recruitment, …); (ii) means (threat, …); and (iii) purpose (exploitation).

human experience level, trafficking is not much different from slavery and has been described as the modern form of slavery.

The major instrument to prevent human trafficking at the international level is 'The United Nations Convention against Transnational Organized Crime (UNTOC)'[27] and its two protocols 'The United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children'[28], and "The United Nations Protocol against the Smuggling of Migrants by Land, Sea, and Air'[29]. The UNODC (United Nations Office on Drugs and Crime) is the United Nations organization which deals with the activities under the Convention and its protocols. UNODC created "United Nations Global Initiative to Fight Human Trafficking (UN.GIFT)" in 2007 to deal with the issue of human trafficking. The history of fight to prevent human trafficking dates back to the efforts for the abolition of slavery. Trafficking is regarded as a genus which includes within itself the crime of slavery. Trafficking is exploitation of human being and the factum of consent is absent in such a relationship. Slavery is just another form of trafficking, only the intensity of the offence and thereby the legal implications become different. The primary documents dealing with the abolition of slavery were Slavery Convention[30] (1926) and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery[31] (1956). Subsequent to the creation of the United Nations, human rights instruments came into existence that were instrumental in controlling slavery by providing respect to the human rights of the individuals and requiring the States to respect these human rights. These were the Universal Declaration of Human Rights[32] (1948), the International Covenants on Civil and Political Rights[33] (1966), The United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)[34], and the Convention on the Elimination of all Forms of Discrimination Against Women (1979)[35].

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27 Convention against Transnational Organized Crime, 40 ILM 335 (2001); UN Doc. A/55/383 at 25 (2000); UN Doc. A/RES/55/25 at 4 (2001).

28 *Supra* note 25.

29 Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Crime, GA Res. 55/25, annex III, UN GAOR, 55th Sess., Supp. No. 49, at 65, UN Doc. A/45/49 (vol. I) 40 ILM 384 (2001).

30 Slavery Convention, 60 LNTS 253 (1926).

31 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 UNTS 3 (1957).

32 Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810 at 71 (1948).

33 International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967).

34 United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, A/RES/317.

35 Convention on the Elimination of All Forms of Discrimination against Women, GA Res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980).

While the above convention and protocols deal with human trafficking in general making it immaterial whether the movement of such trafficked individuals is by land, water or air, our inquiries are limited to prevention of trafficking on the high seas and therefore we would have to read the convention and the protocols in consonance with the UNCLOS. The law dealing with interdiction of vessels at sea suspected of dealing in human trafficking is bit nuanced as under the UNCLOS, jurisdiction can be exercised on the high seas where there is suspicion of slave trade and there too the right is only of boarding and search without the enforcement jurisdiction. There is absence of jurisdiction in the case of human trafficking unless the crime is committed in the territorial waters of the nation. In the case of migrant smuggling the jurisdiction is exercised under treaties that grant such rights to the ratifying states. The absence of treaties granting enforcement jurisdiction to states to prevent human trafficking is presumably on the grounds that states want to retain with themselves the flexibility of the decision of whom to allow to enter their shores and are confident of being able to prevent such trafficked individuals from entering its territories.

There is further a strong relation between migrants and human trafficking. Migrants may either be trafficked or smuggled into the destination. Where the movement is voluntary the movement of migrants is the case of smuggling and where the movement is involuntary or fraudulent and is for the purpose of exploitation, the case becomes that of human trafficking. Thus it implies that human trafficking though being a distinct crime does falls under the rubric of migrant smuggling because only following the interdiction of vessel smuggling migrants it can be determined whether the smuggled individuals are migrants or victims of human trafficking. It would thus be in the fitness of things, that the law related to migrant smuggling is discussed to arrive at the law dealing with human trafficking at high seas for under the UNCLOS what can be prevented is migrant smuggling and not human trafficking per se.

Article 3 (a) of the Smuggling of Migrants Protocol defines smuggling of migrants as

> "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident."

Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children defines trafficking as

> "The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force

> or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

The question that arises is when does a State gets the right of interdiction of vessels suspected of being involved in human trafficking. The UNTOC migrant smuggling protocol provides that signatory States have to provide for the legislation to prevent smuggling or facilitation of smuggling of persons across international borders where such persons are not entitled to be present in the State across the international border for the purpose of financial or other benefits. The protocol establishes as an aggravating circumstance such migrant smuggling may entail inhuman or degrading treatment, including for exploitation of such migrants[36]. Thus migrant smuggling protocol, through reference to exploitation of such migrants can be studied as making a reference to trafficking. The question that arises is 'under what attributes of jurisdiction, the interdicting vessels can board and search the suspected vessel'. The migrant smuggling protocol under article 7 imposes a duty of 'cooperation to the fullest extent possible' to 'prevent and suppress' migrant smuggling at sea 'in accordance with international law of sea'. Thus according to Article 7, the duty is merely of cooperation which then by definition requires that the interdicting State cannot act independently. Similar limitations on jurisdiction can also be inferred from the wordings of Article 8[37] where 'flag state may request another State for assistance' or the interdicting state may seek confirmation and authorisation from the flag state to carry out the interdiction[38]. A limitation is imposed that the measures taken by the boarding state shall be to the extent of authorization and no further 'except those necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements'[39]. The next question that arises is what is the jurisdiction of the State party subsequent to interdiction. Article 8(2)(c) provides guidance on the question where it says that the State party is authorized 'to take appropriate

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[36] Para 3(b) of Art. 6 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Crime, *supra* note 29.

[37] Art. 8(1) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Crime, *supra* note 29.

[38] Art. 8(2) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Crime, *supra* note 29.

[39] Art. 8 (5) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Crime, *supra* note29.

measures with respect to the vessel and persons and cargo on board, as authorized by the flag State'. Thus the power to punish is kept with the flag state and doesn't devolves to the State party. The only position where a State party can exercise prescriptive jurisdiction is when the offending vessel is present within the territory of the State party.

III. SECURITY COUNCIL RESOLUTIONS TO TACKLE HUMAN TRAFFICKING

The Security Council was seized with the matter of human trafficking off the coast of Libya where the persons were being trafficked into Europe through the sea route. The Security Council acted under the authority provided under Chapter VII of the United Nations Charter and adopted resolution 2240 (2015) on 9 October, 2015[40] authorising Member States to inspect vessels on the high seas that were reasonably suspected of migrant smuggling or human trafficking of the coast of Libya after making good faith efforts to secure authorization from the vessel's flag states[41]. This authorization was valid for a period of one year from the date of the resolution. It authorized Member States to act either nationally or through regional organizations to use all measures to confront migrant smuggling or human trafficking but it has to be in full compliance with international human rights law. The authorization under the UN Security Council resolution did not extend to the vessels that had sovereign immunity under international law and was confined only to vessels that lacked such sovereign immunity. It further empowered the interdicting States to seize such vessels on the high seas and to take further actions with respect to such vessels as may be available under applicable international law[42]. The Security Council further extended the period of authorization for a period of one year by resolution 2312 (2016)[43] and provided the reaffirmation that the authorization extended to check migrant smuggling and human trafficking on the High Seas off the coast of Libya and shall not affect the exclusive jurisdiction of the flag state on other issues under the UNCLOS[44]. This resolution of the Security Council was followed by a similar resolution in 2017[45] by virtue of

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[40] United Nations Security Council Resolution, 2240 (2015) [on authorising Member States for a period of one year to inspect vessels on the high seas off the coast of Libya that they had reasonable grounds to suspect were being used for migrant smuggling or human trafficking from that country.] S/RES/2240 (2015).

[41] Para 7 of the Resolution 2240, *Ibid.*

[42] Para 8 of the Resolution 2240, *Ibid.*

[43] United Nations Security Council Resolution, 2312 (2016) [extending authorising to Member States for a period of one year to inspect vessels on the high seas off the coast of Libya that they had reasonable grounds to suspect were being used for migrant smuggling or human trafficking from that country.] S/RES/2312 (2016).

[44] Para 8 of the Resolution 2016, *Ibid.*

[45] United Nations Security Council Resolution, 2380 (2017) [on extending authorisation to Member States for a period of one year to inspect vessels on the high seas off the coast of

which the Security Council extended the period of authorization for a year more from the date of adoption of the resolution that is well into 2018. An analysis of the statements of the delegates in the 2015 resolution shows that the Chinese and the Libyan delegates were concerned that the authorization granted by the Security Council should not impinge upon the independence, sovereignty and territorial integrity of the states. It would be interesting to note here that human trafficking that was taking place from Libya has acquired such increased significance that it formed a threat to international peace and the United Nations Security Council had to invoke its powers under Chapter VII of the Charter to provide powers to the states to intervene. It thus throws light on the menace of human trafficking and the absence of an adequate legal framework to deal with the issue of migrant smuggling and human trafficking.

IV. CONCLUSION

From the above discussion it is evident that the issue of migrant smuggling or human trafficking on high seas hasn't been accorded the same gravity as that of the crime of piracy. The crime of piracy is covered under the ambit of 'universal jurisdiction', while the crime of migrant smuggling or human trafficking on high seas, doesn't falls into the ambit. The intervention of the Security Council under Chapter VII shows that the problem of 'human trafficking' has acquired increased gravity over the years and is capable of presenting a threat to breach of peace and security and that the present conventions and treaties that have been ratified by the states are incapable of addressing the problem. States have addressed the problem through the protocol to the UNTOC but the solution is inefficient since the States are concerned that granting any more powers to other States would infringe on their sovereignty and in the meanwhile the migrants suffer due to trafficking. The problem appears intractable at present since the States are unlikely to agree to hand over the powers of deciding who should enter their territories to other states and devoid of powers to enforce prescriptive jurisdiction, the nations possessing capacities to interdict are left helpless. The solution to this problem will probably need a technological solution where a ship on the high seas, except those having sovereign immunity, should be required to broadcast their registration continuously so that they can be tracked in their journey towards the shores of a State and possibly interdicted by the coastal State concerned where the registration doesn't conforms to a legal vessel.

Libya that they had reasonable grounds to suspect were being used for migrant smuggling or human trafficking from that country.] S/RES/2380.

UNIFORM CIVIL CODE: PANACEA OR A PROBLEM

—*Sakshat Bansal*[*] *& Saema Jamil*[**]

Abstract — Uniform Civil Code at present seems to be one of the most challenging intellectual thorns. This article is an endeavour to bring forth that how the debate around UCC has in one way or another resulted in an understanding that uniformity in personal laws is possible only through a comprehensive Code and not through devising sole legislations dedicated to a single or few areas put together. Researchers argue that a deep dive into the details of governance with special reference to the existing legislations reveals that at least partial uniformity in personal laws have been achieved to a measurable extent. In furtherance of this, researchers minutely deliberate over the actions of the then governments and the response of the stake holders with a view to understand the reasons behind the success of endeavours aiming towards introducing uniformity in personal Laws of different communities on a stand-alone basis and the failure to make any progress with respect to introducing uniformity at one go under the umbrella term" Uniform Civil Code". In the light of above mentioned areas of investigation, our key argument focuses on desirability, feasibility, relative strength and success of two pronged strategy approach, i.e. reforming personal laws and simultaneously enacting uniform personal laws, rather than that of fixation at enactment of UCC, under present socio-political ethos.

[*] Assistant Professor, Jindal Global Law School, Ph.D. Scholar at NLSIU, Bangalore.
[**] Judicial officer(Delhi), Ph.D. scholar at Delhi University, LL.M. from National Law University, Delhi, UGC- NET (JRF).

I. INTRODUCTION

Governance is a comprehensive term encompassing several functions ranging from anticipating the response of stakeholders to devising strategies to ensure that the desired goal is achieved. The present debate on uniform civil code (hereinafter referred to as UCC) has attracted attention from every nook and corner of this nation. It is pertinent to note that in a nation where diversity is its unique feature, uniformity in the laws, nay, personal laws, becomes a herculean task for obvious reasons. The enactment of UCC can be seen as an end which has certainly not been attained but it is necessary to deliberate whether we have started our journey towards a UCC and if yes, how much ground has been covered? Another issue that needs to be grappled with is the feasibility of having an end which is termed as "Uniform Civil Code".

Law is dynamic in nature and the legislature is expected to be well versed with the ever changing nature of society and accordingly to devise an appropriate legal framework. Judiciary through its ancillary function is also competent to create law in certain circumstances. It is as clear as day light that the legislature and the judiciary have performed their role effectively to a certain extent. With reference to uniformity in personal laws, several legislations exist which are clear examples of uniformity irrespective of the religion of the stakeholders.

The above mentioned phenomenon compels the authors to delve deep into the details of governance with special reference to the existing legislations through which partial uniformity in personal laws has been achieved. The researchers intend to deliberate over the question whether public opinion through consultations was sought before introducing a particular legislation, any criticism of the same and also the response of the then government to it.

In the penultimate Section, the authors intend to examine if the goal of having a UCC can be achieved through understanding how uniform laws dealing with personal laws have existed thus far and also if the benefits of having a UCC can be accomplished without actually enacting one.

II. MEAT OF THE MATTER : INTERPLAY BETWEEN ARTICLE 25, ARTICLE 14 AND ARTICLE 44 OF THE CONSTITUTION OF INDIA

The most debated and discussed provisions in the Constitution of India relate to the freedom of conscience of all persons and the provision guaranteeing the right to Equality along with the DPSP which imposes a duty

on the State to endeavour to enact a Uniform Civil Code. These provisions are often quoted as intellectual thorn. The Harmonious construction of these provisions is indeed a complex issue which has been deliberated and cerebrated for years. Establishing a practically feasible nexus has been a complex issue which has been deliberated and cerebrated for years. Each religion in the name of right to conscience and to culture has been given the right to govern their personal matters (marriage, divorce, succession, etc.) in accordance with their own religious personal laws. The Constitution also guarantees the right to equality which includes equality before the law as well as equal protection of the laws within the territory of India.[1] The right guarantees not only formal equality but also substantive equality.[2] The Constitution thus implies that the State is obliged to treat unequals unequally and equals equally and to enact provisions to help underprivileged groups progress.[3] There has been a constant tussle between these two rights and no concrete solution to this quandary has been found yet. It has been argued by many that the enactment of a Uniform Civil Code (which is a Directive Principle of State Policy[4]) would result in attaining justice and equality for women. Others argue that enactment of a UCC would be violative of their right to practice their religion. Thus far, a Uniform Civil Code has remained a distant dream.

The root of this apparent conflict between the fundamental right to equality and the right to practice one's religion is the question: what happens when religious practices themselves discriminate and violate certain people's rights? Which of the two rights is to be given precedence?

The courts have in certain decisions held that the word "law" in Article 13 of the Indian Constitution does not include personal laws and hence personal laws cannot be challenged on the ground of violation of fundamental rights.[5] However, these were cases where traditional personal laws were in question. In Narasu Appa Mali case, the applicability of The Bombay Prevention of Hindu Bigamous Marriages Act to only Hindus was challenged while in the Ahmedabad Women Action Group case the court had to decide if Muslim personal law which allows for polygamy and unilateral

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1 See Art. 14 of the Constitution of India.

2 Formal equality focuses on equal treatment of law while substantive equality focuses on equal impact of law. See Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India*, *(*New Delhi, Sage Publications, 1996) 176.

3 To ensure substantive equality, the Constitution of India enables the State to make special provisions for women under Art. 15(3). The court in *K. Krishna Murthy* v. *Union of India*, (2010) 7 SCC 202 held that "*Affirmative action is designed to pursue the goal of substantive equality and for this purpose it is necessary to take into account the existing patterns of discrimination, disadvantage and disempowerment among the different sections of society*".

4 See Art 44 of the Indian Constitution.

5 *See, State of Bombay* v. *Narasu Appa Mali,* 1951 SCC OnLine Bom 72 : AIR 1952 Bom 84; *Ahmedabad Women Action Group* v. *Union of India*, (1997) 3 SCC 573**.**

divorce through talaq is violative of Articles 14 and 15 of the Indian Constitution. In other decisions, the courts have considered challenges against personal laws on the ground that they are violative of fundamental rights and either struck down the provisions or read them down. For example in *Mary Sonia Zachariah* v. *Union of India*[6], Section 10 of the Divorce Act was challenged on the ground that it was violative of Articles 14, 15 and 21 of the Indian Constitution. The Kerala High Court dismissed the argument that personal laws do not come within the ambit of Article 13 and hence cannot be declared ultra vires by drawing a distinction between cases that are directly concerned with a particular provision in an enactment passed by the legislature and traditional personal laws. It held that "*so long as the infringed provisions are part of an Act, it must pass the test of constitutionality even if the provision is based upon religious principles*." The Court considered the challenge to Section 9 of the Hindu Marriage Act in *Saroj Rani* v. *Sudarshan Kumar Chadha*[7] on the ground that it violated Articles 14 and 21 of the Constitution of India. It eventually held that the provision providing for restitution of conjugal rights did not violate any fundamental right. In *John Vallamattom* v. *Union of India*[8], the Supreme Court dealt with a challenge against Section 118 of the Indian Succession Act, 1925. The particular Section put an embargo on bequeathing property to religious or charitable uses. One of the grounds of challenge was that the said provision applied only to Christians and hence violated Article 14. The court held that "*there cannot be any unusual burden on Christian testators alone when all other testators making similar bequests for similar charities and similar religious purposes are not subjected to such procedure*" and struck down the provision.

It can be deduced from the judgments discussed in the preceding paragraph that statutes defining personal laws are required to be tested on the touchstone of fundamental rights and they do fall within the ambit of "laws" under Article 13 of the Indian Constitution but traditional personal laws may not fall within the same category[9].

Article 44 of the Constitution of India becomes important here because if a UCC is enacted and if it assures that the right to equality is not violated and if it is accepted by all, it would provide a solution to the contradiction between Articles 14 and 25. It falls under the Chapter on Directive Principle of State Policy. It states that *the State shall endeavour to secure for citizens a uniform civil code throughout the territory of India*. A Uniform Civil Code is a Code which would be applicable to all persons irrespective of their religion and would thus do away with discrepancies between different

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6 1995 SCC OnLine Ker 288 : (1995) 2 DMC 27.
7 (1984) 4 SCC 90 : AIR 1984 SC 1562.
8 (2003) 6 SCC 611.
9 Also see *Saumya Ann Thomas* v. *Union of India*, (2010) 1 KLT 869.

personal laws. It has been a sensitive issue as some people argue that a Uniform Civil Code would violate the principles of secularism. It has also become a major political issue.

The Constituent Assembly debates are testimony to the fact that the Uniform Civil Code was a contentious issue even at that time. Raj Kumari Amrit Kaur, Hansa Mehta and M.R. Masani were in favour of making the provision of Uniform Civil Code a Fundamental Right instead of a Directive Principle of State Policy as the existence of various personal laws was one of the main reasons for keeping India divided.[10] Mohamed Ismail Saheb and B. Pocker Sahib took the other extreme view. They wanted to retain the provision as a Directive Principle of State Policy and also desired to insert a proviso after the main article to ensure that any group, section or community of people would not be coerced into giving up its own personal law to protect the right to religious practice[11]. Consequently, they opposed the very introduction of a Uniform Civil Code. A middle position was taken by people like K.M. Munshi and B.R. Ambedkar who believed that a Uniform Civil Code ought to come into existence but only with the consent of the communities.[12]

Ultimately, the onus was put on the State to bring in a UCC whenever it felt right in its wisdom. Laws can be imposed from the top but a UCC stands on a different footing because it has the potential of overhauling personal laws and thus, taking away the right of people to practice their religious practices. Striking down a provision from a personal law for being against the right to equality is not the same as altering entire personal laws. And thus, a UCC can only be achieved if it is arrived at between different communities of people by consensus.[13] And until such a consensus is not reached, any endeavour to realise the goal of uniform civil code will not only remain unsuccessful but will also be inconsistent with the Constitution.[14]

A cumulative reading and analysis of the concerned articles of the Constitution demonstrates that the statutes codifying personal laws are subject to fundamental rights and State's obligation to enact a Uniform Civil Code would depend on its acceptability. Until then, as illustrated in the following sections, uniform personal laws help in dealing with the problems of having multiple personal laws.

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[10] B. Shiva Rao, *The Framing of India's Constitution: Select Documents* — vol. II, Government of India Press, Nasik, p. 162.

[11] Contituent Assemble Debates — vol. VII, pp. 540.

[12] Shefali Jha, "Secularism in the Constituent Assembly Debates", EPW vol. 37, no. 30 (July 27-August 2, 2002), pp. 3175-3180.

[13] *See* M.P. Singh, "On Uniform Civil Code, Legal Pluralism and the Constitution of India", 5 J. Indian L. & Soc'y V 2014.

[14] *Ibid.*

III. UNIFORM PERSONAL LAWS: IMPOSITION, INTERNALISATION OR A MIX?

The issue of UCC is certainly delicate and it is almost impossible to enact it in the near future. At the same time, it cannot be denied that certain personal law provisions are unfair and violative of the right to equality[15]. Either these provisions can be challenged in the courts and struck down (or read down[16]) or the legislature can enact laws that override them. Fortunately, regressive laws which are violative of the Constitution are being amended, new liberal laws are being enacted and these changes are being accepted by the society. Most of the new laws enacted are secular in nature, i.e. they are applicable to people of all communities and override the personal laws. Dowry Prohibition Act 1961, Prohibition of Child Marriage Act 2006, Juvenile Justice Act 2000, Section 125 of the Criminal Procedure Code 1973, Medical Termination of Pregnancy Act, 1971, Special Marriage Act 1954 and Indian Succession Act 1925 are examples of laws that are applicable to all people irrespective of their religions. Some of them are mandatorily applicable[17] while some of them give the freedom to the parties to choose if they wish to be governed by them[18].

These secular provisions and laws fall in the realm of personal laws and hence can be referred to as "uniform personal laws". These do not form a Code and are not comprehensive but they effectively deal with one aspect at a given point of time.[19] Some of these Acts would be discussed in this part.

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[15] For example Ss. 15 and 16 of Hindu Succession Act, 1956 provide different rules for devolution of property of Hindu females dying intestate based on the source of the property instead of the principle of nearness (which is used in the case of males), thus, bringing back the doctrine of reversion. Similarly S. 6 of the Hindu Minority and Guardianship Act, 1956 states that the father is the natural guardian of a Hindu minor when the minor is a boy or an unmarried girl and the mother would be the natural guardian after the father, thereby relegating the mother to a lower position than the father. Under Muslim Law, triple talaq is an easy way out for husbands and it has caused immense suffering to Muslim women (the constitutionality of triple talaq has been challenged in the Supreme Court).

[16] *See* Githa Hariharan v. RBI, (1999) 2 SCC 228 and *Danial Latifi* v. *Union of India*, (2001) 7 SCC 740 where the Supreme Court read down S. 6 of the Hindu Minority and Guardianship Act and S. 3 of The Muslim Women (Protection of Rights on Divorce) Act respectively and declared the provisions constitutional.

[17] Dowry Prohibition Act, 1961, Prohibition of Child Marriage Act, 2006 and S. 125 of Criminal Procedure Code are examples of laws that are mandatorily applicable.

[18] Special Marriage Act, 1954, Indian Succession Act, 1925 and Juvenile Justice Act, 2000 (which empowers a person of any religion to adopt a surrendered, abandoned or orphaned child) are examples where the laws would be applicable to persons only when the persons choose to be governed by them.

[19] *See* generally, Werner Menski, "The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda", 9 German L.J. 211 2008.

Marriages under the Hindu Marriage Act are valid though punishable[20] and marriages under Muslim Law are valid if contracted after the parties to it have attained the age of puberty or if they have been given in marriage by their guardians. Under both laws, marriage can be dissolved if the option of puberty is exercised by the girl[21] but there is no option of annulment of marriage. However, with the enactment of The Prohibition of Child Marriage Act, 2006, all child marriages are voidable if the petition is filed before the child completes two years of attaining majority[22]. Thus, a secular law overrides personal laws.[23]

Similarly, now all persons including Muslims are free to adopt children under the Juvenile Justice Act, 2000 even though their personal laws might not permit adoption.[24] The Juvenile Justice Act affects Hindu law dealing with adoption also. The Hindu Adoption and Maintenance Act, 1956 forbids adoption of a son if a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) is living at the time of adoption and the adoption of a daughter if a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) is living at the time of adoption[25]. However, a Hindu is free to adopt any number of sons or daughters under the 2000 Act if the child is orphaned, abandoned or surrendered[26].

It is pertinent to mention here that an Adoption Bill was introduced in the Parliament in 1972 and the introduction rekindled the debate on UCC. It could not be passed because of opposition by Muslims. Muslims claimed that adoption was against the tenets of Islam and even if the Act was voluntary it would enable Muslims to act against the Quran[27]. This resistance from the Muslims (the scheduled tribes also resisted but for different reasons) was based on the fear that Hindu law was being forcefully imposed on them.

It is hard to ignore the irony here. While the Adoption Bill received stiff opposition, the Juvenile Justice Act did not. It can be argued that the latter was enacted primarily due to the mounting pressure on the Indian

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[20] *See Pinninti Venkataramana* v. *State*, 1976 SCC OnLine AP 98 : AIR 1977 AP 43.

[21] *See* S. 13(2)(iv) of the Hindu Marriage Act, 1955 and S. 2(vii) of The Dissolution of Muslim Marriages Act, 1939. Under Muslim Law, even the males can exercise the option of puberty (khiyar al-bulugh).

[22] Except under a few circumstances when the marriage is void. See Ss. 12 and 14 of Prohibition of Child Marriage Act, 2006.

[23] *Yunusbhai Usmanbhai Shaikh* v. *State of Gujarat*, 2015 SCC OnLine Guj 6211.

[24] *See Shabnam Hashmi* v. *Union of India*, (2014) 4 SCC 1.

[25] *See* Ss. 11(i) and (ii) of the Hindu Adoption and Maintenance Act, 1956.

[26] *See Payal* v. *Indian Adoption*, 2009 SCC OnLine Bom 1448 : (2010) 1 Bom CR 434, 2009 (111).

[27] Vasudha Dhagamwar, *Towards the Uniform Civil Code* (Bombay, N.M. Tripathi, 1989) 57-67.

government to submit a Country Report to the Committee on the Rights of the Child highlighting concrete accomplishments. The Act was to protect the interests of children in conflict with law and not to enable adoption per se. Hence, it was not seen as a legislation touching upon personal laws even though it actually did so.

The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 puts a legal obligation on children or relatives to maintain senior citizens. This is a secular act entitling all senior citizens to claim maintenance to help them lead a normal life. Personal laws consider it a moral obligation to maintain elderly parents. Under Hindu law, children are under a statutory obligation to maintain aged parents if they are unable to maintain themselves[28]. Step parents except childless step mothers are not entitled to any maintenance under Hindu Law[29]. Muslim law entitles parents unable to maintain themselves to obtain maintenance from their children. This obligation is based on the fact that parents come under prohibited degrees of relationship. However, the secular 2007 Act entitles senior citizens to claim maintenance from not only their children (biological, adopted or step children) but also other relatives, if s/he is childless. It thus, broadens the rights of the elderly and does not force them to take recourse of their personal laws.

The Medical Termination of Pregnancy Act, 1971 has made abortion under certain circumstances legal. This, too, is a secular law applicable to all women irrespective of their religion. The legislation was opposed during the Lok Sabha debates by Muslims on the ground that it undermined the moral fibre necessary for nation building.[30] The reason behind the successful passing of 1971 Act was that it was not the result of any mass movement or the brain child of any political party. It was a more of a government measure to control population.[31] Therefore, there was no popular debate on the Act and even though the Act was passed with ease (because the Congress was in majority), the attitude towards the Act was rather pessimistic.[32]

The Dowry Prohibition Act, 1961 is another example of a uniform law that affects personal law. The Act was enacted to get rid of the social malice of dowry. It explicitly excluded dower or mahr from definition of dowry[33], thus, insulating itself from any opposition from Muslims. The

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[28] *See* S. 20 of the Hindu Adoption and Maintenance Act, 1956.

[29] *See* proviso to S. 20 of the Hindu Adoption and Maintenance Act, 1956.

[30] *See* the Lok Sabha Debates, August 2, 1971.

[31] Savithri Chattopadhyay, "Medical Termination of Pregnancy Act, 1971: A Study of the Legislative Process", Journal of the Indian Law Institute, vol. 16:4 (1974).

[32] *Ibid*.

[33] *See* S. 2 of Dowry Prohibition Act, 1961. It reads as follows: In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly—

effect of this exclusion is debatable. It has been argued that it has resulted in demand of heavy dowry amongst Muslims leading to Muslim fathers being coerced into giving multiple daughters to the same man.[34]

The legislations discussed above have been enacted for the welfare of children, women and elderly persons. The religion of the persons is inconsequential and even though marriage, adoption, maintenance, dowry and abortion are matters of personal laws, they are now dealt with by secular laws.

IV. JUDICIARY AS AN INSTRUMENT OF SOCIAL ENGINEERING VIS- A-VIS UNIFORM PERSONAL LAWS

Legislation is only one mode of creating uniform personal laws for all. The judiciary plays an important part too. The interpretation given to Section 125 of Criminal Procedure Code and Section 3 of The Muslim Women (Protection of Rights on Divorce) Act, 1986 is an ideal example to demonstrate the judiciary's role. The Court has always applied Section 125 to Muslim women[35] and there was no major opposition to this application. However, post Shah Bano case[36], there were a lot of protests against the interpretation of the Court. The Muslims opposed the Court's interpretation of Quran and demanded religious autonomy in the matter. To appease the Muslims, the Rajiv Gandhi government enacted The Muslim Women (Protection of Rights on Divorce) Act, 1986 which stated that the husband is obligated to provide reasonable and fair provision and maintenance to his divorced wife within the iddat period. In *Danial Latifi* v. *Union of India*[37], the Supreme Court gave a beneficial interpretation to this Section and held that the husband is obligated to maintain the wife until they die or remarry. The provision was held to merely mean that this obligation is to be fulfilled within three months of the divorce. The court thus, upheld the constitutionality of the 1986 Act by ruling that it actually provided more protection than Section 125 of CrPC and consequently did not violate the right to equality of Muslim women. The Supreme Court has now gone a step further by holding that a divorced wife can claim maintenance under Section

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(a) by one party to a marriage to the other party to the marriage; or
(b) by the parent of either party to a marriage or by any other person, to either party to the marriage or to any other person, at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.

[34] *See* Ananda bazaar dated 28/8/1995 as quoted in D.D. Basu, *Uniform Civil Code for India* (New Delhi, Prentice Hall, 1997) 38.

[35] *See Bai Tahira* v. *Ali Hussain Fidaalli Chothia*, (1979) 2 SCC 316 : AIR 1979 SC 362; *Fuzlunbi* v. *K. Khader Vali* (1980) 4 SCC 125 : (1980) 3 SCR 1127.

[36] *Mohd. Ahmed Khan* v. *Shah Bano Begum*, (1985) 2 SCC 556 : (1985) 3 SCR 844.

[37] (2001) 7 SCC 740.

125 of CrPC even after the expiry of the iddat period.[38] Not surprisingly, the secular provision of maintenance is applied even when a special law applicable only to Muslims is in place.

The Special Marriage Act, 1954 can be put in a slightly different class of secular laws since it is not necessarily a beneficial legislation for any particular class of persons but allows inter-religion marriages, thus, blurring the lines between the various personal laws. With reference to conflict between Islamic Law of Succession and Special Marriage Act, public opinion was not sought which is in sharp contrast to the questionnaire framed and put in public domain for UCC[39]. Persons who choose to be married under the Special Marriage Act are governed by the Indian Succession Act instead of their respective personal laws. It gives an option to the parties to have a court marriage instead of a marriage in accordance with religious ceremonies. A man and woman belonging to the same religion are also free to marry under this secular law.[40]

These developments are leading to the enactment of what can referred be to as "uniform personal laws". *While the passing of Uniform Civil Code still seems a herculean task and the obstacles in its path remain the same, we have come a long way in ensuring that all people are subject to the same laws. There might come a time when a Uniform Civil Code would not be a new law but a compilation of several scattered uniform personal laws. This might be comparatively an easier feat to achieve because people would have already accepted these laws.*

V. CONCLUDING REMARKS

In this section, the researchers intend to analyse the possible reasons for the successful implementation of above mentioned Uniform Personal Laws. The enactment of secular laws altering personal laws have not received the kind of opposition that the very idea of UCC has. There could be two reasons for this. The first one is that there is a certain invisible hierarchy within personal laws, i.e. certain parts of the personal laws do not form the

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[38] *Shabana Bano* v. *Imran Khan*, (2010) 1 SCC 666; *Shamima Farooqui* v. *Shahid Khan*, (2015) 5 SCC 705.

[39] Neema Qamar, *Need of Uniform Civil Code — A Critical Study,* 34, available at: https://books.google.co.in/books?id=MW2pCQAAQBAJ&pg=PA31&lpg=PA31&dq=Dowry+Prohibition+Act+1961+is+applicable+to+muslims+as+well&source=bl&ots=HzYTXvlcdP&sig=6eDEwkCFQrvv8BEInUrBzLG4tJ8&hl=en&sa=X&ved=0ahUKEwi2rJ7NpMfVAhUBNI8KHYSpA6w4ChDoAQg4MAU#v=onepage&q=Dowry%20Prohibition%20Act%201961%20is%20applicable%20to%20muslims%20as%20well&f=false, accessed 12th August 2017.

[40] S. 21-A of the Special Marriage Act, 1954 states that if two Hindus get married under the said Act, they would be governed by Hindu Succession Act and not Indian Succession Act.

basis of the religion and if those parts are amended, there is no fear of eroding the religious values. This logic assumes that the secular personal laws that have been enacted do not strike at the root of the religion and hence, there has been no substantial opposition against them. The second possible reason could be that the secular personal laws have been piece meal in nature and therefore, they are not seen as a threat to any religion as a whole. It is not feared that these laws are or could result in rewriting personal laws. In fact, some laws might not even be seen as amending personal laws at all.

The enactment of a UCC, on the other hand, has received stiff opposition especially from the minority groups. This could be a result of what Professor Shachar refers to as "*reactive culturism*"[41]. Reactive culturalism is resistance to external forces of change in the form of stricter adherence to the particular group's traditional laws, norms and practices. It gives rise to a justificatory attitude as opposed to a rational approach.

India is a democracy and the ideal way of enacting laws could be through deliberation and consultation but in a country with a population of 1.2 billion, an open debate per se is not practical in most of the cases and reaching a consensus would be impossible. However, public opinion can be gathered through asking for comments and suggestions. Recently, Law Commission of India headed by Justice B.S. Chauhan released a questionnaire on UCC to the general public to obtain their views on the issue.[42]

As already discussed such efforts have not been taken in the case of secular personal laws like Special Marriage Act, Prohibition of Child Marriage Act, Section 125 of CrPC, etc. These laws were based on certain public policies like prevention of destitution or promotion of education and health of children. They were imposed from the top and were not seen as an affront to any personal law.[43] This comparison highlights the possible reasons for the lack of vehement attack on endeavours of coming up with uniform personal law.

UCC might also be based on the public policy of having one uniform codified law which does not violate the right to equality for all people irrespective of their religion but it is in direct conflict with the right to conscience which is guaranteed by the Indian Constitution. Also, at present right to conscience is fundamentally connected with religious practices, in

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[41] Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* 39 (2001).

[42] *Available at* http://www.lawcommissionofindia.nic.in/questionnaire.pdf.

[43] There has been opposition to S. 125 CrPC being applicable to Muslims but the genesis of the opposition lay more in the attempt to interpret Quran by the Supreme Court than in the provision per se.

particular the essential practices. The very term "Uniform Civil Code" is perceived by many as an attack on the very pillars of a particular religion at one go, which might not be the case at all if efforts are made to introduce the changes on a stand-alone basis and not at one go. Enacting a law from below taking different views into consideration is a laudable thing to do but perhaps it's time introspect and see if it's actually working. A mere perusal through the debates on UCC from the early 1950's till today would show that the arguments for and against a UCC have remained more or less the same and we have not really come any closer to making a UCC into a reality.

A fixation with the enactment of a UCC is futile at present. Instead enacting laws which are just is possible by employing a two pronged strategy: reforming personal laws and simultaneously enacting uniform personal laws. This would bring back focus on issues of gender equality and justice. The limelight ought to be stolen by efforts to reform personal laws and to enact uniform personal laws which are gender just. The need of the hour is not a Uniform Code but the realisation that religious autonomy and gender equality are not antithetical.[44] And ultimately, there would come a day when achieving a consensus on a uniform civil code would not seem an impossible feat.

[44] *See* Archana Parashar, "Gender Inequality and Religious Personal Laws in India", Brown Journal of World Affairs, Spring/Summer 2008, vol. XIV, Issue 2. The article suggests that all family laws should be mandatorily gender non-discriminatory; that the State must not interfere with religious autonomy but must not allow religiously sanctioned inequalities.

ROLE OF ELECTION COMMISSION IN ELECTORAL REFORMS

—*Dr. Neetu Gupta*[*]

Abstract — Popular elections in a Parliamentary democracy are vitally important for its success. The success of elections itself depends upon how best the voters participate and exercise their right to vote. But the mere presence of elections does not necessarily guarantee representative form of government. It is the free and fair electoral system which provides the representative form of government to the people. In this context, the electoral system and body to conduct elections becomes significant. The framers of the Constitution gave careful and earnest consideration to these factors and accordingly evolved a device- the Election Commission which is responsible for the supervision and conduct of elections to the Parliament and State Legislatures. Over the years, the Election Commission has performed an activist role in ensuring the conduct of elections in a free and fair manner and in curbing out the role of money power in the elections. It has vigorously enforced model code of conduct and has evolved many innovative techniques like Electronic Voting Machine to ensure and maintain the confidence of the people in the electoral system. The Commission is also deeply concerned about criminalisation of politics. In this context, present paper discusses the role of Election commission in reforming the electoral system and earning the distinction of flag runner of largest democracy of the world.

Keywords: Elections, democracy, criminalisation of politics, model code of conduct, electoral system.

[*] Assistant Professor Department of Laws, Panjab University, Chandigarh.

I. ROLE OF ELECTION COMMISSION IN ELECTORAL REFORMS

At the bottom of all tributes paid to democracy is the little man, walking onto a little booth, with a little pencil making a little cross on a little bit of paper- no amount of rhetoric and voluminous discussion can possibly diminish the overwhelming importance of that point.

—Sir Winston Churchill

II. INTRODUCTION

In a democratic State, the role of people is important. Democracy provides the people an opportunity to participate in the process of governance which is essential for human existence since the interference of State in human affairs has increased manifold. However, democracy cannot be a direct process for participation in the government in view of huge populations and huge territories of various States in the world. It is bound to be indirect, or in other words, people elect their representatives to rule over themselves. Election thus becomes an effective instrument of choosing one's representatives at various levels in any political set up.[1] The public participation in a democratic set up is possible only through the elections. It is considered as one of the significant mode to know the efficacy of the system and the participation of the masses in governance which assures the legitimization of political power.

But the process of election in any political system does not by itself necessarily guarantee representative form of government. It is the free and fair electoral system which is sine qua non of any good government which profess to be based on people's will. In "*Special Reference No. 1 of 2002, In re*[2]*,* Justice Pasayat observed as under:

"Democracy and free and fair election are inseparable twins. There is almost an in severable umbilical cord joining them.the little man's ballot and not the bullet of those who want to capture power, is the heart beat of democracy. Path of the little man to the polling booth should be free and unhindered, and his freedom to elect a candidate of his choice is the foundation of a free and fair election."

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1 Dr. R.S. Rajput, "*Dynamics of Democratic Politics in India*", 1(1986).

2 (2002) 8 SCC 237 at 299.

In this context, the electoral system and body to conduct elections becomes significant. The Founding Fathers of Indian Constitution opted for parliamentary form of government with a commitment to hold regular, free and fair elections. To ensure the purity of elections, Constitution makers conceived the idea of a centralized Election Commission, independent and autonomous in its functioning and immune from the interference by the government of the day. This issue of independent Election commission was discussed extensively in the Constituent Assembly and distinct provisions to this effect were incorporated in the final draft of the Constitution of India in the form of Part XV (Articles 324-329).

III. ELECTION COMMISSION OF INDIA

In the words of T.E. Smith, "In the development of a genuine electoral administration what is required is an administrative machine, capable of conducting elections with impartiality and without confusion."[3]

Similar views were expressed by Sh. H.N. Kunzru, on the floor of Constituent Assembly. He said, "If the electoral machinery is defective or is not efficient or is worked by the people whose integrity cannot be depended upon, democracy will be poisoned at the source."[4]

The framers of the Constitution gave careful and earnest consideration to these factors and accordingly evolved a device- the Election Commission after sustained deliberations and discussions. Article 324 of the constitution, thus, vests superintendence, direction and control of elections in the Election Commission. Article 324 is being reproduced as under:

The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission).

The Election Commission consists of[5]:

1. Chief Election Commissioner;

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[3] T.E. Smith, "*Elections in Developing Countries:* A Study of Electoral Procedures used in Tropical Africa, South-East Asia and the British Caribbean", 3 (1960).

[4] Constituent Assembly Debates (New Delhi: Official Report), vol. VIII, June 16, 1949, at 923.

[5] Art. 324, the Constitution of India.

2. Such number of other Election Commissioners as the President may from time to time fix;
3. Such Regional Commissioners as the President may appoint in consultation with the Election commission;
4. Tenure of office and conditions of service of Election Commissioners and Regional Commissioners shall be determined by the President by rule but they shall not be removed from the office except on the recommendation of Chief Election Commissioner and further provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court.

It is apparent from the provisions of Article 324 that the appointment of Chief Election Commissioner and other Election Commissioners is made by the President subject to the provisions of any law made by the Parliament. No such law has yet been made by the Parliament. In the absence of such law it is quite obvious that these appointments are made by the President after consulting the Prime Minister. In these circumstances, it may be apprehended that a person who is favourite of the Prime Minister is likely to be selected and his prejudices might possibly affect the impartiality and fairness of elections.[6]

Such a suspicion was anticipated even at the time of making of the Constitution. At the time of adoption of the Article relating to the Election Commission by the Constituent Assembly, Sh. H.N. Kunzru felt that these provisions gave room for the exercise of political influence by the Central government. And, Dr. K.M. Munshi suggested that in order to meet such apprehension, the Article could be amended to provide that the appointment of the Chief Election Commissioner and other Election Commissioners would be subject to law made by Parliament.[7] This suggestion was accepted and the necessary amendment was made. But Parliament has not, so far, enacted any such law.

IV. ISSUE OF MULTIMEMBER ELECTION COMMISSION

Article 324 provides for the appointment of the Chief Election Commissioner and any number of Election Commissioners by the President. For a long time since its inception, the Election Commission consisted only of the Chief Election Commissioner, i.e., the Commission had functioned as

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[6] Raisa Ali, *Representative Democracy and Concept of Free and Fair Elections,* 279 (1996).
[7] *Supra* note 4, at 923-25.

a single member body. The departure was shown for the first time during the regime of Mr. Rajiv Gandhi as Prime Minister. The President, by his order of October 7, 1989 fixed until further order, the number of Election Commissioners, other than the Chief Election Commissioner at two. Nine days later (i.e., on October 16, 1989), S.S. Dhanoa and V. Seigell were appointed against the two posts. The appointments were made with unseeing haste as S.S. Dhanoa, who was appointed as Chairman of Bihar Public Service Commission on September 30, 1989 had to resign 14 days later to take up his new post in the Election Commission.

The multimember Election Commission continued only for 79 days. After the ninth Lok Sabha elections when the new government of Mr. V.P. Singh came into power, both the Election Commissioners were removed from their posts by the Presidential order on January 1, 1990.[8] Upholding the termination of service the Supreme Court in *S.S. Dhanoa* v. *Union of India*[9] observed that the manner of the appointment of the petitioner and other Election Commissioner, and the attitude adopted by them in the discharge of their functions was hardly calculated to ensure the free and independent functioning of the Commission.

On October 1, 1993 the President of India promulgated an ordinance entitled "The Chief Election Commissioner and other Election Commissioners (Conditions of Service) Amendment Ordinance, 1993." By the ordinance, the President fixed, until further orders the number of election Commissioners (other than the Chief Election Commissioner) at two and by a further notification President appointed Mr. M.S. Gill and Mr. G.V.G. Krishnamurthy as Election Commissioners with effect from October 1, 1993. The appointments were again challenged by the then Chief Election Commissioner Mr. T.N. Seshan alleging that the aforesaid ordinance was arbitrary, unconstitutional and void and was issued to sideline the Chief Election Commissioner and to erode his authority so that the ruling party at the centre could extract favourable orders by using the services of newly appointed Election Commissioners.[10] The Supreme Court dismissed the writ petition and upheld the impugned ordinance. Since the decision of the Supreme Court in this case, the Election Commission of India is a three member body consisting of Chief Election Commissioner and other Election Commissioners.

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8 *Supra* note 6, at 233.

9 (1991) 3 SCC 567.

10 *T.N. Seshan* v. *Union of India*, (1995) 4 SCC 611.

V. ROLE OF THE ELECTION COMMISSION

Election Commission has a vital role to play in conducting the elections in such a manner so as to inspire the confidence of the general public, the political parties and the contesting candidates. Article 324(1) of the Constitution, on the face of it, vests vast functions in the Election Commission in the form of powers and duties of different nature. These powers are further supplemented by the Representation of People Acts, 1950 and 1951 and the rules and orders made thereunder. In the light of these provisions, the Election Commission performs following functions:

A. Preparation of electoral rolls

The preparation and maintenance of complete and accurate electoral rolls are essential prerequisites for holding elections. The electoral roll for a constituency contains the names of all the persons eligible to vote in an election in that constituency. As mandated by Article 324 of the Constitution and Representation of People's Acts, the primary function of the Election Commission is to superintend, direct and control the preparation of Electoral Rolls. Every person who fulfils the following conditions is entitled to be registered in the electoral roll for a particular constituency:

A) he is not less than eighteen years of age on the qualifying date; and

B) Is ordinarily resident in that constituency;

However, a person shall be disqualified for registration in electoral roll if he:

A) Is not a citizen of India; or

B) Is of unsound mind and stands so declared by a competent court; or

C) Is for the time being disqualified from voting under the provisions of any law relating to corrupt practices and other offences in connection with election.[11]

If a person becomes so disqualified after registration, his name shall be struck off the electoral roll in which it is included.[12] Thus, Election Commission has a daunting task to perform in recognizing the bogus voters and taking steps to ensure the deletion of names of such bogus voters from the electoral roll.

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[11] S. 16(1), the Representation of People Act, 1950.

[12] *Ibid*., S. 16(2).

B. Registration of political parties

Political parties are an established part of modern democracy and the conduct of elections in India is largely dependent on the behaviour of political parties. Political parties are registered with the Election Commission under Section 29A of Representation of People Act, 1951. The registered political parties are granted recognition at the State and National levels by the Election Commission on the basis of their poll performance at general elections according to criteria prescribed by it. Section 29A of Representation of People Act, 1951 makes it mandatory for the political parties to provide specifically in their constitutions that they bear true faith and allegiance to the Constitution of India as well as principle of secularism, socialism and democracy to gain registration by the Election Commission. But the question arises can the Election Commission resort to deregistration of a political party if it acts in violation of the Constitution. In *Indian National Congress (I)* v. *Institute of Social Welfare*[13], the Supreme Court denied any such power to the Commission. However, the Court recognised three exceptions where the Commission is not deprived of its power to cancel the registration. These are:

(a) where a political party has obtained registration by practising fraud or forgery;

(b) Where a registered political party intimates to the Election Commission that it has ceased to have faith and allegiance to the Constitution of India or to the principles of secularism, socialism and democracy or it would not uphold the sovereignty, unity and integrity of India; and

(c) Any like ground where no enquiry is called forth on the part of the Commission.[14]

The Election Commission has also the power to decide certain disputes arising out of splits in recognised political parties and amalgamation of two or more political parties. When the Election Commission is satisfied on the information in its possession that there are rival sections and groups of a recognised political party, each of whom claims to be that party, the commission after taking into account all the available facts and circumstances of the case and after hearing such representatives of the sections of groups and other person as desire to be heard, decide that one such rival section or group or none of such rival sections or groups is that recognised party.[15]

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[13] (2002) 5 SCC 685.

[14] *Ibid.*

[15] Para 15, the Election Symbols (Reservation and Allotment Order), 1968.

C. Allotment of symbols to political parties

India is a country which consists of millions of voters. Although they are quite conscious of their duties politically, unfortunately, a large percentage of them is still illiterate. Hence, there is need to allot symbol to a recognised political party so that a voter may cast his vote in favour of the candidate of his choice by recognising him by the symbol of the party. The Election Commission has the power to allot symbols for purposes of elections to the political parties and to decide all the disputes arising out of such allotment in accordance with the provisions of the Election Symbols (Reservation and Allotment) Order, 1968. The symbols specified by the Commission are classified into two categories by Paragraph 5 of the Order. They are either reserved or free. A reserved symbol is a symbol which is reserved for a recognised political party for exclusive allotment to contesting candidates set up by the party. A free symbol is a symbol other than a reserved symbol. The Election Commission has reserved '*Lotus*' for BJP; '*Hand*' for Congress; '*Chakra*' for Janta Dal; '*Ears of Corns and Sickle*' for CPI; '*Hammer, Sickle and Star*' for CPI(M) in all States.[16] Recognising the power of the Election Commission in connection with allotment of symbols and disputes arising out of that, the Supreme Court has observed in *Sadiq Ali* v. *Election Commission of India*[17] as under:

> "the Commission has been clothed with plenary powers in the matter of allotment of symbols.....it is plainly essential that the Commission should have the power to settle a dispute in case claim for the allotment of the symbol of a political party is made by two rival claimants."

The validity of the Election Symbols (Reservation and Allotment) Order, 1968 has been challenged in several cases alleging lack of competence in the Commission to issue such order. In *Kanhiya Lal Omar* v. *R.K. Trivedi*[18], the Supreme Court held that the order is justified under the Conduct of Election Rules, 1961. Even if for any reason it is held that any of the provisions contained in the Order are not traceable to the Rules, the power of the Commission under Article 324(1) of the Constitution which is plenary in character can encompass all such provisions.

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[16] S.S. Awasthy, *Indian Government and Politics*, 376 (1999).
[17] (1972) 4 SCC 664 : AIR 1972 SC 187.
[18] (1985) 4 SCC 628.

D. Superintendence, direction and control over the conduct of elections

The function of the Election Commission regarding the conduct of elections begins right from the notification of elections and runs up to the declaration of result. In a country as huge and diverse as India, finding a suitable period when elections can be held throughout the country is not an easy task. The Commission which decides the schedule of elections, has to take account of weather- during winter the constituencies may be snow bound and during monsoon access to remote areas may be restricted; the agriculture cycle so that the planting and harvesting of crops is not disrupted; exam schedules as schools are used as polling stations and religious festivals and public holidays. On the top of this there are logistical difficulties that go with the holding of an election- mobilisation and movement of civil and para military police forces, printing and distribution of hundreds of millions of ballot papers, sending out ballot boxes, appointing millions of officials to conduct poll and counting and oversee the elections.[19] In this connection an important question arose in *Election Commission of India* v. *State of Haryana*[20], i.e., can the Election Commission's decision regarding the date of poll be challenged by the government? The case arose out of difference between the Government of Haryana and the Election Commission as to whether the position of law and order in Haryana was such as to render it undesirable to hold the proposed bye election at a particular point of time. The High Court of Punjab & Haryana considered it proper to issue a writ preventing the election from being held, thereby interfering with the decision of the Election Commission. Setting aside the decision of High Court, the Supreme Court held that from the correspondence, it appeared that the Election Commission, before coming to its decision, had taken all facts into account. The High Court could not substitute its opinion for that of an authority duly appointed for a specific purpose by the law and the Constitution.

But at the same time it is also true that the constitutional powers of the Commission must be exercised in conformity with the powers conferred upon the other organs of the government. Even the Supreme Court in *Election Commission of India* v. *SBI*[21] and *Election Commission of India* v. *St. Mary's School*[22] held that though the power of the Election Commission under Article 324 is very wide it does not have untrammelled powers. The power of the Election Commission cannot be exercised in such a manner so

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[19] Available at: http://eci.nic.in/eci_main1/the_function.aspx, accessed July 18, 2017.
[20] 1984 Supp SCC 104 : AIR 1984 SC 1406.
[21] 1995 Supp (2) SCC 13 : AIR 1995 SC 1078.
[22] (2008) 2 SCC 390 : AIR 2008 SC 655.

as to defeat another constitutional obligation or in derogation of the other constitutional imperatives.

E. Adjournment of poll including the power to order fresh poll

By virtue of Sections 58, 58A and 64A of the Representation of People Act, 1951, a very wide power to order fresh poll has been vested in the Election Commission. The exercise of this power begins with the commencement of polling and ends with the completion of the counting of votes. Thus, Section 58 of the Representation of People Act, 1951 vests such power in the Commission on account of any destruction, damage or tampering with the ballot papers or on account of mechanical failure in the voting machine. Section 58A of the Act authorises the Commission to declare a poll void and to make order for fresh poll on a specific ground namely, 'booth capturing'. The question arises: can the election Commission declare the poll void and order fresh poll in the entire constituency? Thus issue came up for consideration before the Supreme Court in *Mohinder Singh Gill* v. *Chief Election Commr.*[23]. The Commission cancelled the poll in the entire constituency on receipt of report from the Returning Officer that there has been large scale disturbances. A contesting candidate challenged the validity of the order by filing a writ petition. The Supreme Court held that it is clear from Sections 58 and 64A of the Representation of People Act, 1951 tat the legislature envisaged the necessity for the cancellation of poll and ordering repoll in particular polling stations where situation may warrant such a course. It cannot be said that if a general situation arises whereby numerous polling stations may witness serious mal practices affecting the purity of the electoral process, that power can be denied to the Election Commission to take an appropriate decision. It cannot be denied on apprehension of misuse of power by the Election Commission. The fact that Chief Election Commissioner may take certain decisions unlawfully, arbitrarily or with ulterior motives or in mala fide exercise of power, is not the test in such a case. The question always relates to the existence of power and not the mode of exercise of power. Although Sections 58 and 64A mention "a polling station" or "a place fixed for the poll", it may embrace multiple polling stations.

F. Advisory powers

Articles 103 and 192 of the Constitution vest advisory jurisdiction in the Election Commission in the matter of post election disqualification of sitting

[23] (1978) 1 SCC 405 : AIR 1978 SC 851.

members of Parliament and State Legislatures respectively.[24] Now, the question arises as to whether the opinion tendered by the Commission on the question of disqualification of a member is binding on the President or the governor. In *Election Commission of India* v. *N.G. Ranga*[25], the Supreme Court held that Article 103(2) requires the President to obtain the opinion of the Election Commission before deciding the question referred to in clause (1) of that Article. The President is bound to act according to the opinion given by the Commission. Since the Commission is charged with the obligation to tender its opinion to the President, it has power to make such inquiry as it thinks fit in order to enable it to express his opinion.

Similarly in *Brudaban Nayak* v. *Election Commission of India*[26], the Supreme Court held that it is obligation of the Governor to take a decision in accordance with the opinion of the Election Commission. It is clear from the conjoint reading of Article 192 that once a question of the type mentioned in the first clause is raised before the Governor, the Governor and the Governor alone must decide it but this decision must be taken after obtaining the opinion of the Election Commission.

G. Enforcement of model code of conduct

Model code of conduct is a set of guidelines issued by the Election Commission of India for conduct of political parties and candidates during elections mainly with respect to speeches, polling day, polling booths, election manifestos, processions and general conduct. These set of norms has been evolved with the consensus of political parties who have consented to abide by the principles embodied in the said code in its letter and spirit. The model code of conduct comes into force immediately on announcement of the election schedule by the commission for the need of ensuring free and fair elections. Much of it is designed to avert communal clashes and corrupt practices. For example, politicians should not make hate speeches, putting one community against another or make promises about new projects that may sway a voter.[27] it is intended to maintain the election campaign on healthy lines, avoid clashes and conflicts between political parties or their

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[24] Art. 103: If any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in cl. (1) of Art. 102, the question shall be referred for the decision of the President and his decision shall be final.

Before giving any decision on any such question, the President shall obtain the opinion of the Election Commission and shall act according to such opinion.

Art. 192 contains analogous provision with respect to member of Legislative Assembly of State.

[25] (1978) 4 SCC 181 : (1979) 1 SCR 210.

[26] AIR 1965 SC 1892 : (1965) 3 SCR 53.

[27] Available at: https://en.wikipedia.org/wiki/Election_Commission_of_India%27s_Model_Code_of_Conduct accessed July 20, 2017.

supporters and to ensure peace and order during the campaign period and thereafter, until the results are declared.[28]

A model code of conduct containing 12 points was for the first time formulated by the Election Commission at the time of Fifth general election held in 1971-72. This code was revised in 1974 before the general elections to legislative Assemblies of five States/Union Territories held in that year and it had 23 points.[29] Very often model code of conduct is flouted by the candidates on the ground that it has no statutory sanction. Mr. T.N. Seshan, when he was Chief Election Commissioner, was working on a model code of conduct for the political parties. When he came up with this, he met huge criticism. The then congress spokesman Mr. V.N. Gadgil said: "The code is not a statutory code, nor has it any legislative backing. It has not been passed by the Parliament and there is no obligation on the government either to implement it or to enforce it."[30] About legal sanction, Seshan said in an interview to the Blitz: "Does it require a legal sanction to tell you that you should not tell a lie?"[31] During the November-December 1993 elections, Seshan had taken a firm resolve. The model code of conduct was not a document for decoration. Seshan's firmness yielded result. One Governor, Kanwar Mahmood Ali Khan of Himachal Pradesh, had to go home after it was found that he had used or misused his official car when he went to help his son, who was candidate in another State, Madhya Pradesh. Several orders of appointments and transfers and announcements of so called development projects issued on the eve of elections were forcibly withdrawn.[32]

Seshan's tradition continued and the successive Election Commissioners took serious note of violations of model code of conduct. With respect to the power of the Commission to enforce model code of conduct, a question arises as to whether a notification issued by the government regarding any welfare scheme prior to the notification of election but implemented during the election process would fall within the ambit of violation of model code of conduct? In this respect a judgment of Division bench of Kerala High Court in *Rajaji Mathew Thomas* v. *Election Commission of India*[33] is worth mention here. The Election Commission of India (1st respondent) announced the election schedule on 1st March, 2011 for the Legislative Assembly of the State of Kerala. With this announcement, the provisions of the model code of conduct for the guidance of Political Parties and Candidates came into force with immediate effect. The Government of Kerala issued an order

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[28] Elections in India: Major Events and New Initiatives 1996-2000, (New Delhi: Publication and Division, Election Commission of India, 2000), at 4.

[29] Report on the Seventh General Election in India, 1980, at 93.

[30] K. Govindan Kutty, "*Seshan: An Intimate Story*", 220 (1994).

[31] *Ibid.*

[32] *Ibid*., at 221.

[33] 2011 SCC OnLine Ker 4313 : (2011) 6 RCR (Civil) 793.

approving the scheme for providing rice at the rate of Rs. 2 per kilo gram to all the ration card holders including the persons categorized as BPL and APL, fishermen, scheduled cast, scheduled tribe persons and families of Asraya Scheme, workers of traditional industries including 40 lakh families, working under the national employment guarantee scheme. Election Commission passed an order deferring implementation of the scheme till the election process was over o the ground that it has the effect of disturbing 'the level playing field amongst the political parties who are contesting the election as it influences the voters and gives the ruling party special political benefit'. Setting aside the order as arbitrary, the High Court held that the policy decisions taken by the State prior to the issuance of the election notification could be implemented and necessary steps for the implementation of the same could be continued even during the subsistence of the election notification.

It is clear that despite of all the efforts on the part of the Election Commission to maintain a level playing field among the political parties by enforcing model code of conduct, political parties do not consider it obligatory. So, there is urgent need for a legislation incorporating the model code of conduct and prescribing punishment for violation thereof.

H. Election Commission on Criminalisation of Politics

Democracy is about choice, but the choice is what the Indian Voter lacks when he is called upon to pick from a bunch of crooks and worse. It is no secret that criminals have invaded the political arena and have captured a large chunk of it. It is no longer a case of mere nexus between crooks and politicians, increasingly over the years the two have not only become interchangeable but are now indistinguishable.[34] Mafia and guns have become an integral part of the battle of the ballot over the years. Rare in the recent decades has been a legislature at the Centre or in the States where criminal have not adorned the 'August Benches'. According to former Chief Election Commissioner G.V.G. Krishnamurthy, in the 1996 elections, as many as 1500 candidates had criminal cases registered against them- cases of murder, rape, dacoity, abduction. Although he did not specify the number, it is a fact that many of them got elected.[35] In the Lok Sabha of 2004, the number of winning candidates who faced criminal charges was 24% which further rose to 30% in 2009 and furthermore to 34% in 2014. The fact that these candidates not only contest election but also win and reach to the political office is evident of the failure of the democracy as the greatest power a

[34] Summer Kaul, "Who Wants to Cleaner Electoral System? Not the Politicians", Parliamentary Affairs 12 (August 2002).

[35] *Supra* note 26, at 333.

citizen has been armed with is to show the exit way to the incompetent contestants and such authority has not been exercised in a reasonable manner by the people.[36]

The Election Commission has also been devoting serious thought to this vital issue. In August 1997, it issued an order under Article 324 of the Constitution, whereby all candidates for elections to parliament and State Legislatures were required to file an affidavit about their conviction in cases covered by Section 8(3) of the Representation of People Act, 1951[37] which disqualifies persons convicted of those special offences. The Commission also clarified that the conviction with the trial court itself is sufficient to attract disqualification and even those who are released on bail during the pendency of their appeals against their convictions are disqualified for contesting elections.[38] Accordingly, the Commission directed the Returning Officers to obtain sworn affidavits from candidates detailing whether the contestant has ever been convicted, nature of offence, punishment imposed, period of imprisonment and other relevant details. The Returning Officers were ordered to take note of the new legal position and decide about the validity of the candidature of the contestant.[39]

Even the Supreme Court in its historic judgment in *Union of India* v. *Assn. for Democratic Reforms*[40] directed the Election Commission to issue necessary order in exercise of its power under Article 324 of the Constitution calling for information on affidavit from each candidate seeking election to Parliament or the State legislature as a necessary part of his nomination paper regarding his conviction/acquittal or discharge in any criminal offence in the past; the assets (movable, immovable, bank balance etc.) of the candidate and his/her spouse and dependents; liabilities and educational qualification of the candidate. Accordingly, Election Commission issued an order on June 28, 2002 making it clear that failure to furnish the affidavit as mandated by the Supreme Court's judgment shall be considered a violation of the Supreme Court's order and as such the nomination paper of the candidate shall be liable to be rejected.[41] Union Government tried to nullify the judgment of the Supreme Court as well as consequent order of the Election commission by making amendments in the Representation

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[36] Available at: http://journal.lawmantra.co.in/wp-content/uploads/2015/10/10.pdf, accessed July 21, 2017.

[37] S. 8(3): A person convicted of any offence and sentenced to imprisonment for not less than two years [other than any offence referred to in sub-s. (1) or sub-s. (2)] shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

[38] B. Venkatesh Kumar, "Electoral Reform Bill: Too Little, Too Late", Economic and Political Weekly 3105 (27/7/2002).

[39] Available at: http://paperroom.ipsa.org/papers/paper_5194.pdf, accessed July 22, 2017.

[40] (2002) 5 SCC 294.

[41] V. Venkatesan, "Fighting Disclosure Norms", Chronicle 25 (2/8/2002).

of the People Act, 1951. But fortunately, Supreme Court again came as a guardian of the people's right to information and by its judgment in *People's Union for Civil Liberties* v. *Union of India*[42] declared the amended electoral reform law as unconstitutional and restored its verdict in *Union of India* v. *Assn. for Democratic Reforms*[43].

Very recently, Election Commission found itself in a difficult position before the Supreme Court in a PIL which demanded life ban of convicted MPs and MLAs from contesting the elections. A bench headed by Justice Ranjan Gogoi pulled up the Commission after its counsel was not able to convince the court that why the poll panel has not taken a stand on the issue. The petition, filed by Mr. Ashwini Kumar Upadhyay, demanded that an order be issued directing the Centre to take necessary steps to debar persons charged with criminal offences from contesting elections, forming a political party and becoming office bearers of any party. It further seeks a direction for providing adequate infrastructure to set up special Courts to decide criminal cases related to members of the Legislature, Executive and Judiciary within one year. On the reply by the Commission that it doubts whether the subject falls in Legislature's domain, the bench said, "If you are constrained by the legislature from giving your views, please say so. Can you afford to remain silent. Is silence an option ?"[44]

VI. CONCLUSION

A perusal of the above discussion makes it clear that the Election Commission of India has acquired for itself a significant and unique position in the constitutional structure of India. The Commission has been successfully conducting national as well as state elections since 1952. The former President of India Late K.R. Narayanan praising the pro-active role of the Commission said:

The Commission very quickly adapted itself to the changed political milieu that came about in the country. From a relatively passive role that it had played in the earlier years following our independence, it quickly responded and acquired centre stage to play a vigorous, proactive role to ensure that the democratic process in the country remains, as was envisaged by all at the time of independence, free and fair in both character and content.[45]

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42 (2003) 4 SCC 399.

43 (2002) 5 SCC 294.

44 Available at: http://www.livelaw.in/life-ban-convicted-legislators-sc-pulls-election-commission-not-taking-clear-stand/, accessed July 24, 2017.

45 Available at: http://paperroom.ipsa.org/papers/paper_5194.pdf, accessed July 22, 2017.

But an analysis of the functions conferred upon the Election Commission as envisaged above shows that most of the functions relate to pre election activities of the Commission. But once the elections are over, the representatives are free from any control of the Commission. For the next five years, it goes to abeyance performing only subsidiary functions like revision of electoral rolls, delimitation of constituencies etc. Keeping in view changing political scenario, it is desirable that Election Commission should be given not only powers to curb pre election criminalisation of politics but also post election powers in this regard so that the representatives of the people can be made accountable to them. And this will go a long way to enable the Indian democracy to flourish and to grow.

RULE OF LAW AND INDIAN CONSTITUTION

Dr. K. Sangeetha[*]

Abstract — The concept of Rule of Law is that the State is governed, not by the ruler or the nominated representatives of the people but by the Law. The Constitution of India intended for Citizens of India and India to be a country governed by the rule of law. It provides that the Constitution shall be the Supreme power in the Land and the Legislative and the Executive derive their authority from the Constitution.

India adopted the Common Law System of Justice delivery which owes its origins to British Jurisprudence, the basis of which is the Rule of Law. Dicey famously maintained that the Englishman does not need Administrative Law or any form of written law to keep cheeks on the Government but that the Rule of Law and Natural Law would be enough to ensure absence of executive arbitrariness. While India also accepts and follows the concept of Natural Law, there are formal and written Laws to ensure its compliance.

Any Law that is made by the Legislature has to be in conformity with the Constitution of India failing which it will be declared as invalid, this is provided for under Article 13 (1). Article 21 provides a further check against arbitrary executive action by stating that no person shall be deprived of his life or liberty except in accordance with the procedure established by Law. This paper begins by providing an introduction to Dicey's three pillars on what a Government must be based on and how the Indian Constitution

[*] Dr. K. Sangeetha, Assistant Professor, School of Excellence in Law, Department of Environmental Law, The Tamil Nadu Dr. Ambedkar Law University, Chennai – 600 028. This Article is submitted to Chanakya National Law University, Patna, established as a multidisciplinary journal, vol. VIII.

fulfils these three requirements. Later, it discusses the theoretical and practical application of this rule of law in India.

I. INTRODUCTION

The concept of Rule of Law is that the State is governed, not by the ruler or the nominated representatives of the people but by the Law. A County that enshrines the rule of law would be one where in the Grundnorm of the Country, or the basic and core Law from which all other Law derives its authority is the Supreme authority of the State. The monarch or the representatives of the republic are governed by the Laws derived out of the Grundnorm and their powers are limited by the Law. The King is not the Law but the Law is King.

The origins of the Rule of Law theory can be traced back to the Ancient Romans during the formation of the first republic; it has since been championed by several medieval thinkers in Europe such as Hobbs, Locke and Rousseau through the Social Contract Theory. Indian philosophers such as Chanakya have also espoused the rule of law theory in their own way; by maintain that the King should be governed by the word of law. The formal origin of the word is attributed to Sir. Edward Coke, and is derived from French phase 'la principle de legalite' which means the principle of legality. The firm basis for the Rule of Law theory was expounded by A.V. Dicey and his theory on the rule of law remains the most popular. Dicey's theory has three pillars based on the concept that "a Government should be based on principles of Law and not of men", these are:

A. Supremacy of Law

This has always been the basic understanding of rule of law that propounds that the Law rules over all people including the persons administering the Law. The Law makers need to give reasons that can be justified under the law while exercising their powers to make and administer Law.

B. Equality before the Law

While the principle of Supremacy of Law sets in place checks and balances over the Government on making and administering Law, the principle of equality before the law seeks to ensure that the Law is administered and enforced in a just manner. It is not enough to have a fair Law but the Law must be applied in a just manner as well. The Law cannot discriminate between people in matters of sex, religion, race etc. This concept of the rule

of law has been codified in the Indian Constitution under Article 14 and the Universal Declaration of Human Rights under the preamble and Article 7.

C. Predominance of legal spirit

In including this as a requirement for the rule of law, Dicey's belief was that it was insufficient to simply include the above two principles in the Constitution of the Country or in its other Laws for the State to be one in which the principles of rule of law are being followed. There must be an enforcing authority and Dicey believed that this authority could be found in the Courts. The Courts are the enforcers of the rule of law and they must be both impartial and free from all external influences. Thus the freedom of the judiciary becomes an important pillar to the rule of law. In modern parlance Rule of Law has to be understood as a system which has to safe guard against official arbitrariness, prevents anarchy and allows people to plan the legal consequences of their actions.

II. THEORETICAL APPLICATION OF RULE OF LAW IN INDIA

Indian adopted the Common Law system of justice delivery which owes its origins to British Jurisprudence, the basis of which is Rule of Law. Dicey famously maintained that the Englishman does not need Administrative Law or any form of Written Law to keep checks and balance on the Government but that the Rule of Law and Natural Law would be enough to ensure absence of executive arbitrariness. While India also accepts and follows the concept of Natural Law, there are formal and written Laws to ensure its compliance.

The Constitution of India intended for India to be a Country governed by the rule of law. It provides that the Constitution shall be the Supreme Power in the land and the Legislative and the Executive derive their authority from the Constitution. Any Law that is made by the Legislature has to be in conformity with the Constitution failing which it will be declared as invalid, this is provided for under Article 13 (1). Article 21 provides a further check against arbitrary executive action by stating that no person shall be deprived of his life or liberty except in accordance with the procedure established by Law.

Article 14 ensures that all Citizens are equal and that no person shall be discriminated on the basis of sex, religion, race or place of birth, finally it ensures that there is separation of power between the three wings of the Government and the Executive and the Legislature have no influence on the

Judiciary. By these methods, the Constitution fulfils all the requirements of Dicey's theory to be recognized as a Country following the Rule of Law.

The Supreme Court of Indian has further strengthened this mechanism through its various Judgments, the foremost of them being, *ADM, Jabalpur* v. *Shivakant Shukla*.[1] In this case the question of Law before the Court was, 'Whether there was any rule of law in India apart from Article 21'. This was in context of suspension of enforcement of Articles 14, 21 and 22 during the proclamation of an emergency. The answer of the majority of the bench was in negative for the question of law. However Justice H.R. Khanna dissented from the majority opinion and observed that: "Even in absence of Article 21 in the Constitution, the State has got no power to deprive a person of his life and liberty without the authority of Law. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by Laws would cease to have any meaning…Rule of Law is now the accepted norm of all Civilized Societies".

In C*hief Settlement Commr.* v. *Om Parkash*[2]*,* it was observed by the Supreme Court that, "In our Constitutional system, the Central and most characteristic feature is the concept of rule of law which means, in the present context, the authority of Law Courts to test all administrative action by the standard of legality. The Administrative or Executive action that does not meet the standard will be set aside if the aggrieved person brings the matter into notice."

In Satwant Singh Sawhney v. *D. Ramarathnam*[3] the Supreme Court has held that every executive action if it operates to the prejudice of any person must be supported by some legislative authority.

In *State of Karnataka* v. *Umadevi (3)*[4] a Constitution Bench of this Court has laid down the law in the following terms: "Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution."

Most famously in *Kesavananda Bharati Sripadagalvaru* v. *State of Kerala*[5] the Supreme Court held that the Rule of Law is an essential part of the basic structure of the constitution and as such cannot be amended by

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1 (1976) 2 SCC 521 : AIR 1976 SC 1207, para 154.
2 AIR 1969 SC 33.
3 AIR 1967 SC 1836, para 33.
4 (2006) 4 SCC 1 : AIR 2006 SC 1806.
5 (1973) 4 SCC 225 : AIR 1973 SC 1461.

any Act of Parliament, thereby showing how the law is superior to all other authority of men.

III. PRACTICAL APPLICATION OF RULE OF LAW IN INDIA

Critiques have often maintained that the Rule of Law in India is merely a theory with no practical application. While it cannot be denied that the Country is one where corruption runs rampant and according to 2012 World Justice Project data, India fares well on openness of Government and democratic controls, in the category limited Government powers, which evaluates the checks on Government, India ranks 37th of the 97th Countries surveyed around the World, is first among five in its region, and comes in second out of 23 lower-middle-income countries. Yet the rule of law that exists on paper does not always exist in practice. When it comes to procedural effectiveness, India fares poorly. In the categories of absence of corruption and order and security, India ranks 83rd and 96th globally.

In addition to the problem faced in India due to corruption in the law making and justice delivery systems, there also exists the problem of old laws still being in place. India does not adopt a 'sunset' clause in its laws and post independence the Indian Independence Act provided that all laws existing under the colonial rulers would continue to exist under the new system unless explicitly revoked by the parliament. While this did provide the nation with a firm basic system of laws, thereby preventing a situation of anarchy in the immediate aftermath of independence, some of these laws were drafted to suit the environment of those time and they become hard to interpret in the current environment. This leads to ambiguity and endless litigation in an attempt to interpret the provisions.

While these problems persist it is important to note that the constitutional mechanism has provided enough safe guards to endure that the Rule of Law in some form will always persist. One of the most important factors contributing to the maintenance of the Rule of Law is the activity of the courts in the interpretation of the Law. It is rightly reiterated by the Supreme Court in *Union of India* v. *Raghubir Singh*[6] that it is not a matter of doubt that a considerable degree that governs the lives of the people and regulates the State functions flows from the decision of the superior courts. Most famously in *Maneka Gandhi* v. *Union of India*[7] the court ensured that exercise of power in an arbitrary manner by the government would not infringe the rights of the people and in Kesavananda Bharati the Court ensured that Laws could not be made that essentially go against the Rule

[6] (1989) 2 SCC 754 : AIR 1989 SC 1933.
[7] (1978) 1 SCC 248 : AIR 1978 SC 597.

of Law by saying that the basic structure could not be breached, altered or modified.

Apart from judicial decision the constitutional mechanism in itself provides for the protection of the rule of law through the creation of monitoring agencies. While there have been numerous scams that have come to light in the last few years, the fact that must also be noted is that these scams have come to light and the justice delivery mechanism has been set in motion against the perpetrators. The role of the Central Vigilance Commission and the Comptroller and Auditor General in the exposure of these discrepancies is commendable and this shows how the law has provided for its own protection by putting in place multiple levels of safe guards which ensure that it will be effective at some level. The Election Commission of India, a Constitutional body has also been undertaking the task of ensuring free and fair elections with some degree of efficiency.

A. Rule of Law Part of the Basic Structure

The Constitution (First Amendment) Act, 1951, shocked the status of Rule of law in India. The question which came up for consideration in *Sankari Prasad Singh Deo* v. *Union of India*[8] was whether the fundamental rights can be amended under Article 368. The Supreme Court held that Parliament has the power to amend Part III of the Constitution under Article 368 as under Article 13 'Law' means any Legislative action and not a Constitutional amendment. Therefore, a Constitutional amendment would be valid if abridges any of the Fundamental Rights.

The question again came up for consideration in *Sajjan Singh* v. *State of Rajasthan*[9] in which the Supreme Court approved the majority judgment in Sankari Prasad case and held that amendment of the Constitution means amendment of all provisions of the Constitution. Hon'ble Chief Justice Gajendragadkar held that if the framers of the constitution intended to exclude fundamental rights from the scope of the amending power they would have made a clear provision in that behalf.

However, both these cases were overruled by the Supreme Court in *C. Golak Nath* v. *State of Punjab*[10] and it held that Parliament has no power to amend the Part III of the Constitution so as to take away or abridges the Fundamental rights and thus, at the end the Rule of Law was sub-served by the Judiciary from abridging away. However, the Rule of Law was crumpled down with the Constitution (Twenty-Fourth Amendment) Act, 1971.

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[8] AIR 1951 SC 458.
[9] AIR 1965 SC 845.
[10] AIR 1967 SC 1643.

Parliament by the way of this Amendment inserted a new clause (4) in Article 13 which provided that 'nothing in this Article shall apply to any amendment of this constitution made under Art 368'. It substituted the heading of Article 368 from 'Procedure for amendment of Constitution' to 'Power of Parliament to amend Constitution and Procedure thereof'. The Amendment not only restored the amending power of the Parliament but also extended its scope by adding the words "to amend by way of the addition or variation or repeal any provision of this constitution in accordance with the procedure laid down in the Article".

This was challenged in *Kesavananda Bharti* v. *State of Kerala*[11]. The Supreme Court by majority overruled the decision given in Golaknath case and held that Parliament has wide powers of amending the Constitution and it extends to all the Articles, but the amending power is not unlimited and does not include the power to destroy or abrogate the basic feature or framework of the Constitution. There are implied limitations on the power of amendment under Article 368. Within these limits Parliament can amend every Article of the Constitution. Thus, Rule of Law prevailed.

In *Kesavananda Bharati Sripadagalvaru* v. *State of Kerala* the Supreme Court states that "Our Constitution postulates Rule of Law in the sense of supremacy of the Constitution and the laws as opposed to arbitrariness." The 13 judge Bench also laid down that the Rule of law is an "aspect of the basic structure of the Constitution, which even the plenary power of Parliament cannot reach to amend." Since Kesavananda case, Rule of law has been much expanded and applied differently in different cases.

In *Indira Nehru Gandhi* v. *Raj Narain*[12] the Supreme Court invalidated Clause (4) of Article 329-A inserted by the Constitution (Thirty-ninth Amendment) Act, 1975 to immunise the election dispute to the office of the Prime Minister from any kind of judicial review. The Court said that this violated the concept of Rule of law which cannot be abrogated or destroyed even by the Parliament.

The Habeas Corpus case according to many scholars is a black mark on the rule of law. The case entails Dicey's third principle of rule of law. The legal question in this case was whether there is any rule of law over and above the Constitutional rule of law and whether there was any rule of law in India apart from Article 21 of the Constitution regarding right to life and personal liberty. A five judge Bench with a majority of 4:1 (going by strict interpretation) held in the negative. The majority judges held that the Constitution is the mandate and the rule of law. They held that there cannot

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[11] (1973) 4 SCC 225 : AIR 1973 SC 1461.
[12] 1975 Supp SCC 1 : AIR 1975 SC 2299.

be any rule of law other than the constitutional rule of law. Excluding moral conscience, they held that there cannot be any pre-Constitution or post-Constitution rule of law which can run counter to the rule of law embodied in the Constitution, nor there any rule of law to nullify the constitutional provisions during the time of Emergency.

The majority judges held that "Article 21 is our rule of law regarding life and liberty. No other rule of law can have separate existence as a distinct right. The rule of law is not merely a catchword or incantation. It is not a law of nature consistent and invariable at all times and in all circumstances. There cannot be a brooding and omnipotent rule of law drowning in its effervescence the emergency provisions of the Constitution." Thus they held that Article 21 is the sole repository of right to life and liberty and during an emergency, the emergency provisions themself constitute the rule of law.

In a powerful dissent, Justice H.R. Khanna observed that "Rule of law is the antithesis of arbitrariness...Rule of law is now the accepted form of all civilized societies...Everywhere it is identified with the liberty of the individual. It seeks to maintain a balance between the opposing notions of individual liberty and public order. In every State the problem arises of reconciling human rights with the requirements of public interest. Such harmonizing can only be attained by the existence of independent courts which can hold the balance between citizen and the state and compel governments to conform to the law."

With the Constitution (Forty-Fourth Amendment) Act, 1978 it has been laid down that even during emergency, Articles 20 and 21 will not be suspended. According to me, Justice Khanna (with due respect to his high moral conscience) has not given a judgment in consonance with the rule of law. His Lordship has on the other hand tried to place the judiciary over and above the rule of law. During emergency, that was the rule of law that Article 21 is suspended. Creating rule of law above the Constitution will create huge implications. Whatever be the case, the Austinian sense of jurisprudence does apply in the present case and the majority judges have not decided wrongly. Though now it remains only an academic question but if a law does not seem to be morally rich then it is the job of the Legislature to amend it and not the Judiciary to come up with its own new law which is non-existent and against the existing law. In *Ramana Dayaram Shetty* v. *International Airport Authority of India*,[13] the Supreme Court held that the great purpose of rule of law is the protection of individual against arbitrary exercise of power, wherever it is found. In re: Arundhati Roy, Justice Sethi observed that for achieving the establishment of the rule of law, the Constitution has assigned the special task to the judiciary.

[13] (1979) 3 SCC 489 : AIR 1979 SC 1628.

When Article 371-D (5) (Proviso) authorized the A.P. Government to nullify any decision of the Administrative Services Tribunal, it was held violative of the rule of law. Holding the provision unconstitutional, the Supreme Court said that it is a basic principle of the rule of law that the exercise of power by the Executive must not only be governed by the Constitution but also be in accordance with law. The Court also held that the power of judicial review should be used to ensure that rule of law is maintained. Over the years, the Courts have used judicial activism to expand the concept of rule of law. For example, in Courts are trying to establish a rule of law society in India by insisting on 'fairness'.

In *Sheela Barse* v. *State of Maharashtra*[14] the Supreme Court insisted on fairness to women in police lock-up and also drafted a code of guidelines for the protection of prisoners in police custody, especially female prisoners. In *Veena Sethi* v. *State of Bihar*[15] also the Supreme Court extended the reach of rule of law to the poor who constitute the bulk of India by ruling that rule of law does not merely for those who have the means to fight for their rights and expanded the locus standi principle to help the poor.

B. The relevance of the Rule of Law is demonstrated by application of the following principles in practice

- The separation of powers between the legislature, the executive and the judiciary.
- The law is made by representatives of the people in an open and transparent way.
- The law and its administration is subject to open and free criticism by the people, who may assemble without fear.
- The law is applied equally and fairly, so that no one is above the law.
- The law is capable of being known to everyone, so that everyone can comply.
- No one is subject to any action by any government agency other than in accordance with the law and the model litigant rules; no one is subject to any torture.
- The judicial system is independent, impartial, open and transparent and provides a fair and prompt trial.

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[14] (1983) 2 SCC 96 : AIR 1983 SC 378.
[15] (1982) 2 SCC 583.

- All people are presumed to be innocent until proven otherwise and are entitled to remain silent and are not required to incriminate themselves.

- No one can be prosecuted, civilly or criminally, for any offence not known to the law when committed.

- No one is subject adversely to a retrospective change of the law.

C. Important Components of Rule of Law Reforms

i. Court Reforms

- The efficiency of the courts is an important component in rule of law reforms as the existence of a judiciary is a fundamental aspect of the rule of law.

- To increase accountability and transparency, information technology systems may be installed to provide greater public access. To increase independence of the courts, the government can provide them with funding that will allow them to make their own financial and administrative decisions.

- Recent aggressive judicial activism can also be seen as a part of the efforts of the Constitutional Courts in India to establish rule of law society, which implies that no matter how high a person, may be the law is always above him. Court is also trying to identify the concept of rule of law with human rights of the people. The Court is developing techniques by which it can force the Government not only to submit to the law but also to create conditions where people can develop capacities to exercise their rights properly and meaningfully. However, Separation of Powers should be maintained.

ii. Legal Rules

- Another important rule of law reform goal is to build the legal rules. As Fuller stated, "Laws must Exist."

iii. Institutional Encouragement on the Global Level

- To encourage additional Country specific development, in the early 1990s the World Bank and the International Monetary Fund (IMF) began conditioning financial assistance on the implementation of the rule of law in recipient Countries.

- These organizations had provided aid to support initiatives in legislative drafting, legal information, public and legal education, and judicial reforms, including alternative dispute resolution.

- By conditioning funds on the establishment of the rule of law, the World Bank and the IMF also hope to reduce corruption, which undermines economic development by scaring away investors and preventing the free flow of goods and capital. Currently, in its Sustainable Development Goals (SDG), the United Nations (UN) also champions the rule of law as a vehicle to bring about more sustainable environmental practices.

D. Lt Governor bound to listen to Delhi Government's advice, rules Supreme Court in win for Aam Aadmi Party: (Power Tussle case)

The Arvind Kejriwal led Aam Aadmi Party Government had challenged the Delhi High Court ruling which stated that Delhi is a Union Territory and the Lieutenant Governor its administrative head. Delhi's Lieutenant Governor (L-G) is bound to listen to the city's democratically elected government and cannot act independently, said the Supreme Court on Wednesday, prompting the Aam Aadmi Party (AAP) government to claim victory against the Centre over administrative control of the national capital.

"The L-G is bound by the aid and advice of the council of ministers," said a five-judge bench in a majority verdict after hearing appeals filed by chief minister Arvind Kejriwal's Government against a Delhi high court judgment declaring L-G as the sole administrator of the city. The L-G's special power that of referring matters to the President needs to be exercised in exceptional circumstances and not routinely, said the Supreme Court.

All decisions by Delhi's council of ministers, who are elected representatives, must be communicated to the L-G but that does not mean his concurrence is required. "There is no room for absolutism and there is no room for anarchism also," said the court, according to news report on 4th July 2018. The judgment pronounced by Chief Justice Dipak Misra also held that the LG cannot act as an "obstructionist". In three separate but concurring judgments, Justices A.K. Sikri, A.M. Khanwilkar, D.Y. Chandrachud and Ashok Bhushan said there is no independent authority vested with the LG to take independent decisions.

L.G. Anil Baijal and his predecessor Najeeb Jung and the Delhi government have been locked in a bitter power tussle ever since the AAP swept to power in Delhi in 2015. The conflicts stems out of the status of Delhi,

which is a Union Territory and not a full State. As a result, the Delhi Government does not have control over land, appointment of senior officers and the police force. These three are controlled by the L-G, "A big victory for the people of Delhi...a big victory for democracy," said Kejriwal on Twitter minutes after the Supreme Court verdict.

Supreme Court verdict is a check on Delhi Lieutenant-Governor, but decisions could still be stalled

The Court made it clear that the Lieutenant Governor cannot exercise the power to refer the State Government's decisions to the President in a mechanical way. A five-judge Constitutional bench of the Supreme Court led by Chief Justice of India Dipak Misra made it clear on Wednesday that the lieutenant governor's agreement is not necessary for every decision the Delhi government makes. The exceptions are the three subjects of Land, Police and Public order, over which the Delhi Government does not have any jurisdiction in the National Capital Territory. (National Capital Act 1991).

However, this does not mean that the Lieutenant Governor will not be able to stall the Government's decisions. Though the court has made it clear that the Lieutenant Governor cannot exercise the power to refer the State Government's decisions to the President in a mechanical manner, it did not make an exhaustive list of matters that could be referred to the President. This means that the Lieutenant Governor's power to make references to the President remains discretionary. This could lead to litigation if the Delhi Government and the Lieutenant Governor differ on a subject.

IV. CONCLUSION

The founding fathers of India accomplished what the rest of the world though impossible- establish a country that would follow the letter of the law and implement the Rule of Law. In all matters such as the protection of the rights of the people, equal treatment before the law, protection against excessive arbitrariness, the Constitution of India has provided enough mechanisms to ensure that the Rule of Law is followed. Through its decisions the Courts have strived to reinforce these mechanisms and ensure smooth justice delivery to all Citizens. Problems such as outdates Legislations and overcrowded Courts are but small hindrances and bodies such as the Law Commission of India work towards ironing out these problems with the aim of achieving a system where there are no barriers to the smooth operation of the Rule of Law.

Rule of Law is a basic concept which originated from the Common Law in England, and since has become an overarching concept which defines the Law in Common Law Countries.The essence of the concept is simple. “Be you ever so high, Law is above you”, essentially the Law makes no distinction between persons, all are equal before the law and everyone is entitled to the protection of Law. This basic concept has evolved to create the concept of rights which cannot be taken away by any Government or King. The foremost right is that no one shall be treated differently by the Law or in the eye of Law or the Courts because of who he is or where he comes from.

In Indian Law, this has been encapsulated in what is called the Golden Triangle of the Constitution Articles 14, 19 and 21. Article 14 deals with the right to equality, and says that no one shall be deprived of the right to equality and the equal protection of laws. Article 19 enumerates basic freedoms afforded to every citizen such as freedom of speech, freedom of movement, freedom to carry out trade or profession etc. Article 21 says that no one shall be deprived of life or personal liberty except in accordance with procedure established by law.

Rule of Law protects people against powerful persons who may wish to tyrannize and subjugate others by holding that all are equal before the law, and that everyone is entitled to equal protection of laws. If any person or group ever tries to subjugate others, the Courts will hold them accountable for their actions, and will seek to protect the Common man, because our nation is governed by Rule of Law, not according to whims and fancies of a particular person or group of people.

SUCCESSION ON INTESTACY: A COMPARATIVE ANALYSIS OF SELECTED INTESTACY RULES AND ISLAMIC LAW

Dr. D.A. Ariyoosu[*]

Key Words: Succession, Intestacy, Intestacy Rules, Islamic Law.

Abstract — The law of succession involves the transmission of the rights and obligations of the deceased person in respect of his estate to the heirs and successors. It deals primarily with the distribution of a deceased person's property, including state participation in respect of the real estate situate within its territory and personal estate of the deceased person subject to its jurisdiction. Succession on intestacy or intestate succession is the mode or method of distribution or devolution of the property or estate of a person who died without making a valid will. And as opposed to testate succession, where a deceased person did not make a will, he is said to have died intestate and the distribution of his estate will be governed by the law governing intestate succession.

The main objective of this paper is to analyse the relevant laws and rules governing succession on intestacy in selected areas. The methodology employed in achieving the aim of this paper is comparative. A comparative analysis of the intestacy rules and Islamic law is made with a view to determining their similarities and differences.

It has been found that while there is universality in certain instances under various aspects of law of succession on intestacy, there is no doubt that some degree of variation exists based on difference

[*] LL.B, LL.M, Ph.D., BL, PGDE, ACTI, ACIArb, Notary Public Department of Business Law, Faculty of Law, University of Ilorin, Nigeria E-Mail Address: ariyoosu4law@yahoo.com, Phone No: +2348066497298

in cultural and religious background of the community or people concerned with devolution and distribution of the intestate's estate. It is therefore recommended that in line with the rules of natural justice, equity and good conscience, any rule of inheritance which prevents a legal heir from inheritance should be declared repugnant to natural justice, equity and good conscience

I. INTRODUCTION

In the realm of family law, succession to the estate of a deceased person has always been an inevitable and indispensable event that has been in vogue right from the time immemorial. It is equally not in dispute that properties acquired by a person during his lifetime, except in certain circumstances, are inheritable and distributed to beneficiaries to such properties. Again, what is inheritable is subject to the law relating either to the dictate of the deceased or the local enactments or custom of the deceased.

The law of succession generally involves the transmission of rights and obligations of a deceased person in respect of his estate, be it realty or personality, to his heirs or successors. It also deals with distribution of a deceased person's property either in accordance with his testamentary disposition (i.e Will) and in which case it is testate succession or in accordance with the statutory or customary law applicable to the deceased regarding the distribution of his property after his death, if he did not make a Will before his death and in which case it is succession on intestacy.

As a result of plurality in family law, intestate succession in Nigeria is governed by different rules.[1] Therefore, this paper shall focus on intestate succession under the Intestacy Rules and Islamic law

II. INTESTATE SUCCESSION UNDER THE INTESTACY RULES

The rules relating to succession on intestacy under the statute will apply and be invoked to administer and distribute the estate of a deceased where the deceased who died intestate was not subject to customary or Islamic law. These rules are generally termed "The Intestacy Rules".

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[1] Margaret C. Onokah, *Family Law* Nigeria: Spectrum Books Limited (2003) 317.

A. Application of Intestacy Rules

The intestacy rules have been incorporated and/or enacted by many states of the federation, mostly in the Southern part of Nigeria, and basically the laws on the administration of estates are applicable where the deceased was subject to statutory law i.e the deceased contracted a marriage under the Marriage Act and because of lack of absolute uniformity in the provisions of the various states Administration of Estates Law, the intestacy rules in selected jurisdictions shall be referred to.

Section 49 (5) of the Administration of Estates Law of Lagos State provides as follows:

> Where any person who is subject to a customary law contracts a marriage in accordance with the provisions of the Marriage Act and such person dies intestate after the commencement of this law, leaving a widow or husband or any issue of such marriage, any property of which the said intestate might have disposed by will shall be distributed in accordance with the provisions of this law, any customary law to the contrary notwithstanding[2] (underlining is mine for emphasis)

A perusal of the above provision shows that the customary law rules on inheritance and succession seem to have been displaced.

In *T.E.A. Salubi* v. *Benedicta E. Nwariaku*[3], the Supreme Court, per Ayoola JSC delivering the leading judgment held, while interpreting s. 49 (5) of the then *Administration of Estates Law of Bendel State* that:

> The provision of section 49 (5) of the Administration of Estate Law…. leave on room for any doubt that the estate in this case fell to be distributed in accordance with the "The provisions of this law", that is the Administration of Estate Law and not English law or customary law.

It should be noted, however, that the displacement of customary rules on inheritance and succession by virtue of the S.49 (5) of the Administration of Estates Law is not absolute. Hence, customary law is indispensable where

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[2] See similar provision in S. 49(5) of the Administration of Estates Law of Kwara State, Cap A1 Laws of Kwara State 2007; S. 49(5) Administration of Estates Law, Cap 2, Laws of Bendel State; S. 36(1) of the Marriage Ordinance, Cap 115 Laws of the Federation of Nigeria and Lagos 1958; *Kharie Zaidan* v. *Fatima Khalil Mohssen* (1973) 11 SC (Reprint) 1,16.

[3] (2003) 2 SC 161, 169.

appropriate. Thus, S. 1 (3) of the Administration of Estates Law of Lagos State provides that: ''Nothing in this law affects the administration of the estate of deceased persons by or under the authority of any customary court nor unless otherwise expressly provided the distribution, inheritance or succession in governed by customary law whether such estate is administered under this law or by or under the authority of a customary court.[4]

Each state of the Federation that has incorporated the common law rules of intestacy into their laws has also made provisions for the protection of its customary law or Islamic Law. S 1 (1)(b) of the Administration of Estate Law of Kwara State[5] provides:

> 1. This Law shall not apply:-
>
> ……
>
> (b) to the estates of deceased persons, the administration of which is governed by Islamic Law

The proviso to S.1 (2) of the same law says:

> provided that any property the succession of which cannot according to customary law be affected by testamentary disposition shall descend in accordance with such customary law anything herein to the contrary notwithstanding.

The communal effect of the provision of S. 49 (5) and 1 (3) of the Administration of Estate Law of Lagos State (and the proviso to S.1 (2) of the Administration of Estate Law of Kwara State) is that customary laws on distribution of a deceased's estate are protected to a certain extent and would not be displaced where the deceased was subject to customary or Islamic law and did not contract a marriage under the marriage Act.

In *Obusez* v. *Obusez*[6] Aderemi J.C.A. in his concurring judgment held:

> No doubt, problem always arises as to whether customary law or statute law should govern the distribution of the estate of a deceased person. There can be no doubt that prima facie, customary law governs the inheritance if the deceased is a person subject to customary law and marries under the native law and custom or if he dies

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4 *See* S. 1(1) Administration of Estates Law of Kwara State; S. 1(1) of Administration of Estates Law of Oyo State.

5 Cap A1, Laws of Kwara State 2007.

6 (2001) 15 NWLR (Pt. 736) 377, 399-400.

> without going through any form of marriage. Where, however, a person who is subject to customary law went on to transact marriages under the act, this raises a presumption that the distribution of his estate shall be regulated by the Marriage Act, This presumption can be rebutted by the manner of the life deceased lived and this is suggestive that the deceased wanted customary law to apply. This was the decision in *Smith* v. *Smith*[7]. That presumption must however be strong.

It is to be noted that the provision of the *Administration of Estate Law* will not equally apply to deaths occurring before its commencement unless otherwise provided for.[8]

B. Devolution of Deceased' Estate under the Intestacy Rules

Generally, the property or estate of the deceased is broadly classified as either realty or personally. It is realty or real property where it is landed property including any interest thereto. On the other hand, personal property, otherwise called personal chattels, is property other than real property and this includes carriages, garden effects, domestic animal, articles of household or personal use or ornaments, liquor and consumable stores e.t.c.[9]

Section 2 (1) of the Administration of Estates Law of Kwara State provides that all property to which a deceased person was entitled for an interest not ceasing on his death shall on his death, and notwithstanding any testamentary disposition thereof, devolve from time to time on the personal representatives of the deceased with a proviso that any interest in land shall not be administered unless the administrator shows to the satisfaction of the court that other assets of the estate are insufficient to pay the intestate's debts and expenses of his funeral and of taking out administration.[10]

From the above, it can be garnered that all property, be it real or personal, the interest of which the diseased is entitled to on his death devolves on the personal representatives of the deceased for the purpose of the administration of his estate without prejudice, however, to the expenses of his funerals, payment of debts and taking out the administration.

Personal representatives of the deceased in this sense means the executor, original or by representation, or administrator for the time being of a

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7 (1924) 5 NLR 105.

8 *See* S. 1(1) of the Administration of Estates Law of Kwara State; S. 1(1) of Administration of Estates Law of Oyo State.

9 S. 58 of the Administration of Estates Law of Kwara State.

10 *See* also S. 3 of the Administration of Estates Law of Oyo State.

deceased person[11] and who shall be entitled to be granted the administration or letter of administration of the estate of deceased.

C. Grant of Administration of Deceased's Estate

It is instructive to note that there is the principle of priority in the grant of letter of administration. Similarly, a person who ordinarily is entitled to be granted a letter of administration may be denied such grant, and this is the view of the Lagos Division of the Court of Appeal in *Obusez* v. *Obusez*[12] where Oguntade J.C.A. (as he then was) delivering the lead judgment held as follows:

> It is not the law that the surviving widow of a deceased person is automatically entitled to the grant of letters of administration in respect of the estate of the intestate. See *Okon* v. *Administrator-General (Cross-River State)*[13]. The court has discretion in the matter. It is a correct statement of law that a widow who has been guilty of moral misconduct may be passed over.

A widow who since her husband's death has led an immoral life may be passed over.

Accordingly, the spouse will take priority in respect of grant of administration if the deceased leaves spouse, followed by issue of the marriage and so on and so forth.[14]

In effect, for the purpose of succession on intestacy, the personal representatives who are entitled to be administrators of the deceased estate are entitled to be granted letter of administration except in certain circumstances and subject to the rule of priority as stated earlier. It is, therefore, not at large that once a person is a personal representative of the deceased, he is automatically entitled to be granted a letter of administration. The right of all persons interested in the estate of the deceased person must be considered. Thus, section 26 (1) of the Administration of Estates Law of Oyo State[15] provides that in granting administration, the court shall have

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[11] S. 58 of Administration of Estates Law of Kwara State; S. 2 Administration of Estates Law of Oyo State.

[12] (2001) Supra 398.

[13] (1992) 6 NWLR (Pt. 248) 473.

[14] *See* 2nd Schedule to the Administration of Estates Law of Kwara State; S. 49(1) of the Administration of Estates Law of Oyo State.

[15] This provision is in pari materia with the provision of S. 22 of the Administration of Estates Law of Kwara State. *See* also Or. 52 R.10 of the Kwara State High Court (Civil Procedure) Rules, 2005.

regard to the rights of all persons interested in the estate of the deceased person or the proceeds of sale thereof.

In interpreting the proviso to the above section, Karibi Whyte J.S.C. in *Charles Dele Igunbor* v. *Olabisi Afolabi*[16] *held as follows:*

> It has not been disputed by either of the parties that the action before the court is one in respect of the grant of letters of administration of an intestate estate. It is also not disputed that application subject matter of appeal is inter alia one seeking joinder of parties as co-administrators to the intestate estate. It is common ground that the provisions of the Administration of Estates Law, 1978 of Oyo State is applicable. This is because by section 26 (1) (a) of the Administration of Estate Law, 1978 Cap 1 of Oyo State ''where the deceased died wholly intestate as to his estate, administration shall be granted to some one or more persons interested in the residuary estate of the deceased if they make application for the purpose.

Also noteworthy is the necessity of the person seeking the grant of letter of administration to file in the Court[17] a true declaration of all the personal property of the deceased and the value thereof[18] and if a letter of administration is granted in respect of personal estate such grant does not and cannot cover the administration of real property of the intestate.

In *Madam Christiana Ugu* v. *Andrew Ebinni Tabi*[19] Belgore J.S.C. (as he then was) in his lead judgment opined as follows:

> The present respondent deliberately applied for letters of administration in respect of personal estate of the intestate and was granted. He paid the appropriate fees. It is clear in evidence at the trial court that the appellant who is the widow of the intestate during his life lived at 44 Ijaye Street, Ajegunle Apapa, and continued to reside there at his death as her matrimonial home. The house belonged to her deceased husband. The respondent obtained the letters of administration simply because he claimed to be a brother of the deceased and this was in respect of the personal estate. He was aware of the house in issue as part

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16 (2001) 2 NWLR (Pt. 723) 148, 16.2.

17 By the relevant interpretation section of the Administration of Estates Law, the "court" here means the High Court.

18 *See* Or. 52 R. 11 of High Court (Civil Procedure) Rules of Kwara State.

19 (1997) 7 NWLR (Pt. 513) 368, 381.

> of the deceased's estate of under £20 (twenty pounds) so as to administer the money in the saving account as well as the house, real property situate at 44 Ijaye Street, Ajegunle, Apapa? This is not convincing except fraud would be allowed to flourish! I therefore hold that a grant of letters of administration in respect of personal estate does not cover the administration of the real property of the intestate.

D. Distribution of Deceased's Estate under Intestacy Rules

In the distribution of the estate of a deceased who died intestate, the funeral, testamentary and administration expenses shall have priority, and all debts of the deceased shall also be paid from his estate.[20]

Subject to the above and without prejudice to the reserved rules of customary law relating to a particular estate of the deceased, the remainder of the estate of the deceased, otherwise known and called the residuary estate, shall be distributed in accordance with the intestacy rules under the Distribution of Residuary Estate rules. Thus, if the intestate leaves a spouse but no issue and no parent or brother or sister of the whole blood, the residuary estate shall be held in trust for the surviving spouse absolutely.[21]

Similarly, if the intestate leaves a spouse and issue but no parents, a brother or sister of the whole blood, then the surviving spouse shall take personal chattels absolutely, and in addition, the residuary estate of the intestate (other than the personal chattels) shall stand charged with the payment of a net sum of money equivalent to the value of one-third of residuary estate (other than the personal chattels) shall be held as to the other two-thirds, on the statutory trusts for the issues of the intestate.[22]

Where the intestate leaves a spouse, issue and parents, whether or not he leaves brother or sister of the whole blood or issue of such brother or sister of the whole blood, the surviving spouse shall take the personal effects absolutely and in addition the residuary estate (other than personal effects, shall stand charged with the payment of a net sum of money equivalent to the value of one-quarter of residuary estate to the surviving spouse and the remainder of the residuary estate shall be held as to one-quarter upon trust for parents of the intestate during their individual lives and thereafter held

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[20] *See* Para 1 of Part 1 of the Schedule to the Administration of Estate Law of Oyo State; Para 1 of Part 1 of the 1st Schedule to the Administration of Estate Law of Kwara State.

[21] Para 1 of Part 1 of the 2nd Schedule to the Administration of Estate Law of Kwara State; S. 49(1)(a) of the Administration of Estate Law of Oyo State.

[22] Para 2 of the 2nd Schedule to the Administration of Estates of Kwara State; S. 49(1)(9) of the Administration of Estate Law of Oyo State.

on statutory trusts for the issues of the intestate, and as to the remainder three-quarters on statutory trusts for the issue of the intestate.[23]

lf the intestate leaves a spouse and parents but leaves no issue, the surviving spouse shall take the personal effects absolutely and in addition the residuary estate of the intestate (other than the personal effect) shall stand charged with the payment of a net sum of money equivalent to the value of two-thirds of residuary to the surviving spouse and the remainder shall be held in trust for the parents absolutely, whether or not the spouse leaves brothers or sisters. And where the intestate leaves no parent but leaves brothers or sister of the whole blood of the intestate spouse but still without a child, the remainder shall be held on the statutory trusts for the brothers and sisters.[24]

Where the intestate is not survived by spouse but survived by parent, one-third of the residuary estate shall be held by the parent for life, and subject to such life interest, on statutory trusts for the issue of the intestate and as to the remaining two-thirds on statutory trusts for the issue of intestates.[25]

If the intestate leaves issue but no husband or wife the residuary estate of the intestate shall be held on the statutory trusts for the issue of the intestate. Similarly, if the intestate leaves no husband or wife but leaves both parents, than the residuary estate of the intestate shall be held in trust for the parents absolutely and in equal shares.[26]

In a situation where the intestate leaves no spouse, no issue and no parent then the residuary estate shall be held in the followings order and manner of priority:

If the intestate leaves brothers and sister of the whole blood, on the statutory trusts for such brothers and sister; if he leaves sister and brothers of half blood, on the statutory trusts for such half brothers and sisters; if the intestate leaves grandparents on the statutory trust for such grandparents; if the intestate leaves uncles and aunts on the statutory trusts for such uncles and aunts of the whole blood of a parent of the intestate as the first priority in this class and of half blood of a parent of the intestate.[27]

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[23] Para 3 of the 2nd Schedule to the Administration of Estates Law of Kwara State.
[24] Para 4 of the 2nd Schedule to the Administration of Estates Law of Kwara State.
[25] Para 5 of the 2nd Schedule to the Administration of Estates Law of Kwara State.
[26] *See* S. 49(1) of the Administration of Estates Law of Oyo State.
[27] *Ibid*.

A situation may arise where there is default of any person taking an absolute interest under the provisions of the distribution of residuary estate rules and in such a case the law varies from State to State.

In some states, in such cases the residuary estate of the intestate shall be distributed in accordance with the customary laws that would apply to the deceased person's estate as if the administration of estate law had not been passed[28] while in some other states the residuary estate shall belong to the state as *bona vacantia*.[29]

For purposes of distribution or division of the deceased estate under the intestacy rules, a husband and wife shall be treated as two persons and where husband and wife have died in circumstance rendering it uncertain which of them survived the other, each of them shall be deemed not to have survived the other if they both died intestate.[30]

III. INTESTATE SUCCESSION UNDER ISLAMIC LAW

According to the principles of Islamic religion, a muslim does not die intestate because Islamic Law has stipulated how to handle his estate. Whether a Muslim dies testate or intestate the distribution of his estate is governed by Islamic Law of inheritance.[31] However, conflicts usually arise where a Muslim makes a will or testamentary disposition otherwise than under Islamic law as exemplified in *Adesubokun* v. *Yinusa*.[32] Similarly, conflicts arise where a Muslim contracts marriage otherwise than under the Islamic Law, and though Islamic Law recognizes will-making and monogamous marriage, the application of Islamic Law to the distribution of the estate of a muslim intestate is curtailed by his wilful option to make a will or contract a marriage otherwise than under the Islamic Law. And it is because of the conflicts so generated that for the purpose of this paper one shall have to conclude that, and within the context of this paper, a Muslim who dies without making a will whether under the Islamic law of otherwise has died intestate.

In Islamic Law, inheritance or succession on intestacy is known as Miirath and it depicts the property or estate which passes from the deceased person to those set of people who are qualified according to the Quran to

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[28] *See* for instance Para 6 of the 2nd Schedule to the Administration of Estates Law of Kwara State.

[29] That is it will become property that cannot be disposed of by will and no relative is entitled to it under intestacy laws. See S. 49(1)(f) of the Administration of Estates Law of Oyo State.

[30] *See* Ss. 49(2) & (3) of Administration of Estates Law of Oyo State.

[31] M.A. Ambali, *The Practice of Muslim Family Law in Nigeria* Nigeria: 2nd edn. Tamaza Publishing Co. Ltd. (2003) 299.

[32] (1971) 1 ALL NLR 225.

share from the deceased's property.[33] And like under customary or intestacy rules, succession on intestacy under Islamic law is not applicable until it becomes evidenced that somebody is confirmed deed. Also payment or settlement of debt, funeral expenses and legacies are payable before the estates are distributed. Thus, in *Baka* v. *Dandare*[34] the Court of Appeal, per Adamu J.C.A., held:

> It is also trite that under principle of Sharia the subject of succession begins with the preliminary payments of funeral expenses, debts and other outgoings which must be made from the estate of the deceased before its division or inheritance among his heirs or successors.

It is also worthy of note that the principle of *nemo dat quod non habet* is readily available in Islamic law[35] so much so that once the deceased's estate has not been distributed, any sale of such an undistributed inheritable property is invalid no matter how long the property has been sold and the purchaser in such circumstance purchased nothing.[36]

A. Entitlement to Inherit under Islamic Law

Under Islamic Law, the door of inheritance only opens on the fulfilment of certain fundamental conditions namely: proof of death of the intestate, the survival of heirs, an inheritable estate left behind by the intestate and the relationship which justifies inheritance.[37] In other words, where any of the above conditions is missing, there can be no distribution of estate of a deceased Muslim intestate.

For a person to be entitled to inherit under Islamic law he must be legal heir either as Quranic sharers/heirs or those who are entitled to the remainder of the shares. Thus, the Holy Quran has stated the heirs with their shares as follows:

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[33] A. Adekilekun Tijani, "A Comparative Study of the Law of Inheritance in the Shariah and among the Yoruba of Nigeria-being a Contribution to a Digest on Islamic Law and Jurisprudence" in Nigeria-Essays in Honour of Honourable Justice Umaru Faruk Abdullahi.

[34] (1997) 4 NWLR (Pt. 498) 244, 250. See also Quran 4:11 and 12.

[35] *See Ige* v. *Dubi*, (1999) 3 NWLR (Pt. 596) 550.

[36] *See Hawwa Gewayan* v. *Ado Dushi*, (1997) 8 NWLR (Pt. 517) 522, 525.

[37] *See Jatau* v. *Mailafiya*, (1998) 1 NWLR (Pt. 535) 682, 693. *See* also Abdur Rahman I.. Doi, *Shariah: The Islamic Law* London: Ta-Ha Publishers (1984) 272-273; *Muhammad* v. *Mohammed*, (2001) 6 NWLR (Pt. 708) 104, 112.

There is a share for men and a share for women from what is left by parents and those nearest relations, whether the property be small or large -a legal share.[38]

It continues:

> Allah commands you as regards your children's inheritance; to the male, a portion equal to that of two females; if there are only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is half. For parents, a sixth share of inheritance to each if the deceased left children; if no children, and parents are the only heirs, the mother has a third, if the deceased left brothers or sisters, the mother has a sixth. The distribution in all cases is after the payment of legacies he may have bequeathed or debts. You know not which of them, whether your parents nor your children, are nearest to you in benefit. These fixed shares are ordained by Allah and Allah is ever All-Knower, All-wise.[39]

Chapter 4 verse 12 of the Holy Quran also says:

> In that which your wives leave your share is a half if they have no child, but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts. In that which you leave, their (your wives) share is a fourth if you leave no child; but if you leave a child, they get an eight of that which you leave after payment of legacies that you may have bequeathed or debts. If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister each one of the two gets a sixth; but if more than two, they share in a third, after payment of legacies he or she may have bequeathed or debts, so that no loss is caused to anyone. This is a commandment from Allah; and even All-Knowing, Most-forebearing.

Finally, Quran 4:176 provides thus:

> They ask you for a legal verdict, say:

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[38] Ch. 4 verse 7.
[39] Ch. 4 verse 8.

> Allah directs (thus) about Al-Kalalah (those who leave neither descendants nor ascendants as heir). If it is a man that dies, leaving a sister, but no child, she shall have half the inheritance. If such a deceased was a woman, who left no child, her brother takes her inheritance. If there are two sisters, they shall have two-thirds of the inheritance; if there are brothers and sister, the male will have twice the share of the female. (Thus) does Allah make clear to you His law lest you go astray. And All-Knower of everything.

The above Quranic verses are unequivocal that the categories of heirs are children of the deceased, parents of the deceased, spouse, relations such as brothers and sister.[40] It should however be noted that the share of each heir may vary, depending on the existence or otherwise of a particular heir. Thus, where a husband dies, the wife as widow will inherit one quarter of the estate of the deceased husband if he has no issue legitimate enough to be his heir. But if he has children, she will be relegated to one-eighth. If there is only one daughter and no surviving son, the daughter takes a half. Similarly, if there are two or more daughters alone they will get two-thirds to share among themselves and the share of son or sons can easily be deduced once that of a daughter or daughters is determined as the son will get twice that of the daughter. Again, if a husband inherits his deceased wife he will get a half of what she left behind and it does not matter whether the surviving son or daughter belongs to her husband.

However, if one of her children survived her then he will be reduced to a quarter. But he still maintains his half share even if his deceased wife was survived by her father.

B. Impediments to Inheritance under Islamic Law

Certain factors exclude a person from inheritance, even though he might ordinarily be entitled to inherit. Thus, the murderer of the deceased is excluded to inherit, if the murder is not involuntary, even if he is a legal heir. The prophetic tradition says: ''A killer does not receive a share of the inheritance of the one killed."[41]

Thus, Islamic law bars a potential heir who is responsible for the death of the intestate. Similarly, a child born out of wedlock is not qualified to inherit from the estate of the partner of his/her mother in the act of the illegal association and the man too is barred from sharing in the estate of the

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[40] *See* also *Muhammad* v. *Mohammed* (supra), 122-113.

[41] Imam Ibn Hajr, *Buluugh Al-Maram Min Adillat Al-Ahkam* Riyadh: Dar-us-Salam Publications (2003) Paras 982, 354.

product of his illegal association with a woman. However, the mother and child are free to inherit from each other.[42]

Difference in religion is also a bar to inheritance under Islamic law. A Muslim does not share out of the estate of non-Muslim nor does a non-Muslim qualify to inherit a Muslim.[43] Slavery is another impediment to inheritance. A slave cannot inherit the estate of his/her husband or wife as the slave is considered a property of his/her master so much so that whatever he/she has belongs to the master.

C. Principle of Priority and Displacement under Islamic Law of Inheritance

Even though a person is entitled to inherit as legal heir, priority is given to certain heirs over the other and certain heirs may be displaced by the existence of others. Similarly, some heirs cannot be barred at all from inheritance while some are partially excluded, but all are subject to the rules as to impediments to inheritance under Islamic law.

The spouse, children, and parent cannot be barred from inheritance and their inheritance takes precedent over those of distant relations. And for the purpose of Islamic Law of inheritance, child includes grandchild or great grandchild how highsoever while father includes grandfather and great grandfather how highsoever e.t.c

The existence of son displaces grandchild or brother of the deceased from inheritance. Also the existence of grandchild displaces or excludes totally great grandchild e.t.c.

Similarly, father or children of the deceased bars brother or sister. Full sisters exclude consanguine sister while father displaces grandfather and brothers. Grandfather displaces great grandfather and mother displaces grandmother e.t.c

IV. CONCLUSION

In this paper selected aspects of law of succession on intestacy have been examined. While there are similarities and universality in certain aspects under various aspects of laws of succession on intestacy, there is no doubt that some degree of variation exists based on difference in cultural and religious background of the community or people concerned with devolution

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[42] *See* M.A. Ambali, *The Practice of Muslim Family Law in Nigeria* Nigeria: 2nd edn. Tamaza Publishing Co. Ltd. (2003) 272.

[43] *Op cit* p. 273.

and distribution of the intestate's estate. It seems payment of debt, funeral expenses and legacies take priority before the deceased estate is distributed in accordance with the applicable laws. It seems also that the principle of exclusion is recognized by the majority of the laws. However, certain aspects are not without conflict. When a woman is properly and legally married under the Islamic or intestacy rules she is entitled to her share of the deceased estate with or without children.

It may look abominable under any other cultures for a father or mother to inherit his or her child, but both the intestacy rules and Islamic law apportion shares to them, hence it cannot by any stretch of imagination be an overstatement to conclude that both the intestacy rules and Islamic law are in favour of the deceased's heirs although this might not be unconnected with the sole fact that both the intestacy rules and Islamic law are largely written. It is therefore recommended that in line with the rules of natural justice, equity and good conscience, any rule of inheritance which prevents a legal heir from inheritance should be declared repugnant to natural justice, equity and good conscience in appropriate cases.

NON-ACADEMICIANS

'AGEISM' & THE INTERNATIONAL RIGHTS REGIME FOR THE OLDER COHORTS: A COMPELLING EXIGENCY FOR A SPECIALIZED FRAMEWORK

—Tavleen Kaur Khurana[*]

Abstract — With the advancement in healthcare and technology, the longevity has increased considerably. World over the life expectancy of the people has enhanced. The global phenomenon of demographic aging influences societies and brings with it, newer kind of challenges. Amidst the longevity revolution, an issue which has come to the forefront and which has become quite virulent is that of ageism. Ageism encompasses biases against the 'old age per se'. A set perception operates which considers older adults as incompetent, unworthy and a burden on the resources. This social construction of older people as 'social others' is contentious as well as against their rights regime. From emotional seclusion and financial constraints to violence committed against them, the list of the prejudicial conduct is long. It not only attacks the basic human right to dignity but also hampers in extreme cases, their right to life. We have become so consumed by the notions of 'young' and 'old', that negative stereotyping of older people is considered unproblematic.

Internationally, none of the instruments create a binding obligation on the part of states to create a rights regime for the elderly. Particularly deficient are instruments of participation and accountability. In this paper the researcher has deliberated on the phenomena of demographic ageing, 'ageism', the peculiar

[*] JRF Research Fellow (pursuing Ph.D), University School of Law and Legal Studies (USLLS), IP University, New Delhi.

socio-legal issues concerning the elderly, the existing international framework in place for their protection and most importantly the imperativeness and a compelling exigency for a specialized international framework for safeguarding the interests and rights of the older cohorts.

I. INTRODUCTION

With the advancement in healthcare and technology, the longevity has increased considerably. World over life expectancy of the people has enhanced. The global phenomenon of demographic aging influences societies and brings with it newer kind of challenges. The fact that we are living longer is very often described as a 'problem' and we constantly hear reference to the 'demographic time bomb'.

The population of the world is ageing. Nearly every country in the world is experiencing surge in the number as well as the proportion of older persons in their population. The United Nations uses 60 years (and +) to refer to older people[1]. As per their report the number of older persons is expected to more than double by 2050 and to more than triple by 2100, rising from 962 million globally in 2017 to 2.1 billion in 2050 and 3.1 billion in 2100[2]. The increasing population of older adults is one of the crucial social transformations and the implications of it are ubiquitous as well as multi-facet.

Amidst the longevity revolution, an issue which has come to the forefront and which has become quite virulent is that of ageism[3]. Ageism is the prejudice or discrimination on the grounds of a person's age. It encompasses biases against the 'old age per se'. Merely because an individual has crossed a certain age, it is assumed that he has a diminished physical and cognitive ability. The stereotypical attitudes include unwarranted conjectures and suppositions about reduced working capacity, loss of judgment-making skill, debilitated tendencies etc. Without difficulty these fixed ideas can attain the standing of 'facts', which unless challenged and deliberated upon, are believed to be unproblematic.

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1 United Nations Population Fund (UNFPA), Ageing in the Twenty-First Century: A Celebration and A Challenge, (2012), https://www.unfpa.org/sites/default/files/pub-pdf/Ageing%20report.pdf.

2 United Nations, Department of Economic and Social Affairs, Population Division (2017). World Population Prospects: The 2017 Revision, Key Findings and Advance Tables. Working Paper No. ESA/P/WP/248. https://esa.un.org/unpd/wpp/publications/Files/WPP2017KeyFindings.pdf.

3 The term "ageism" was coined in 1969 by American gerontologist Robert N. Butler.

The process of ageing is a biological reality, with its own dynamics, and which are largely beyond human control, but the societal constructions of old age greatly affect one's understanding and treatment vis a vis the older people. This social construction of older people as 'social others' and a 'collective problem' is contentious, as well as against their rights regime. These biased views are gradually internalised and reflected in the legal and the policy set up. With the result that cases involving prejudicial conduct against the elderly, are often given a cold shoulder and callously ignored. It is only when an issue is recognised and deliberated upon, that its solution can be sought. But in cases involving older cohorts we are yet to cross the initial stage of acknowledging that a 'concern' exists.

A pertinent need arises for a deeper understanding of the issues associated with older persons and how their rights regime can be strengthened and their vulnerability addressed. Internationally, protection of the human rights of older persons includes set of principles and declarations. However none of these creates a binding obligation on the part of states to create a rights regime for the elderly. Particularly deficient are instruments of participation and accountability. In situations which call for concrete structural measures, many governments have resorted to a 'welfare approach' which does not guarantee long-term enjoyment of human rights without discrimination. In this paper the researcher has deliberated on the phenomena of demographic ageing, 'ageism', the peculiar socio-legal issues concerning the elderly, the existing international framework in place for their protection and most importantly the imperativeness and a compelling exigency for a specialized international framework for safeguarding the interests and rights of the older cohorts.

II. PHENOMENA OF DEMOGRAPHIC AGEING

The population of 60+ individuals is increasing at a rate of about 3 per cent per year. As per United Nation's Department of Economic and Social Affairs Population Division, as of 2017, globally there are approximately 962 million people who are of 60 years of age (or above). They comprise 13 per cent of the world population. As far as the number of persons aged 80 or over is concerned, it is projected that they are going to triple by 2050. This means that from a population of 137 million in 2017, they are going to be 425 million in 2050. And by 2100 it is expected that their population will increase to 909 million, nearly seven times its value in 2017[4].

There are a number of variables which play a pertinent role in influencing the demography of nations. Some of the factors on which the size and age composition of a population depend are: mortality, fertility and

[4] *Supra* note 2 at 2.

migration. Their interplay has a bearing on the population structures across the world. Since 1950, almost all the parts of the world have experienced increases in life expectancy. This has been made possible by the modern day technology, better health facilities[5], improved nutrition etc. With increases in life expectancy at birth, advancement in survival at older ages makes for a rising proportion of the older adults. Thus, there being an overall development in longevity. Another key driver which has played a crucial role in altering the demography is 'international migration'. There are some regions of the world which experience larger influx of migrants compared to the others. Since migrants usually comprise of the younger populations (which may be work related or otherwise), in these countries, the process of ageing gets slowed temporarily. However eventually these countries will experience population ageing and would demand adequate measures for safeguarding the interests of the older population. Since population ageing and the unique safeguards it warrants is not a region specific concern, efforts at the International and National level both attain prominence.

III. 'AGEISM'

Social gerontologists have assigned different connotations to the term 'age'. Some of these are: the chronological, social and physiological age. Out of the various meanings assigned, the expression 'social' age is the most riveting, for it signifies socially recognized age norms and the behaviours which are age appropriate. The society decides the course of conduct to be followed which is unique to a particular age. The societal standards operate on a strict timeline and any deviation is despised. It is quite common to hear expressions like 'act your age', 'you look great for your age', 'you're too old to do those things' etc. Age based distinctions, judgments and perceptions have subtly found their way into our style of thinking. Bernice Neugarten has argued that in all societies, age 'is one of the bases for the ascription of status and one of the underlying dimensions by which social interaction is regulated'.[6] She observes that several key aspects pertaining to rights, responsibilities and rewards are influenced by age. The societal norms determine the conduct of an individual which are largely aged based. Thus a biological component is assigned a social meaning.

Often the social construct given to the term 'age' has discriminatory overtones. Amongst the various grounds on which inequality is experienced i.e. class, age, gender, race etc, the aspect of 'age' is the most virulent and pernicious. It is here that the term 'ageism' becomes relevant. Ageism is the prejudice or discrimination on the grounds of a person's age. It encompasses

[5] Over the years our capability to treat chronic and acute health conditions has also improved significantly. This has made extended living possible.

[6] Bernice L. Neugarten et al., "Age Norms, Age Constraints, and Adult Socialization" 70, AJS 710, 712 (1965).

biases against the 'old age per se'. Prejudicial conduct is meted out simply because a person has crossed a certain age. As opposed to their skills, individuals are judged by the number of years they have lived. A set perception operates which considers older adults as incompetent, unworthy and a burden on the resources. According to Butler (who coined the term 'ageism' in 1969), ageism is the practice of systematic stereotyping and prejudice against people solely because they are old[7]. The older cohorts are viewed as senile, cranky, old fashioned, over consumptive, closed minded etc. For instance, a slight forgetfulness on their part is construed as a 'senior moment'. Since discrimination based on the age of the person is the least acknowledged and sparsely debated, the discriminatory conduct and the language associated with it is often normalized and ignored. Language holds great power and therefore a discriminatory linguistic has the ability to reinforce stereotypes.

Moreover, our society has become so consumed by the notions of 'young' and 'old', that negative stereotyping of older people is considered unproblematic. Instead of taking active measures against the bigoted treatment, such conduct is brushed aside or justified as being for the 'welfare' of the elderly. Under the garb of the paternalistic behaviour, inequalities are normalized and potentially internalized. Ageist ideas are often propagated and encouraged; for instance the huge cosmetic industry thrives by exploiting people's fear of growing old. 'Anti-aging' beauty campaigns make us believe that young is positive and old is negative. The prevailing culture which vehemently adores the youth and despises the 'old age' results in the social marginality and decrepitude of the older adults.

To some extent, ageism is connected to a culture's perception of (or fears about) death, and to the importance that a society places on change, flexibility and swiftness in the workforce. As a natural outflow, a society in which these factors have a huge bearing will be more likely to be biased against the older worker and would regard them as non-competitive. It is this age related biasness which gives rise to the perception that older adults are a burden on the resources. Such attitude reflects a deep seated uneasiness on the part of the young and middle-aged—a personal revulsion to and distaste for growing old, disease, disability, fear of powerlessness, uselessness and death[8]. It is a kind of self hatred by foolishly ignoring the fact that as each of us was once a child, we will eventually (if alive) turn into an old individual. The eternal truth that gradually the tables will turn and the so called young of today will become old and face the wrath of prejudicial treatment is callously ignored.

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[7] Robert N. Butler, "Age-Ism: Another Form of Bigotry", 9 The Gerontologist 243, 243, 244 (1969).

[8] *Ibid.* at 243.

Ageism rests on the belief that people turn into an inferior variety the moment they cross a certain age. It operates both implicitly and explicitly. Implicit biases which are also termed as automatic or unconscious stereotypes operate without much thought or deliberations that a particular action is discriminatory against the old. Becca Levy defines 'implicit ageism as the thoughts, feelings, and behaviours toward elderly people that exist and operate without conscious awareness or control.[9] Every socialized individual who has internalized the age stereotypes of their culture is likely to engage in implicit ageism'.[10] On the other hand explicit ageism includes a conscious and an intentional discrimination against the old. It includes usage of discriminatory language against them, denial of jobs to the elderly, healthcare rationing, their emotional and financial seclusion etc.

Societal aim should be to aid older people in leading an independent, resilient and a productive life. As Butler argues that the disease of ageism can be treated. The negative perceptions and attitudes which propagate discrimination against them and turn them 'social others' can be contained. He says that,

it is within our power to intervene in social, cultural, economic and personal environments, influencing individual lives as well as those of older persons en masse. If, however, we fail to alter present negative imagery, stereotypes, myths and distortions concerning aging and the aged in society, our ability to exercise these new possibilities will remain sharply curtailed[11].

Other gerontologists suggest that victimized individuals need to stand up for their rights and counter ageism head on. They cannot silently bear this mistreatment.

'Dignity' is the essence of human existence. The 'age' of a person cannot fix his dignity and worth. Therefore turning a nelson's eye towards ageism is against the rights regime of the older persons. It robes them off of their existence and makes them extremely vulnerable. This calls for their protection and the imperativeness of safeguarding their interests.

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[9] Becca R. Levy and Mahzarin R. Banaji, "Ageism: Stereotypes and Prejudice against Older Persons", 49 (Todd D. Nelson ed., A Bradford Book, 2002).

[10] Becca R. Levy, "Eradication of Ageism Requires Addressing the Enemy Within", 41(5) The Gerontologist 578-579 (2001).

[11] Robert N. Butler, "Dispelling Ageism: The Cross-Cutting Intervention", 503 Annals of the American Academy of Political and Social Science, 138, 143 (1989).

IV. THE PECULIAR SOCIO-LEGAL ISSUES CONCERNING THE ELDERLY

Ageing which is a normal, natural and an inevitable biological process is looked down upon and is a source of great many human right violations. Abuse, neglect, violence and discrimination against the elderly are quite common and pervasive. Often older adults are isolated from their families and left on their own. With the growing prevalence of nuclear families and a declining social structure, these individuals feel excluded and left out. Even if they are living with their family members it is not uncommon for them to feel neglected. From emotional seclusion and financial constraints to violence committed against them, the list of the prejudicial conduct is long. It not only attacks their basic human 'right to dignity' but also hampers in extreme cases, their 'right to life'. The extent of detrimental conduct has reached to such an extent that their exclusion and marginalization is considered 'normal' and their interests pitilessly ignored.

There are certain specific issues distinctly faced by the older persons, which result in the violation of their human rights. Several crucial rights are infringed with no remedy at their disposal. The commonly breached rights include: the right to life, right to health, right to dignity etc. Some of the peculiar issues faced by the elderly which are a cause of human right violations are deliberated in the following part: *i) Discrimination:* - Discrimination against the old stems from 'ageism'. A prejudiced treatment is meted out against older persons simply by virtue of their age. This stereotypical behaviour can be both at the personal level as well as at the institutional level. At the personal level it may take the form of isolation and neglect by the family members. Institutional level bias includes exclusion from innovative training programmes, denial of opportunities, encouraging early retirement etc. Age-related discrimination is one of the most frequent challenges faced by older persons in the exercise of their human rights; *ii) Poverty:*- A large number of older persons face economic hardships. With no source of regular income coupled with inadequate or no social security mechanism in place, the issue of poverty is quite paramount. Often emotional reasons compel the elderly to forego just claims due from their children; with the result, that they become destitute and live in extremely poor conditions. *iii) Abuse and violence:* - Abuse may take the form of discrete neglect, street crime, verbal, sexual, financial abuse, and psychological or physical violence[12]. Pressure from the family members and fear of social stigma operate heavily in the minds of the older adults which makes reporting of such abuse difficult. The 'physical' vulnerability of the older adults

[12] Marthe Fredvang & Simon Biggs, *The Rights of Older Persons: Protection and Gaps under Human Rights Law*, Social Policy, Centre For Public Policy Australia (2012) https://social.un.org/ageing-working-group/documents/fourth/Rightsofolderpersons.pdf.

makes them prone to violence. In certain cases older individuals live alone and lead isolated lives which make them more susceptible to crimes; both from their own family members as well as from the outsiders. *iv) Health: Physical & Mental:* - In a number of cases the health issues of the elderly are mainly confined to access to healthcare, lack of which is responsible for unhealthy ageing. Often the little access which is provided only focuses on the physical diseases. The aspect of mental health which is chiefly connected with emotional, social and economic insecurities is completely ignored. *v) Peculiar vulnerability of older women:* Older women (especially the widowed) are particularly vulnerable to poverty and social exclusion. They represent a classic example of a doubly disadvantaged group. They experience the combined impact of gender discrimination, ageism and social ostracisation. Emotional and financial seclusion, denial of property rights, abuse and violence are the commonly faced troubles of the older women. Numerous human right violations take place which leads to their marginalization.

The challenges faced by the older cohorts are related and interconnected. Often one thing leads to the other. Ageism is the root cause of all human right violations vis a vis the elderly. The 'perception' that these individuals have nothing to contribute leads to a prejudicial treatment towards them. It is here that a pertinent need arises to address the significant human right violations faced by the elderly through a specialized human rights framework specifically dedicated to them.

V. CURRENT FRAMEWORK IN PLACE FOR THE OLDER COHORTS

Both state-to-state and state-to-citizen conduct is governed by the International human rights law. A threefold commitment is made on part of the Nations when they espouse a human rights instrument. *Firstly,* a commitment by the States to respect and desist from interference in the enjoyment of human rights; *secondly,* to ensure protection against human rights abuses and *thirdly,* affirmative steps facilitating the enjoyment of rights.

In the year 1982 World Assembly on Ageing adopted the Vienna International Plan of Action on Ageing (VIPAA). This was the foremost UN human rights instrument which deliberated on the issue of ageing and its allied aspects. Its recommendations included avoiding the segregation of the elderly, making available home-based care for elderly persons; rejecting stereotypical concepts in government policies and recognizing the value of old age[13]. In the year 1991, the UN General Assembly adopted resolution

[13] Vienna International Plan of Action on Ageing, 1982.

46/91, the United Nations Principles for Older Persons[14]. Although as an Assembly resolution this too is not legally binding, it lists principles in five areas which governments are encouraged to include in national policies: independence, participation, care, self-fulfilment and dignity[15].

In 2002, the Madrid International Plan of Action on Ageing (MIPAA) was adopted at the Second World Assembly on Ageing. The plan lays a strong emphasis on human rights. It identified three policy directions to guide policy formulation and implementation: i) older persons and development; ii) advancing health and well being into old age'; iii) ensuring enabling and supportive environments[16]. The Political Declaration reaffirms the commitment to elimination of age discrimination, to enhance the recognition of dignity in older persons, their inclusion in society, and the promotion of their human rights in general[17].

Certain regional human rights instruments also make a reference to older persons or old age. For instance article 17[18] of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Culture and Social Rights (the "Protocol of San Salvador")[19] states that everyone has the right to special protection in old age. Other regional instruments referring to older persons are the African Charter on Human and Peoples' Rights (1981)[20], the Arab Charter on Human Rights[21] (1997) and the Charter of Fundamental Rights of the European Union[22] (2000). At the international level, an Open-ended Working Group on Ageing was established in 2011 to address the human rights situation of older men and women and consider a stronger protection regime. In Latin America, both in the Brasilia Declaration of 2007 and in the San José Charter of 2012, there is recognition of the need for a convention on the human rights of older persons.

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14 United Nations Principles for Older Persons, 1991.

15 *Ibid*.

16 The Madrid International Plan of Action on Ageing and the Political Declaration.

17 *Ibid*.

18 Everyone has the right to special protection in old age. With this in view the States Parties agree to take progressively the necessary steps to make this right a reality and, particularly, to: (a) Provide suitable facilities, as well as food and specialized medical care, for elderly individuals who lack them and are unable to provide them for themselves; (b) Undertake work programs specifically designed to give the elderly the opportunity to engage in a productive activity suited to their abilities and consistent with their vocations or desires; (c) Foster the establishment of social organizations aimed at improving the quality of life for the elderly.

19 It entered into force in 1999.

20 Art. 18: "The aged shall also have the right to special measures of protection in keeping with their physical or moral needs."

21 Art. 38(b): "The State undertakes to provide outstanding care and special protection for the family, mothers, children and the aged."

22 Art. 25: "The rights of the elderly: The Union recognizes and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life."

VI. A COMPELLING EXIGENCY FOR A SPECIALIZED FRAMEWORK

In this age of demographic ageing it becomes imperative that the legal, social and economic implications arising from growing number of older people are deliberated upon. One of the steps in this regard is the enactment of a specialized framework in the form of an International Convention on the rights of the older persons. The existing international and regional human rights mechanism in place for the elderly is insufficient to adequately tackle their peculiar concerns. One of the prime reasons for it is that 'age' is not explicitly listed as a ground on which someone should not be discriminated against in any human rights framework[23]. As a result of which age based discrimination, especially concerning 'old age' is often overlooked. Clearly a normative gap exists. The prevailing human rights framework offers a very limited protection for the issues of the elderly. Their peculiar concerns are not given much thought. Moreover insufficient attention has been paid to the specific vulnerability of the older women. Feminization of elderly is an issue which calls for serious consideration. They constitute a doubly vulnerable group as they face dual discrimination owing to gender as well as due to the stigmatization attached to the older widowed women.

Another very significant reason in support of a tailored approach for protecting the rights regime of the older persons is the fact that whatever little safeguards are currently available are scattered and dispersed. This implies that there is a lack of clarity, and invisibility of their peculiar issues. A convention would aid in bringing their issues to the mainstream, increase the visibility of older people, tackle ageism, change people's perception towards older adults, clarify responsibilities towards older people, improve accountability and provide a framework for policy and decision making. In short it will promote a life of dignity for the older persons.

The proposed convention ought to adequately address the vulnerabilities of older adults. It should provide safeguards against discrimination on the basis of old age, steps on the part of nations to contain ageism through education, awareness etc, measures for their health, safety & recreation, affordable housing, harsh provisions for dealing with elder abuse perpetrators, flexible retirement options, alternate employment opportunities, social security measures, provisions addressing their holistic needs – spiritual, social, general well being. Strict action should be taken against those medical personnel or hospitals that turn away elderly patients or encourage cessation of treatment as a cost cutting measure. The right to dignity of the older women especially those who are widowed should be protected.

[23] With the exception of one convention on migrant workers.

There should be strict provisions in place for addressing their ostracisation. Innovative steps should be introduced to make them financially independent.

The imperativeness of a convention would be that once States ratify it, they would be obligated to have in place stricter laws for the benefit of the elderly. The human right violations of the elderly would be properly checked and contained. And most importantly a regular mechanism in the form of 'reporting' and 'accountability' would ensure that nations do not shy away from protecting the rights of elderly and take active steps to reduce the number of violations in their State. This holds pertinence as any lapse on their part would bring disrepute for the nation on the International forum which obviously the States detest. Thus nations would become more responsible in their conduct towards the elderly. A tailored convention would also ensure a consistent dialogue among the member states, civil society, NGOs, private players and the older people. This in turn will lead to innovative approaches and strategies to safeguarding the interests of the older cohorts.

Having said that, it is nobody's case that a convention is 'the solution' for all the human right violations experienced by the older persons. Mere enactment of specific national policies, plans, programmes and legislations after ratification of the convention, would not bring about a real change unless implementation and regular monitoring is carried on. It has to be realized that recognition of their rights regime is just a step towards their empowerment.

The need of the hour is that a new rights-based culture vis a vis the aged is introduced. Further a change of mindset and societal attitudes towards ageing and older persons should be brought about. Rather than viewing them as welfare recipients, they need to be viewed as dynamic, contributing and crucial members of the society. This entails working towards the development of international human rights instruments and their acceptance into national laws and policies. Stricter measures that challenge age discrimination and recognition of older people as autonomous subjects are the dire need of the hour. Some of the steps which can be taken in this regard include: firstly, flexible employment, lifelong learning and retraining opportunities etc. This would facilitate the integration of the older persons in the current labour market. Secondly, supporting international and national efforts to develop comparative research on ageing and ensure that gendered culture-sensitive data and evidence from the research are available to inform policymaking.[24] Lastly: inclusion of ageing and the needs of older persons in all national development policies and programmes would go a long way in safeguarding the interests of the elderly population.

[24] *Supra* note 1 at 15.

VII. CONCLUSION

Population ageing is an issue which affects us all. It is an issue which is not confined by the barriers of the nations. A universal rights framework in place will go a long way in addressing the pertinent concerns of the growing elderly population and bringing their unique challenges in the mainstream. The basic human right to dignity often gets blurred in the welfare model which calls for a rights framework in place. With a rights regime in place on an international level, the States will get an impetus to enact laws addressing elderly concerns as well as lay down policies enabling them to live with security and dignity. Addressing their crucial issues is not a matter of charity but in conformity with the basic notions of human rights which guarantee equal safeguards for all. Putting an end to elder abuse, containing old age induced poverty and addressing their vulnerabilities are some of the significant steps in this regard.

The rights regime for the older cohorts cannot be ignored or postponed. Their concerns are valid and pressing. Giving it a cold shoulder or having a callous attitude against them would be imprudent and harsh to say the least. Older persons should not be viewed as a scary prospect. Rather population ageing is a cause for celebration. For it connotes the success of mankind in making extended living possible. It's time that we move ahead on the ladder and make these extended years meaningful. For as Butler says:

'We don't all grow white or black, but we all grow old'[25].

[25] *Supra* note 7 at 246.

ONE NATION ONE ELECTION QUESTION OF DESIRABILITY OR FEASIBILITY

—*Shrangika Jaju and Ramla Kalim*[*]

Abstract — Elections are the means to serve the democracy. The periodic organisation of free and fair elections is one of the pillars of Indian democracy. Frequent elections are also an ever increasing administrative burden for Election commission of India. Simultaneous elections can be seen an option to resolve it which basically mean conducting elections at all the tiers together at a fixed period of time. The more sensible this idea is; the more difficult implementation it has. Simultaneous elections not only offer desirability but also resolve the questions of feasibility.

This paper seeks to analyse various legal issues relating to simultaneous election. Since Free and Fair election is recognized as a basic feature of Indian Constitution, it is important to examine as to what provisions of the Constitution needs to be amended. Further to confer deep analysis of this concept, this paper has tried to examine whether such amendment will affect the basic structure of the Constitution. Consequently, it considered its effect on federal and democratic spirit of Indian Constitution. Further, the light is also thrown upon the two issues relating to question of feasibility. One deals with the situation when ruling government is not able to complete its full tenure and another with the state of hung assembly.

Taking into consideration the various reports including that of Election Commission of India, Law Commission of India, Parliamentary Committee and NITI Aayog, this paper made an attempt to analyse the idea of conducting it into two phases as recommended by the Standing Committee. In latter part, the

[*] 4 th Year (B.A. LLB.), Lloyd Law College,

question of desirability is also discussed along with the need of bringing simultaneous elections, issue relating to its legality and its impracticability in India scenario.

I. INTRODUCTION

Election process displays democratic values, and is one of the mechanisms that empower people to attain the path of good governance. India's governance system is divided into three tiers. Elections are being conducted at centre, State and local level. Present system of conducting election keeps the public preoccupied throughout the year which in a way affects the time to focus on developmental issues. The concept of 'One Nation One Election', which in simple terms known as 'simultaneous elections' is being seen as one of the way to solve this very problem. Simultaneous elections basically means structuring the election cycle in a manner that election to centre, State and local levels are synchronised together at same period of time. A time period is chosen to conduct elections for all level at once and that period is basically referred to as election period. In India, 'One nation one election' denotes for conducting simultaneous elections for the Lok Sabha and all the State assemblies together. Local elections are not being included in this process as these are subjects of state government;[1] and accordingly only the State governments have power to make laws regarding it.[2] Further, as there are many local elections, it would be impracticable to synchronise them with central and State elections. However, a view has been given that centre and state elections are to be conducted at once while all other local elections are to be conducted at another instance.

Simultaneous elections are not new for India as these were being conducted till the year 1967. The general election to Lok Sabha and all legislative assemblies were held together in 1952, 1957, 1962, and 1967. Due to premature dissolution of some state assemblies in 1968-1969, the cycle got disrupt. Fourth and fifth Lok Sabha completed its 5 year term but sixth, seventh, twelfth and thirteenth Lok Sabha was dissolved prematurely. Several State assemblies also faced similar consequences due to different reasons. This led to present system of conducting elections in whole of the year.

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1 *See*, Indian Constitution Art. 243-K, Art. 243-ZA, Entry 5 of List II of Sch. 7.

2 Standing Committee of Parliament, Feasibility of Holding Simultaneous Elections to the House of People (Lok Sabha) and State Legislative Assemblies (Report No. 79, 2015), at p. 12.

II. NEED FOR SIMULTANEOUS ELECTIONS

Various reports have favoured to introduce the process of conducting simultaneous election again in India. Justice B.P. Jeevan Reddy, chairman of fifteenth Law Commission, has stated in its report on election reforms,

> *"We must go back to the situation where the elections to Lok Sabha and all the legislative assemblies are held at once."*[3]

In 2012, former deputy Prime Minister Mr. L.K. Advani and Ex-President Mr. Pranav Mukherjee in 2018 had also it and recommended for simultaneous elections.

Most, recently the Hon'ble Prime Minister Mr. Narendra Modi supporting the need to conduct simultaneous election has said,

> *"With some elections or the other throughout the year, normal activities of the government come to a standstill because of code of conduct. This is an idea the political leadership should think of, If Political Parties collectively think we can change it... The Election Commission can also put in their idea and efforts on holding the polls together and that will be highly beneficial."*[4]

On 4th October 2017, Hon'ble Prime Minister of India had invited public opinion on this issue on 'My Government' portal.

One of the main arguments given in support of simultaneous elections is the huge amount of expenditure incurred in conducting election in present system. This amount is increasing with every next election. It was about Rs. 1115 crore for conducting Lok Sabha election in 2009. It got tripled to Rs. 3870 crore during 2014 Lok Sabha elections. A recent report titled 'Analysis of funds collected and expenditure incurred by political parties during elections between 2004-2015' published by association for democratic reforms mentions that collectively for the Lok Sabha elections held in 2004, 2009 and 2014, political parties had spent Rs. 2355.35 crore.[5] Simultaneous election will save this money since parties will be relieved from frequent

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[3] Law Commission of India, Reform of the Electoral Laws, (Report No. 170, 1999), at Para 7.2.1.1.

[4] Bibek Debroy & Kishore Desai, "Analysis of Simultaneous Elections: The 'What', 'Why' and 'How' ", (April 14, 2018, 01:36 A.M.), http://niti.gov.in/writereaddata/files/document_publication/Note%20on%20Simultaneous%20Elections.pdf.

[5] Association for Democratic Reforms, Analysis of Funds Collected and Expenditure incurred by Political Parties during elections between 2004 and 2015 (2016).

collection of funds for various elections. Other reasons are that frequent elections led to imposition of model code of conduct many times which hampers the working of government effectively. Further parties used to get involved in elections whole of the year, so the time to think for nation's development is somewhere get affected. Simultaneous elections will help to solve all these problems. Csaba Nikolenyi, a Montreal based professor at Concordia University studying India elections, published a paper in publication of political studies Associations. He used the most basic of all the formulas to calculate voter's motivation, among others, and drew the conclusion that separate elections in India are preventing more people from participating in democratic process because participation of voters shows the strength of democracy.[6]

However simultaneous election is not only a legal issue but also an issue relating to desirability and feasibility. The legal issues that highlight the feasibility of simultaneous elections in India are as follows:

- Whether such amendment will violate basic structure of Indian Constitution?
- Whether it will violate sprit of federalism of Indian Constitution?
- Whether it will attack on democracy?

Light is also thrown upon the two issues relating to question of feasibility. One deals with the situation when ruling government is not able to complete its full tenure and another with the state of hung assembly.

III. CONSTITUTIONAL ISSUES RELATING TO SIMULTANEOUS ELECTIONS

A. Whether it violates the basic structure of the Constitution?

Parliament is empowered to make law with respect to all matters relating to election of either Houses of Parliament as well as state legislature as provided under Article 327 read with entry 72 of the Union List. In case where Parliament has made no law in this respect then the respective state legislature has power to make any provisions with respect to all matters relating to election of both the Houses of state legislature as provided under Article 328 read with entry 37 of the State list.

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[6] Party Government in Post-Communist Central Europe: "The Role of Political Parties in Cabinet Formation, Cabinet Decision-Making and Cabinet Stability in the Czech Republic, Hungary, Poland and Slovakia", Paper delivered at the Annual Meeting of the British Columbia Political Studies Association, Vancouver, 2004.

Parliament has power to amend any part of Constitution provided it does not violate the basic structure of Constitution.[7] Basic structure is itself nowhere defined in Constitution. It has to be judged from cases to case.

Here the issue is whether simultaneous elections affect the basic structure of the Constitution and if they are then up to what extent principle of basic structure restricts the power of Parliament in amending the election provisions. In Election case, Hon'ble Supreme Court clearly held that free and fair election and democracy are part of basic structure.[8] It is said that any attack on free and fair election is also attack on democracy. This means any attempt by Parliament to violate the mechanism of free and fair election or democracy will be in violation of basic structure.

The main question which has to be examined is whether bringing of simultaneous election will attack on free and fair election?

Simultaneous election emphasised only on conducting of elections for Lok Sabha and all state assemblies at a fixed time. Manner of conducting free and fair election is nowhere affected. Only the timing of conducting election is fixed. In order to ensure free, fair and impartial elections, the Constitution establishes the election commission, a body autonomous in character and insulated from political pressure and executive influence. Care has been taken that commission functions as an independent agency free from external pressures from the party in power, or the executive of the day.[9] Article 324(5) clearly states that the tenure of chief election commissioner is independent of executive discretion, for he cannot be removed from his office except in like manner and on the like grounds as a judge of the Supreme Court. Further, the conditions of the services of the chief election commissioner cannot be varied to his disadvantages after his appointment as provided in proviso of Article 324(5). Introduction of simultaneous election does not in any way affect these provisions of Constitution. Election Commission will work as has been envisaged in the present Constitution. Thus it can be argued that simultaneous election will not in any way attack on free and fair election principle as propounded by Hon'ble Court in Election case.

For feasibility of simultaneous election, the term of Lok Sabha or some Vidhan Sabha has either to be expanded or reduced so that all the elections can be synchronised together. This means Parliament has to amend Article 83(2) and 172(1) which clearly states that the term will be 5 years from day of appointment of its first meeting. It can extend not exceeding 1 year

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7 *Kesavananda Bharati Sripadagalvaru* v. *State of Kerala*, (1973) 4 SCC 225 : AIR 1973 SC 1461.

8 *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1 : AIR 1975 SC 2299.

9 M.P. Jain, *Indian Constitutional Law* 827 (7th edn., 2014).

at a time, but only in case of emergency. If Parliament brings a provision which allows the term of some state legislatures to be less or more than five years to achieve the goal of simultaneous election as discussed above, then again the question arises whether such provision will be in violation of basic structure doctrine?

It is viewed that such provision will only be a temporary provision to deal with one time situation. Since basic structure has only been decide by cases so far so it is difficult to say that such a temporary provision will not violate the basic structure doctrine.

Thus it can be argued that as far as above two provisions are concerned. Simultaneous elections may pass the above tests. Democracy and federalism are also part of basic structure of Constitution which means that so as to pass the test of basic structure doctrine, simultaneous elections have to pass the test of federalism and democracy.

B. Whether it violates the principle of federalism?

It has always been a question of academic debate whether India is a truly federal country. According to Wheare, the Constitution of India is 'quasi-federal' and not 'strictly federal.' Dr. Ambedkar, is of the view. "The Constitution has been set in a tight mould of federalism." Sir Ivor Jennings viewed "India has a federation with a strong centralizing tendency." Dr. Gajendragadkar, former Chief Justice of India, observed, "It cannot be said to be federal in the true sense of the term." Dr. K.M. Munshi, a distinguished jurist, portrayed Indian Federation as "a quasi-federal union invested with several important features of a unitary government." Austin describes it as a cooperative federalism.

Indian courts have favoured the argument that India is not completely federal and it has unitary features also.[10] Federalism has been declared as part of basic structure of Indian Constitution.[11] It means Parliament does not have power to violate this unique federal structure of Indian Constitution. Although it does not appears from the concept of simultaneous elections that it is going in any way to affect the federal structure of our economy. However it is alleged that it may affect the federal structure in long run. It is alleged that if simultaneous elections are brought then there are more chances that states and centre will be ruled by same party which means it may in a way suppress the regional parties. The reason being is that parties organize campaign to persuade the electorate to vote the party. Each party has its own manifesto and it is generally different when they campaign for

[10] *State of Rajasthan* v. *Union of India*, (1977) 3 SCC 592 : AIR 1977 SC 1361.
[11] *S.R. Bommai* v. *Union of India*, (1994) 3 SCC 1 : AIR 1994 SC 1918.

State election since at that time they used to focus more on local issues. In case of simultaneous election, both the manifesto will be done at same time. Voters will not be able to distinguish between national and regional issues. It is further supported by the study conducted by IDFC institute that "on average there is a 77 percent chance that the Indian voter will vote for the same party for both the State and centre when elections are held simultaneously."

Although simultaneous were being conducted till 1967 but that was not a planned system rather a historical fact only. Further that era was largely an era of one party system at centre and states. System of simultaneous elections did not work for long even there was largely one party ruling at centre and States. The practice was broken in 1967 just because of formation of some non-congress government at some states. Today we have multiple numbers of parties. Moreover splits and merger of one party with another is very common today. For example- In 1981, Congress party split into two parties because of difference on choice of congress candidate for presidential elections. Party was divided into two groups. One is known as Congress 'R' which was in support of then Prime Minister Indira Gandhi and presided by Shri C. Subramaniyam. The other class is known as Congress 'O' led by Shri Nijalingappa who was the president of unified party before the split. Such splits and mergers are like signing of the death warrant.[12] This has increased very much in today's scenario. Now it can be argued that the implementation of simultaneous election is impracticable because of presence such large number of parties.

It is submitted that if simultaneous elections in long run brings as what has been apprehended by above discussion then it may affect the federal sprit of our Constitution because such centralisation of power in hand of one party is not good for federalism.

C. Whether it will attack on democracy?

> "Elections in a democracy affect the purse of the people and the dynamic sprit of public opinions. Elections are necessary for the security of all members as they provide protection against responsible government. The accountability introduced by elections in a democratic system makes it necessary for the government to peruse collective goals that the majority agrees upon."

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[12] *All Party Hill Leaders' Conference* v. *W.A. Sangma*, (1977) 4 SCC 161 : AIR 1977 SC 2155.

India is known for being the largest democracy of world. Preamble of our Constitution clearly states the vision of founding fathers. They took lot of pain to create a political system which is based on parliamentary democracy. Even in Kesavananda bharati case, Jaganmohan Reddy, J. stated that elements of the basic features were to be found in the Preamble of the Constitution and the provisions into which they translated such as: sovereign democratic republic, parliamentary democracy, three organs of the State.

In Election case, Justice H.R. Khanna opined that democracy is a basic feature of the Constitution and includes free and fair elections. Justice K.K. Mathew and Justice AN Ray were also of the opinion that democracy is a basic feature of our Constitution.

Democracy has also been declared as basic structure of India Constitution by Supreme Court in *Kihota Hollohon* v. *Zachilhu*.[13]

Elections provide the citizens to judge the functioning of government. This right is being exercised after every five year for elections of Lok Sabha and Vidhan Sabha unless dissolved earlier since these are the very roots of democracy. Simultaneous election will mean that voters will get to hold the accountability union as well as state government at once. If these simultaneous elections are held in two phases then the chance of holding accountability will only at two times in 5 year term. While in present system, since election are being conducted many time for different states so they are in better position to held the government responsible for its actions. If there are no more elections for five years, the people will surely be forgotten for that duration. Frequent elections keep the bond between the people and their representatives strong.

IV. QUESTION OF FEASIBILITY OF SIMULTANEOUS ELECTIONS

S.Y. Qureshi, Former Election Commissioner of India, has said that,-

> *"Simultaneous elections are not only question of desirability but also feasibility."*

Although simultaneous elections were being conducted till 1967 but that was just an incident of history rather than an intended practise. Parliamentary standing committee on Personnel, Pubic Grievances, Law and Justice has submitted a report in which it has examined the feasibility of conducting simultaneous elections for Lok Sabha and all State assemblies.

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[13] 1992 Supp (2) SCC 651 : AIR 1993 SC 412.

Committee has given many recommendations to synchronise the present terms of different government.

Standing Committee of Parliament has also said that, -

> *"The committee is conscious of the fact that holding simultaneous elections may not be feasible in 2016 or even in a decade but it expresses confidence that a solution will be found to reduce the frequency of elections which relieve people and government machinery being tires of frequent electoral processes."*[14]

This is why it has recommended an alternative and practicable method of holding simultaneous elections which involves holding of elections in two phases.

It has recommended that for bringing simultaneous elections the term of some of state legislative assemblies either be expanded or reduced so that elections for all the state legislative assemblies can be conducted with Lok Sabha. Article 83(2) and 172(1) states the term shall be five years unless dissolved earlier for Lok Sabha and State assemblies respectively. It means that there needs an amendment in the Constitution for bringing such provision which depends upon the desirability of parliamentarians. Further such amendment should not violate the basic structure.

- What if ruling party looses power before completion of its full term?

One of the main questions regarding feasibility of simultaneous election is 'How to deal with the situation if any ruling government has lost confidence of House of People or state legislative assembly as the case may be?'

Article 75 states that Council of ministers shall be collectively responsible to the House of People i.e. If Parliament has no confidence in the ruling government then the ruling government has to resign. In such situation, President calls another party to prove majority on floor of House to form the government. If no other party is able to prove the majority then President dissolves the Lok Sabha under Article 85(2)(b). Similar provisions are provided for state under Article 164(2) and 174(2)(b) respectively.

During the last 50 years, Lok Sabha has witnessed several premature dissolutions, the reason being that no political party has been able to secure a stable majority in the House. In 1969, the ruling Congress Party broke up which led to premature dissolution of Lok Sabha without completing its

[14] *Supra* note 2, at 16.

remained fourteen months. In 1979, again Lok Sabha was dissolved after only two years of its existence. In 1991, Lok Sabha elected in 1990 got dissolved. In 1997 Lok Sabha, elected in 1996, got dissolved within two years of its election. Again, government formed in 1997 got defeated in 1999, led to dissolution of Lok Sabha. These instances clearly show that there can be no certainty that government will always complete its five year term. Although after judgment of *S.R. Bommai* v. *Union of India*, Court has put a check on president power to impose president rule in states. But it cannot be said that it has completely removed the problem of fall of state government. This means if government at union level or at any state level fails to complete its term then it will directly affects the feasibility of simultaneous election which was one of the cause of transforming India from simultaneous election to present situation due to fall of some state governments in 1969.

In order to avoid such situation, there may be three alternatives to deal with such situation-

- Passing of confidence and no confidence motion concurrently-

In Britain, section 2(3)(b) read with sec 2(4) and 2(5) of Fixed-term Parliament Act, 2011 states that Confidence motion in favour of alternate government is to be passed within 14 days of passing of no-confidence motion.[15]

Standing Committee on Personal, Public grievances and Justice has also suggested for this provision in its 79th report.[16]

Writers are of the view that it is always not possible to form alternate ministry having confidence of House of People or state legislature as the case may be.

For an instance - In 1990, Hon'ble Prime Minister Chandra Shekhar managed a majority in Lok Sabha with the help of Congress party get defeated in 1991 when congress withdrew its support. President tried his best to form alternate ministry but he has to dissolve Lok Sabha because no viable alternate government could possibly be installed.

Similarly at another instance in 1997, Hon'ble Prime Minister I.K. Gujaral lost his majority in Lok Sabha and advised president to dissolve Lok Sabha. Again President tried his best to form alternate ministry and

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[15] Fixed-term Parliaments Act, 2011 (Britain).

[16] *Supra* note 2 at 16.

refused to accept the advice but he failed as no alternate party has majority to form the government.

When re-election held in 1997 and coalition government came to power but it fell in 1999. The president sought to explore the possibility of an alternative government but when he failed in this enterprise, Lok Sabha got dissolved and fresh election had to be conducted. It can be argued from all these instances clearly show that the above idea of alternative confidence motion is although good but will not always work.

It is also submitted that according to this provision, if no alternative government can be formed then the ruling government will remain in power even though it does not have confidence of the Lok Sabha. Such a step vindicates the normal working of parliamentary form of government as well as constitutionalism as it is against democratic norms that a cabinet which has lost confidence of the majority in the house should continue to remain in power.[17] This will be against the notion of democracy. This will also violate the principle of collective responsibility which represents ministerial accountability o the legislature. It means that the Government must maintain a majority in the Lok Sabha a condition of its survival. In Britain, the principle is no legal but conventional; in India, on the other hand, there is a specific provision in the Constitution to ensure the same as provided under Article 75(3) which clearly states that Council of ministers shall be collectively responsible to Lok Sabha and Article 164(2) which clearly states that Council of ministers shall be collectively responsible to state legislative assembly.

- Emergency provision

Another alternative may be imposing partial emergency till the next elections.

Article 356 read with Article 357 empowers President to impose president rule in state. It is further supported by Article 355 which directs state to ensure that the government of every state is carried in accordance with the provisions of the Constitution. In India, President Rule has been imposed several times when there is fall of government and no alternate ministry can be formed at State level.

For an instance, in 1967, because of the difficulties in the Ministry making in Rajasthan, the state legislature was suspended and president rule was imposed. Similarly president rule was imposed in Uttar Pradesh, Bihar and Punjab legislatures in 1968 due to mistrial crises. In 1974, when chief

[17] *Supra* note 9.

minister resigned, Gujarat assembly was dissolved and president rule was imposed. There are many examples of imposing president rule in States when there is no possibility of forming ministry. It can be argued that the situation of fall of state government if arises after simultaneous elections then it can be dealt by imposing president rule at state level and dissolving the assembly. However dissolution of assembly ought to be the last resort.

The maximum period for which a proclamation can remain in force in a state is three years.[18] It means it is mandatory to conduct election before completion of 3 years. It again raises the question of dealing with situation if state government falls within one year of its formation.

If we talk about emergency provision at union, there is no constitutional provision to impose president rule at centre such as there is for States. Only National and Financial emergency can be imposed on centre. It is observed that national emergency can be imposed when there is threat to security of India because of war or external aggression or armed rebellion while financial emergency can be imposed on ground of threat on financial stability or credit of India or any part of India.[19] Mere fall of government can't be the ground of imposing these types of emergencies. In such situations, there is convention that President will resume the power till the time of next election and work with the aid of caretaker government.[20] A view has been expressed that such a ministry should act only as a caretaker government and takes routine decisions not policy decisions or make heavy financial commitments binding the future government.[21] It can be argued that it will not be prudent to appoint caretaker government for a long time.

- Provision for Re-election

Another alternative is to conduct re-election to fill the vacancy. In Gujarat Assembly Election Matter, SC has directed that-

"On the premature dissolution of the Assembly, the Election Commission is required to initiate immediate steps for holding election for constituting legislature assembly on the first occasion and in any case within six months from the date of premature dissolution of the assembly. Efforts should be to hold the election and not to defer holding the election. Only when there is an 'act of God' the election can be postponed beyond six-months."[22]

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[18] Indian Constitution Art. 356 cl. 4.
[19] Indian Constitution Art. 352, Art. 360.
[20] *Thiru K.N. Rajgopal* v. *Thiru M. Karunanidhi*, (1972) 4 SCC 733 : AIR 1971 SC 1551.
[21] R. Venkataraman, "Relations with Cabinet", *Hindustan Times*, February 24, 1998, at 13.
[22] *Special Reference No. 1 of 2002, In re (Gujarat Assembly Election Matter)*, (2002) 8 SCC 237.

In Britain, section 2(1)(b) of Fixed-term Parliament Act, 2011 states that,-

> *'If House of Commons, with the support of two-thirds of its membership (including vacant seats), resolves that there shall be an early Parliamentary election.'*[23]

It is viewed it would be very difficult to introduce this provision in India because India is a federal polity. If election are conducted again for one or more state for another 5 year term then simultaneous election can't be sustained as happened in 1967 due to fall of some state legislatures.

Standing committee in its report has recommended that this provision is to be incorporated in India subject to the condition that the newly appointed government shall be elected for the remaining term of preceding government only and next election will be conducted on the same time on which it has to be conducted if the preceding government did not fall and completed its term.[24] It is submitted that this will require amendment in Constitution since Article 83 and 172 clearly states that the term of Lok Sabha and state legislature shall be 5 years each respectively provided these are not dissolved prematurely.

- What if there is hung Assembly?

Another question regarding feasibility of simultaneous election is how to deal with situation when there is hung Assembly. Hung Assembly is a term used in legislatures under the Westminster system to describe a situation in which no particular political party or pre-existing coalition has an absolute majority. In India is an election results in a hung assembly in one of the state legislative assemblies and no party is capable of gaining confidence then fresh elections are announced to held as soon as possible. Until this occurs, President Rule is imposes. In India, there have been many situations of hung assemblies in the state legislatures. For example- Bihar legislative assembly elections were held twice in 2005. There was a hung assembly in February 2005 Assembly election. Since no government could be formed in Bihar, fresh elections were held in October-November the same year. President rule was imposed in between two elections. Then Nitish Kumar formed the government along with BJP as a part of National Democratic Alliance.

Such situation may also arise under simultaneous election. In such case only two options would be available either to implement president rule till next 5 year so that cycle of election may not be disturbed to re-conduct the

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[23] *Supra* note 15.
[24] *Supra* note 2.

election. President rule can't be imposed for such long time because of three year bar placed under Article 356. If election is re-conducted then it will again questionable whether the newly formed government will work for its full 5 year term or for remained 5 year term for which government have ruled if the assembly was not hung. If newly formed government rules for its full 5 year term then it will disturb the election cycle of simultaneous elections and if it rules for remained five year term then it will be against the Constitutional mandate of 5 year term. This can only be done after an amendment in Constitution.

A. Election in two phases

Parliamentary committee has recommended an alternative approach in which simultaneous elections can be made more practicable.

"The committee has envisaged holding of elections of some legislative assemblies of midterm of Lok Sabha and remaining with end of tenure of Lok Sabha."

This paper has tried to examine the extent of practicability after adopting such approach. Two periods are suggested for conducting elections. In one period, elections of Lok Sabha along with some State assemblies are to be conducted and in second period, i.e. after 2.5 years from conducting of Lok Sabha election, election of remained state assemblies are to be conducted.

If we take first major issue regarding feasibility, i.e. when ruling party looses power before completion of its five year term then the solution may be reached first by trying to pass an alternative confidence motion in favour of another government. If this is not possible then emergency may be imposed at State till the time of next second phase of election which will definitely be conducted after 2.5 years of first phase. At that time, re-election of that particular state will also be conducted along with other States. In this way, such emergency will not be barred by three year limit of article 356 and newly formed government will get its full 5 year term. If the same situation has been arisen at centre level then caretaker government may work. Although it may make simultaneous elections practicable but it has many flaws. Imposition of president rule for such long time may affect the federal sprit of States and autonomy of state governments as discussed above. Such provision will not definitely work for union level because as already been discussed that caretaker government is against the principle of collective responsibility. Further such government can take only routine decision and should not take major policy decisions. This may cause damage to national interest to appoint it for such a long time.

Same issues will arise in case of Hung Parliament. At that time, only two alternative would be available either to impose emergency till next phase of election and then to conduct re-election. It will also be subject to same flaws as discussed above.

V. QUESTION OF DESIRABILITY

Parliamentary democracy can work efficiently only with the consensus of Mps and MLAs. In India, there are 29 States and several political parties. These parties are different from each other and their manifestos are also very different. For example, Bhartiya Janta Party has always supported simultaneous elections. Infect its manifesto of 2014 election was 'Evolving method of holding assembly and Lok Sabha Elections simultaneously'. But various parties are not agreeing with this. Congress has termed it as impracticable and unworkable. Communist party of India has also said that it is not feasible. Telgu Desam Party has termed it as undemocratic. Communist Party of India- Marxist has pointed out that there are many problems in its implementation.

Further since for implementing simultaneous elections, term of some state assemblies would have to be reduced. It is very difficult to accept that parties will easily agree to leave their term of ruling.

Consensus among parties is tool for working of parliamentary democracy. Standing committee has also agreed with fact and has said in its report that

> *"The Committee feels that gaining consensus of all political parties may be difficult in certain states of the country. However in larger context of economic development and implementation of election promises without creation of the impediments due to enforcement of model code of conduct as a result of frequent elections, the prospect of holding simultaneous election needs to be weighed and deeply considered by all political parties."*[25]

It can be said that simultaneous elections can be possible with the cooperation of political parties which represents political will of the people.

VI. CONCLUSION

It is concluded that simultaneous elections are good in theory but bad in its practicability in country like India. Its practicability firstly depends upon

[25] *Supra* note 2 at 16.

the political will of parties. Parliamentary democracy works on consensus. Here comes the question of desirability. However, if in the larger context of economic development and implementation of election promises, political parties bring it in force by consensus then question of its feasibility arises. Transformation of India into multiparty system has made its feasibility very difficult. Elections bring changes in democratic values but in India, emergence of multi party system has change the election system of India from "one nation one election' to present system of frequent elections. It was not difficult to come to present situation but it will be very difficult to go back to starting system. Though the idea of conducting simultaneous elections in two phases may help to some extent but as discussed above that it still does not answers the entire question on its feasibility. This paper strongly suggests that it is completely impracticable to implement it even in upcoming decades. Although it is very difficult to say that it may become practicable after some decades but today India is certainly not ready for 'One nation one election'.

JUVENILE INJUSTICE: A CRITIQUE ON THE CONSTITUTIONALITY OF DEEMING 16-18 YEAR OLD JUVENILES AS ADULTS UNDER THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015

—Abhinav Benjamin and Ananth Kamath M[*]

Abstract — The Juvenile Justice (Care and Protection of Children) Act of 2015 has brought in a system of trial process wherein juveniles aged between 16 to 18 years have a possibility of being tried as adults for heinous offences in a Sessions Court. This paper analyses in detail whether the provisions of this Act that eventuate this system is constitutionally valid. The paper tests the constitutionality of these provisions with respect to the right to equality under Article 14 and the right to fair trial under Article 21 of the Constitution of India. The arbitrary classification of juveniles aged between 16 to 18 as adults and the arbitrary powers of the Juvenile Justice Board in determining whether a juvenile be tried by the Board or a Sessions Court has been examined in detail. Further a comparison is drawn between the provisions of the Act and other Indian and International legislations, as well as International Conventions dealing with the determination of the age separating a juvenile and an adult. The implications of this system of treating juveniles in this particular age group as adults under various statutes have also been discussed. The authors conclude in this paper that the impugned provisions of the Act are in violation of the Constitution of India as well as various International Conventions; thereby warranting its invalidation by law at the earliest.

[*] 5th year, BA LLB Hons., School of Law, CHRIST (Deemed to be University) , Bangalore.

I. INTRODUCTION

The presumption that sentencing a criminal to prison will make the world a better place is not always true. Sentencing a 16 year old juvenile to prison will create an even greater danger to society because a child going to prison at the age of 16 and coming out at the age of 26 or 30 will not be reformed. He will not have a job, and will hold a grudge against society for confining him to a life in prison during the most crucial years of his life. In all likelihood, such a juvenile will turn back to a life of crime.

The Juvenile Justice (Care and Protection) Act which came into force on the 31st of December, 2015 is the primary legislation in India that appertains to children alleged and found to be in conflict with law and children in need of care and protection. The scope of this paper is restricted to the provisions of the Act that provide for cases where, if a juvenile aged 16 and above commits a heinous offence, the Juvenile board will assess the mental and physical capacity of the juvenile to commit such a crime[1]; and based on this preliminary assessment, the Board if it so decides, may transfer the case to the Children's Court or Sessions Court[2] where the child will be tried as an adult.[3]

This paper examines the Constitutionality of the impugned Sections of the Act with emphasis on the unreasonable classification of 16-18 year old juveniles, and the arbitrariness of this classification and the procedure involved. The paper lists the implications of treating 16-18 year old juveniles as adults and compares the impugned provisions with other legislations in India dealing with the age of majority; other Juvenile Justice legislations in different countries and with International Conventions. The purpose of this paper is to examine whether the treatment of 16-18 year old juveniles as adults under the Act is in violation of the Constitution of India and the principles of Juvenile Justice.

II. UNCONSTITUTIONALITY OF THE ACT

A. Violation of the Right to Equality under Article 14

Section 15 of the Act[4] violates the Right to Equality enshrined under Article 14 of the Constitution[5] in two aspects: First, the treatment of juveniles or children in the age group of 16-18 differently from juveniles or

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1 The Juvenile Justice (Care and Protection of Children) Act, 2015, S. 15.
2 The Juvenile Justice (Care and Protection of Children) Act, 2015, S. 2(20).
3 The Juvenile Justice (Care and Protection of Children) Act, 2015, S. 18(3).
4 The Juvenile Justice Act, *supra* note 1.
5 Indian Constitution Art. 14.

children below 16 years of age. On examination of the impugned Section, it is clear that there is no reasonable basis to differentiate juveniles or children in the age group of 16-18 from the other ages of juveniles[6] thereby resulting in a blatant form of inequality for the juveniles and children above the age of 16. Second, the arbitrary power given to the Juvenile Justice Board under Sections 15 and 18(3) of the Act to decide the case or transfer it to the Children's or Sessions Court.

As per the provision of Section 15 read with Section 18(3) of Act[7], the Juvenile Justice Board will determine whether they will decide upon the matter or transfer it to the Children's Court based on a preliminary assessment which takes into regard the mental and physical capacity of the child to commit an offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence.

The Standing Committee[8] which was constituted prior to the passing of the The Juvenile Justice (Care and Protection of Children) Bill, 2014 in the Rajya Sabha stated that the various stakeholders who were consulted by the Committee were in agreement that then proposed legislation seeking to bring major changes in juvenile justice system were in contravention of the Constitutional Provisions of Article 14 and 15. The Committee Report concluded at that time that "the existing juvenile system[9] is not only reformative and rehabilitative in nature but also recognises the fact that 16-18 years is an extremely sensitive and critical age requiring greater protection. Hence, there is no need to subject them to different or adult judicial system as it will go against Articles 14 and 15(3) of the Constitution."[10]

The Justice Verma Committee which was assigned to look into the possible amendments in the criminal laws related to sexual violence against women looked at available statistics, scientific evidence on recidivism and also took into account India's international commitment on protecting the Rights of Children; took the view that the present cut-off of 18 years should be retained and that the age of a juvenile need not be reduced to 16 years[11].

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6 The Juvenile Justice (Care and Protection of Children) Act, 2015, S. 2(35), "*Juvenile" means a child below the age of eighteen years*;

The Juvenile Justice (Care and Protection of Children) Act, 2015, S. 2(12), "*Child" means a person who has not completed eighteen years of age*.

7 The Juvenile Justice Act, *supra* note 3.

8 Department Related Parliamentary Standing Committee on Human Resource Development, Rajya Sabha, The Juvenile Justice (Care and Protection of Children) Bill, 2014, Report No. 264, (25 February 2015) available from http://www.prsindia.org/uploads/media/Juvenile%20Justice/SC%20report-%20Juvenile%20justice.pdf.

9 The Juvenile Justice (Care and Protection of Children) Act, 2000.

10 Indian Constitution Art. 14; Indian Constitution Art. 15, cl. 3.

11 Gopal Subramanium, J.S. Verma & Leila Seth, Report of the Committee on Amendments to Criminal Law, (23 January 2013) available from http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf.

On dissecting the provisions of the Act, an in-depth analysis of how the Act contravenes the Right to Equality is elucidated as follows:

i. The Lack of any Reasonable Classification to treat juveniles and children above the age of 16 differently

In any scenario where similarly situated persons are treated differently, the question of violation of equality and discrimination arises.[12] Article 14 envisages equality before law and equal protection of laws. The Supreme Court has aptly observed that "Equal Protection of Laws is corollary to Equality before Law and in substance both the expressions mean the same"[13]. "The principle of equal protection does not take away from the state the power of classifying persons for the legitimate purpose"[14]. "But the doctrine of Reasonable Classification must not be over emphasized as it is only a subsidiary rule involved to give practical content to the doctrine of Equality and therefore the doctrine of equality should remain superior to doctrine of classification"[15].

As per law, classification[16] should be based upon two things[17] firstly, it should be based upon the Intelligible Differentia[18] and secondly, the Intelligible Differentia should have a "rational nexus with the object sought to be achieved"[19]. Article 14 forbids class legislation but permits reasonable classification provided that it is founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and the differentia has a rational nexus to the object sought to be achieved by the legislation in question[20].

The classification under Section 15 of the Act is not reasonable and it has no rational nexus to the object sought to be achieved. As per its preamble, the Act was enacted to consolidate and amend the law relating to children

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12 *L.P. Agarwal* v. *Union of India*, (1992) 3 SCC 526 : AIR 1992 SC 1872.

13 *Ibid*.

14 *State of Bombay* v. *F.N. Balsara*, AIR 1951 SC 318.

15 *Mohd. Shujat Ali* v. *Union of India*, (1975) 3 SCC 76 : AIR 1974 SC 1631.

16 Acharya Dr. Durga Das Basu, *Commentary on the Constitution of India*, 1396 (LexisNexis Butterworths Wadhwa Nagpur, 8th edn., 2007). "Classification means segregation of classes which have a systematic relation, usually found in common properties and characteristics."

17 *Kangsari Haldar* v. *State of W.B*., AIR 1960 SC 457 : (1960) 2 SCR 646; *Kedar Nath Bajoria* v. *State of W.B*., AIR 1953 SC 404; *Ram Sarup* v. *Union of India*, AIR 1965 SC 247.

18 Ramanatha Aiyar, *Advanced Law Lexicon*, 2391 (3rd edn., 2005). "The expression Intelligible Differentia means difference capable of being understood. A factor that distinguishes or in different state or class from another which is capable of being understood".

19 *Laxmi Khandsari* v. *State of U.P*., (1981) 2 SCC 600; *Harakchand Ratanchand Banthia* v.*Union of India*, (1969) 2 SCC 166 : AIR 1970 SC 1453.

20 National Council for Teacher Education v. Shri Shyam Shiksha Prashikshan Sansthan, (2011) 3 SCC 238.

alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, herein under and for matters connected therewith or incidental thereto.[21]

The Act has defined juveniles and children as persons who are below the age of 18[22]. However Section 15 of the Act brings in a separate classification of the age group of 16-18 without any Intelligible Differentia. Thus Section 15 makes the Classification of this age group unreasonable, resulting in the violation of the Right to Equality. In *Subramanian Swamy* v. *Raju*[23], the Supreme Court elucidated that "categorization need not be the outcome of a mathematical or arithmetical precision in the similarities of the persons included in a class and there may be differences amongst the members included within a particular class. So long as the broad features of the categorization are identifiable and distinguishable and the categorization made is reasonably connected with the object targeted, Article 14 will not forbid such a course of action." The Supreme Court in *State of W.B.* v. *Anwar Ali Sarkar*[24], declared Section 5(1) of WB Special Courts Act, 1950 unconstitutional as it gave arbitrary power to the executive and the legislature to decide which cases are to go a special Court and which ones are to be decided by a normal Court without making any classification in the law itself.

Therefore if the inclusion of all persons under 18 into a class called 'juveniles' is understood in the above manner, differences inter se and within the 'under 18' category may exist. Article 14 will, however, tolerate the said position. "Precision and arithmetical accuracy will not exist in any categorization. But such precision and accuracy is not what Article 14 contemplates"[25]. The separate classification of 16 – 18 year old juveniles does not adhere to or does not have any nexus with the objective sought to be achieved. The Juvenile Justice Board under section 15 of the Act therefore has an arbitrary power to conduct a preliminary inquiry to determine whether a juvenile offender is to be sent for rehabilitation or be tried as an adult. The jurisdiction of Article 14 extends to the prevention of arbitrary and unreasonable actions of the State, which are "antithetical"[26] to the rule

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21 The Juvenile Justice (Care and Protection of Children) Act, 2015, Preamble.
22 The Juvenile Justice (Care and Protection of Children) Act, 2015, Ss. 2(12) & 2(35).
23 (2014) 8 SCC 390.
24 AIR 1952 SC 75.
25 *Ibid.*
26 *A.P. Pollution Control Board II* v. *M.V. Nayudu*, (2001) 2 SCC 62.

of equality. In *Avinder Singh* v. *State of Punjab*[27] it was held that arbitrariness must be excluded from the law, for if power is arbitrary, it is potential inequality, and Article 14 is fatally allergic to inequality of the law.[28] Therefore the unreasonable classification of juveniles of the age group of 16-18 as per Section 15 of the Act, being of such an arbitrary nature is in grave violation of the Right to Equality.

ii. Arbitrary power of the Board under Section 15 of the Juvenile Justice Act, 2015

In addition to the classification of 16-18 year olds itself being arbitrary, the manner in which the Juvenile Board makes this classification is also of the same degree of arbitrariness, if not more. A detailed elucidation of this is stated in the three aspects described below.

a. Absence of the compulsory presence of a psychologist in the preliminary assessment of the juvenile

The proviso[29] under Section 15 of the Act, 2015 states that the in the preliminary assessment by the Board in the case of heinous crimes, the Board ***may*** take the assistance of experienced psychologists or psycho-social workers or other experts. This implies that the Board **may also not take** the said assistance. Thus this imparts a power on the Board which is completely arbitrary in Nature as the board may choose to take assistance at its own will. A common man or lay person is not qualified to assess the mental capacity of a juvenile and therefore the assistance of experienced psychologists or psycho-social workers or other experts is extremely crucial in assessing the mental capacity of a juvenile.

The term 'may' in Section 15 results in a vague and ambiguous understanding of the statute. The Supreme Court has held that in case of such vague and ambiguous laws, the Court after gathering the intentions of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made; has a duty to strike it down and leave it to the legislature if it so desires, to amend it.[30] The Supreme Court has so far not struck down this arbitrary provision of the Juvenile Justice Act. Such a law affecting a Fundamental Right may be held bad for

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[27] (1979) 1 SCC 137 : AIR 1979 SC 321.

[28] Arvind P. Datar, *Commentary on the Constitution of India*, (LexisNexis Butterworths Wadhwa Nagpur, 2nd edn., 2007).

[29] The Juvenile Justice (Care and Protection of Children) Act, 2015, S. 15, "*Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts.*"

[30] *DTC* v. *DTC Mazdoor Congress*, 1991 Supp (1) SCC 600.

sheer vagueness and uncertainty[31] and therefore should be held as unconstitutional at the earliest.

b. The Lack of appropriate qualified persons in the Board for preliminary assessment of the juvenile

The Composition of the Juvenile Board has been provided in Section 4 of the Juvenile Justice (Care and Protection of Children) Act, 2015. The Section states that:

> *"(2) A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of First Class not being Chief Metropolitan Magistrate or Chief Judicial Magistrate (hereinafter referred to as Principal Magistrate) with at least three years' experience and two social workers selected in such manner as may be prescribed, of whom at least one shall be a woman, forming a Bench and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973 on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class.*
>
> *(3) No social worker shall be appointed as a member of the Board unless such person has been actively involved in health, education, or welfare activities pertaining to children for at least seven years or a practicing professional with a degree in child psychology, psychiatry, sociology or law."*[32]

The operative word used in subsection (3) of section 4 is 'or'. This means that the social workers in the board need not compulsorily be a practicing professional with a degree in child psychology or psychiatry. In order to assess whether a juvenile has the required mental capacity of an adult while committing the crime, it is vital and of crucial importance that at least one member of the board is a practicing professional with a degree in child psychology or psychiatry in order to appropriately assess the juvenile. The basis for determining whether trial of the juvenile is to be conducted as is for an adult, is a preliminary assessment with regard to the juvenile's mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which the juvenile allegedly committed the offence. If there is no mandatory requirement that a psychologist or psychiatrist assess the mental capacity of the juvenile, then

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[31] *K.A. Abbas* v. *Union of India*, (1970) 2 SCC 780 : AIR 1971 SC 481.

[32] The Juvenile Justice (Care and Protection of Children) Act, 2015, S. 4.

there is a high possibility that the assessment by the Board is not credible. This lack of qualified persons in the Board for assessment is an abuse of power and of arbitrary nature thereby violating Article 14.

c. The Lack of a reasonable time for preliminary assessment of the juvenile by the Board

Section 14 (3)[33] of the Act states that the preliminary assessment in case of heinous offences under Section 15 shall be disposed of by the Board within a period of three months from the date of first production of the child before the Board. The Juvenile Justice Boards have just three months to take a call if the child is to be tried as an adult based on the circumstances, his understanding of the consequences of his actions and his maturity levels. This assessment will have to be done based only on the FIR made by the police. This preliminary investigation of only three months to decide whether someone in the age group 16-18 can be tried as an adult, has stripped such children in conflict with law of the basic safeguards provided to all accused under the criminal law.

The juvenile will have an opportunity to give his version only when the police file the charge sheet, which generally takes more than three months. In the meantime, the Board would have already passed him over to the adult criminal justice system without giving him an opportunity to defend himself. Thus the procedure which is currently in place to assess the heinous offence is of a completely arbitrary nature being a bar to fairness and justice.

III. INFRINGEMENT OF THE RIGHT TO FAIR TRIAL: A VIOLATION OF ARTICLE 21 OF THE CONSTITUTION

Every individual has a Right to free and fair trial under Article 21 of the constitution[34]. In *Zahira Habibulla H. Sheikh* v. *State of Gujarat*[35] the Hon'ble Supreme Court opined that fair trial is a trial in which any form of bias or prejudice for or against the accused, the witnesses, or the cause which is being tried; is absent.

Fair trial includes that all citizens of the country be dealt with by the same procedure of law in the conduction of trial with no discrimination on any basis. However under Section 15 read with Section 18 (3) of the Act, on commission of the same heinous offence, any two persons, between the

[33] The Juvenile Justice (Care and Protection of Children) Act, 2015, S. 14(3).
[34] Indian Constitution Art. 21.
[35] (2004) 4 SCC 158.

age group of 16-18, can be tried in two different courts[36] and thereby be liable for two different forms of punishment, for committing the same heinous offence, based only on the preliminary investigation by the Juvenile Justice Board. Thus when two juveniles are being tried and punished differently for committing the same heinous offence, it results in a clear violation of a fair trial and therefore infringes the Right to fair trial under Article 21.

IV. DETERMINING THE AGE OF A JUVENILE: A COMPARISON WITH EXISTING INDIAN AND INTERNATIONAL LAWS.

Under all the other existing laws in India, a minor or juvenile or child has been defined as a person who is below the age of 18. The Juvenile Justice (Care and Protection of Children) Act, itself defines child and juvenile as a person under the age of 18, under Sections 2(12) and 2(35) of the Act respectively. Under the Majority Act 1875[37], every person domiciled in India attains the age of majority only on completion of 18 years and not before. Article 326[38] of the Constitution states that No Indian can vote before he or she is 18 years of age. Under Section 2(d)[39] of The Protection of Children from Sexual Offences Act, 2012, the government reinforced the definition of a child as somebody aged less than 18 years. Similarly no person less than 18 years in age can make a valid agreement under the Indian Contract Act[40]. The Hindu Minority and Guardianship Act, 1956[41], defines a 'minor' as a person who has not completed the age of 18 years. The age of majority for appointment of guardians for minors and their property, according to the Dissolution of Muslim Marriages Act, 1939[42], is also upon completion of 18 years. The age of majority has been fixed at 21 for men and 18 for women under the Child Marriage Restraint Act, 1929[43]. Christians and Parsis also reach majority at 18, under their respective personal laws. The minimum age at which a man can marry is 21 years, which is in keeping with recent neuro scientific evidence that the human brain does not attain full maturity before 20-22 years. A girl of age less than 18 cannot give consent for sexual relationships[44]. The Indian Mines Act[45] defines children as those below 18 years and prohibits anyone younger from working in mines. As per excise laws, which are in the state domain, the

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36 The Juvenile Justice (Care and Protection of Children) Act, 2015, S.18(3).
37 The Majority Act, 1875, S. 3.
38 Indian Constitution Art. 326.
39 The Protection of Children from Sexual Offences Act, 2012, S. 2(d).
40 The Indian Contract Act, 1872, S. 11.
41 The Hindu Minority and Guardianship Act, 1956, S. 4(a).
42 The Dissolution of Muslim Marriages Act, 1939, S.2(7).
43 The Child Marriage Restraint Act, 1929, S. 2(1)(a).
44 The Indian Penal Code, 1860, S. 375.5.
45 The Mines Act, 1952, S. 2(1)(b).

minimum age at which a person is allowed to drink is 18. In some states, it is higher.

Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2015 which reduces this age to 16 in certain cases is the only law that is treating juveniles below the age of 18 as adults and this being an exception that is not based on any Reasonable Classification, thereby makes it a completely arbitrary and draconian law.

In the International arena, the general rule is that the age of prosecution of adults is above 18 and anyone below this age is treated separately as a juvenile under the respective country's law. In most US states, juvenile courts have jurisdiction over juveniles who commit offences before they turn 18[46], though it is lower in some states. In Brazil, Minors under eighteen years of age may not be held criminally liable and shall be subject to the rules of the special legislation.[47] In Sweden if a person under the age of 18 commits a crime for which the punishment is imprisonment, the Swedish Penal Code states that the minor will be subjected to closed juvenile care for a certain period, in place of imprisonment[48]. In Denmark, as per the Danish Penal Code[49], Special provisions are made to ensure that persons below the age of 18 are treated differently as compared to adults.

"In Japan, offenders below age 20 are tried in a family court, rather than in the criminal court system. In all Scandinavian countries, the age of criminal responsibility is 15, and adolescents under 18 are tried in a justice system that is geared mostly towards social services. In China, children from age 14 to 18 are dealt with by the juvenile justice system and responsibility for the correction of problematic juvenile behaviour lies with parents and schools. The age of adult criminal responsibility has been raised to 18 in Colombia and Peru".[50]

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[46] Shoemaker D.J., Jensen G., "Juvenile Justice", *Encyclopaedia Britannica*, (February 3, 2018), https://www.britannica.com/topic/juvenile-justice.

[47] Federative Republic of Brazil Constitution Art. 228.

[48] The Swedish Penal Code 1962 (Sweden), S. 1(a),

"*If a person has committed crime before attaining the age of eighteen, and if the court finds in application of Chapter 30 that the sanction should be imprisonment, it shall instead decide on the sanction of closed juvenile care for a certain period. This shall not apply, however, if, having regard to the age of the accused at the time of prosecution or other circumstance, special reasons argue against this course of action. The court may impose closed juvenile care for at least fourteen days and at most four years*."

[49] The Danish Penal Code (Denmark), S. 82(1),

"*In determining the penalty it shall, as a rule, be considered a circumstance in mitigation: (1) that the offender had not reached the age of 18, when the offence was committed;"*

The Danish Penal Code (Denmark), S. 33(3),

"(3) *The punishment may not exceed imprisonment for eight years for an offender who had not reached the age of 18 at the time the crime was committed."*

[50] Mines Act, *supra* note 45.

In all the above stated legislations, a 'minor' or a 'child' is someone who has attained a minimum age; none of these laws create an exception by classifying them on the basis of their 'mental ability to understand consequences of their actions', or qualify their actions on the basis of severity or their behaviour. In contrast, the Juvenile Justice (Care and Protection of Children) Act, 2015, is not in line with the above mentioned legislations and is so, in a way that is definitely not for the better.

V. THE IMPLICATIONS OF TREATING 16-18 YEAR OLDS AS ADULTS

In the event that the Juvenile Board, under Section 15 read with Section 2(20) of the Act, finds a juvenile of the 16-18 age group to have had the mental and physical capacity to commit the offence, and transfers the case to the Session's Court, the resulting implications will be of grave consequences for the future, life and liberty of the juvenile. These implications include that the juvenile will be liable to be tried for all grave offences under the Indian Penal Code. Juveniles can even be booked for 'waging or attempting or abetting to wage war' against the Government of India[51]. Juveniles can also be booked for trafficking[52], despite the fact that several times, it is the children who are trafficked themselves; or are children of commercial sex workers who get involved in trafficking. Therefore these implications will persecute the already vulnerable juveniles.

The other implications include cases where the juvenile will become liable under various sections of the Commission of Sati (Prevention) Act[53], Narcotic Drugs and Psychotropic Substances (NDPS) Act[54], Arms Act[55], Unlawful Activities (Prevention) Act[56], Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act[57], Terrorist and Disruptive Activities (Prevention) Act[58] and Food Safety and Standards Act[59]. In The NDPS Act[60], for instance, there are several sections[61] where the punishment is between 10 to 20 years in case of 'contravention in relation to' poppy straw, cannabis and psychotropic substances involving commercial quantity or for external dealings in certain kinds of narcotic drugs and psychotropic substances. In

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51 Indian Penal Code, 1860, S. 121.
52 Indian Penal Code, 1860, S. 370.
53 The Sati (Prevention) Act, 1987.
54 The Narcotic Drugs and Psychotropic Substances Act, 1985.
55 The Arms Act, 1959.
56 The Unlawful Activities (Prevention) Act, 1967.
57 The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 2015.
58 Terrorist and Disruptive Activities (Prevention) Act, 1987.
59 The Food Safety and Standards Act, 2006.
60 The Narcotic Drugs and Psychotropic Substances Act, 1985.
61 The Narcotic Drugs and Psychotropic Substances Act, 1985, Ss. 20(c), 15(c) & 24.

all such cases, the principle of fresh start[62] under the Juvenile Justice Act, will not apply.

Thus the treatment of 16-18 year olds as adults has severe implications that will invariably result in ruining the life of the juvenile if he is sentenced to long term imprisonment by deeming him to be an adult. These far reaching effect of Sections 15 and 18 therefore go against the very principles of the Juvenile Justice Act, 2015 and Juvenile Justice Jurisprudence; for the first and foremost objective of Juvenile Justice is to protect the rights of Juveniles. The State should strive to ensure reformation of juveniles rather than imposing unjust punitive or retributive consequences. Juveniles are a vulnerable section of the society. The Juvenile Justice Jurisprudence is built on the principles of restorative and reformative justice and any digression from the same would be detrimental to the Right of the children and in contravention with the principle as enunciated under Article 15(3) of the Constitution of India.

VI. DISSONANCE WITH INTERNATIONAL LAW

Treating a juvenile as an adult is in violation of multiple International Treaties and Conventions dealing with Human Rights and Child Rights. As a ratified member of these Conventions and Treaties, India has to ensure that its laws do not violate the relevant International laws. However Section 15 of the Juvenile Justice Act, 2015 is in clear violation of these conventions as stated below.

Under the United Nations Convention on the Rights of the Child (UNCRC), which is a comprehensive and internationally binding agreement on the Rights of children, Article 1 states that "*For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.*"[63] In furtherance of the UNCRC, the General Resolution of the year 2007[64] clearly contemplates the age of a juvenile as 18 years and mandates member States to act accordingly. The UNCRC requires all signatory countries to treat every child under the age of 18 years as equal. The Convention explicitly states that children below 18 cannot be punished with

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[62] The Juvenile Justice (Care and Protection of Children) Act, 2015, S. 3 (xiv),
"*Principle of fresh start: All past records of any child under the Juvenile Justice system should be erased except in special circumstances.*"

[63] General Assembly resolution 44/25, Convention on the Rights of the Child, A/RES/44/25 (20 November 1989) available from http://www.un.org/documents/ga/res/44/a44r025.htm.

[64] United Nations, Committee on the Rights of the Child (CRC), Children's Rights in Juvenile Justice: General Comment No. 10, CRC/C/GC/10, (15 January 2007), available from http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf.

life imprisonment or death[65]. It also states that no child shall be deprived of his or her liberty unlawfully or arbitrarily[66]. However the treatment of 16-18 year olds as adults as per the Juvenile Justice Act, 2015 is a clear contravention of the UNCRC.

This contravention exists despite the fact that the object clause of the Juvenile Justice Act 2015 states that: "*And whereas, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of United Nations which has prescribed a set of standards to be adhered to by all State parties in securing the best interest of child.*"[67] The mention of the UNCRC in the objective of the Juvenile Justice Act, 2015 is not justified in any manner as the Act erodes the very definition of child as envisaged in the UNCRC.

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("the Beijing Rules") were adopted by the General Assembly of the United Nations in 1985[68]. Rule 2.2(a)[69] of the Beijing Rules defines a juvenile as a child or young person who, under the respective legal system, may be dealt with for an offence differently than an adult. Rule 4.1[70] of the Beijing Rules mandates Member States to refrain from fixing a minimum age of criminal responsibility that is too low, bearing in mind the facts of emotional, mental and intellectual maturity.

India has accepted the International Conventions of keeping 18 years as the age of the child and the same is reflected in various laws where the age of child was kept at 18 years as seen in the multiple legislations mentioned earlier in this paper. However it has failed to adhere to this in the case of the Juvenile Justice (Care and Protection) Act, 2015. Therefore the Act is in contravention, not just of the Constitutional Provisions of India, but also the International Treaties and Conventions.

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[65] *Supra* note 63, at 10.

Art. 37(a), "*States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;*"

[66] *Ibid*.

Art. 37(b), "*States Parties shall ensure that: (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*"

[67] The Juvenile Justice (Care and Protection of Children) Act, 2015, Object Clause.

[68] General Assembly resolution 40/33, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, 4, (29 November 1985) available from http://www.un.org/documents/ga/res/40/a40r033.htm.

[69] The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), 1985, R. 2.2(a).

[70] *Ibid*. at R. 4.1.

VII. CONCLUSION

The purpose or object of the Juvenile Justice (Care and Protection) Act, 2015 is to protect the Rights of Children. It is a special legislation that strives to come to the aid of Children rather than to be of a detrimental nature. However through this paper it is clear that the procedure of assessing and treating 16-18 year old juveniles as adults for the crimes they have committed is in no way benefitting the juveniles Rights. The 2015 Act was hurriedly passed by the government after the unfortunate Nirbhaya rape incident[71] which had sent shockwaves across the country. The public outrage against the juvenile aged 17, who was let off after a few months in prison, as per the then prevalent Juvenile Justice (Care and Protection of Children) Act, 2000; was one of the primary factors that led to the Parliament passing the 2015 Act as a safety valve tactic to diffuse the public wrath.

Though the new Act has considerably provided for the better protection of children, the provisions of Sections 15 and 18 which provide for the assessment of 16-18 year olds and sending them for trial to the Children's Court or the Sessions Court is both bad in law as well as bad in justice. It is bad in law as it blatantly violates the Fundamental Rights of Equality and Fair Trial as illuminated in this paper. It is bad in justice as it goes against the principles of Juvenile Justice which advocate that children below the age of 18 are to be treated separately from adults as they are a vulnerable part of society. The Supreme Court of India, itself is of the view that the age of eighteen has been fixed on account of the understanding of experts in child psychology and behavioural patterns that till such an age the children in conflict with law could still be redeemed and restored to mainstream society, instead of becoming hardened criminals in future[72].

This paper has extensively examined how the classification and procedure of assessing 16-18 year old juveniles and transferring them to a Children's or Sessions Court is an unreasonable classification, arbitrary in nature, is in violation of fair trial; therefore making it unreservedly Unconstitutional. Additionally it is in dissonance with International Treaties. In this regard, the Supreme Court has a duty to declare the impugned provisions of the Juvenile Justice (Care and Protection) Act, 2015 as constitutionally void, and the Parliament has to amend the Juvenile Justice Act to either fix an age for adult criminal liability which is the same for every person[73],

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[71] Nirbhaya rape incident is the gang rape and fatal assault of a woman that occurred on 16 December 2012 in Delhi.

[72] *Salil Bali* v. *Union of India*, (2013) 7 SCC 705.

[73] Schiraldi, Vincent, Bruce Western & Kendra Bradner, "New Thinking in Community Corrections: Community-Based Responses to Justice-Involved Young Adults", Washington, D.C: U.S. Department of Justice, National Institute of Justice 1, 9 (2015). *"An extension of the age of jurisdiction is, however, just one reform for a fundamentally more age responsive criminal justice system. In the Juvenile Justice System, priority should*

with no exception; or to improve the assessment procedure by the Juvenile Board to ensure that there is a mandatory psychologist or psychiatrist present on the Board to assess the mental capacity of the Juvenile. These improvements will result in the Juvenile Justice Act, 2015 being an effective instrument in the development of Juvenile Justice in our country.

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be placed on keeping young adults in the community whenever possible, where they are able to maintain and build prosocial relationships through education, housing, family and employment."

ALGO-TRADING: ANALYSING THE NEW FRONTIERS

—*Apoorva Singh Vishnoi*[*]

Abstract — Algorithm trading can simply be defined to mean any order that is generated using automated execution logic. High-frequency trading (HFT) is a subspecies of it and its most controversial form. Two extreme camps have formed when it comes to algo-trading, those of its supporters and those of critics, with both treating it like a new species of trading when it's simply evolution of trading. What it does is simply magnifies what has been good or what has been bad about trading traditionally. Hardly any of the challenges that this paper will discuss will be new ones or exclusive only to algo-trading. They were in existence even before the advent of algo-trading, though the degree of their impact was lesser or slower. The basic principles governing it should remain the same, but few tweaking may be required keeping in mind its differences with the previous forms of trading. This paper aims to take a bird's eye view of exactly those modifications and discuss their merits and demerits. When evaluating the merits and demerits of these regulations, the position will be one amiable to technology as long as the basic principles of fairness, transparency and non-discrimination are fulfilled. Moreover, it aims to look at the cases of algo-trading as adjudicated upon by SEBI's adjudicating bodies. Due to the slow proliferation of algo-trading in India and lack of any highprofile cases, this area has been hitherto completely neglected.

[*] V year student, BA-LLB (Hons.), Rajiv Gandhi National University of Law, Patiala, Punjab

I. INTRODUCTION

Algorithm trading or algo-trading can simply be defined to mean any order that is generated using automated execution logic[1]. Algorithmic trading has also been described as "a step-by-step instruction for trading actions taken by computers (automated systems)"[2]. It replaces a human trader with an algorithm as the decision-maker, thus bringing in all the advantages and disadvantages that are associated with computer and other software programs. High-frequency trading (HFT) is a subspecies of it and its most controversial form. It is "characterized by the ability to give effect to a large amount of orders at very high speed".[3] Another term that is closely associated with algo-trading is co-location which is a "service offered by the stock exchange or by third-parties appointed by the stock exchange to its stock brokers and data vendors to locate their trading or data-vending systems within the stock exchange's premises."[4] It reduces the latency or the time that is taken in matching and execution of sell and buy orders, making HFT possible.

Two extreme camps have formed when it comes to algo-trading, those of its supporters and those of critics, with both treating it like a new species of trading when it's simply a step in evolution of trading. What it does is simply magnifies what has been good or what has been bad about trading traditionally. Hardly any of the challenges that this paper will discuss will be new ones or exclusive only to algo-trading. They were in existence even before the advent of algo-trading, though the degree of their impact was lesser or slower. The basic principles governing it should remain the same, but few tweaking may be required keeping in mind its differences with the previous forms of trading. This paper aims to take a bird's eye view of exactly those modifications and discuss their merits and demerits. When evaluating the merits and demerits of these regulations, the position will be one amiable to technology as long as the basic principles of fairness, transparency and non-discrimination are fulfilled. Moreover, it aims to look at the cases of algo-trading as adjudicated upon by SEBI's adjudicating bodies. Due to the slow proliferation of algo-trading in India and lack of any high profile cases, this area has been hitherto completely neglected.

The paper can be divided into four parts, with the first part giving an overview of algo-trading regulatory regime in USA and Europe and its

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1 Broad Guidelines on Algorithmic Trading, SEBI, CIR/MRD/DP/ 09 /2012, at ¶3 (March 30, 2012).

2 Discussion paper on "Strengthening of the Regulatory framework for Algorithmic Trading & Co-location", SEBI, at ¶2.1 (August 5, 2016).

3 Roberto Merli et al., "Achievements and Challenges of Commodity Science in the Age of Globalization" 179 (2014).

4 Discussion paper on Co-location/Proximity hosting facility offered by the stock exchanges, SEBI, at ¶2.1 (May 3, 2013).

history in these places, the second part discussing the challenges posed by it, the third part discussing the regulatory regime of SEBI and discuss the discussion paper forwarded by it and the last part discusses the few cases where algo-trading plays a part in the problem, all related to instances of self-trading.

A. Algo-trading in USA

The story of any innovation in stock market generally is an American story due to the sheer volume and importance of capital market situated in USA with capitalization of 28.9 trillion US dollars.[5] In 1971, NASDAQ gained the title of "world's first electronic stock market". NASDAQ employed an electronic quotation system for the auction of provisions in quotes for stocks[6] For NYSE, the process of computerization of the order flow in financial markets began with the introduction of "designated order turnaround" system or DOT in 1976, and Super DOT in 1984.[7]

Then came the trading strategy called program trading, and the doom for the traditional trading era was spelled[8] and later, NYSE Arca[9] was among the first all electronic exchange in the world, along with Island ECN[10] and Instinet[11].

The final major development in history of algo-trading occurred in 2005, when SEC passed Regulation National Market System (Reg. NMS)[12]. NMS was created to strengthen and modernize the equity markets. Through it, SEC promoted a national market system which decreed "market orders be posted electronically and immediately executed at the best price nationally"[13] Before it was implemented, brokerages could internally match buy and sell orders and then pocket the spread, or alternatively, "send them to

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5 2017 Fact Book, SIFMA, https://www.sifma.org/wp-content/uploads/2016/10/US-Fact-Book-2017-SIFMA.pdf (2017).

6 Michael J. Mcgowan, "The Rise of Computerized High Frequency Trading: Use and Controversy", 16 Duke L. & Tech. Rev. 2 (2010).

7 Jerry W. Markham & Daniel J. Harty, "For Whom the Bell Tolls: The Demise of Exchange Trading Floors and the Growth of ECNs", 33 Iowa J. Corp. L. 865, 897 (2008).

8 Dean Furbush, "Program Trading", *Concise Encyclopedia of Economics*, http://www.econlib.org/library/Enc1/ProgramTrading.html (accessed March 26, 2010).

9 NYSE Arca Equities, https://www.nyse.com/markets/nyse-arca (accessed April 14, 2018).

10 The Island ECN, Inc. History, http://www.fundinguniverse.com/company-histories/the-island-ecn-inc-history/ (accessed April 14, 2018).

11 About Instinet, History, www.instinet.com/about-instinet/history.html (accessed April 14, 2018).

12 Regulation NMS, Exchange Act Release No. 34-51808, 70 Fed. Reg. 37495, https://www.sec.gov/rules/final/34-51808.pdf (2005).

13 Regulation NMS, Exchange Act Release No. 34-51808, 70 Fed. Reg. 37496, 300 (2005).

exchanges that paid kickbacks for order flow."[14] By 2006, an estimated third of all American stock trades in 2006 were driven by automatic programs.[15]

HFT had a bit slower growth. New York Times could still describe it as "hot new thing on Wall Street" in 2009.[16] As there was adoption of HFT by more and more people, the amount of time in which HFT was executed also kept on shrinking. In a matter of decade, execution interval for HFTs condensed from seconds to mere milliseconds or microseconds.[17]

B. Algo-trading in Europe

Since early 2000s, the European traders have been writing algorithms to automate the trading on Deutsche Terminbörse, a predecessor to Eurex.[18] Today, algo-trading accounts for a major chunk of European securities market.

In 2012, ESMA, the pan-European regulator issued Guidelines titled 'Systems and controls in an automated trading environment for trading platforms, investment firms and competent authorities' under ESMA Regulation. They targeted "the use of an electronic trading system, including a trading algorithm, by an investment firm for dealing on own account or for the execution of orders on behalf of clients". It prescribed the required actions on many topics including testing, monitoring and review, security, staffing, record-keeping and co-operation and aimed to fill the gaps in places that Mifid I failed.[19]

Then in 2014, Directive 2014/65/EU (hereinafter as '2014 Directive') was passed by the European Parliament[20]. This Directive along with Markets in

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[14] Liz Moyer & Emily Lambert, "Wall Street's New Masters", *Forbes* (September 21, 2009), http://www.forbes.com/forbes/2009/0921/revolutionaries-stocks-getco-newmasters-of-wall-street.html.

[15] Rob Iati, "The Real Story of Software Trading Espionage", Advanced Trading (July 10, 2009), http://advancedtrading.com/algorithms/showArticle.jhtml?articleID=218401501.

[16] Charles Duhigg, "Stock Traders Find Speed Pays, in Milliseconds", *The New York Times* (July 23, 2009), https://www.nytimes.com/2009/07/24/business/24trading.html.

[17] Andrew Haldane, Executive Director, Financial Stability, Bank of England, Speech at the Oxford China Business Forum, Beijing, (September 9, 2010), https://www.bis.org/review/r100909e.pdf.

[18] Namir Hamid, "White Paper Electronic Trading — Algorithmic & High Frequency Trading", Enableit Llc, enableit.us.com/wp-content/uploads/2015/10/WhitePaperElectronicTrading.pdf (April 14, 2018).

[19] Guidelines-Systems and controls in an automated trading environment for trading platforms, investment firms and competent authorities, ESMA/2012/122 (EN) (February 24, 2012), https://www.esma.europa.eu/system/files_force/library/2015/11/esma_2012_122_en.pdf.

[20] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and

Financial Instruments Regulation (MiFIR - 600/2014/EU)[21] forms the basis of Markets in Financial Instruments Directive II (hereinafter as 'MiFID II'), which came into action from 3 January 2018. Because of MiFIR's nature, it becomes part of municipal law without any separate regulation from the EU's member states.[22] MiFID II is an interesting piece of legislation. It takes the middle path in dealing with algo-trading and its subset HFT as it doesn't prohibit HFT, but it also subjects it to stringent supervision. Its preamble touches on both the benefits and risks of flash trading.

Then there are supplementary regulations including the Commission Delegated Regulation (EU) 2017/565, the Commission Delegated Regulation (EU) 2017/565, the Commission Delegated Regulation (EU) 2017/565 and others that regulate other aspects of algo-trading[23].

II. CHALLENGES OF ALGO-TRADING IN INDIA

This section discusses in brief some of the common criticism that is charged against algo-trading and HFT. Some of these issues can be solved by regulation, some can't be. Some only came into existence in juncture with algo-trading. Others existed in the pre-algo-trading era, but they worsened due to algo-trading. Some are largely absent or unnoticed in the Indian market, due to the non-proliferation of advanced or complex forms of algo-trading here as well as the lack of more data and literature. Some are already illegal in India, some are unethical and some are merely questionable or objectionable.

A. Market volatility

HFT can significantly impact the volatility in the market, increasing it for top stocks and during time of uncertainty, as per a study on US capita market. It can also lead to obstruction in price discovery.[24]

Directive 2011/61/EU, 2014 OJ L 257, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0065.

[21] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, OJ L 173 12.6.2014, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2014_173_R_0005&from=EN.

[22] Letitia Bolton, "Algo Trading: A Glance at MiFID II", RegTech (September 12, 2017), https://regtechfs.com/algo-trading-a-glance-at-mifid-ii/.

[23] Questions and Answers on MiFID II and MiFIR market structures topics, ESMA70-872942901-38 (March 28, 2016), https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-38_qas_markets_structures_issues.pdf.

[24] Frank Zhang, *The Effect of High-Frequency Trading on Stock Volatility and Price Discovery*, SSRN (December 27, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1691679.

B. Price synchronization

HFT has encouraged the instantaneous synchronization of securities across the world. Austin Gerig defines synchronization to mean price change in one security being similar and coinciding nearly instantaneously with a price change in another security, to the extent the two securities are related to each other.[25] This synchronization can, on occasions, have harmful effects. The negative impact of localized errors spreads quickly through the interconnected security markets. Another drawback is when relations, unwarranted by economic fundamentals, are formed and enforced between security markets.

C. Limitation of programs

In events of crises or markets stress, if algo-programmes encounter parameters they're not designed to handle, HFT and algo-trading firms may be forced to withdraw from the markets[26]. This can cause the liquidity to disappear from the market and further aggravate the crises.[27]

D. Acquiring of asymmetric information

This ability is something HFT firms are notorious for. Asymmetric information refers to the asymmetric or unequal distribution of information when few market players have information or knowledge which others do not, lending them an advantage. One example of asymmetric information is insider trading,[28] which is already prohibited by SEBI[29].

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[25] Austin Gerig, "High-Frequency Trading Synchronizes Prices in Financial Markets", SSRN Electronic Journal (2012), https://www.researchgate.net/publication/233282132_High-Frequency_Trading_Synchronizes_Prices_in_Financial_Markets.

[26] Michael Goldstein, High-frequency trading strategies, 7th Emerging Markets Conference (2016), https://www.ifrogs.org/PDF/CONF_2016/Goldstein_Kwan_Philip_2016.pdf.

[27] Nupur Pavan Bang & Ramabhadran S. Thirumalai, "How do High-Frequency Traders Trade?", NSE-NYU Stern School of Business Initiative for the Study of the Indian Capital Markets (2014), https://www.nseindia.com/research/content/1314_BS6.pdf.

[28] Orleans Silva Martins & Edilson Paulo, "Information Asymmetry in Stock Trading, Economic and Financial Characteristics and Corporate Governance in the Brazilian Stock Market", 25 Revista Contabilidade & Finanças 34 (2014).

[29] SEBI (Prohibition of Insider Trading) Regulations, 2015, SEBI Regulation No. LAD-NRO/GN/2014-15/21/85 (January 15, 2015), https://www.sebi.gov.in/legal/regulations/jan-2015/sebi-prohibition-of-insider-trading-regulations-2015-issued-on-15-jan-2015-28884.html.

HFTs are able to receive and act on information faster.[30] This is considered by some to be against the principle of fairness.[31] It can cause accusations of other problematic practices: one being that of "micro front-running" other investors and the second being that of "micro-price manipulation"[32].

E. Front-running

While trading, traders usually try to create a position while trying not to disclose their intention. If a trader's position is large and known among other traders, the market can move violently against that trader by decreasing the prices when he is selling and driving the prices high when he's buying.[33] Front-running is the practice of "moving prices ahead of future flows and trading against the flows".[34] This practice has been exacerbated by the expanded role of algorithms in trading.[35]

SEBI has not called front-running by its name in Securities And Exchange Board Of India (Prohibition Of Fraudulent And Unfair Trade Practices Relating To Securities Market) Regulations, 2003 [hereinafter "FUTP Regulations"] but it's one of the "unfair trade practice" under Regulation 4 (2) (q) of FUTP Regulations.[36]

There was a doubt whether non-intermediary front- running is legal or illegal. The SEBI Appellate Tribunal had given conflicting rulings. For example, in *Dipak Patel* v. *SEBI*[37], it did not consider non-intermediary front running to be illegal but in Pooja Menghani v.SEBI[38], it did. This question was finally settled by the Supreme Court in appeal to these cases when it decided that non-intermediary front running may be brought

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[30] A Study on algorithm trading/high frequency trading in the Indian capital market, National Institutre of Financial management, www.nifm.ac.in/files/study-algorithm-tradinghigh-frequency-trading-indian-capital-market.

[31] E.F. Fama, "Efficient Capital Markets: A Review of Theory and Empirical Work", 25 The Journal of Finance 383(1970), http://www.jstor.org/stable/2325486.

[32] Jon Lukomnik et al., "High-Frequency Trading: A White Paper and an Innovative Solution to Address Key Issues", IRRC Institute & Stevens Institute of Technology (2014), irrcinstitute.org/wp-content/uploads/2014/09/HFT_Practioner-Summary-Small.pdf.

[33] Felix Salmon, "JP Morgan: When Basis Trades Blow Up", Reuters, May 10, 2012, http://blogs.reuters.com/felix-salmon/2012/05/10/jp-morgan-when-basis-trades-blow-up/.

[34] Corey O. Garriott, "Front-Running and Post-Trade Transparency", Frontiers of Finance 2012 Conference Programme (September 13, 2012), https://warwick.ac.uk/fac/soc/wbs/subjects/finance/fof2012/programme/garriott-_front-running_and_post-trade_transparency.pdf.

[35] John Arnold, Spoofers Keep Markets Honest, Bloomberg, January 23, 2015, https://www.bloomberg.com/view/articles/2015-01-23/high-frequency-trading-spoofers-and-front-running.

[36] SEBI (Prohibition of Insider Trading) Regulations, 2015, *supra* note 29.

[37] 2012 SCC OnLine SAT 217, https://www.sebi.gov.in/sebi_data/attachdocs/1352450988486.pdf.

[38] 2014 SCC OnLine SAT 69, https://www.sebi.gov.in/enforcement/orders/apr-2014/in-the-matter-of-ms-pooja-menghani_26733.html.

under prohibition as prescribed under Regulation 3 and 4 (1) of FUTP Regulations, subject to satisfaction of ingredients under these heads.

F. Order anticipation

Order anticipation is similar in certain aspects to front running[39] with the key difference being that in order anticipation, the party at mischief doesn't trade in front of a large party's trading interest by misappropriating information or violating some kind of duty. Instead it engages in speculation.

G. Price manipulation

Price manipulation, in manners such as localized price skewing mechanisms and quote stuffing is also another serious allegation which has frequently been levelled against HFT[40].

H. Requirement of financial and technological resources

HFT can be labelled as an enemy of retail and small investors. To indulge in HFT, one needs to have a lot of resources as it can expensive. Even retail HFT investors can't afford co-location facilities, a must have privilege in HFT. The annual cost of collocation is between Rs. 7.5-15.0 lakh, thus being prohibitively expensive. Moreover, one needs either good understanding of programming or the ability to hire someone who does so that the trading algorithms can be written. By an estimate only 2% of total volume of trade is attributable to retail algo-investors.[41] It can also spur a technological arms race. Such an arms race can reduce market quality by transforming a competition of price into a competition of speed.[42]

I. Lack of control

There's no kill switch for algo-trading. If the program is not carefully written, keeping in mind the possible contingencies, disastrous results may occur and before a human being can even lift a finger, trading can acquire a nightmarish hue, as a firm called Knights Capital learned during the inaugural session of their new program, which led to its bankruptcy[43], though in

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[39] Concept Release on Equity Market Structure, SEC, at 54 (January 14, 2010), https://www.sec.gov/rules/concept/2010/34-61358.pdf.

[40] Jon Lukomnik et al, *supra* note 32.

[41] A Study on algorithm trading/high frequency trading in the Indian capital market, *supra* note 30.

[42] Eric Budish et al., "The High-Frequency Trading Arms Race: Frequent Batch Auctions as a Market Design Response", 130 The Quarterly Journal of Economics 1548 (2015).

[43] A Study on algorithm trading/high frequency trading in the Indian capital market, *supra* note 30.

India the traders have stayed away from complex algorithms, playing safe[44]. With HFT, this problem is only further augmented.[45]

J. Lack of visibility or transparency

This factor ties with the lack of control factor. There's little transparency in how a program is designed and how it functions.[46] Algo-trading also makes market manipulation, market abuse and unlawful activities difficult to uncover.[47]

K. Spoofing

This practice is also known as 'phantom bids'[48] or 'painting the tape'.[49] It can be defined as a "is a form of market manipulation that involves actions taken by market participants to give an improper or false impression of unusual activity or price movement in a security".[50] Layering was the technique employed allegedly by Navinder Singh Sarao during 2010 Flash crash.[51]

Spoofing is not specifically outlawed in India. In USA also, until 2010, when Dodd-Frank Wall Street Reform and Consumer Protection Act was signed[52], there was no comprehensive law prohibiting spoofing[53] (spoofing being only outlawed in Commodities Exchange Act)[54].

Illustrative cases of challenges of algo-trading

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44 Shailesh Menon, "For Retail Investors, A Long Wait for Algorithm Trading", *The Economic Times*, July 28, 2016, https://economictimes.indiatimes.com/markets/stocks/policy/for-retail-investors-a-long-wait-for-algorithm-trading/articleshow/53424468.cms.

45 A Study on algorithm trading/high frequency trading in the Indian capital market, *supra* note 30.

46 *Ibid.*

47 Technological Challenges to Effective Market Surveillance Issues and Regulatory Tools, IOSCO, CR12/2012, (April 22, 2013), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD389.pdf.

48 Henrik Johansson, High Frequency Trading (May 2013) (unpublished thesis, Jönköping University), www.diva-portal.org/smash/get/diva2:627869/FULLTEXT01.pdf.

49 Douglas J. Cumming et al., "Exchange Trading Rules and Stock Market Liquidity", 99 Journal of Financial Economics 652 (2010).

50 *See ibid.*

51 Jason Grimes, " 'Flash Crash' Derivatives Trader Navinder Singh Sarao Settles Spoofing Case", The National Law Review, November 24, 2016, https://www.natlawreview.com/article/flash-crash-derivatives-trader-navinder-singh-sarao-settles-spoofing-case.

52 Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, 1913 [codified at 12 USC § 5301 (2012)].

53 D. Deniz Aktas, "Spoofing", 33 Review of Banking & Financial Law 89 (2014).

54 The Commodity Exchange Act, Ch. 545, 49 Stat. 1491 (1936).

L. 2010 Flash Crash

It is perhaps the most memorable incident that actualized publicly the dangers, such as lack of control or spoofing, of algo-trading which the critics were warning against for years, though flash crashes are not unfamiliar for the stock markets (especially the non-Indian ones).

The term refers to an incident on May 6, 2010 in USA when Dow Jones Index lost about 9% of its value in matter of few minutes.[55] The market eventually recovered most of its lost value, though still closing 3% lower. People speculated about the cause of this turbulence in share market and SEC and CFTC began joint investigation. More facts emerged with the publication of their joint report titled "Findings Regarding the Market Events of May 6, 2010" [hereinafter as "joint report"] few months later[56]

The joint report highlighted several key lessons from the event, like disorderly market can result from "interaction between automated execution programs and algorithmic trading strategies" and pausing a market can be an effective way for algorithms to "reset their parameters". A new circuit breaker was installed which pauses trading in a security if it has experienced 10% price change in the preceding 5 minutes.

M. Cases of flash crash in India

Instances of flash crash, blamed on erroneous algorithms, have occurred even in India. Examples being:

- 2011 BSE Muhurat session debacle

On 26 October, 2011, during the special Diwali Muhurat session of BSE, Senses futures trading between 25 and 27 thousand crore rupees occurred which was hundred times the average daily turnover in the preceding five sessions.[57] Two hours after the session ended, all the trades done were

[55] Jill Treanor, "The 2010 'Flash Crash': How it Unfolded", *The Guardian*, April 22, 2015, https://www.theguardian.com/business/2015/apr/22/2010-flash-crash-new-york-stock-exchange-unfolded.

[56] Findings Regarding the Market Events of May 6, 2010, Report of the Staffs of The CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues, SEC (September 30, 2010), https://www.sec.gov/news/studies/2010/marketevents-report.pdf. The findings of the joint report were later undermined when an Indian origin British trader was arrested for causing and benefitting from the crash. PTI, "Indian-Origin 'Flash Crash' Trader Pleads Guilty in US Court", Indian Express, November 10, 2016, indianexpress.com/article/business/business-others/indian-origin-flash-crash-trader-pleads-guilty-in-us-court-4367567/.

[57] Mobis Philipose, "BSE Needs to Clear the Air on Annulment of Muhurat Trades", *LiveMint*, November 1, 2011, https://www.livemint.com/Opinion/vSY91KQ4YnYAoyy29QgwWK/BSE-needs-to-clear-the-air-on-annulment-of-Muhurat-trades.html.

cancelled. The culprit behind the unusually high volumes of trading was found to be an errant algorithm. BSE, apart from cancelling the session's trade, also suspended the algorithm's broker. SEBI also began investigation in this matter. Lack of strong risk management was blamed for the faulty algorithms.[58]

- 2012 Nifty Flash Crash

NSE's Nifty went down by 15.5% in a matter of minutes due to orders placed by a faulty algorithm before the trading halted. The guilty broking house was suspended and a preliminary investigation was started by SEBI. NSE faced severe backlash for the delay in circuit breaker to act.[59] Their reply points to the struggle major exchanges, with all their resources face to catch up with HFT.

III. POSITIVE CONTRIBUTION OF ALGO-TRADING

While the problems elucidated are concerning, no country's market regular has placed an outright ban on algo-trading or on HFT. There are few basic reasons for it. Most of the research directed towards studying the nature, impact etc. of the practice has shown a positive impact on the market and the research that has discussed its negative consequence has on many occasions been narrow in its focus or mixed or ambiguous.

Research has shown that HFT supplies liquidity to the market helps in price discovery and formation of transaction prices. Price synchronization has beneficial effects too, like more accurate prices and reduced transaction costs1. Some of the research has attempted to refute the problems discussed above by showing results contrary to that discussed.*1* For example, a --- research shows that HFT actually reduces volatility and doesn't withdraws from market in turbulent times. This position is supported by another paper which states that HFT has positive impact on short term volatility.

And the grim forecasts of technological arms-race can itself be critcised for its Luddite undertone. Moreover, if we were to start eliminating all technologies unless accessible to the most resource-strapped layman, we may as well as go back to the 19th century. And, there is one thing common in both pre- and post-algo-trading era: inequality between the retail traders and the professional, dedicated ones. In fact, algo-trading has been credited

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[58] Sundaresha Subramanian, "SEBI Probes Muhurat Trading Mishap on BSE", *Business Standard*, January 21, 2013, www.business-standard.com/article/markets/sebi-probes-muhurat-trading-mishap-on-bse-111111200083_1.html.

[59] TNN, "NSE Flash Crash Pulls Nifty Down by 15.5%", *The Times of India*, October 6, 2012, https://timesofindia.indiatimes.com/city/delhi/NSE-flash-crash-pulls-Nifty-down-by-15-5/articleshow/16691260.cms.

for introducing new players in the market, retail players who are good with computers.

SEBI thus should adopt a middle path between strangling to extinction this practice and completely absenting itself from the regulating this practice. This paper will discuss in the next chapter what are the regulatory areas in which SEBI should step-in and which areas from which it should step-back and de-regulate.

IV. ALGO-TRADING IN INDIA

In India, security trading was a concept brought by the British from Europe during colonial times. With liberalization and introduction of SEBI, capital markets finally matured into what they are today.[60] The result is that India has the eighth biggest stock market in the world since 2017.[61]

If we see the data given by NSE[62] and BSE[63], in `March 2018, 18.38% and 6.97% respectively of all trade occurred through algo-trading. With a slow increase in it, the question of past, present and future of policymaking on algo-trading in India would be a paramount one and which this paper aims to answer. This paper will now give a brief overview of three things: firstly, the regulations, guidelines etc. that have been by SEBI, the secondly their effectiveness in addressing problems related to algo-trading and finally, case-laws related to algo-trading.

V. SEBI CIRCULARS AND DISCUSSION PAPERS

The journey of algo-trading in India started from a 2008 SEBI circular.[64] The circular allowed Direct Market Access facility for first time on Stock Exchanges which is a sine quo non of high frequency trading as it allow for better latency sensitivity.[65] SEBI then issued guidelines on algo-trading for the first time in 2012.

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[60] B.K. Muhammed Juman & M.K. Irshad, "An Overview of India Capital Markets", 5 Bonfring International Journal of Industrial Engineering and Management Science 17 (2015).

[61] Pavan Burugula, "India at 8th Spot in M-Cap Rankings", *Business Standard*, November 2, 2017, www.business-standard.com/article/markets/india-at-8th-spot-in-m-cap-rankings-117110200077_1.html.

[62] Cash Market — Mode of Trading, NSE (March 2018), https://www.nseindia.com/content/equities/cm_mode_of_trading.pdf.

[63] Mode of Trading Data, BSE (March 2018), https://www.bseindia.com/markets/equity/EQReports/Cmmode.aspx.

[64] Introduction of Direct Market Access facility, SEBI, MRD/ DoP/SE/Cir-7/2008 (April 3, 2008).

[65] *See ibid.*

A. Circular dated March 30, 2012[66]

The circular was based on the recommendations of Secondary Market Advisory Committee (SMAC) and Technical Advisory Committee (TAC). It spells out guidelines for stock exchanges and stock brokers.

B. Guidelines for stock exchange

Stock exchanges were to have arrangements that gave "consistent response time to all stock brokers", periodic upgradation of their surveillance system and have monitoring systems that can identify and impede order flooding. Stock exchanges were also supposed to address a main area of concern by putting effective economic disincentives to combat high daily order-to-trade ratio, which is a universal by-product of algo-trading.

To ensure the integrity of the system, stock exchanges were to have appropriate risk controls mechanism. These risk controls were required to have at least two things: Price check and Quantity Limit check. Price check was to ensure non-violation of price bands and Quantity limit check was to put a maximum limit to quantity per order for each security.

Then, dysfunctional algos or "algos leading to loop or runaway situation" were to be identified by stock exchanges' system which was to further shut down algos or broker's terminal and remove outstanding orders of dysfunctional algos. As the joint report of SEC has already highlighted, pausing or shutting down system at such times is an effective method.

C. Guideline for stock brokers

On part of stock brokers, apart from price checks and quantity check, they were supposed to adhere to *Order Value check* and *Cumulative Open Order Value check. The former refers to defining of* 'value per order' and the latter refers to "total value of its unexecuted orders released from the stock broker system". Algo orders were to be "tagged with a unique identifier provided by the stock exchange in order to establish audit trail".

D. Circular dated Aug 2 2012[67]

After prescribing the duties of stock exchanges and stock brokers, it prescribed the duties of the client while algo trading though a circular dated 2 August, 2012. Among the several duties prescribed, client had to be aware about SEBI guidelines, that new algos are not used or changes to old algos

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[66] Broad Guidelines on Algorithmic Trading, SEBI, CIR/MRD/DP/09/2012 (March 30, 2012).

[67] Direct Market Access — Clarification, SEBI, CIR/MRD/DP/20/2012 (March 30, 2012).

not done without prior approval of the respective stock exchange, that there exists necessary checks and balances to counter dysfunctional algorithms and also knows that broker can shut down the DMA facility on suspicion of dysfunctional algo.

E. Circular dated May 21 2013[68]

This circular modified the guidelines given in Match 30, 2012 circular and prescribed additional steps to be followed. This circular prescribed the auditors whose services algo-traders are allowed to use. Any issue that comes to light during such audit has to be immediately corrected and reported to stock exchange. In case of failure to correct, the stock broker or trading member can be barred from using that software till that correction is committed or penalized.

The circular further directed stock exchanges to strengthen monitoring of orders to detect and counter any attempts at market manipulation and market disruptions. The stock exchanges were additionally directed to double their rates of penalties disincentivizing high daily order-to-trade ratio in algo-trading and in case of continuation of high daily order-to-trade ration on more than ten occasions in last thirty days, the guilty party can have proprietary trading right suspended.

F. 2013 paper[69]

The paper highlights the role and necessity of co-location in "latency sensitive strategies viz. High Frequency Traders, Market Makers, etc", the reason for its demand (to drive down the latency) and International Organization of Securities Commissions' (IOSCO) recommendations in a 2011 report titled 'Regulatory Issues Raised by the Impact of Technological Changes on Market Integrity and Efficiency' about providing "fair, transparent and non-discriminatory access to markets and associated products and services".

In order to whittle down any advantage that the co-located traders' orders were proposed to be subjected to "separate order-validation mechanism and a separate queue". The paper further proposed use of round-robin methodology "to time-stamp and forward validated orders from the two order-queues to the order-book". This means that orders from each queue will get their chance one by one.

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[68] Broad guidelines on Algorithmic Trading, SEBI, CIR/MRD/DP/16/2013 (May 21, 2013).

[69] Discussion paper on Co-location/Proximity hosting facility offered by the stock exchanges, *supra* note 4.

G. Circular dated August 19, 2013[70]

The next 2013 circular, dated August 19, is on testing of software used by market players. It advises the stock exchanges to extract an undertaking in form of affidavit stating their assurance in using of only authorised software by brokers and trading members and speaks of their absolute liability in case of malfunctioning of software.

The circular also states that stock exchanges will also provide software testing facilities to them. The circular then emphasizes the need for stringent software testing because of previous incidents where software used in the market malfunctioned. The circular then goes on to specify in detail the various conditions for testing like testing in a simulated test environment, mock testing, User Acceptance Test (UAT) etc. The software will only then be approved by stock exchanges.

H. Discussion paper 2016

The discussion paper begins with definitions, glance at IOSCO's recommendations and mention of issues under consideration and then list the proposed mechanisms which, with the exception of 'Maximum order message-to-trade ratio requirement' and 'Review of Tick-by-Tick (TBT) data feed', were purposed to reduce latency advantage of HFT traders and throttle HFT and even algo-trading somewhat, subjecting Indian capital markets to a technological freeze. Due to their Luddite overtone, this paper would not recommend their prescription by a regulator, though individual stock exchanges should be free to implement them.

I. Minimum Resting Time for Orders

This mechanism was proposed to counter the problem of 'apparent', 'vanishing' or 'fleeting' liquidity i.e. liquidity appearing in the market for briefest of time before disappearing, which algo trading has been accused of causing. By resting time what is meant is "the time between an order is received by the exchange and the said order is allowed to be amended or cancelled thereafter". Had SEBI decided to go ahead with the proposal, it would have been an unprecedented move by a market regulator in the world. Australian Securities and Investment Commission (ASIC) had considered this mechanism in 2013[71]

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[70] Testing of software used in or related to Trading and Risk Management, SEBI, CIR/MRD/DP/24/2013 (August 19, 2013).

[71] ASIC refines dark liquidity, high-frequency trading rules, ASIC, 13-142MR (June 18, 2013), http://asic.gov.au/about-asic/media-centre/find-a-media-release/2013-releases/13-142mr-asic-refines-dark-liquidity-high-frequency-trading-rules/.

i. Frequent Batch Auctions

To understand this concept, one requires basic understanding of matching of orders take place at stock exchanges. The buy and sell orders are continuously matched, without a break. What this move tries to introduce is break the process in parts by accumulating all buy and sell orders received during the given period, say 100 milliseconds and matching them at one go.

Orders are still matched by call auction in Taiwan Stock Exchange (TWSE) at "the opening and closing of the regular trading session"[72]. Moreover, for illiquid stocks, this mechanism has been employed in NSE, BSE and MSEI.

J. Random Speed Bumps or delays in order processing or matching

In this mechanism, as the name suggest random delays or "speed bumps" in order matching would be introduced. No regulator has been known to make this mechanism mandatory in the world.

K. Randomization of orders received during a period

In this mechanism, the orders received during a certain period, for example, 1-2 seconds would be put in a revised queue and then matched as per this new queue.

L. Separate queues for co-location orders and non-colocation orders

This mechanism, to be executed in round-robin fashion, has already been proposed by SEBI in the 2013 co-location paper. This would affect the latency, like the above mechanisms.

M. Maximum order message-to-trade ratio requirement

This mechanism aimed to put a full stop to high order cancellation rates of some algo-traders by making it a compulsory requirement that a trader has to convert at least 'x' orders into trades so that he does not go beyond the prescribed ceiling. As already discussed, economic disincentives had been put in place so that if a trader went beyond certain daily order-to-trade ratio, he would have to pay fine. The inadequacy of this technique must

[72] Trading Mechanism, TWSE, www.twse.com.tw/en/page/products/trading_rules/mechanism01.html.

have frustrated SEBI since even before this, SEBI had tried to raise the fine multiple times.

N. Review of TBT data feed

TBT data feed furnishes raw data on the order and trade details on real-time basis. This data is necessary for algorithms to make a better decision on what orders to place. But because of being data heavy and needing subscription by fees, small market players eschew it, which create information asymmetry in algo-traders or big market players and the small ones. The paper proposed to provide limited and processed 'structured data' to everyone free of cost.

O. Circular dated April 09, 2018[73]

This circular is a somewhat late follow up of the 2016 discussion paper. The circular has provided good news to small and medium sized traders. As has been discussed previously in this paper also, concern has been shown that in technological arms race, the small and medium sized traders will suffer the most because they may lack the financial resources or the technological know-how to take part in it and take advantage of the latest development in algo-trading world. One of the major deterrents for these traders was the expense of availing co-location facilities which had provided to be too much for most. SEBI has decided that based on input received from them in the aftermath of the 2016 paper, stock exchanges shall take additional measures to bring down the financial and technological wall for them. These measures have been called 'Managed Co-location Services'. As stated in the circular:

> "Under this facility, space/rack in co-location facility shall be allotted to eligible vendors by the stock exchange along with provision for receiving market data for further dissemination of the same to their client members and the facility to place orders (algorithmic / non-algorithmic) by the client members from such facility."

Then the circular discusses the role of these vendors:

> "The vendors shall provide the technical knowhow, hardware, software and other associated expertise as services to trading members and shall be responsible for upkeep

[73] Measures to strengthen Algorithmic Trading and Co-location/Proximity Hosting framework, SEBI/HO/MRD/DP/CIR/P/2018/62 (April 9, 2018).

> and maintenance of all infrastructure in the racks provided to them."

Primary responsibility will remain with stock exchanges for "the actions of vendors providing Managed Co-location Services" and for the "integrity, security and privacy of data" being processed at co-location facilities. To guarantee 'fair competition', stock exchanges are required to permit multiple vendors a chance for providing Managed Co-location Services.

In a bid to make the knowledge of latency period accessible to the public and keep up the principle of transparency, stock exchanges are required to publish on their websites quarterly reports "latencies observed at the exchange", "minimum, maximum and mean latencies and latencies at 50th and 99th percentile" and "reference latency". Latency is defined for a stock exchange as "the time taken to complete the round trip from the Core Router (Core Router is the place where both Co-location orders and Non-colocation orders meet) to the matching engine and back" and reference latency is defined as "the time taken for an order message to travel between a reference rack in the Colocation facility and the Core Router"

The proposed measure where the Tick-by-Tick (TBT) data feed was to be offered free of charge to make it algo-trading and HFT more inclusive of small and medium traders was implemented. The stock exchanges will need to provide "detailed view of the entire order-book, which includes details relating to addition, modification and cancellation of orders and trades on a real-time basis". This would create levelling of playing field for the market players without the imposition of negative costs on algo-traders for having superior trading method. The burden of expenses will now be on stock exchanges but eventually the exchanges will benefit from this move as this would encourage algo-trading, which as we saw in figures displayed on BSE and NSE website, remains way less than that in other major stock markets. It's up to the exchanges to further increase the depth of snapshot of 5 best bid and ask quotes currently being based on the need of participants.

With the aim to discourage the high daily order-to-trade ratio (OTR) of algo-trading, SEBI decided to continue with the practice of asking exchanges to place economic disincentives instead of putting a physical limit on the number of order one can put without converting it into a trade, but with a slight modification. Orders from now that are placed within ±0.75% of the last traded price (LTP) will be exempted from penalty rather than orders placed within ±1 of LTP. The scope of the OTR framework is extended by including "orders placed in the cash segment" and "orders placed under the liquidity enhancement schemes" in the framework.

To improve the data available on the functioning of algo-trading in Indian markets, SEBI has enlarged the scope of audit trail and stretched the requirement of unique identifier by making it compulsory for each approved algorithm, and not just for each algo-order as was prescribed in the notice dated March 30, 2012. These unique identifiers would be a part of the data set that exchanges share for surveillance purpose with SEBI. This has to be completed by September 30, 2018 while the rest of the directions have to be completed before June 30, 2018 gets over.

VI. SEBI CASES

While in this paper it has been discussed how the fear of misuse of algo-trading to commit market abuse in a variety of manners has been expressed sometimes by SEBI and by others many a times elsewhere, when it comes to case laws, chiefly one kind of violation using algo-trading appears: that in self-trading.

A. Self trading

On self–trading, there has been lot of flip-flop by SEBI on whether they violate FUTP Regulations or not. It first needs to be made clear what's self trading. Self trades occur when the same person is the buyer as well as the seller, as held in Securities Appellate Tribunal (SAT) in the matter of *Shankar Sharma Ratnam Square* v. *SEBI*[74] *As adjudicated in H.J. Securities (P) Ltd.* v. *SEBI*, self-trade "does not result in change of beneficial ownership". They're considered to be in violation of Regulations 3 and 4 of FUTP Regulations. Perhaps the most landmark judgment which gives the basis for conviction in many subsequent cases involving self-trades was *H.J. Securities (P) Ltd.* v. *SEBI.*

i. H.J. Securities (P) Ltd. v. SEBI[75]

In this case, a broker's PRO account committed self-trades in small quantity and through 19 terminals from two locations. Adjudicating officer (AO) and SEBI had found the appellate guilty and SAT sat in appeal. It also founded him guilty of violation of FUTP Regulations because self-trades create "artificial volume in the traded scrip and send wrong signal to the lay investor with regard to trading in the scrip" and are "considered to be fraudulent" and "fictitious". The defense that self-trades happened in pro-account through various terminals has already been rejected by SAT as this would give permission for large number of self-trades to occur, giving a false impression to other traders. The defense that "the number of such self

[74] 2009 SCC OnLine SAT 163.
[75] 2012 SCC Online SAT 80.

trades is not large" was also rejected. SAT then stated the principle, which would be used to reject the defense of algo-trading in subsequent cases, that the party is "free to adopt any business model but he has to ensure that whatever business model he adopts, it is in conformity with the regulatory framework".

The above case should have settled the matter on self-trades, but for the ambiguity on the law when it come to two questions: what if the amount of self-trade is so small that it can't send wrong signals and create artificial volumes and thus, be considered fraudulent? And what if the intention was absent, such as in case of algo-trading without manual intervention and with approved algorithms?

Due to the narrow focus of the appear, it would deal with only the answer of only the second question in detail as explored by SEBI's adjudicating authorities. The cases that will be discussed here will be related to Crosseas Capital Services Private Limited and R.M. Shares Trading Private Limited who were alleged to indulge in fraudulent self-trading multiple times.

ii. Crosseas Capital Services (P) Ltd. in the matter of Servalakshmi Papers Ltd., In re[76]

In this case, self-trading occurred while operating through "in-house automated trading system called Crossfire developed for carrying on "Algo/ Automated Trading" in the stock market with a strategy name called Ultra High Frequency Trading (UHFT)". AO here firstly questioned whether mere instances of self-trades were illegal or fictitious? He concluded as self trades do not find any mention in Algo Guidelines, manuals, circulars, NSE or BSE Byelaws, etc., "intention" or "motive" will be a decisive factor in adjudicating on illegitimacy of such self-trades.

As the operation of algo-trading did not involve any manual intervention and the algorithm was approved by both BSE and NSE, the intention of the noticee could not be proved. In his own words, differentiating algo-trading related self-trades with manual self-trades:

> "There is inherent difference between self trades happening manually and self trades happening while trading using the Algo Trading Software. In manual trading, the self trades happen on account of an intention and a specific motive to hamper the system of the market and

[76] SEBI, Adjudication Order No. EAD-2/DSR/RG/07/2013.

> normally the intention is to match 100% of the order quantity in question."

Moreover, AO observed that no harm has been caused to other traders and no benefit to the noticee. AO did reprimand him for his high volume of orders which were not converted into trades, but as there was no violation of SEBI guidelines, he merely advised him to bring it down.

iii. Crosseas Capital Services (P) Ltd., in the matter of Bharatiya Global Infomedia Ltd., In re[77]

In this, in a separate incidences of self-trades that occurred with the same broker, the case went till Whole Time Member (WTM) of SEBI. The facts of the case were similar to Servalakshmi Papers case and the decision given by AO was also similar. He stated that the "allegation of manipulation of market prices" and "allegation of aiding and abetting" are not proved. But WTM overruled his decision.

Noticee was found guilty of violation of Regulations 3(a), 3(b), 3(c), 3(d), 4(1), 4(2)(a) and 4(2)(g) of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 and Clause A(2) of the Code of Conduct for Stock Brokers as specified under Schedule II read with Regulation 7 of the SEBI (Stock Brokers and Sub Brokers) Regulations, 1992, and then imposing penalty for this.

iv. Crosseas Capital Services (P) Ltd., In re[78]

In this case WTM, SEBI stated that noticee has the "duty to preserve the integrity and equilibrium" of the markets and consequently has to maintain parameters to make sure that his algorithm complies with the full regulatory framework and results in avoidance of self-trades and other prohibited activities. The judgment was almost identical to Bharatiya Global Infomedia Limited case and noticee was penalized.

v. R.M. Shares Trading (P) Ltd. in the matter of Onelife Capital Advisors Ltd., In re[79]

The trade in this case was executed by 17 dealers from their respective terminals. He put up lack of mala fide intention to execute self trades as a defense. It was stated that even in an anonymous trading platform, the noticee must take steps to avoid any instance of self-trade and penalized him. H J Securities Private Limited was quoted to reject the contention that

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[77] 2014 SCC OnLine SEBI 128.

[78] SEBI, Adjudication Order No. ID1/EAL/AO/DRK-VB/EAD3-716/41-2015.

[79] SEBI, Adjudication Order No. ASK/AO/09/2014-15.

multiple terminals ere trading with each other by accident, and not mere on terminal.

In this case, noticee explained in detail the nature of algo-trading and HFT like how exchanges work on "supersonic speed of broadcast and trade execution" and this faster speed leads to faster transactions. AO rejected this contention, just like in *Bharatiya Global Infomedia Ltd.,In re*[80].

vi. R.M. Shares Trading (P) Ltd. in the matter of Rushil Décor Ltd., In re[81]

This case and the next one are significant for marking a major relief to algo-traders. Between this case and the string of cases penalizing self-traders two important developments had occurred: NSE and BSE had put in place a system to avoid self-trades, marking a major decrease in such instances and then SEBI came out with a new policy on self-trades dated May 16, 2017 that made volume a factor when adjudicating on self-trade cases[82].

The reason for rejection of contention of violation was that "volume of self-trades vis-a-vis total volume in the shares of Rushil Décor Ltd. is not significant" and that no "mala fide intention behind self-trades could be established. This case signifies that as long as algo-traders do not engage in self-trading at large scale or mala-fide intention can be attributed to them, will be immune from random charges of self-trading. They're anyways specially prone to charges of self-trade because of large volume of trade and data they deal with as well as lack of manual intervention.

vii. R.M. Shares Trading (P) Ltd. in the matter of Prakash Constrowell Ltd., In re[83]

This 2018 case also builds upon the *Rushil Décor Ltd.* case and declares charges of violation of FUTP Regulations unfounded as the instances of self-trades were 'non-intentional' and 'non-manipulative'. Again, the volume of self-trades was a deciding factor.

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80 SEBI, *supra* note 77.

81 SEBI, Adjudication Order No. EAD-5/BS/AO/03/2017-18.

82 Jayshree P. Upadhyay, "SEBI not to Penalize Self Trades, Sets Legal Policy for Such Orders", *LiveMint*, June 12, 2017, https://www.livemint.com/Money/EKb1EjTgBRuWNCnWHOprCI/Sebi-not-to-penalize-self-trades-sets-legal-policy-for-such.html.

83 SEBI, Adjudication Order No. EAD/PM-AA/AO/24/2017-18.

VII. CONCLUSION

Algo-trading and HFT is in all probability the future of stock-trading and by having an unwarranted and irrationally hostile attitude it, Indian stock market will suffer in realization of its potential. The 2016 discussion paper was marked y exactly this kind of attitude where implementation of any of the mechanisms, except that of free of charge TBT feed that would be effective in fighting information asymmetry, would have put a full stop the story of HFT and to a large extent, algo-trading in India.

While principles like fairness, transparency and non-discrimination are something SEBI and every other regulator in the world should try to implement, it cannot come at the cost of technological advancement and in punishing innocent and honest traders. No one should have to have his advancement stopped, as long as it doesn't come at the cost of others.

Moreover, the change in policy in regard to self-trade and algo-trading is to be highly commended for recognizing the distinction between manual and algo-trading when it comes to instances of self-trading. The Supreme Court, in *Direct Recruit Class II Engg. Officers' Assn.* v. *State of Maharashtra*[84] and in many others, ruled that to treat two unequals as equal would violate the equality clause of Article 14 of the Indian Constitution. Self-trading is unavoidable in the most well-written algorithm when trades are occurring in large volumes. It could only be hoped that SEBI would continue such reform and make Indian stock markets more technology friendly.

[84] (1990) 2 SCC 715.

CUSTOMARY EXCLUSION: NEEDLESS AND UNJUSTIFIED

—Riya Kaushik[*] & Himanshu Thakur[**]

Abstract — Exclusion is never a way forward on our shared paths of freedom and justice.

—Desmond tutu

Debarment or mere exclusion is something which every soul on earth has experienced in some way or the other at least once in their lifetime. Not only we remain silent but also give in to the excuses and justifications rendered by the people for this marginalization. But what if this exclusion takes place in the name of customs and traditions and is against a particular gender? This is what continues to happen in the 21st century where change is the constant factor.

Can you better the condition of your women? Then there will be hope for your well-being, otherwise you will remain as backward as you are now.

—Swami Vivekananda

While on one hand, women have become independent, strong-willed, are entering professional fields and bringing the monopoly of men in various spheres to an end, on the other hand, we are still fighting the entrenched stereotypes revolving around women. In modern India, where women are in the forefront of almost all the fields and have proved themselves no less than men, yet there

[*] 2nd Year B.L.S LLB five years' integrated course from Government Law College, Mumbai.

[**] 3rd Year B.L.S LLB five years' integrated course from Government Law College, Mumbai.

seems to be an emphasis on the physical chastity of women and their appearance.

On International women's day,2017, Iceland became the first country in the world to force companies to prove that they pay all employees the same regardless of gender, ethnicity, sexuality or nationality. Iceland is not the first country to introduce a scheme like this, Switzerland has one, as does the US state of Minnesota but Iceland is thought to be the first country to make it a mandatory requirement[1].

While these countries are making efforts to make sure that men and women enjoy equal opportunity in the workplace, in India, even now, we are restraining the ostracization of women being done on the authority of safeguarding customs.

Customary exclusion of women which is carried out in the garb of preserving traditions and practices relating to a particular religion is not only deplorable but also conjectural.

I. CUSTOMARY EXCLUSON OF WOMEN AT THE PLACES OF WORSHIP

There are a number of places of worship[2] in India where either the entry of women is completely banned or they aren't allowed to enter the *Sanctum sanctorum* of the religious place. Recently, women activists were banned from entering the Shani Shingnapur temple in Maharashtra as they tried to intrude in, protesting against the tradition of not allowing women from entering the inner sanctorum of the shrine. However, Senior advocate Neelima Vartak and activist Vidya Bal have filed a PIL in the high court, arguing that such prohibition is arbitrary, illegal and in violation of fundamental rights of citizens[3]. They have sought implementation of the Maharashtra Hindu Places of Public Worship (entry Authorization) Act, 1956[4]. The Bombay High court in response to the PIL has remarked that "Women cannot be barred from entering the Shani Shinganapur temple,

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1 Available at https://economictimes.indiatimes.com/magazines/panache/iceland-to-become-the-first-country-in-the-world-to-neutralise-gender-pay-gap/articleshow/58025347.cms (accessed July 12, 2018.)

2 The places of worship (special provisions) Bill, 1991: Places of worship means a temple, mosque, gurudwara, church, monastery or any other place of public religious worship of any religious denomination or any section thereof, by whatever name called.

3 *Vidya Bal* v. *State of Maharashtra*, PIL No. 55 of 2016 decided on 1-4-2016 (Bom).

4 Hereinreferred to as ''The Act''.

there is no law preventing entry of women, if men are allowed, even women should''. If any temple or person prohibits any person from entering a temple then he or she faces a six-month imprisonment[5] the court maintained.

In a historic verdict, the Bombay high court has also permitted the entry of women up to the restricted grave area of the famous Haji Ali Dargah in Mumbai. According to the PIL filed by the Bharatiya Muslim Mahila Andolan[6], Dargah had been open to women but entry to the inner sanctorum was restricted from June 2012. The Bombay High Court *Noorjehan Safia Niaz* v. *State of Maharashtra*[7] struck down the ban on entry of women into the inner sanctorum terming it a violation of Fundamental Rights enshrined under Articles 15, 16 and 21 of the Indian Constitution.

Patbausi Satra temple in Assam bans women from entering the temple as it considers menstruation as ''unclean''. In 2010, J.B. Patnaik, the then governor of Assam created a history of sorts by persuading the spiritual head of Patbausi satra to allow women into the sanctum sanctorum of the shrine, something which is contrary to propriety. Following this, the satra was briefly open to women before the rule was eventually re-imposed.

A misconception prevails in the Lord Kartikeya temple of Pushkar that lord curses those women who enter the temple instead of blessing them, indeed an excuse to prohibit the entry of women. Ranakpur temple in Rajasthan which many Indian and International tourists visit to revere its splendor carries a huge board outside which states when and how a woman can enter the temple. It also has rules regarding the attire of women entering the temple complex and according to one such rule women wearing western clothes which do not cover up till their knee aren't allowed to go inside the temple.

The Sabarimala temple in Kerala has been stuck in a legal battle for not allowing women between 10 and 50 years of age to enter the temple complex.. Senior advocate Indira Jaising appearing on behalf of NGO Happy to Bleed, sought the Supreme Court's direction to permit entry of women into the temple without age restrictions. The PIL contended that the entry ban violated the fundamental right of women to practice religion that included right of entry and worshipping the deity. The Sabarimala governing board's argument is that the prohibition of women is justified by 'custom'. As of

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[5] S. 4(1), The Maharashtra Hindu Places of Public Worship (Entry Authorization) Act, 1956: Prevents any person belonging to any class or section of Hindus from entering, worshipping or offering prayers, or performing any religious service in any Hindu temple which is used as a place of public worship.

[6] 2016 SCC OnLine Bom 5394.

[7] *Ibid.*

October 2017, the Supreme Court is referring the constitution bench to make a decision on the pertaining ban.

The ongoing trial in the Supreme Court has also put the spotlight on the 1991 Kerala High Court Judgment, which held that the restriction was in accordance with a usage from time immemorial and not discriminatory under the Constitution. As the Supreme Court decides to examine the ban on entry of women aged between 10 and 50 years to the Sabarimala shrine, it will first have to prove wrong this 1991 judgment.

II. MENSTRUATION: MYTH VS THE FACT

Irony is that menstruation, a healthy biological process which is essential for the survival and perpetuation of mankind is not only considered impious but also it is the most un-talked topic in India. What is more shocking and disheartening is the fact that menstruating women are considered to mar the sanctitude of the temples and other religious places.

One of the mis-conceived ideas about menstruation is that the menstrual blood is impure and one must get rid of it as it is believed to be a carrier of bad omen. Misconceptions like these further add to the established myths and taboos about menstruation. Barring women from offering prayers and entering the kitchen are some of the reflections of the same.

The possible explanation of such practices can be given in physiological and hormonal terms. Decades ago, the traditional role of a woman in the house involved arduous and physically demanding tasks such as carrying heavy pots of water, grinding of wheat, spices and farming duties too. In order to save women from discomfort which included menstrual cramps, headaches and PMS syndrome, they were prescribed rest and exempted from doing household tasks.

However, the only way to defend it in the modern times was to add a religious aspect to it. It is disheartening to see how Westernization and Modernization has left the taboos about menstruation untouched.

III. CUSTOMARY EXCLUSION OF WOMEN UNJUSTIFIED UNDER THE PROVISIONS OF INDIAN CONSTITUTION.

I believe that a woman in India is restrained in all the respects be it education or religion. No doubt that lately, there has been substantial improvements in women's rights, but the society is never unsuccessful in drawing

that line between men and women. Customary discrimination of women at the places of worship is one such issue involving the gender biased practices in the name of religion. Women's right to enter a place of worship is a right that is fundamental in nature under the following provisions of the Indian Constitution:-

Article 14: Equality before Law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 15: The state shall not discrimination against any citizen on grounds only of religion, race, cast, sex, or place of birth or any of them.

Article 25: Freedom of conscience and free profession, practice and propagation of religion.

Article 26: Freedom to manage religious affairs. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right.

The exclusionary practice which is exclusive to the female gender amounts to "discrimination" and thereby violates the very core of Articles 14, 15 and 17 and not protected by 'morality' as used in Articles 25 and 26 of the Constitution. In the landmark judgments of *Naz Foundation* v. *Govt. of Nct of Delhi*[8], 'morality' has been interpreted as 'constitutional morality' and not popular or individual morality. Constitutional morality may be understood as the core framework of values and principles like equality, non-discrimination, dignity, rule of law etc., that characterizes and justifies the constitution- In Sabarimala case, there is a very strong presumption that the controversial custom of restricting women offends the value of 'non-discrimination' which is the central pillar of that constitutional morality.

A. Religious Laws *Vis-à-vis* Judicial Review.

Article 13 of the Indian Constitution mandates that any "law" that is in violation to a fundamental right is void in nature. The Allahabad High Court in *Vijay Singh* v. *State of U.P.*[9] and *Shri Krishna Singh* v. *Mathura Ahir*[10] held that ''The definition of law cannot be restricted to Article 13(2) alone and therefore "laws in force" would include customs or usage, having the force of law.''

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8 2009 SCC OnLine Del 1762.
9 2004 SCC OnLine All 1656 : (2005) 2 AWC 1191.
10 (1981) 3 SCC 689 : AIR 1980 SC 707.

The hon'ble Court here chose to interpret the meaning of word "law" to include customs or usages, but not personal law. Thus, while personal law is exempted from the process of Judicial Review, customs are not. Hence, it is clear that according to Article 13 of the Indian Constitution, the court is free to strike down any "custom" or "usage" which is in contravention of the fundamental rights of a person.

B. Unconstitutionality of denying women the access to places of worship

The prohibition on the entry of women in temples is based on discrimination against them. It by and large targets an entire segment of the population by relying on outdated and sexist impression of purity and impurity. It spreads prejudice on a structured and widespread manner and is prima facie incapable of being defended and *per se* is violative of Article 14 and 15 of the Constitution. The said customary ban is clearly contrary to the provisions of the Constitution of India and as such ban ought to be lifted and status-quo be restored.

The Religious authorities defend such unconstitutional acts by relying exclusively on Article 26 of the Indian Constitution according to which ''Every religious denomination shall have the fundamental right to manage religious affairs''. They contend that involvement of the state in matters which are of religious importance such as temple entry will infringe their religious rights. It is to be rightly noted that Article 25(2) of the Indian Constitution allows state intervention in religious practice, if it is for the purpose of ''social welfare or reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus''. In support of the argument against use of article 26 as a safeguard it is of utmost importance to note that under the above mentioned article, the religious authorities can only manage the affairs of the Trust and cannot regulate the same by imposing conditions or rules contrary to the Constitution of India.

In *Commr. of Police* v. *Acharya Jagadishwarananda Avadhuta*[11] is was observed that ''The protection guaranteed under Articles 25 and 26 of the Constitution is not confined to matters of doctrine or belief but extends to acts done in pursuance of religion and, therefore, contains a guarantee for rituals, observances, ceremonies and modes of worship which are essential or integral part of religion. With respect to Right to religion of an individual under article 25 of the Indian Constitution, the Bombay High Court in *State of Bombay* v. *Narasu Appa Mali*[12] has observed that "Religion in a modern

[11] (2004) 12 SCC 770.

[12] 1951 SCC OnLine Bom 72 : AIR 1952 Bom 84.

democratic State is purely a matter of the individual and his God; with the religious beliefs of the citizen and his religious practices normally the State would not interfere. But if these religious beliefs or practices conflict with matters of social reform or welfare on which the State wants to legislate, such religious beliefs or practices must yield to the higher requirements of social welfare and reform."

In *Commr., Hindu Religious Endowments* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[13] it was contended that what is protected under Article 26(b) is only the 'essential part' of religion. The 7 Judges' Bench laid down the essential function test, which states that only those practices which are "integral to the faith" can get exemption from State intervention. It was observed that, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. It was also observed that the use of the phrase "of its own affairs in matters of religion" suggests that there could be other affairs of a religious denomination or section, which are not strictly matters of religion and to such affairs, the rights guaranteed by Article 26(b) will not apply.

Relying on *Durgah Committee* v. *Syed Hussain Ali*[14], it is to be mentioned that clauses (c) and (d) of Article26 do not create any new right in favour of religious denomination but only safeguards their rights. I contend that in the matters of managing religious affairs, all practices are not always sacrosanct, for there may be many ill practices like superstitions which in due course of time may be merely accretions to the basic theme of that religious denomination. It is hereby to be noted that entry to the temple is not essential to religion and there is difference between "regulation of entry" and "complete prohibition of entry".

In *Venkataramana Devaru* v. *State of Mysore*[15], it was observed that the religious denomination cannot completely exclude the members of any community and may only restrict their entry in certain rituals. The relevant Rule cannot be interpreted to mean that it bars entry of women as such an interpretation would invite violation of principles underlying gender equality.

In *Sri Adi Visheshwara of Kashi Vishwanath Temple* v. *State of U.P.*[16], it was held that 'The denomination sect is also bound by constitutional goals and they too are required to abide by law; they are not above law. Law aims at removal of the social ills and evils for social peace, order, stability and progress in an egalitarian society…'

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[13] AIR 1954 SC 282.
[14] AIR 1961 SC 1402.
[15] AIR 1958 SC 255.
[16] (1997) 4 SCC 606.

IV. CONCLUSION

The causes of customary exclusion of women are many but the fountainhead among all is the menstrual misapprehension and the delusions allied to it. It is propelled on the pretext of protecting the saintliness of religious institutions. While these saviours of religion talk about preserving the traditions and customs, they themselves deviate from rectitude and blatantly proclaim notions and 'usages' which do not hold water. Initially, misconceptions and facts were muddled together in order to enforce some rules and this went on for years to create a harrowing environment for women gradually. It's high time now that we as a society understand that the process of menstruation is not that excruciating but the stigma that people link with it, is.

Women in the modern times have left the domains of their home and continue to walk on the path of achieving freedom and equality but it's a sad reality that this path is full of ordeals and requires power to fight against the socialized prejudices and discrimination. It is no lie that menstrual myths are deeply rooted in people's lack of understanding of the human biological processes but with the advancement of time and the plethora of knowledge that is at our disposal today, we must debunk these conjectures once and for all.

Alvin Toffler once said, "*The illiterate of the 21*st *century will not be those who cannot read and write, but those who cannot learn, unlearn and relearn*[17]*".* This is very much in accordance with the current scenario. Traditions need to evolve with time and so do the mindset and reasoning of people.

A large number of people who are well educated not only believe in the superstitions created in the name of god but also practice such prejudicial customs. It is appalling to see that some women too tend to accept and continue to bear this discrimination in their homes.

What needs to be done is that more awareness ought to be raised regarding menses and its effects, women made to be conscious of their legal rights and men to be even-handed. Those customs and traditions which are not consonant with the ongoing state of affairs should be discarded. If women are not mindful of their social rights, then no upliftment in their status can be done.

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[17] Alvin Toffler, Rethinking the Future: Rethinking Business, Principles, Competition, Control & Complexity, Leadership, Markets and the World, (1st edn., 1998).

The father of the Nation, said *"Nothing in the Shastra, which is manifestly contrary to the universal truths and morals, can stand*[18]*".* No matter how ingrained these stereotypes are, they need to be deracinated in case they do not resonate with reality.

The most substantial way to do this is by using **the power of courts.** From dealing with rapes, dowry, sexual harassment, domestic violence to giving women property rights, many patriarchal and male chauvinistic practices have been challenged in the courts and justice has been done. Customary exclusion of women has to be explored from the perspective of patriarchy which has confined all the powers within it for centuries.

However, over the years, the Supreme Court has been on fence while dealing with personal laws. In a number of cases it has held that personal laws of parties are not susceptible to Part III of the Constitution dealing with fundamental rights. Therefore, they cannot be challenged as being in violation of fundamental rights especially those guaranteed under Articles 14, 15 and 21 of the Constitution of India. On the other hand, in a number of other cases the Supreme Court has examined personal laws on the guidelines of fundamental rights and interpreted them so as to make them consistent with fundamental rights. Thus, there is no uniformity of decisions. I strongly feel that Courts need to be clear on the issue of whether personal laws can be challenged on the ground of violation of fundamental rights or not. A consistency needs to be brought in the judgments concerning uncodified personal laws, customs and usages.

Nevertheless, Courts can only show the way but the change has to come from within the society. As Gandhi Ji said, "Be the change you wish to see in the world", this is no time to beat around the bush and the need of the hour is to set the right intentions and work upon them. Customary exclusion can only cease to exist by enforcement of stringent laws concerning like rights for both men and women. That's the only way men and women can be equal participants in the country's way forward.

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[18] Ajit K. Dasgupta, Gandhi's Economic Thought, (1st edn., 1996).

DOMAIN NAMES AND CYBERSQUATTING IN IP LAWS

—*Ms. Akansha Srivastava*

Abstract — The developments in the field of Information and technology have brought a new platform for traders and businesses. Information technology has rapidly increased their presence in the online markets to attract consumers with the help of the trademark. Therefore, trademarks play a very important role and it is crucial to protect the trademarks. The domain names and Cybersquatting's are also a part of the trademark and they need protection too. The domain names represent the purpose of trademarks for online trade and businesses. The registration of domain names is granted on a first come – first serve basis. So this becomes a loophole this leads to reserving of the trade names, company names etc., with a view of ill-will to the genuine buyers which is called Cybersquatting. The protection of which is not given by the Indian Trademark law. It can be only protected by passing off. And the consequences to which will be further explained in this paper.

Keywords: Trademarks, Domain names, Cybersquatting, Infringement, Cases

I. INTRODUCTION

Trademarks[1] are the marks which help in distinguishing one person from those of others and which are capable of being represented graphically. They are actually the marks of the goodwill which the owner possesses.

* 5 th year Student, Amity Law School, Amity University.

1 As defined in S. 2(zb) of Trade Marks Act, 1999.

Trademarks help the common public to distinguish different goods and services of the same classification. Therefore, it can be said that the trademarks act as communicators. Trademark allows the traders to allow diverse type of products and services. Trademark also needs to be of distinctive character[2] to make it easy for the general public to recognize the difference between the goods. Also, a trademark, like any other sign has to signify something else rather than itself in order to function as a trademark.[3] Trademark also signifies that all goods bearing a particular trademark come from a single course and also on an equal level of quality[4] and it also acts as prime instrument in advertising and selling goods.[5] The rapid growths of businesses do want to have presence technically, which can be done by creating websites and getting domain names. The websites can be launched after registering the name of the website which are called domain names which the traders generally keep the domain name same as of their company or business.[6] Domain names are easy to remember and are often coined to reflect the trademark of an organization. Cyber Squatting has come to be with an association with the registration of domain names without the bonafide intension or without the intension of using them, in the names of popular brands only for the purpose of making money. It is where a domain name is registered, sold or used with the intent of profiting from the goodwill from someone else's trademark.[7] The remedy for it is not explained in Indian Trademark Law, so the only remedies available to it are cancellation of offending domain name or transfer of domain names to the other party[8]. Accordingly, the world is in process of searching for a better solution to address the issues of domain names and Cybersquatting.

II. FUNDAMENTALS OF DOMAINS

Internet Protocol (IP) addresses which is a chain of numbers and which are separated by periods is used to identify the Internet Websites to which a domain name provides a corresponding address[9]. For example, www.icann.org is ICANN's website. Domain names serve the purpose of identifying the goods and the services like promotion of business and building up of

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2 As per S. 9 of Trade Marks Act, 1999

3 Spyros M. Maniatis, "Trade Mark Law and Domain Names: Back to Basics", EIPR 2002, 24(8), 397-408.

4 Dr. V.K. Ahuja, *Law Relating to Intellectual Property Rights*, 2nd edition, p. 278.

5 J.T. McCarthy, *Trademarks and Unfair Competition*, vol. 1, New York, 1973, p. 86.

6 Dr. Sreenivasulu N.S., *Intellectual Property Rights*, Regal Publications, New Delhi,2nd revised, 2011, p.152.

7 Christopher Varas, "Sealing the Cracks: A Proposal to Update the Anti-Cybersquatting Regime to Combat Advertising-Based Cybersquatting", 3 J. of Intellectual Property Law 246, 246-261(2008).

8 Para 4(i) of the UDRP rules.

9 Available on http://www.legalservicesindia.com/article/article/cybersquatting-and-domain-names-1745-1.html (accessed 28th October 2017).

customer base online, advertising on the web, establishment of credibility. There is no international treaty regulating the domain names like the other domains of Intellectual property Rights. The Domain Name system, with its flexibility, was developed to deal with the issues related to the ARPANET name and addressing system.[10] If someone wants to send a letter to someone physically, and for that the house address needs to be distinctive, similarly, there needs to be a distinctive address for Internet as well, which are dealt through IP protocol.[11] In order to send and receive information on a proper address, there needs to be 2 addresses, one of receiver and other of sender.

In *Sataym Infoway Ltd.* v. *Siffynet Solutions (P) Ltd.*[12]*,* the appellant registered several domain names likes www.sifynt.com, www.sifymall.com, etc in June 1999 through WIPO and ICANN, based on the word "Sify", devised using elements of its corporate name, satyam Infoway, which by that time had earned a wide amount of goodwill and reputation. Whereas, the respondent had registered www.siffynet.net and www.siffynet.com with ICANN in 2001 and 2002 as it carried on business of Internet Marketing. On denying to the respondent's demand to the appellant or transferring the domain name, the city civil court granted an injunction against the respondent on the ground that the appellant was sing the trade name *"sify"* which had built up a strong goodwill and reputation.

On appeal to the High Court, it held that the balance of convenience between both parties should be considered and the respondent had invested huge sum of money in business. According to High Court, customers would not be misled or confused between 2 parties as the 2 business were different and the services were also different. It also held that there was an overlap or identical or similar services by both parties and confusion was likely, unlike claimed by the defendant. As for the balance of convenience issue, the court was convinced of the appellant's evidence of being the prior user and having a reputation with the public with regard to *"sify"*. The respondent would not suffer much loss and could carry on its business under a different name.

The Supreme Court ignored the finding's of the High Court, saying this would be important only if the case was one where the right to use as a co-equal to both parties. The respondent's adoption of the appellant's trade

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[10] Adam Dunn, "The Relationship between Domain Names and Trademark Law", Central European University.

[11] Lindsay, David, *International Domain Name Law: ICANN and the UDRP* at p.11, Oxford: Hart Pub., 2007, Print.

[12] (2004) 6 SCC 145 : AIR 2004 SC 3540.

name was dishonest and so the High Court's decision was set aside while that of the Civil Court was affirmed.[13]

In the Hon'ble Supreme Court explained the importance of domain names as *"The original role of a domain name was no doubt to provide an address for computers on the Internet. But the internet has developed from a mere means of communication to a mode of carrying on commercial activity. With the increase of commercial activity on the internet, a domain name is also used as a business identifier. Therefore, the domain name not only serves as an address for internet communication, but also identifies the specific internet site. In the field of commercialization, each domain name owner provides information/services which are associated with such domain name. Thus, a domain name may pertain to the provision of services within the meaning of section 2 (z). A domain name is easy to remember and use, and is chosen as an instrument of commercial enterprise, not only because it facilitates the ability of consumers to navigate the Internet to find websites they are looking for, but also at the same time, serves to identify and distinguish the business itself, or its goods or services, and to specify a corresponding online Internet location. Consequently a domain name as an address must, of necessity, be peculiar and unique and where a domain name is used in connection with a business, the value of maintaining an exclusive identity becomes critical."* In *Rediff Communication Ltd.* v. *Cyberbooth*[14] the court held that *"the internet domain names are of importance and are a valuable corporate asset. A domain name is more than an internet address and is entitled to protection as a trademark".*

One of the 2 addresses is an IP address and the other one is the one assigned to each host computer connected to Internet, which is a human – readable name and known as a domain name.[15] The main purpose of the Domain Name System is to link domain names to IP addresses to make internet more of user friendly. For example, http://www.amity.edu/ is easier to remember than 55.66.187.102[16]. The IP number and the equivalent linked name of the domain both identify each website; as no 2 organizations can have exactly the same domain name.[17] The Domain Name System (DNS) helps people to search websites on the Internet. Just like each house has a different address and no address can be same, similarly each and every computer has a unique IP address or even like the telephone numbers which

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[13] Jagadish, A.T., "A Critical Study on Menace of Cyber Squatting and the Regulatory Mechanism", ISSN 2321-4171.

[14] 1999 SCC OnLine Bom 275 : AIR 2000 Bom 27.

[15] Lindsay, David, *International Domain Name Law: ICANN and the UDRP* at p.11, Oxford: Hart Pub., 2007, Print.

[16] The IP number is of the Amity University website.

[17] Caroline Wilson, "Internationalized Domain Name Problems and Opportunities" CTLR 2004, 10(7), 174-181.

is a string of different numbers, which can well explained as similar to what is called an IP (Internet Protocol) address.

A typical domain name consists of several segments. Examining the domain name www.amity.edu; the letters "www." Describe the location of a website on the World Wide Web and the "amity.edu" or the URL are known as its top-level domain. The well-known top-level domain names include .com, .org, .edu, .Gov. which indicates a business site, non-profit and charity, educational purpose, or a governmental website respectively. There are other top-level domains like .US for United States of America or .au for Australia etc.[18] There are 2 type of Top level domains: First is Generic Top Level Domain – gTLDs which include .com, .edu, .int, .mil, .gov, .net, .org, .biz, .info, .name, .pro etc. Second is Country Code Top Level Domain – CCTLD which includes .uk for United Kingdom, .de for Germany etc. which correspond to a country, territory etc. A domain name acquires the features of a trademark or a trade name, as it is a means of individualization of a business entity. Existing companies having a value of trademark tries its best to transpose itself and get its trademark extended to internet zones. It also happens that the value of trademark is grown on the internet from starting. A survey in United States and United Kingdom shows that there is rapid increase in domain name infringement is the major cause of online abuse.

III. CYBERSQUATTING

There are always a large number of registrations of domain names on "First come-first serve basis" and is easy to get and is also considered as cheap. Through this people who are not the real owners of the trademark register many well-known trade names, company names, etc. with a view of bad faith and trafficking. The practice of procuring the registration of the domain name, with the intension to sell the name to the real owner is called "Cybersquatting". After that, the cyber squatters sell these names to other non- related entities which enable dilution of the well-known trademarks. They pose a threat to the companies who have trademarked. In *Yahoo! Inc.* v. *Akash Arora*[19]*, the plaintiff was a registered owner of the domain name "yahoo.com", succeeded in obtaining an interim order restraining the defendants and agents from dealing in goods and services on the rise also under the domain name "yahooindia.com" or any other name which is deceptively similar to that of plaintiff's trademark "yahoo".* Till now NSI (Network Solutions, Inc.) distributed all, of the domain names to the

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[18] Available at https://definitions.uslegal.com/i/internet-domain-names/ (accessed 29th October 2017).

[19] 1999 SCC OnLine Del 133 : (1999) 2 AD (Del) 229.

registrants purely on a first come-first serve basis[20] as it only checked for the uniqueness, many individuals were able to claim domain names those of the famous trademarks with the bad faith of reselling the domain names to the original owners[21] and receive a good amount of royalty. Competitors also register the domain name of their competitor's trademark in order to sell their own goods in the name of their competitors. This also constitutes to be an infringement.

On the other hand, there also exist come concurrent and innocent registrants, who register trade mark as domain names for some unrelated interest and not to harm the trademark owner. These types of people are not liable as Cybersquatters. There are 3 largest organizations which that are present for the victims of cybersquatting and explains ways to protect your business against cyber squatters. These organizations are WIPO - World Intellectual Property Organizations, ICANN- Internet Corporation for Assigned Names and Numbers, and ACPA – Anti-cybersquatting consumer protection act'1999.

The WIPO[22] is "the leading institution in the resolution of Internet domain name disputes." The WIPO has formed an arbitration and mediation center to give alternative resolution options to the private parties. It deals in both contractual and non-contractual disputed matters.

The ACPA'1999[23] makes the cyber squatters liable to court's action if brought under a claim. The act provides many provisions for the protection, but to file a claim, the trademark holder must determine that firstly, the mark of the trademark owner is distinctive, secondly, the domain name and trademark are either identical or has a confusing nature, lastly, the domain name owner acted in a bad faith.

The ICANN's[24] policies require that trademark based disputes be resolved by agreement or court action. If the dispute arises from an abusive registration, then the proceedings can be expedited. The trademark holder must file a complaint in the actual jurisdiction against the domain holder name.

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[20] Gregg Duffey, "Trademark Dilution under the Federal Trademark Dilution Act of 1995: You've Come a Long Way Baby – Too Far, Maybe?", 39 S. Tex. L. Rev. 133, 147 (1997).

[21] Martin B. Schwimmer, "Domain Names and Everything Else: Trademark Issues in Cyberspace", in Understanding Basic Trademark Law 1998.

[22] Available at http://www.wipo.int/portal/en/index.html (available at 29th October 2017).

[23] Available at https://jux.law/the-anti-cybersquatting-consumer-protection-act-acpa/ (available at 29th October, 2017).

[24] Available at https://www.icann.org/ (available at 29th October, 2017).

IV. UNIFORM DISPUTE RESOLUTION POLICY (UDRP)

ICANN(through UDRP) offers expedited dispute resolution proceedings for holders of trademarks to contest abusive registrations of domain names.

A. Elements to prove under UDRP

- Domain name is identical or confusingly similar to trademark or service mark in which the complainant has rights;
- Have no rights or legitimate interests in respect of the domain name; and
- Domain name has been registered and is being used in bad faith[25]

The following circumstances will be considered as bad faith:

- If done for valuable consideration by the trademark owner;
- In order to prevent trademark owners from reflecting the mark in a corresponding domain name;
- Registered for the purpose of disrupting the business competitor; or
- Purposefully creating a likelihood of confusion.

B. UDRP procedure

The burden of proof is on complainant who actually needs to prove all 3 elements. The elements would be proved if the complainant establishes that the evidences were more likely than not. With respect to 2nd rule UDRP requires that complaninat need to prove that he has no legal interest or right over that domain name.

C. UDRP Defenses

- Before any notice to the defendant of dispute, his use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services; or

[25] Available at http://www.icann.org/en/help/dndr/udrp/policy (accessed 16th December, 2017).

- The person have been commonly known by the domain name, even if he have acquired no trademark or service mark right; or

- He is making a legitimate non-commerial for fair use of the domain name, without intent for commercial gain to mislead consumers.[26]

V. TRADEMARK AND CYBERSQUATTING LAWS IN INDIA, UK AND US

Trademark and Cybersquatting laws in INDIA

Trademark laws in India are formulated by the Trademark Act' 1999. And as far as domain name dispute resolution, there is no legislation which explicitly refers to dispute resolution. But since, Trade Marks Act' 1999 itself is not territorial, so, it may not allow for adequate protection of domain names, however, this does not mean that domain names are not to be legally protected to the las relating to passing off.[27] The information Technology act' 2000 of India along with 2008 IT Amendment act addresses many cybercrimes and has also set up cyber crime cell. However, the act ignores the problem of domain name disputes and cyber squatting. In case of, cyber squatting domain names may be considered as trademarks based on use and brand reputation, so they fall under the Trade Marks act 1999.

Other than that, According to *section 13 of the Indian trademarks act' 1999*, legal remedies for the suit of infringement includes Injunction, Damage or Acounts of profit or delivery up of infringement of goods or destruction of infringing goods. *Section 103* imposes penalty for applying false trademarks and *Section 104* imposes penalty for selling goods or services bearing a false trademark, which is punishable with imprisonment for a term not less than 6 months which may extend to 3 years along with fine not less than Rs. 50,000 which may be extended to Rs. 2 lakh. The copyright Act' 1957, is also invoked at times and raids conducted. However, still, domain name offences are still struggling for legislative clarity.[28] The common law remedy of passing off is available to the owner of the trademark but in case his mark is registered , he can file an action for infringement of trademark.[29]

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[26] Available at http://www.icann.org/en/help/dndr/udrp/policy Para 4(a)(ii) (accessed 16th December, 2017).

[27] Jagadish, A.T., "A Critical Study on Menace of Cyber Squatting and the Regulatory Mechanism", ISSN 2321-4171.

[28] Jagadish, A.T., "A Critical Study on Menace of Cyber Squatting and the Regulatory Mechanism", ISSN 2321-4171.

[29] S. 27 of the Trade Marks Act, 1999.

Trademark and Cybersquatting laws in UK

There were demands of the legal protection of trademarks as plaintiff's demanded injunction.[30] Therefore, a more updated approach was needed, thus, in 1875, The United Kingdom introduced Trademarks Registration act.[31] The act of 1875 became the ancestor of Trademark act' 1934 and of 1994. Since, UK is a part of the European Union and the scope of 1994 act was expanded to fall within European Union Directive.

The Trade Mark Act of 1994 defines "Trademark" as:

"Any Sign capable of being represented graphically which is capable of distinguishing good or services of one undertaking from those of other undertaking.

A Trademark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging"[32]

The elements which are necessary for trademark infringement actions according to trademark act are:

- A person is infringing a trademark if he is using a sign which is identical with the trademark in relation to goods or services which are identical with those for which it is registered in the *use in the course of trade*. [33]
- A sign is identical with the trademark and is used in relation to goods or services similar to those for which the trademark is registered; or
- The sign is similar to the trademark and is used in relation to goods and services identical with or similar to those for which the trademark is registered,
- There exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the trademark.[34]

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30 W. William Rodolph Cornish & David Llewelyn, "Intellectual Property: Patents, Copyrights, Trademarks and Allied Rights" 607 (Sweet & Maxwell 2007).

31 W. William Rodolph Cornish & David Llewelyn, "Intellectual Property: Patents, Copyrights, Trademarks and Allied Rights" 608 (Sweet & Maxwell 2007).

32 Trade Marks Act, 1994 (UK) S. 1(1).

33 Trade Marks Act, 1994 (UK) S. 10(1).

34 Trade Marks Act 1994 (UK) S. 10(2).

Since, the phrase *"use in the course of trade"* is an essential part of the section, Trademarks act provides a non-exhaustive list of instances for it such as:

- Affixing the sign to goods or its packaging;
- Offering or exposing goods for sale, putting them on the market, or stocking them for those purposes under the sign, or offering or supplying services under the sign;
- Importing or exporting goods under the sign;
- Using the sign on business paper or in advertising.[35]

A. Defenses for the Infringement as provided by Trademark act '1994 are

- Use of the registered trademark is not infringed by the use of the another UK registered trademark in relation to the goods or services for which the another one is registered.[36]
- Use of Person's own name or address with honest practices.
- Suggestions concerning the kind, quantity, intended purpose, quality or other Characterstics.
- Use of an earlier right in a locality[37].

English courts too had struggled to get into the concept of the domain name infringement into traditional trademark laws as in like does registering the domain name that is a registered trademark of another constitute the *"use in the course of trade"*.

B. United Kingdon Cybersquatting laws

The UK has not enacted a law for Cybersquatting. They were only dealing with the cybersqatting cases through the trademark act of 1994 and through precedents. It approached to dealing with the Cybersquatting was introduced through the English Case on Cybersquatting is *British*

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[35] Trade Marks Act, 1994 (UK) S. 10(4).

[36] Available at http://www.legislation.gov.uk/ukpga/1994/26/section/11 (accessed 15th December, 2017).

[37] Available at http://www.legislation.gov.uk/ukpga/1994/26/section/11 (accessed 15th December, 2017).

Telecommunications Plc. v. *One in a Million Ltd.*[38] In the present case, the defendants registered the following domain names: Ladbrokes.com, Sainsbury.com, sainsburys.com, marksandspencer.com, cellnet.net, bt.org, vrgin.org, marksandspencer.co.uk, britishtelecom.co.uk, britishtelecom.com, and britishtelecom.net. The court then, came to know that there was no central authority for the Internet and therefore, it struggled for how to decide the case dealing with Cybersquatting within the trademark law framework. However, the issue was the defendants had not used the domain names in the course of trade in connect with goods or services but had registered it.

Then, the courts conducted a 'passing off' trade mark infringement analysis under 10(3) stating:

"The appellants seek to sell the domain names which confusingly similar to registered marks. The domain names indicate origin. That is the purpose for while they were registered. Further, they will be used in relation to the services provided by the registrant who trades in domain names". The Court also stated that there would be only one possible reason to why would a person register a domain name, who is not linked to the specific domain name, and that would be to pass himself off as part of that group or his products of as theirs.

Consequently, it can be seen that in UK, if it is proved that one is registering domain names just for the purpose of restraining the true owners, i.e. the cybersquatters practicing cybersquatting, a remedy under 'passing off' is available. The court would not entertain any argument that says registering a domain name and parking it for the purpose to be used in the course of trade for buying and selling. Registering a domain name and then parking it would not seem to be used in the course of trade as one is selling or buying. Therefore, the cybersquatting would be squeezed into traditional trademark laws. Therefore, this is how cybersquatting laws are dealt with.

C. UDRP in UK

The remedies available in UK are Trademarks act 1994, and the precedents. But, one may also file the claim through UDRP. UDRP is less expensive and saves time. Litigating through the national courts provides more remedy, but are more expensive and time consuming.

Trademark and cybersquatting laws in US

US trademark law is separated under a dual system of states ad federal protection. A registered trademark offers greater protection for its holder.

[38] 1998 FSR 265 : (1999) 1 WLR 903 : 1999 FSR 1.

The need for trademark law was recognized and therefore, the act of 1870 was introduced as the first federal trademark law. However, the law was held unconstitutional. And then, it further took another 76 years for a comprehensive, constitutional federal trademark law could be enacted. In the year 1946, Lanham Act was enacted to specifically deal with the trademark laws. The Lanham Act defines the trademark as:

"A trademark is any word, name, design or symbol, or any combination thereof, used in commerce to identify and distinguish the goods of one manufacturer or seller from those of another and to indicate the source of the goods.[39]

D. Elements for a trademark Infringement under the Lanham Act are

- A protectable interest is a valid trademark.
- The defendant's use of that mark in commerce; and
- The likelihood of consumer confusion.[40]

This is a 3 step analysis, to ascertain whether a trademark infringement has occurred.

Other factors considered by the US courts are:

- Similarity of Marks
- Competitive proximity
- Strength of plaintiff's mark
- Consumer sophistication
- Actual confusion; and
- Defendant's good faith[41]

Here, also the courts had problems initially with domain names and whether the use of them was a trademark infringement issue, and the reason

[39] United States Lanham Act, 1840.

[40] Adam Dunn, "The Relationship between Domain Names and Trademark Law", Central European University, p. 24.

[41] Adam Dunn, "The Relationship between Domain Names and Trademark Law", Central European University, p. 24.

behind this was because domain name is actually an address and the trademark law was not developed to give protection and remedies to addresses.

E. Defenses to a trademark Infringement as per Lanham act are

- Valid License
- Statute of Limitation
- Laches
- Unclean hands
- Fair use
- First sale doctrine[42]
- Others

US found a need to enact a law to deal with Cybersquatting due to increasing importance of Trade through Internet and therefore, protection of domain names were needed.

ACPA defined Cybersquatting as the registeration or use of a trademark as a domain name in bad faith with an intension to profit from mark[43].

F. Elements of Cyber Squatting Claims

The ACPA (Anti – Cyber Squatting consumer protection act 1999) gives the right to the trademark owner to sue the one who registers a mark in bad faith with the intent to profit when a domain name is:

- Identical or confusingly similar to a mark that was distinctive at the time the defendant's domain name was registered; or
- Identical or confusingly similar to, or dilutive of, a mark that was famous at the time he defendant's domain name was registered.[44]

But in order to prove a claim under ACPA, an owner must prove:

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[42] Available at https://www.justice.gov/usam/criminal-resource-manual-1854-copyright-infringement-first-sale-doctrine (accessed 15th December, 2017).

[43] 15 USC 1125(d).

[44] Mary LaFrance, *Understanding Trademark Law* 6 (LexisNexis 2009).

- It has a valid trademark entitled to protection;
- Its mark is distinctive or famous;
- The defendant's domain is identical or confusingly similar, or in the case of famous marks, dilutive of, the owner's mark; and
- The defendants used, registered, or trafficked in the domain name;
- With a bad faith intent to profit.[45]

The phrase '*Confusingly similar*' of the act is analyzed differently from the phrase 'likelihood of confusion' trademark analysis.[46] To examine the phrase *'bad faith intent to profit'*, the ACPA offers the following factors to be considered:

- "The trade mark or any other Intellectual property rights of a person, if any in the domain name;
- The extent to which the domain name consists of the legal name of the person or a name that is otherwise commonly used to identify that persons;
- The person's prior use, if any, of the domain name in connection with the bona fide offering of any goods or services;
- The person's bona fide non-commercial or fair use of the mark in a sit accessible under the domain name;
- The person's intent to divert consumers from the mark owner's online location to a site accessible under the domain name that could harm the goodwill represented by the mark, either for commercial gain or with the intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site;
- The person's offer the transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain without having used, or having an intent to use, the domain name in the bona fide offering of any goods or services, or the person's prior conduct indicating a pattern of such conduct;

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[45] Mary LaFrance, *Understanding Trademark Law* 6 (LexisNexis 2009).
[46] Mary LaFrance, *Understanding Trademark Law* 6 (LexisNexis 2009).

- The person's provision of material and misleading false contact information when applying for the registration of the domain name, the person's intentional failure to maintain accurate contact information, or the person's prior conduct indicating a pattern of such conduct;

- The person's registration or acquisition of multiple domain names which the person knows are identical or confusingly similar to marks of others that are distinctive at the time of registration of such domain names, or dilutive of famous marks of others that are famous at the time of registration of such domain names, without regards to the goods or services of the parties; and

- The extent to which the mark incorporated in the person's domain name registration is or is not distinctive and famous within the subsection (c) (1) of the section."[47]

G. Defenses to a Cybersquatting Claim

The act states that the bad faith shall not be found in,

'Any case in which the court determines that the person believed and had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful'[48] The courts were still confused with how to treat domain cases. It was because of the duty to protect right to free trade and freedom of expression, while also needing to protect the rights of trademark owners.

H. UDRP in US

In US, one can file claim through the UDRP process or through the state or federal system. Under the UDRP process, one is limited to the remedy of cancellation or transfer of the offending domain name. However, US court system offers more remedies that UDRP such as injunction and monetary damages in addition to UDRP.

VI. CONCLUSION

Protection of Domain names and cybersquatting is a very complex subject, and it needs to be understood minutely.

Trademark laws play an important role in India in regard to Intellectual Property Rights, but when it comes to domain names and cybersquatting, it

[47] United States Lanham Act,1840.
[48] United States Lanham Act,1840.

is a challenge. Due to constantly changing environment of Internet, changes in law for protection is required.

However, UDRP can be considered to be the best solution right now for India. The domain name disputed can be addressed by the local courts, but people find the process of litigation to be expensive and time consuming. UDRP is cheap as well as less time consuming. United States and United Kingdom have also adopted the remedies by the UDRP. Although, both the countries have given the option to choose the remedy either of UDRP or litigating in the local courts, thus option can be considered.

THE DYNAMICS OF LYNCHING IN INDIA: IS IT A NEW NORMAL?

—*Shrashti Jain*[*]

Abstract — The sharp rise in the incidents of lynching in India possesses a serious threat towards its integrity. Mob lynching is one of those hate crimes that has become a language of indoctrinating vigilantism, through organized hate campaigns. Religious tool is a form of investment to inject hatred in the minds of people. An accretion in communal forces is conspicuous which have become successful in spreading violence by taking extra-judicial punitive measures. Rumours are playing major role in this. People are under constant threat of getting killed or beaten up on mere grounds of suspicion that they belong to a particular community, religion or caste. Society is turning fascist by keeping silence that led to moral legitimacy to the people who commit these forms of crimes. This paper aims to analyse the cause and effect of such incidents of mob lynching that catalyses the rise of mobocracy and to give solutions for the same. The modern state remains absolutely mute; the authorities are not taking strong actions to curb them. India is lacking in efficient laws against such hate crimes and the government machinery has failed in proper law enforcement. This calls for an efficient liability system to nullify the benefits accrued by these communal forces. These forms of communal stereotypes will thrive, if left unaddressed. Therefore, the present scenario demands stringent laws to be made against lynching which can deter such grave propagandas affecting people at large.

[*] 3rd Year, B.A.LLB. (Hons.), Gujarat National Law University (GNLU), Gandhinagar.

I. INTRODUCTION

"*India is slipping beyond the pale. It is unfathomable that the ancient Hindu horror at the taking of life, any life - the very same doctrine of ahimsa, or non-violence, that governed the beliefs of men like Mahatma Gandhi and the Rev Dr Martin Luther King Jr - should in our time be used as a justification for murder*"[1]

The irregular behaviour of the crowd is seen during crisis. When class hatred and suspicion become overburdened, when persuaded with passion and prejudice and blowed by an iniquitous crime, the erstwhile law abiding community of a society turns into a destructive force that become deaf to the voice of reasoning, humanity and mercy.[2] Such is the mob with anger and hatred that proceeds with its own set of right and wrong for imaginary satisfaction. Among this mob is lynching mob. Mob vengeance upon a person suspected of a crime.[3] It is infliction of punishment without legal trial by a mob.[4]

The recent wave of lynching is a decentralised communal violence. Earlier the organised acts of mass violence used to be seen. Currently decentralised acts are coming with a few are being attacked at a place. It is being done by a few over different places. The perpetrators want the violence to be known to the people, circulating the information, an intended warning of controlling the social behaviour expected from the minority community. It is a kind of violence that can pop up anywhere. It is never a mass killing but a decentralised violence of a large extent.[5]

II. DEFINITION

Lynching is an unusual, spontaneous violence. It "*combines the fellowship of a hunt with the honor of serving the alleged needs of the community,*" as Fitzhugh Brundage wrote in his book, Lynching In The New South.[6] Generally lynching is defined as a homicidal aggression punishing

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1 Aatish Taseer, "Anatomy of a Lynching", *The New York Times* (April 16, 2017), https://www.nytimes.com/2017/04/16/opinion/anatomy-of-a-lynching.html.

2 Luther Z. Rosser, "The Illegal Enforcement of Criminal Law", 7 Va. L. Rev. 569, (1921), https://www.jstor.org/stable/pdf/1107032.pdf?refreqid=excelsior%3Afa3af7fd889ecbd04e5f7da435763d92.

3 *Ibid.*

4 Rosser, *supra* note 3.

5 Seema Chishti, "Lynch Mobs Seem to Know Nothing will Happen to Them, They're Implicitly Meeting Approval from Higher-Ups: UCLA Scholar", The Indian Express (July 28, 2017, 12:08 A.M.), https://indianexpress.com/article/india/lynch-mobs-seem-to-know-nothing-will-happen-to-them-sanjay-subrahmanyamucla-scholar-4755228/.

6 Supriya Nair, "The Meaning of India's Beef Lynchings", *The Atlantic* (July 24, 2017), https://www.theatlantic.com/international/archive/2017/07/

(often killing) a person or persons by an angry mob to suppress the tendency of deviance and the heinous crime committed by the former. The crime is so savage that it socially revolts the crowd to gather spontaneously killing the criminal.[7]

"*A term descriptive of the action of unofficial persons, organized bands, or mobs, who seize persons charged with or suspected of crimes, or take them out of the* custody of the law*, and inflict summary punishment upon them, without legal trial, and without the warrant or authority of law.*"[8]

The definition of lynching developed by the NAACP (National Association for the Advancement of Colored People) is that: "(1) there must be evidence that a person is killed; (2) the person must have met the death illegally; (3) a group of three or more persons must have participated in the killings; (4) the group must have acted upon the pretext of protecting justice or tradition."[9]

Lynching is often considered as an action due to inefficiency of courts and agencies for the punishment of crime. Justice system has been observed as slow and ineffective. It gives an excuse to the people to take justice in their hands. One great reason behind lynching is the constantly growing distrust in the promptness and efficiency of law.[10]

III. LYNCHING IN INDIA

Lynching is nowhere defined in Indian legislations.[11] There is no separate record of "mob violence" or "lynching". NCRB operates on the principle of 'principle offence' which means that only the most heinous of all offences relating to one incident is recorded. NCRB has started recording "communal" riots separately from 2014 onwards. Similarly, NCRB has started collecting data of "promoting enmity between different groups" from 2014.[12]

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india-modi-beef-lynching-muslim-partition/533739/.

7 Oliver C. Cox, "Lynching and the Status Quo", 14 J. Ng. Educ. 576, 2(1945), https://www.jstor.org/stable/pdf/2966029.pdf?refreqid=excelsior%3A41e781c94d070f3d60149977513c7e1c.

8 The Law Dictionary, https://thelawdictionary.org/lynch-law/ (accessed July 25, 2018).

9 Et Contributors, "Why Government Should Make New Law on Lynching", *The Economic Times* (July 22, 2018, 12:47 P.M.), https://economictimes.indiatimes.com/news/politics-and-nation/why-government-should-make-new-law-on-lynching-soon-before-its-too-late/articleshow/65085294.cms.

10 James H. Chadbourn, *Lynching and the Law* (Lawbook Exchange, 2008).

11 Delna Abraham & Ojaswi Rao, "84% Dead in Cow-Related Violence Since 2010 are Muslim; 97% Attacks after 2014", IndiaSpend (June 28, 2017), http://www.indiaspend.com/cover-story/86-dead-in-cow-related-violence-since-2010-are-muslim-97-attacks-after-2014-2014.

12 Rukmini S., "Can Data Tell Us Whether Lynchings have Gone Up Under Modi, and Should it Matter?", Huffpost (July 3, 2017, 6:53 P.M.), http://www.huffingtonpost.in/

IV. RUMOURS PLAYING MAJOR ROLE

According to the IndiaSpend analysis of news reports across the country, 24 persons have been killed in such mob attacks. There is a 4.5 times rise in lynching cases from 2017. Majority of the cases were due to the rumours spreaded through social networking sites and fake news. Rumours related to child-lifting and being kidnappers makes innocent people target of an angry mob which may lynch them to death or sever injuries.[13]

A report recorded till June 25, 2017, by IndiaSpend which stated that from 2010-17, 51% of all the attacks on bovine issues were targeting Muslims. 86% of 28 Indians killed in 63 incidents were them.[14] There is no national or state data which distinguishes between general violence and cow-related lynching.[15] IndiaSpend has released a data distinguishing general violence from cow-related attacks and lynchings. The database shows that of the 63 attacks since 2010, 33 (52.4%) were rumour based. In 23 cases culprits were mobs comprising of people from various Hindu organisations.[16]

V. CASE STUDIES

A. Dadri Incident, 2015

On 28th September 2015, Mohammad Akhlaq was lynched to death in Uttar Pradesh' Dadri, by a mob on the suspicion that his family is consuming beef at home. Later, it came out by forensic reports that the meat was mutton not beef.[17] This was the first case of a Hindu mob lynching of a Muslim in the name of cow or beef.[18]

B. Dimapur Lynching, 2015

On 5th March 2015, in Dimapur district of Nagaland, a person was accused of raping a woman. He was lynched by an angry mob that broke

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2017/07/03/can-data-tell-us-whether-lynchings-have-gone-up-under-modi-and_a_23012788/.

13 Alison Saldanha, Pranav Rajput & Jay Hazare, "24 Persons Killed in Mob Attacks in 2018", Firstpost (July 10, 2018, 07:28 A.M.), https://www.firstpost.com/india/24-persons-killed-in-mob-attacks-in-2018-analysis-shows-such-incidents-rose-by-4-5-times-since-2017-4698181.html.

14 Abraham & Rao, *supra* note 12.

15 Abraham & Rao, *supra* note 12.

16 Abraham & Rao, *supra* note 12.

17 "Story Map: Documenting Lynchings in India", The Wire (July 13, 2017), https://thewire.in/153091/storymap-lynchings-india-cow-slaughter-beef-ban-gau-rakshak/.

18 Arnold H.T. Sangma, "Mob Lynching: An Uprising Offence Needed to be Strenuous under the Indian Legal System", 2 Int'l J. Acad. Res. Dev. 30, 4(2017), http://www.academicsjournal.com/download/376/2-4-15-139.pdf.

out into Dimapur Central jail[19], dragged the accused and beat him to death.[20]

C. Jharkhand Lynching, 2016

On 18th March, 2016, Majloom Ansari, 32 and Imtiyaz Ansari, 12 were taking their cattle to a fair. The mob assaulted them near Jhabar village of Jharkhand. Their bodies were hanged from a tree.[21]

D. Una Incident, 2016

On 11th July 2016, seven members of a dalit family were beaten up by a group of cow protectors for skinning a dead cow in Una town of Gujarat.[22]

E. Alwar, Rajasthan, 2017

On April 1, 2017, Pehlu Khan was badly beaten by a mob in Alwar, while he was carrying cows to his dairy farm.[23] He was suspected by the mob on illegally transferring cows. He succumbed to his injuries two days later.[24]

F. Jharkhand Lynching, 2017

On 18th May, 2017, Seven men were lynched due to widespread panic created through Whatsapp message warning against child kidnappers. Four men who were cattle traders passing through Sobhapur village were beaten to death. Three men were lynched at other place on the same evening.[25]

G. Delhi Lynching, 2017

On 25th May, 2015 an e-rickshaw driver was beaten by a mob of students of Delhi University. The e-rickshaw driver tried to stop two drunken

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[19] *Ibid*.

[20] Vijaita Singh, "Dimapur Lynching: It Was 'Consensual Sex' not Rape, Says Nagaland Govt. Report", The Indian Express (March 12, 2015, 02:37 A.M.), https://indianexpress.com/article/india/india-others/dimapur-mob-lynching-victim-was-never-raped-nagaland-govt-tells-mha/.

[21] Story Map: Documenting Lynchings in India, *supra* note 17.

[22] Story Map: Documenting Lynchings in India, *supra* note 17.

[23] Story Map: Documenting Lynchings in India, *supra* note 17.

[24] PTI, "Pehlu Khan Lynching Case: Clean Chit to All Six Accused Named in his Dying Declaration", *The Times of India* (September 14, 2017, 05:56 P.M.), https://timesofindia.indiatimes.com/city/jaipur/pehlu-khan-lynching-case-clean-chit-to-all-six-accused-named-in-his-dying-declaration/articleshow/60514309.cms.

[25] "Story Map: Documenting Lynchings in India", The Wire (July 13, 2017), https://thewire.in/153091/storymap-lynchings-india-cow-slaughter-beef-ban-gau-rakshak/.

students from urinating in public to which the students later came in a group and brutally lynched the e-rickshaw driver.[26]

H. Junaid Khan's Lynching

On 22nd June, 2017 A group of 10 – 12 men stabbed three brothers, Junaid, Hashim and Shaqir Khan, on suspicion of carrying beef on a Delhi-Mathura train. The argument arose over train seats.[27]

I. Jammu & Kashmir Lynching

A senior police officer was lynched by a mob outside Srinagar's main mosque. Mohammad Ayub Pandith, a DSP was lynched while taking photos outside the mosque.[28]

J. Attack on Nigerian students

Five Nigerian students were attacked by crowd while another was beaten with rods, bricks and knives in a shopping mall in Noida.[29]

K. Nilotpal Das and Abhijeet Nath's Lynching

Das was a musician and event manager while Nath was an Engineering graduate. On 8 June 2018, at Panjuri village in Karbi Anglong district, they were beaten to death by a mob who suspected both of being abductors.[30]

L. Child-lifter in Chattisgarh's Sarguja district

On 22 June 2018, a mob consisting of the villagers suspected an unidentified man to be a child-lifter and beaten him to death. Rumours were circulated over the last few days in the area which resulted in the lynching.[31]

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[26] Karn Pratap Singh, "Murder Over Public Urination: 5 Students Who Lynched E-Rickshaw Driver Still on the Run", *The Hindustan Times* (June 2, 2017, 11:13 P.M.), https://www.hindustantimes.com/delhi-news/murder-over-public-urination-5-students-who-lynched-e-rickshaw-driver-still-on-the-run/story FngG0eLS0tiWMNnsh9TB7M.html.

[27] Story Map: Documenting Lynchings in India, *supra* note 17.

[28] Toufiq Rashid & Ashiq Hussain, "Kashmir: Senior Police Officer Lynched by Mob Near Jamia Masjid in Srinagar", *The Hindustan Times* (June 23, 2017, 11:49 P.M.), http://www.hindustantimes.com/india-news/j-k-mob-stones-man-to-death-after-he-opens-fire-outside-mosque-in-nowhatta/story-zFIisCu2SnqGMSqt4ktWwO.html.

[29] "Attacks on Nigerian Students Shock India", BBC News (March 28, 2017), http://www.bbc.com/news/world-asia-india-39415903.

[30] "Man Lynched, Another Beaten in Alwar", The Indian Express (July 23, 2018, 10:54 A.M.), https://indianexpress.com/article/india/tripura-lynching-killings-child-lifters-5238635/.

[31] Man Lynched, Another Beaten in Alwar, *supra* note 30.

M. Rainpada lynching

On 1 July, 2018, a group of five people who were nomads came to the weekly bazaar of Rainpada hamlet which is a tribal area. Here, people assaulted them on the suspicion of being child-lifters. In the area, rumours about child-lifters were shared and the mob suspected the victims of being the same.[32]

N. Alwar's Lynching

On July 20, 2018 Rakbar Khan was accused of cow smuggling in the Alwar district of Rajasthan. Five persons attacked on the accusation of smuggling. They lynched Akbar and his friend Aslam in the incident.[33] It is said that they were actually taking two cows to their village in Haryana.

VI. UNDERSTANDING MOBOCRACY: WHY MOB VIOLENCE GETS COLLECTIVELY ORGANISED?

A. Theory of collective violence

Strong Partisanship is a leading factor of collective violence. For strong partisanship among the mob it becomes necessary that the third parties of the mob (1) support one side over the other and (2) solidarity among themselves. And the third parties will do so if they are socially connected to one side and remote from the other side. This happens when one side has more social status against the other. These third parties are in unanimity when they are culturally homogenous, intimate and interdependent.[34]

A strong partisanship towards the alleged victim combined with a weak partisanship with the alleged offender together constitutes lynching. We can see unequal strong partisanship in communal lynching. The partisanship tends to be weak from a side and strong from another side. If the partisanship is strong or weak on both sides lynching is unlikely to occur.[35]

Mob violence is a threat to the minorities. In 2016 we had observe the mass dalit protest against the attack by cow vigilantes on seven members of

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[32] Man Lynched, Another Beaten in Alwar, *supra* note 30.
[33] Man Lynched, Another Beaten in Alwar, *supra* note 30.
[34] Robert Senechal de la Roche, "Why is Collective Violence Collective?", 19 SAGE J. 126(2001), http://journals.sagepub.com/doi/pdf/10.1111/0735-2751.00133.
[35] *Ibid*.

a dalit family. Attacks against the Christians remain under-reported. Many a time churches and priests are accused of converting Hindus.[36]

A widespread criticization of Akhlaq's killing was seen but the officials kept mentioning it as an actual resentment over cow slaughtering; an accident. Post his murder rumours of cow slaughtering and beef have been started spreading and Muslims are attacked on the basis of these rumours. In Jammu & Kashmir, a truck was attacked by a petrol bomb that killed a Muslim. A Muslim dairy owner in Jharkhand was attacked on mere accusation of killing a cow.[37] Other than this it has been observed that rumours of child-lifters and abductors spreaded through social networking sites and instant messaging also led to mob lynching.

Everyone takes part in the acts of violence with acquiescence. This approval is in itself as violent as the act. The mob requires a rumour for attacking the victim to die a horrible death in the republic of lynching. It is irony that the crowd plays sovereign. We call it a society where law and lynching are running parallel in disorder.[38]

B. Organised by extremist groups

Often mob lynching or mob violence is a resultant of instigation by extremist groups. They are not always spontaneous. These violent attacks are created by the political campaign which is being considered as spontaneous actions of aggressive groups. The consistent atmosphere of hatred and suspicion against the minorities or the targeted communities make them a product of mob anger.[39]

C. State keeping quiet

Political analyst, Pratap Bhanu Mehta observes qualitative difference of the current spate of mob lynching. Mob feels guardianship and knows that they are protected due to people in power. Not even the party in power but other parties are also not coming forward to stop this. May be the imaginary majority fear has overpowered the political parties for not supporting Muslims and Christians, weakening the secular bond which was tied in this

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[36] Apoorvanand, "What is Behind India's Epidemic of Mob Lynching?", Al Jazeera (July 6, 2018), http://www.aljazeera.com/indepth/opinion/2017/07/india-epidemic-mob-lynching-170706113733914.html.

[37] *Ibid*.

[38] "DSP Mohammad Ayub Lynched Outside Kashmir's Jamia Masjid: What Has Happened So Far", The Indian Express (June 23, 2017, 8:13 P.M.), http://indianexpress.com/article/india/dsp-mohammad-ayub-pandith-lynched-jammu-and-kashmir-jamia-masjid-4718830/.

[39] Apoorvanand, *supra* note 37.

nation.[40] Society is turning fascist by keeping silence that led to moral legitimacy to the people who commit these forms of crimes.

The silence of the state, says Vishwanathan, makes it worse. "*You will notice there is never any investigation, no follow up. Silence is bought with monetary compensation. The only people who remember a lynching after 15 days are the family members of the victim. State silence becomes a chorus for the mob.*"[41]

Pratap Bhanu Mehta says, "*Even the hypocrisy of the top leadership set the norm. Condemning these violent incidents even for the sake of it can influence the followers on the ground, which is lately absent.*"[42]

VII. THE CURRENT STATE OF SOCIETY

What Thomas Hobbes stated in his social contract theory is in question when we see the modern society. He said state of nature to be chaotic, nasty, poor and solitary and therefore, a society is formed that functions on law. It secures people and makes them civilised. The state guarantees rule of law. But the present incidents of lynching put a question over the society with constitutional laws.[43]

A. Lawlessness

"*India is slipping beyond the pale. It is unfathomable that the ancient Hindu horror at the taking of life, any life - the very same doctrine of ahimsa, or non-violence, that governed the beliefs of men like Mahatma Gandhi and the Rev Dr Martin Luther King Jr - should in our time be used as a justification for murder,*"[44]

In a case of Bihar, the victim continuously begs for mercy and insisted it is a mistake. But the crowd was deaf enough and beats him to death. With no rule of law anarchy along with apprehension and insecurity is prevailing

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[40] Apoorvanand, *supra* note 37

[41] Snigdha Poonam, "The String of Lynchings Point to a National Dysfunction", *The Hindustan Times* (July 1, 2017, 07:12 A.M.), http://www.hindustantimes.com/india-news/the-string-of-lynchings-point-to-a-national-dysfunction/story-jyNPcPyo8tvL64ckIFWH1O.html.

[42] Appu Suresh, "Changing Face of the Mob: New Narrative of Nationalism has Created Dangerous Public Emotion", *The Hindustan Times* (June 27, 2017, 5:53 P.M.), http://www.hindustantimes.com/india-news/changing-face-of-the-mob-new-narrative-of-nationalism-has-created-dangerous-public-emotion/story-pSk9zYbHjGOF7S6ac9uHeK.html.

[43] DSP Mohammad Ayub Lynched Outside Kashmir's Jamia Masjid: What has Happened So Far, supra note 39.

[44] Soutik Biswas, "Is India Descending into Mob Rule?", BBC News (June 26, 2017), http://www.bbc.com/news/world-asia-india-40402021.

in the society. All one needs is climate of suspicion and insecurity. The mob is not considered as the one breaking laws but a crowd is seen as restoring law and order. No question of reason, rationality or dialogue is welcomed in this.[45]

Junaid, the teenager was failed to be saved from the mob anger by the police at the railway station of Haryana. The local police station chief stated crowd to be the reason of not rescuing the boy. "*Such things happen. Whenever there is a riot or fight such things happen and people say some communal things but we can't do anything*," he said.[46]

Law is the foundation of a civilised society. The primary goal of making laws is to have an orderly society. Rights are conferred on the citizens to regulate their social behaviour. Citizens are duty bound to follow the law which are implemented by the law enforcing agencies. Law is the mightiest sovereign in a civilised society.[47]

The supremacy of law cannot be taken away by any individual or group who assumes the character of mob for its enforcement and punish the offender on self-assumption and in the manner they deem fit. The administration of law is conferred on the law enforcing agencies only and no one is allowed to misuse law or to take law in his own hands. The procedure of law will decide the accused to make substantive justice.

B. Vigilantism on a rise

In a recent case of *Tehseen S. Poonawalla* v. *Union of India*[48]*,* CJI Dipak Misra has stated that *"vigilantism cannot, by any stretch of imagination, be given room to take shape, for it is absolutely a perverse notion*".[49]

Vigilantism has six necessary features: (i) planning and premeditation by those engaging in it; (ii) its participants are private engagement is voluntary; (iii) it is a form of 'autonomous citizenship' and, as such, social movement; (iv) it uses or threatens the use of force; (v) it arises when an established under threat from the transgression, the potential transgression,

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[45] DSP Mohammad Ayub Lynched Outside Kashmir's Jamia Masjid: What Has Happened So Far, supra note 38.

[46] Somreet Bhattacharya, "Accused of Carrying Beef, Teen Killed on Train", *The Times of India* (June 24, 2017, 7:31 A.M.), https://timesofindia.indiatimes.com/city/gurgaon/accused-of-carrying-beef-teen-killed-on-train/articleshow/59293024.cms.

[47] *Krishnamoorthy* v. *Sivakumar*, (2015) 3 SCC 467.

[48] (2018) 9 SCC 501.

[49] Ananthakrishnan G., "Mobocracy Can't be the New Normal, Get a Law to Punish Lynching: SC to Govt.", The Indian Express (July 18, 2018, 7:00 A.M.), https://indianexpress.com/article/india/cji-condemns-lynchings-across-country-asks-parliament-to-make-new-law/.

or the imputed institutionalized norms; (vi) it aims to control crime or other social infractions assurances (or 'guarantees') of security both to participants and to others.[50]

When a stronger group takes law in its hands it will result in anarchy and a situation of chaos which ultimately gives birth to a violent society. The mob cannot adjudicate on the open streets. This kind of vigilantism breaks the constitutional order and the legal framework of India. Such vigilantes keep law aside and their actions are barbaric in nature which cannot be allowed in a country with Constitution as Supreme authority.

"When the vigilantes involve themselves in lynching or any kind of brutality, they, in fact, put the requisite accountability of a citizen to law on the ventilator. That cannot be countenanced. Such core groups cannot be allowed to act as they please. They cannot be permitted to indulge in freezing the peace of life on the basis of their contrived notions. They are no one to punish a person by ascribing any justification," it said.

C. Is it majoritarianism?

According to a recent analysis of Pew Research Centre Analysis, India has a shambolic record of religious violence.[51] "*For centuries, emotional or ideological issues have acted as a vehicle for violent behaviour that individuals won't resort to themselves,*" says Nimesh Desai, psychiatrist and director of the Institute of Human Behaviour and Allied Sciences in Delhi, who insists his analysis should be seen as sociological and not political.[52] He further stated that lynching is not new to India. "*Conflict between majorities and minorities or tension between social groups has historically been the ground for most mob violence across the globe.*"[53]

D. Violation of Individual Freedom

Pratap Bhanu Mehta has said: "*These kinds of incidents always inhabited the realm of religious intolerance zone. Now it has entered a Constitutional and political realm and is finding acceptance. This is the first time we are seeing mainstreaming of such philosophy.*"[54] The democratic progressive country should protect individual freedom guaranteed through the consti-

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[50] Les Johnston, "What is Vigilantism?", 36 Brit. J. Criminology 220, 5 (1996), https://www.jstor.org/stable/23638013.

[51] Rukmini S., "On Religious Hostilities, India Ranked Just Slightly Better than Syria: Pew Study", Huffpost (April 14, 2017, 09:02 A.M.), https://www.huffingtonpost.in/2017/04/13/on-religious-hostilities-india-ranked-just-slightly-better-than_a_22037994/.

[52] Snigdha Poonam, *supra* note 41.

[53] Snigdha Poonam, *supra* note 41.

[54] Appu Suresh, *supra* note 42.

tution. Individual freedom is getting submissive to the moral conscience of the society.[55] Deciding 'justice' is done through law and order in a society under authority of law. In all traditional societies state always break the countless cycles of personal, family or group revenge. Any government that fails in controlling this chaos creates a hollow which results in anarchy.[56]

E. Building a New Nation

Restrictions are imposed by the people of conscience in the 'society', and target those who have dissenting opinion on the restrictions. This new political emotion is seen in the current wave of lynching. The thinking other than the majority is judged on religious righteousness and sin. Eating beef, public display of love is sin[57]. Ancient hate is the root of this rising political emotion. This new political emotion curbs the individual freedom of choice. The collective morality of the society is seen to place an important role in deciding once life partner. Akhlaq's crime was that he was suspected of keeping beef in his house which is a sin according to the conscience-keepers of the society. The message of individual freedom is below to the collective conscience of the society.[58] Public rhetoric and attitude of the political leaders towards the violent attacks and lynchings supports this new wave of coercively suppressing other opinions.[59]

VIII. CURRENT LEGAL SYSTEM OF INDIA

A. Indian criminal jurisprudence

The criminal laws face a void as there is no law or provision that criminalises mob lynching. Although IPC[60] has provisions for murder, culpable homicide, rioting and unlawful assembly but there is no provision for a group that comes collectively to kill a person. Under Section 223 (a)[61] of Criminal Procedure Code (CRPC), it is possible to punish two or more accused committing the same offence in the course of the "same transaction". But the provision fall short of punishing offenders of mob lynching.[62]

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55 Appu Suresh, *supra* note 42.

56 Tabish Khair, "The Pathology of Lynching", *The Hindu* (June 27, 2017, 03:38 A.M.), http://www.thehindu.com/todays-paper/tp-opinion/the-pathology-of-lynching/article19152069.ece.

57 S. Raju, "Bulandshahr on the edge: Police Trace Couple Whose Elopement Led to Lynching", *The Hindustan Times* (May 30, 2017, 6:59 A.M.), http://www.hindustantimes.com/india-news/bulandshahr-lynching-police-recover-eloped-couple/story-2ttbctydcI7NxoNWd8vNTN.html.

58 Appu Suresh, *supra* note 42.

59 Appu Suresh, *supra* note 42.

60 The Indian Penal Code, 1860.

61 The Indian Penal Code, 1860.

62 G. Sampath, "It's Time to Enact An Anti-Lynching Law", *The Hindu* (August 4, 2017, 12:27 A.M.), http://www.thehindu.com/opinion/lead/its-time-to-enact-an-anti-lynching-law/

Nimesh Desai further stated that lynchings are different from riots because in the former case crowd sees itself as the one, "restoring law and order instead of disrupting it". "There is something wrong about the Indian society itself, a result of social mobility without any social cohesion. People are living in cities, but without any sense of community."[63]

The National Campaign against Mob Lynching drafted a Lynching Act, 2017 for protection against violent lynching. It defines terms like, 'lynching', 'mob', and 'victim' of mob lynching. Under the act lynching is defined as a non-bailable offence, criminalises delinquency of duty by policemen, and criminalises instigations on social media. It also provides the victim and survivors with adequate compensation within a time limit. It also asked for speedy trial and protection of witnesses.[64]

Apart from this, recently on 17 July 2018, a three-judge bench of the Supreme Court gave guidelines to prevent the incidents of lynching. The Court has given preventive, remedial and punitive measures to deal with lynching and mob vigilantism.[65]

B. Protection under the Constitution

Right to non-discrimination is imbibed in **Article 14**[66] which guarantees each person in the territory of India equality before law and equal protection of laws. **Article 15**[67] of the Indian Constitution prevents discrimination of communities based on caste, sex, race or religion. Incidents of lynching violate the right to equality and prohibition of discrimination enshrined in the Indian Constitution under Article 14 and Article 15 respectively.

Article 21 of the Indian Constitution states, "*No person shall be deprived of his life or personal liberty except under procedure established by law.*"[68] The objective if Article 21 is to prevent the state from depriving a person of his/her personal liberty and life.

But, if a private individual encroaches upon personal liberty and life of a person, it is dealt under **Article 226**[69] of the Indian Constitution. There can be no higher right than the right to live with dignity and to be treated with humanness which the law has provided.

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article19421424.ece.

63 Snigdha Poonam, *supra* note 41.

64 G. Sampath, *supra* note 62.

65 *Tehseen S. Poonawalla* v. *Union of India*, (2018) 9 SCC 501.

66 Art. 14, Constitution of India, 1950.

67 Art. 15, Constitution of India, 1950.

68 Art. 21, Constitution of India, 1950.

69 Art. 226, Constitution of India, 1950.

India functions under rule of law. Authority of law is supreme no one is above that. A person can be punished under authority of law by procedure established by law and not by an angry mob through violence or lynching. Protection of a life is the most important life and the state is under the responsibility of conserving it.

Lynching is clearly against rule of law. Rule of law is not merely a public order. In *National Legal Services Authority* v. *Union of India*, the Supreme Court stated Article 21 to be enjoyed by all citizens of India with dignity, in view that human rights are essential for human development. Indian democracy is not only solely based on rule of people through their representatives but also on other factors such as rule of law, human rights, etc. It further stated, "Democracy requires us to respect and develop free spirit of human being who is responsible for all progress in human history."[70]

Justice Dipak Misra in *S. Krishna Sradha* v. *State of A.P.* states that "..a right is conferred on a person by rule of law and if he seeks remedy through the process meant for establishing rule of law and it is denied to him, it could never subserve the cause of real justice."[71]

In *National Human Rights Commission* v. *State of Gujarat*, the Supreme Court observed: "Communal harmony is the hallmark of a democracy. No religion teaches hatred. If in the name of religion, people are killed, that is essentially a slur and blot on the society governed by the rule of law. The Constitution of India, in its Preamble refers to secularism. Religious fanatics really do not belong to any religion. They are' no better than terrorists who kill innocent people for no rhyme or reason in a society which as noted above is governed by the rule of law.[72]

The Supreme Court in *Sri Adi Visheshwara of Kashi Vishwanath Temple* v. *State of U.P.*[73] highlighted the importance of religious intolerance which constitutes an important part of 'Unity in diversity' and observed unity and diversity as India's culture and ethos. The Court emphasized on tolerance of all religious faiths and respect for each other's religion as our ethos.

A three-judge bench of Supreme Court headed by CJI Dipak Misra in *Tehseen S. Poonawalla* v. *Union of India*[74] stated lynching as an unlawful offence. It is the constitutional duty to protect lives and human rights. It is the fundamental concept of law that law only can take away what it provides through the use of lawful means. No citizen has the right to violate

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70 (2014) 5 SCC 438 : AIR 2014 SC 1863.
71 (2017) 4 SCC 516.
72 (2009) 6 SCC 342 : (2009) 2 GLR 1672.
73 (1997) 4 SCC 606.
74 . (2018) 9 SCC 501.

the dignity of another person. CJI Misra stated that, *"lynching and mob violence are creeping threats that may gradually take the shape of a Typhon-like monster as evidenced in the wake of the rising wave of incidents of recurring patterns by frenzied mobs across the country, instigated by intolerance and misinformed by circulation of fake news and false stories*".[75]

As, the preventive measure has failed to maintain supremacy of law, Supreme Court has passed guidelines as preventive, remedial and punitive measures for prevention of lynching. It is the duty of the State to maintain efficiency of law and order. The Supreme Court has asked Parliament to come up with a special law against such crimes, saying "*the horrendous acts of mobocracy cannot be permitted to inundate the law of the land"*.[76]

C. International laws ratified by India

United Nations has been instrumental in protection and promotion of human rights. **Article 1** of **Universal Declaration of Human Rights** states that, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[77] **Article 3** of it guarantees right to life, liberty and security.[78] **Article 7** states that, "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."[79] **Article 12** states, "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."[80]

Article 6 of **International Covenant of Civil and Political Rights (ICCPR)** provides right to life, " *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life*". **Article 19** guarantees everyone with the right to hold opinions without interference.[81] **Article 20** seeks prohibition by law of any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[82]

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75 (2018) 9 SCC 501.

76 *Ibid*.

77 United Nations, http://www.un.org/en/universal-declaration-human-rights/ (accessed July 16, 2018).

78 *Ibid*.

79 United Nations, *supra* note 78.

80 United Nations, *supra* note 78.

81 United Nations Human Rights Office of the High Commissioner, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx (accessed July 17, 2018).

82 *Ibid*..

IX. RECOMMENDATIONS

A peaceful society can be created if the criminal justice administration is properly functioning. Good governance of a nation is possible when there is efficient criminal justice administration. It is the responsibility of the criminal justice system to punish the offenders of lynching with no delay in the process. This creates an atmosphere of rule of law.

1. Efficient liability system with punishments can stop a person from committing lynching or even being a part of the mob. Lynching should be made a separate offence with adequate punishment.
2. Absence of stringent codified law to deal with offenders of lynching makes it difficult for the judicial system to deliver justice to the victims of lynching. Due to lack of efficiency of the present provisions of the criminal justice system to punish the alleged guilty and provide justice to the victims, it becomes essential to pass an anti-lynching law against mob lynching. Mob lynching should be criminalised for the betterment of a democratic nation in which the state has the responsibility of protecting each innocent life.
3. The criminals think that the system of punishment is too remote to punish them. To maintain supremacy of rule of law it is very essential to punish the offenders of such crimes. To set a strict example, the accused on conviction shall be awarded maximum punishment for various offences under the provisions of IPC. Rule of law is supreme and no one can go in derogation with it.
4. Speedy trial of cases concerning mob lynching. Fast track courts can deal with such crimes. This will enhance the trust on justice delivering system of the country. Independent enquiry of the cases can be done. A time bound trial should be in focus.
5. For better prevention of lynchings in the country anti-lynching body can be formed who can protect the victim on time in India.
6. Victims or next of the kin of the deceased in the cases of lynching shall be provided with free legal aid, so that they can get any advocate of their choice.
7. Victims and survivors of mob lynching should be rehabilitated and compensated. A compensation scheme can be created for victims of mob lynching.
8. Efficiency of police administration should be improved. In many cases it has been seen that police is not ready to register the FIR. Justice cannot be given to the victim if even the very first essential step of Justice delivering system.

9. The state should take actions to prevent spreading of false news and fake videos and other messages of hate speeches which have the tendency to incite mob violence and lynching of any kind.
10. Laws of the country should be respected. Awareness programmes can be created officially by the government to mark the secularity of the state and the rights enshrined in the Indian Constitution.

X. CONCLUSION

Being a democracy of 21st century it is a matter of embarrassment to observe something like lynching, where the group of people is ready to kill the one who is the national of this nation who is as much an Indian as anyone else from the mob or from us through the Constitution of India. It is necessary to show our society the mirror to see what is right and what is wrong. Lynching cannot become a new normal of India. The state must ring with the voices of the people. The representatives in power must guide the society towards building a nation where the principles enshrined in the Constitution are not something only mentioned in it but are followed and obeyed in reality. Silence and inaction towards the coward action of killing a human out of anger and suspicion put a question on India's unity and integrity. The Preamble of our Constitution has constituted India to be a secular democratic. Liberty, equality and fraternity are enshrined principles of our Constitution. They represent our country; us. Rule of law is supreme in India, no one is above that. Extra-judicial killings taking place are against the supremacy of law. No one has been given the right to kill anyone. It is the function of Judiciary to decide the punishment. Lawful means ought to be used to express our opinion and thoughts. We are a multicultural society, a big family and must have respect towards each other's cultures, religions and beliefs.

FAN FICTION STUCK IN THE QUAGMIRE OF INTELLECTUAL PROPERTY LAW

—*Pallavi Tiwari and Shikhar Tandon*[*]

Abstract — *Fan Fiction is a budding literary creation wherein vital ingredients of an original work, like characters and settings, are extracted by a fan, to beget another creative piece of fiction involving a new arrangement of sequence and events. Due to the advent of digitization, these amateur fan fiction writers publish their work online thereby being recognized considerably. But where the world seems comfortable for fan fiction writers, there lies a murkier world leading to legal issues pertaining to intellectual property violations resulting from fan fictions. Primarily, the paper highlights the issues revolving around copyright law as the copyrightability not only vests in the whole of the work but also in its elements, the legality of fan fiction has to be determined with respect to individual copyright protection given to such elements. The aim of the paper is to analyze which of such elements are independently copyrightable and they being so how does fan fiction work, even by appropriating such elements, implore its legality by seeking refuge under the fair use doctrine. The paper further enshrines upon the controversy regarding conflict of trademark law with fan fiction, wherein some cases the use of characters or titles from an original creation can dilute a mark or cause infringement. Akin to copyright law, trademark also provides for some fair use standards involving descriptive and normative use, which further could be used as a defense. The last segment of the paper mentions about the right to publicity given to famous individuals possessing the right to protect their identity which may be taken away by fan fiction writers. Therefore, a harmonious balance has to be struck*

[*] Vth Year Dr. Ram Manohar Lohiya National Law University.

between fan-fiction works, which are an epitome of creativity, and the exclusivity granted to owners of intellectual property.

Keywords: Fan Fiction, Copyright, Trademark, Publicity Rights, Fair Use.

I. INTRODUCTION

We all have loved E.L. James' creation Fifty Shades of Grey, haven't we? Do we know that this work which became so popular was an imaginative creation of a fan who relied on the story of another popular work series *Twilight*. Another such creation is by Neil Gaiman called the "The Problem of Susan" which was a build-up on the life story of one of the four siblings, who was less described in the last part of Chronicles of Narnia by C.S. Lewis. Thus, fan fiction basically is as defined in Fancyclopedia is "fiction about fans, or something about pros, and occasionally bringing in some famous characters of stories."[1] Fan fiction is an imaginative work of a fan which leads to the creation of new expression, although assimilating features, characters and themes from the original creation of another author. This gigantic public response usually leads to the formation of a stumbling block for the original creator and thus raises some intellectual property claims involving copyright, trademark, right to publicity and unfair competition.

In the first part, the paper focuses on issues pertaining to copyright law wherein the vulnerable elements of fan-fiction work are counted upon by authors of original works to subject such works to the onslaughts of the copyright law. Fan works do not survive the repercussions of copyright law as whenever a fan work is published on a website, the original author intimates the website owner to claim against copyright infringement, and thereby he deletes the same. The part further delves into the enquiry as to how law can be maneuvered to satiate such vulnerability and clear the road for fan-fiction works.

The paper further highlights the concerns regarding infringement of trademark protected characters by fan fiction by the use of characters or titles from an original creation. It can further cause dilution or tarnishment of the image of the mark if involves commercial nature of fan fiction. Akin to copyright law, trademark also provides for some fair use standards involving descriptive and nominative use, which further could be used as a

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[1] Fancyclopedia I: F - Fascism, http://fanac.org/Fannish_Reference_Works/Fancyclopedia/Fancyclopedia_I/f1.

defense. The last segment of the paper mentions about the right to publicity given to famous individuals possessing the right to protect their identity which may debilitated by fan fiction writers if they start writing an altogether different story about their character's reputation.

II. LEGALITY OF FAN-FICTION WITH RESPECT TO COPYRIGHT LAW

A work of fiction is basically made of four elements: theme, setting, characters and the plot.

Generally, what a fan-fiction author does is that it takes some elements of an original fictional work i.e. *characters* (both name as well as characterization) and/or *settings,* then puts it into a different *plot* which may or may not have a different theme.[2] The argument against fan-fiction work is that though the whole work is an expression, yet the individual elements of the work, especially the characters therein, are also expressions in themselves and are independently copyrightable and hence not only the reproduction of work but also the appropriation of such elements in some other work is a copyright infringement. Since *theme* is more or less an abstract idea which is not capable of being copyrighted, much fuss revolves around the copyright vested in *characters* and *settings* and that whether such characters and settings are abstract ideas or full-fledged expressions in themselves. Only if such characters are independently copyrightable, it can be said that the fan-fiction work infringes the copyright.[3]

A. When and Why does fan fiction not constitute misappropriation of Character?

Some characters and settings *are* copyrightable and hence the original authors/creators have exclusive right on them. What entails from this conclusion is that if such characters are used in some other fan-fiction work, it would lead to copyright infringement. Does it mean that no fan-fiction work can be based on such characters? The answer to this question is that a fan-fiction work based on such characters would not constitute copyright infringement if the subsequent fan-fiction work is an 'authorized derivative' of the former original work.

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[2] Kate Romanenkova, "The Fandom Problem: A Precarious Intersection of Fanfiction and Copyright", 18 Intellectual Property Law Bulletin, May 20, 2014, at 183.

[3] *Ibid*., 200.

B. Fan-fiction: A kind of Derivative work

In the arena of copyright, if various elements of a fictional work are considered as independent expressions in themselves, fan-fiction falls into the category of what is called as a **"derivative work"**.

For a fan-fiction work in order to *not* constitute infringement of copyright of the elements of the original work, it has to be a 'fair use' of the characters, so borrowed or appropriated and if it does not falls under the category of fair use, it would cause infringement of copyright. What remains to be decided is that what all conditions tilts the balance in favour of the conclusion that a fan-fiction work is 'fair-use' of the characters of the original work.

C. Fair Use: Where the Safe Havens for Creativity Lie.

As Professor Weinreb defines "*fair use is...an exemption from copyright infringement for uses that are fair.*"[4] Thus fair use defenses fall into the category of what is called as the 'affirmative defenses' Weinreb further remarks that what is fair is fact-specific and resistant to generalization[5]. However, being time and again pitted against the challenge of determining whether a particular use is fair or not, Justice Story in *Folsom* v. *Marsh*[6] promulgated certain factors which are to be analyzed in case of judging as to when the borrowing of copyrighted elements in a secondary work would not constitute infringement of the copyright vested in them.

The aim of subsequent research is to discuss how the fair-use factors are interconnected to each other and in which cases a fan-fiction work would be able to take the shelter of fair-use doctrine. The four fair use factors have been discussed in detail in the decreasing order of their importance.

D. The effect fan-fiction work upon the potential market of the copyrighted work ("market substitution")

The most important issue which has to be dealt by courts while deciding the legality of a fan fiction work is- whether the fan-fiction work would act as a *substitute* for the original work? It is so because if it acts as its substitute, then it can happen that some of the target audience would prefer or access the fan fiction work instead of the original, thus creating a competition for the latter and cutting its market. This phenomenon is called as

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4 Lloyd L. Weinreb, "Fair's Fair: A Comment on the Fair Use Doctrine", 103 Harv. L. Rev. No. 5 1137, 1138 (1990).

5 *Ibid*.

6 9 F Cas 342 (CCD Mass 1841).

market substitution. If there is demonstrable reduction of market by substitution, then the use is not fair. It is so because one of the objects of copyright law is to enable the author to enjoy the economic benefits of his creativity and labor.[7] Being the essence of the rationale behind copyright, the effect on the market for the copyrighted work is "*undoubtedly the single most important element of fair use*"[8] and it would be seen later as to how around this factor all the other factors revolve. The central idea of the fair use principle is to excuse such appropriation of copyrighted works which in no manner whatsoever will have bearing on economic benefits of the author.

E. Nature and purpose of the fan fiction work

i. The character/nature of the fan-fiction work ("transformativeness")

An enquiry as to whether or not such fan-fiction work is 'transformative' in nature. *A use is transformative if it uses the copied material in a different manner or for a different purpose from the original and does not merely repackage or republish it*.[9] According to the United States Supreme Court in *Campbell* v. *Acuff-Rose Music Inc*., transformative work "*adds something new, with a further purpose or different character, altering the source with new expression, meaning or message*".[10] The test of transformativeness involves accessing the *intellectual value* added by the secondary work to the primary work.[11] To the extent that the secondary use involves merely an untransformed duplication, the value generated by the secondary use is little or nothing more than the value that inheres in the original. Therefore a detailed analysis has to be made as to what *value* does the fan-fiction work add to the original work. In *Dr. Seuss Enterprises LP* v. *Penguin Books USA Inc.*[12], it was observed that if there is no endeavour to produce a work with a new expression, meaning or message, it shall not be considered as a transformative work. A derivative work portraying the same material in a different form, is not necessarily transformative in nature.[13]

a. Cause-effect relationship of transformativeness and market substitution:

It is herein pertinent to mention the test of transformativeness has a close nexus with the test of market substitution, as the former acts as the determinative factor for the latter. What would be the effect of a fan-fiction work

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7 Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, Revision Bill, 81 (1965).

8 *Harper & Row, Publishers Inc.* v. *Nation Enterprises*, 1985 SCC OnLine US SC 129 : 85 L Ed 2d 588 : 471 US 539 (1985).

9 Pierre N. Leval, "Towards a Fair Use Standard", 103 Harv. L. Rev. 1105, 1111 (1989-1990).

10 1994 SCC OnLine US SC 22 : 127 L Ed 2d 500 : 510 US 569 (1994).

11 *American Geophysical Union* v. *Texaco Inc*., 60 F 3d 913 (2nd Cir 1995).

12 109 F 3d 1394, 1501 (9th Cir 1997).

13 *Cariou* v. *Prince*, 714 F 3d 694, 707-08 (2d Cir 2013).

on the market of the primary work depends on how far the work is transformative. If the work is not transformative and does not add something new or a different purpose, the secondary use would add no intellectual value to the primary work and the *intrinsic purpose* for both the works will coincide.[14] It would automatically and undoubtedly follow that such work would do nothing but to *'supersede the objects'*[15] and *'supplant'*[16] the original work, thus acting as its substitute and hence cutting its markets. A secondary work that has no creative value of its own and has a negative effect on market for the original is hardly likely to qualify as fair use.[17] In *Twin Peaks Productions Inc.* v. *Publications International Ltd.*[18], wherein the defendants published a guide book primarily consisting of the summary the first eight episodes of Twin Peaks, a T.V. series produced by the plaintiff. The court held that the same is not transformative as it can act as a substitute for the serials. Transformativeness has direct cause-effect relationship with market substitution and thus, the two grounds of fan-fiction have to be studied together.

b. Determining transformativeness:

To determine whether a fan-fiction work is transformative or not is a subjective enquiry and no objective or bright-line test can be laid for it. Thus transformativeness is essentially a question of fact to be decided on case to case basis. For example, in *Castle Rock Entertainment Inc.* v. *Carol Publishing Group Inc.*[19], the court held the quiz-book published by the defendants, based on plaintiff's TV series published by the defendant, which in effect summarized the whole series in question answer form, as non-transformative. It was further remarked that due to lack of any transformative purpose the book would act as a substitute for the episodes. On the contrary, in *Blanch* v. *Koons*[20], the court upheld defendant's collage which constituted of four pairs of women's legs one of which the plaintiff alleged to have been appropriated from his well known photograph, on the ground that the defendant had given an entirely different background and had altered the size and colours of the constituent objects thereby connoting an entirely *different purpose and meaning* than the plaintiff's photograph, making it an entirely novel expression and thereby transformative.

c. Fan Fiction affecting the original author's derivative work rights

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[14] *Ibid*.

[15] *Campbell* v. *Acuff-Rose Music Inc.*, 1994 SCC OnLine US SC 22 : 127 L Ed 2d 500 : 510 US 569 (1994).

[16] *Ibid*.

[17] Lloyd L. Weinreb, Fair's Fair: "A Comment on the Fair Use Doctrine",103 Harv. L. Rev. No. 5 1137, 1138 (1990).

[18] 996 F 2d 1366 (2nd Cir 1993).

[19] 150 F 3d 132 (2d Cir 1998).

[20] 467 F 3d 244, 253 (2nd Cir 2006).

An author, in addition to having sole right in reproduction of the work, has the sole right to prepare or license derivatives of his work. Hence, a fan-author has to keep in mind that his work does not have the bearing on the market of the derivatives. [21] Apart from the market of primary work, the potential market for derivative works should also be considered.[22] In *Warner Bros. Entertainment Inc.* v. *RDR Books*[23], the court held as violative an online lexicon for Harry Potter series, because the author of the original series J.K. Rowling had already published many companions books and had declared her intention to launch her own lexicon. Even otherwise in *Salinger* v. *Colting*[24], the court injuncted the Defendant's work which was the sequel of the Plaintiff's novel, though the plaintiff himself had declared not to author any sequel, on the ground that the plaintiff had the right to change his mind and if so, the market of the plaintiff's sequel would be trimmed by that of the Defendant's.

ii. The purpose of the subsequent work ("Commerciality")

An enquiry has to be made under this factor as to whether the secondary work is of a commercial nature or is for non-profit purposes. If it is of a non-commercial nature then this factor weighs heavily in favour of the fan fiction work. Most of the fan-fiction works are usually made by amateur fans *themselves*, not with the motive of earning profits but in order to satiate their fandom-ignited creativity. It is due to this factor that they do not seek publication in print form but rather prefer internet as medium because it has no geographical limitations and facilitates world-wide access.[25] This factor weighs heavily in the favour of fan-fiction work. But it must be remembered that all fan-fiction works are *not* non-commercial in nature. It depends upon the fan whether or not to commercialize his work and such work won't cease to be a part of fan-literature merely because the author has chosen to commercialize it. In this regard special reference has to be made to *referential fan-fiction works*, the elaborate explanation of which is beyond the scope of this paper. They are a kind of *service* provided to the fans and therefore the authors usually tend to commercialize them.[26]

a. Relationship of commerciality with transformativeness and market substitution

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[21] *Frank Gaylord* v. *United States*, 595 F 3d 1364 (Fed Cir 2010).

[22] *Lewis Galoob Toys Inc.* v. *Nintendo of America Inc.*, 780 F Supp 1283 (1991).

[23] 575 F Supp 2d 513 (SDNY 2008).

[24] 607 F 3d 68 (2d Cir 2010).

[25] Karen Hellekson & Kristina Busse, Introduction: Work in Progress, "In Fan Fiction and Fan Communities in the Age of the Internet" 13 (McFarland & Company Inc.) (2006).

[26] Rachel L. Stroude, "Complimentary Creation: Protecting Fan Fiction as Fair Use", 14 Marq. Intell. Prop. L. Rev. 191, 194 (2010).

It has to be noted that fan-fiction work even if commercialized, may qualify as fair use, if it is satisfies the canon of *transformativeness*. Copyright holders are given monopoly not in the sense that they *solely own* the work or its elements, but only in the sense that the work or its elements are not used by others to decrease *their* own economic benefits. If any other person uses such copyrighted work or elements to earn profits, and thereby creates his own market, without at all cutting the markets of the original work, then it is not appropriate that such work should see the frown of copyright law.

On the other hand, it may happen that fan-fiction work made for non-commercial purposes may not avail the defense of fair use if it is not transformative and leads to market substitution.[27] It is a mistaken belief that derivative works that are not made for economic benefit do not interfere with the underlying work's market. For example, an author writes a novel with suspense as its genre. A fan after reading the novel and being highly impressed by it, writes a summary of the novel on a fan-fiction website. Now what can be the effect of this is that any readers, who are not so much of puritans, would prefer to read the summary. The readers who would have opted to read the novel (the target audience) would not do so, either because they get to know of the climax or because the plot does not suit their taste. Thus the potential market would decrease.

Therefore it has been rightly held by court that transformativeness is the largest factor that affects all other factors. The U.S. Supreme Court in *Campbell* v. *Acuff-Rose Music Inc.*[28], held that:

> *"The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."*
>
> [Emphasis Supplied]

F. Amount and substantiality of the work used

An enquiry to establish the amount and substantiality of the work involves two determinative factors: first is to analyze what is the amount of the original work taken (and whether it is so minute that it can be ignored) and second to determine whether the borrowed work happens to be the 'heart'[29] of the whole original work i.e. whether it is *qualitatively*

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[27] Sony Corpn. of America v. Universal City Studios Inc., 1984 SCC OnLine US SC 14 : 78 L Ed 2d 574 : 464 US 417 (1984).

[28] 1994 SCC OnLine US SC 22 : 127 L Ed 2d 500 : 510 US 569 (1994).

[29] *Campbell* v. *Acuff-Rose Music Inc.*,1994 SCC OnLine US SC 22 : 127 L Ed 2d 500 : 510 US 569 (1994); *Harper & Row, Publishers Inc.* v. *Nation Enterprises*, 1985 SCC OnLine

substantial[30] part of the original work. In case of fan-fiction, the most controversial element which is borrowed into the new work is characters. Therefore, the issues which arise are whether the borrowing of just characters from the underlying work is miniscule enough to constitute fair use and if it is, whether the 'characters' constitute a substantial part so as to be called as the heart of the original work?[31]

The quantitative test is apt in cases of exact copying or reproduction of work**,** wherein it has to be determined what amount of work is copied. However, as described earlier, borrowing of characterization does not involve copying/reproduction of the original work. Hence, it must be stated that it would be anomalous to determine *quantitatively* as to what 'amount' of the original work a character constitutes as character. Therefore, reliance must be placed on the qualitative aspect i.e. whether the alleged character is a substantial element of the plot or not. This depends upon the *importance* and *pervasiveness* of that character in the original plot. Whether a character is a substantial part is a subjective question and depends from character to character. Though the 'story being told' test has lost much of its significance after the *Air Pirates* case in determining the copyrightability of characters, yet, it is suggested that it can be instrumental in determining the *substantiality* of a character[32], whose copyrightability is not in dispute, in the plot. The correct course will be that the story being told test is applied to find out the substantiality of the character.

If the character is found to be not substantial, its borrowing in the fan-fiction must be considered as *de minimis* and fair use defense must be given to it. The lesser the substantiality of the character in the original work, the more are the chances that the fan fiction work can take the shade of *de minimis* rule. However, most of the times fan-authors take the protagonists from the original work and that is why the *amount and substantiality* test weighs in favour of the original authors. However, if it is shown that the amount of work taken was necessary to fulfil the transformative purpose, then this factor can be ignored. Hence again it can be said that transformativeness plays an upper hand.

US SC 129 : 85 L Ed 2d 588 : 471 US 539 (1985).

30 Roy Export Co. Establishment v. Columbia Broadcasting System Inc., 503 F Supp 1137 at 1145 (SDNY 1980).

31 Meredith McCardle, "Fan Fiction, Fandom, and Fanfare: What's All the Fuss?", 9 B.U. J. Sci. & Tech. L. 433, 459 (2003).

32 *Ibid*.

G. Nature of the copyrighted work

Under this factor, an enquiry has to be made into the nature of the original work of whose infringement has been alleged or from which the characters have been borrowed in the fan-fiction work.

Courts generally give more protection to highly creative works like *works of fiction* and less to *works of fact* (like news, game scores, telephone directories, biographies etc.), especially those of scientific and social benefits and are therefore less prone to hold fair-use in case of the former.[33] Therefore this defense does not render much assistance in case of fan-fiction works because by the very definition it is clear that fan-fiction works are based on works of fiction like, novels, comics, television serials etc. It is less likely that there would be a *fan* of a work of fact.

III. LEGALITY OF FAN FICTION WITH RESPECT TO TRADEMARK LAW

Trademark is intended to ensure the marketable value of a name, picture or other sign in distinguishing the original source of goods or services, thereby in the long run to evade mystification.[34] To avail benefits under trademark law the mark of the owner should serve as a "source identifier" for goods and services it is dealing with, and this can be established if the concerned purchasers and the originating source have developed a strong relationship, which in other words is known as secondary meaning.[35] An owner of a trademark possesses an exclusive privilege to utilize or to get his mark licensed so that no one else could benefit from the same and the consumers would not have to deal with any likelihood of confusion.

Fan Fiction works are designed with the use of popular characters from other original works, which further catch the attention of the Trademark Dilution Laws. Even if there lies no possibility of confusion, there might be a claim for trademark dilution, covering fanfiction, but there should be an illicit noncommercial exploitation. With respect to fan creations, trademark claims are extremely weak if not entirely frivolous, as fan works do not use trademarked names, images, or characters as marks to identify the source of

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[33] "Fanfiction Dilemma: Is it Copyright Infringement or Fair Use?", www.kentlaw.edu/perritt/courses/seminar/papers%202009%20fall/Susan%20Estes%20Seminar%20paper%20Final.pdf.

[34] 15 USC § 1125 (2010).

[35] Ivan Hoffman, "The Protection of Fictional Characters", http://www.ivanhoffman.com/characters.html.

goods or services. Thus, no reasonable consumer could fail to distinguish a fan creation from an authorized work.[36]

To claim for trademark infringement a trademark owner must establish a likelihood of confusion, for which few factors need to be considered for fan fiction issues: I. Well known factor and distinctiveness of a mark. II. Comparing the similarity of the marks and goods and services of the owner and the alleged infringer. III. Whether there was any intention to deceive or to benefit from the already established goodwill on part of the alleged infringer; IV. Dependence on the consumers V. was there any kind of likelihood of confusion on part of consumers?[37] Be that as it may, fanfiction creators most often do not have any *mala fide* intent to deceive the common public with regards to the established goodwill of the original and thus mostly do not lead to any conceivable disarray.

A. Dilution Caused By Fan Fiction

Fan fiction is not only likely a copyright violation unless it is a protected fair use, but may also constitute a trademark violation or dilution of a mark if the fan fiction tarnishes a mark.[38] In most of the cases a trademark owner cannot win against a fan fiction creator, as the commercial factor in the statue favors the fan fiction creator.[39] This was further observed in *L.L. Bean Inc.* v. *Drake Publishers Inc.*[40] that there lies no cause of action for trademark dilution matters, if there is a non-commercial use of trademark. This case was supported by the House Report to the Federal Trademark Dilution Act, that a tarnishment or dilution claim lies only when there is some form of commercial exploitation.[41]

Dilution involves diminution or "whittling away" or blurring[42] of the value of a name or mark's hold on the public mind. It works on the presumption that a recognized mark should be provided the protection given to property under the statues, and for any misappropriation claims the mandatory element of likelihood of confusion in the minds of consumers should not be relied upon.

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[36] Peter K. Yu, *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age* 261 (2006).

[37] Legal Issues with Fan Fiction — Trademark Law, http://www.liquisearch.com/legal_issues_with_fan_fiction/trademark_law.

[38] Deborah E. Bouchoux, *Intellectual Property: The Law of Trademarks, Copyrights, Patents, and Trade Secrets for the Paralegal* 201 (2008).

[39] 15 USC § 1127 (2010).

[40] 811 F 2d 26-33 (1st Cir 1987).

[41] H.R. Rep. No. 104-374, at 4 (1996), reprinted in 1996 U.S.C.C.A.N. 1029, 1030.

[42] *Original Appalachian Artworks Inc*. v. *Topps Chewing Gum Inc*., 642 F Supp 1031, 1039 (ND Ga 1986).

Thus, this dilution theory helps to protect the distinguishable features of various recognized characters, but it has also been put to use in various infringement claims to disallow compensation.[43] The protection against trademark dilution is available only if certain factors exist:

- The alleged dilution causing mark is impossible to tell apart or similar to the original mark.
- There is an existing reputation and goodwill of the original mark.
- The alleged dilution causing mark has been used without any bona fide reason.
- The alleged dilution causing leads to some kind of inequitable gain deteriorates the distinctiveness and the reputation or goodwill of the already established mark.

Unlike in infringement of trademark in relation to similar goods or services where the onus to prove dissimilarity is on the defendants, in claims regarding dilution there lies no presumption.[44] Where the defendant's mark is identical with the plaintiff's mark, the plaintiff has not to prove that the defendant's use is likely to deceive or cause confusion.[45]

Usage of existing trademark protected characters, themes and settings may lead to dilution. Any abuse or despicable utilization of a mark, notwithstanding when it doesn't make purchaser disarray, can diminish the mark's uniqueness and esteem as a source identifier, is the major idea on which trademark dilution relies upon. A trademark dilution case requires that the mark being referred to be popular all through general consumers and that the utilization of the mark makes a probability of either "obscuring" or "tarnishment." A probability of blurring and tarnishment happens when the utilization of the mark makes a relation that is probably going to hinder the goodwill and reputation of the renowned mark; when the utilization of the mark makes a connection that is probably going to hurt the notoriety of the acclaimed mark.

Though, trademark law protects marks which possess a certain amount of distinctiveness with respect to some goods and services, it has been on and off recognized by the courts that the marks that already have an

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[43] Kenneth E. Spahn, "The Legal Protection of Fictional Characters", University of Miami Entertainment & Sports Law Review 331 (January 1, 1992), http://repository.law.miami.edu/umeslr/vol9/iss2/6.

[44] Elizabeth Verkey, *Intellectual Property* 253 (1st edn., Eastern Book Company) (2015).

[45] *Health and Glow Retailing (P) Ltd.* v. *Dhiren Krishna Paul*, (2007) 35 PTC 474.

established goodwill in the market, have to be protected against disparate goods and services, even though they might be totally unrelated.[46]

Trademark Dilution also involves the concept of unfair competition where ambiguity or mystification regarding source identification of a mark is the essential element. Although it still remains a intricate concept while talking about characters owned by someone else originally. Such concerns were raised in the Wind Done Gone Case.[47] Unfair competition is a trespass, and no trespasser can justify by setting up the right of one to whom he is legal stranger.[48]

It was observed by the court in the *Dynamite Entertainment* case, that since the defendant's work resulted in an irretrievable loss to the plaintiff as he caused a trademark infringement and unfair competition to the plaintiff's comic series. In an earlier case, of *Universal City Studios, Inc.*[49] the Supreme Court had stated that "every commercial use of copyrighted material is presumptively…unfair." Thus, it is observed that unfair competition clearly leads to infringement of intellectual property laws.

If a person uses a character which belongs to the original author and is exclusive and distinctive to him, it results in deception.[50] It was further observed in a case concerning dilution that where a person uses trademark similar to another person's to dilute the trademark; such use does not cause confusion among consumers but takes advantage of the goodwill of another and constitutes an act of unfair competition.[51]

B. Fair Use and Descriptive and Normative Standards

The fair use standards under the Trademark Law differs entirely from the Copyright Fair Use standards, as in trademark statutes there exist two categories of fair use provisions: the descriptive and nominative standards.

Descriptive marks are allowed to be exploited in a descriptive manner i.e. to define the consumer's products and services and are further protected by the fair use standard under trademark law. In *U.S. Shoe Corpn*. v. *Brown*

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46 *Health and Glow Retailing (P) Ltd*. v. *Dhiren Krishna Paul*, (2007) 25 PTC 474.

47 "Copyright in Fictional Characters: Can I Have Don Draper Make a Cameo Appearance in My Novel?" (April 8, 2011), http://www.rightsofwriters.com/2011/04/copyright-in-fictional-characters-can-i.html.

48 *National Picture Theatres Inc.* v. *Foundation Film Corpn*., 266 Fed 208 (CCA 2d 1920).

49 *Sony Corpn. of America* v. *Universal City Studios Inc.*, 1984 SCC OnLine US SC 14 : 78 L Ed 2d 574 : 464 US 417 (1984).

50 Divyakant Lahoti, "Copyright and Trade Mark Protection in the Title of a Movie and Characters", [2010] P.L. June S-2.

51 *D.M. Entertainment (P) Ltd.* v. *Baby Gift House*, CS (OS) No. 893 of 2002, decided on 2-11-2010 (Del).

Group Inc.[52] it was observed that even if an advertisement takes away the trademark of some other production company, it does not infringe the trademark law.

The nominative defense is used when a trademark owned by a person is used by another party in a different manner not covered under trademark law, such as parody, advertising, commentary. This is considered as a fair use as they will act in different markets. This doctrine evolved as a result of major landmark cases then converted into the statute by the addition of 15 U.S.C. § 1125, "which provides for exclusions that the following shall not be actionable as dilution by blurring or dilution by tarnishment under this subsection:**(A)** Any fair use, including a nominative or descriptive fair use, or facilitation of such fair use, of a famous mark by another person other than as a designation of source for the person's own goods or services."[53]

Fan fiction majorly involves the nominative fair use standard as the fan fiction works meet the three essential elements of nominative standard. Another major defense for trademark violation cases involving infringement and dilution is the Freedom of Speech. In *Mattel Inc.* v. *MCA Records Inc.*[54] the court allowed the usage of the plaintiff's trademark as firstly the usage was necessary for the song and secondly there was no likelihood of confusion as to find out the source destination of the mark. The defense provided by the First Amendment is not available in cases where there some deception or confusion.[55] Usually, cases involving this concept do not reach to the appellate reports, as there exists no evidence of deception or any likelihood of confusion from such uses, and thus the reparation cannot be ascertained.

IV. RIGHT TO PUBLICITY

The publicity right is for the mostly characterized as an individual's entitlement to control and benefit from the business utilization of his/her name, resemblance and persona. Shielding the person from the loss of business value deriving out because of the misappropriation of an individual's personality for business reasons is the major concern of the law.[56]

The main objective of the law protecting publicity rights is to protect the celebrities' images from being commercially browbeaten even though there exists no confusion. Fan fictions can affect publicity rights mostly

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[52] 740 F Supp 196 (SDNY 1990).

[53] 15 USC § 1125 — False designations of origin, false descriptions, and dilution forbidden, Cornell University Law School, https://www.law.cornell.edu/uscode/text/15/1125.

[54] 296 F 3d 894 (9th Cir 2002).

[55] Meredith McCardle, "Fan Fiction, Fandom, and Fanfare: What's All The Fuss?", 9 B.U. J. Sci. & Tech. L. 433, 459 (2003).

[56] Right of Publicity, http://corporate.findlaw.com/litigation-disputes/right-of-publicity.html.

in a visual manner taking ideas from movies or TV shows. Though some problems occur in claiming infringement of publicity rights by fan fiction as according to the First Amendment, only commercial uses are involved, and most fan fictions are non-commercial in nature. A case involving transformative work and publicity rights was *Winter* v. *DC Comics*[57] where it was observed that since the characters in the comic book were expressed in a new manner thus being transformative in nature, and thereby do not violate any celebrity's publicity rights.

Traditional privacy- based torts, rather than intellectual property claims, seem more naturally suited to non-commercial depictions of real people in possibly unflattering situations. Given that RPF is inherently presented as fictional, it might be extremely difficult for a celebrity to recover against a fan author for defamation, even if a story portrays him as a serial killer. Labelling a work as fiction will not save against defamation claims, because the audience will perceive the work as roman a clef and thus believe that the fictional work tells the truth about real people.[58] Fans generally produce RPF for their own satisfaction. Fan fiction involves a concept of "actorfic" when the art or fiction depicts or makes reference to the actor or other performer, as opposed to the character they play, in the form previously referred to. There is however no availability of fair use doctrine for infringement of publicity rights by fan fiction. What has, however, likely been the reason there are no cases of celebrity's bringing ROP claims against fan fiction is the lack of provable damages, lack of evidence of use for commercial advantage, and the general lack of interest in this kind of fan art and fiction in mainstream fandom.[59]

V. CONCLUSION

It is observable from the perusal of this research that the focal point for all the legal problems in case of a fan-fiction work is the fact that some elements of the original work such as settings or characters which are adopted in the fan-fiction work are independently copyrightable, *de hors* the parent work of which they are a constituent element. However this fact does not put an absolute embargo on these elements being re-used to create any derivative work, in our case fan-fiction works, provided the same falls under fair use. Hence, in order to beseech the legality of these fan fiction works and also to find as to which of these fan fiction works would dodge

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[57] 30 Cal 4th 881, 890.

[58] Peter K. Yu, *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age* 261 (2006).

[59] Marc Greenberg & Linda Kattwinke, "Fan Fiction and Fan Art: Copyright and Trademark Issues Involving User-Generated Content", The State Bar of California Intellectual Property Law Section, 6 (November 11, 2016), 07_Fan_Fiction_and_Fan_Art_-_Copyright_and_Trademark_Issues_Involving_User-Generated_Content0(1).pdf.

the onslaughts of the copyright law, the authors have exhaustively dealt with these four fair use factors and have analyzed them qua the fan fiction works. It can be concluded from the research that these factors are subjective as well as interrelated in nature and therefore have to be analyzed in conjunction with each other, not in water tight compartments. This characteristic of them significantly increases their scope, making them broad and open-ended. In backdrop of this broad scope and also keeping in mind the nature of majority of the fan fiction works it can be said that that these factors are tailor made for accommodating within them fan fiction works, thereby fortifying their legality.

Regarding the factors, it has been maintained throughout the course of this paper and been pointed out time and again that transformativeness of the fan fiction work is the single largest factor which in turn has the direct impact on the other very important factor which is market substitution, which is the very kernel of the copyright law, the sacrosanct aim of which is to ascribe the due economic benefits to the author of the original. Together, these two factors can be also be called, for the sake of convenience, as the 'mandatory factors', the satisfaction of which is a *sine qua non* for a fan-fiction work to be legal. The other fair use factors such as commerciality, amount and substantiality can of the original work used and the nature of the work can be clubbed in category of what can be called as 'persuasive factors' which would have to be delved upon only after the satisfaction of the mandatory factors, and none of them can individually strike legality of the fan fiction work. The dominance of the mandatory factors over the persuasive factors has been manifested with the aid of case laws and examples throughout the course of the paper wherein it has been shown how even commercial fan fiction works can be legal provided they are transformative and how even non-commercial fan fictions works would see the frown of copyright law if they are not transformative and lead to market substitution. It has also been shown how even a very substantial part of the original work if adopted in a fan fiction work would not necessarily lead to copyright infringement if the latter is transformative and adds intellectual value to the adopted part.

However one must not lose sight of the fact that even if mandatory factors are fulfilled, it is not the end of the enquiry, and a fan fiction work can still be an infringement if the persuasive factors greatly outweigh the mandatory factors. Therefore it can be concluded that for being legal the fulfillment of mandatory factors is necessary. If the court comes to conclusion that the fan fiction work is transformative and doesn't cause market substitution, then the court would analyze the persuasive factors. If the persuasive factors weigh against the mandatory factors, then in such case the fan fiction work would be an infringement of the original work.

Considering the above mentioned aspects of Intellectual Property Law, it is clear that fan fiction is not something which can act freely within the public domain. Even if these writers are able to strike down the web created by copyright law, there can be issues pertaining to trademark infringement or trademark dilution. Thus, fan fiction author should always keep tabs on any kind of concern arising out of trademark laws which could occur if any fan fiction creator formulates a different story on characters already under the ambit of trademark protection. Such work could also lead to tarnishment, blurring or whittling away of the goodwill established by the original author relying on such characters, which leads to trademark dilution. But to win in cases of trademark tarnishment there should be a commercial use factor which is essential to be proved, and the unavailability of this in fan fiction cases, destroys the strength of the claim. Further, such dilution claims lead to the issue of unfair competition where the tarnishment causes a loss in the market value of the trademark owner. Another concept and rights which might get affected by fan fiction are publicity rights which mean that famous people or celebrities are given the right to bar anyone from commercially exploiting the image created by them and the personality they depict. Fan fiction is usually protected in this aspect as it is non-commercial in nature and mostly publicity rights deal with commercialization of the work. Thus, with respect to intellectual property rights pertaining to trademark and publicity of the celebrities fan fiction, being noncommercial in nature, do not seem to trespass these rights. Therefore, a harmonious balance has to be struck between fan-fiction works, which are an epitome of creativity, and the exclusivity granted to owners of intellectual property.

EXAMINING THE GOOD SAMARITAN PROTECTION LAW AND POLICY FRAMEWORK IN INDIA : THE NEED FOR INTROSPECTION

—Aditya Bharat Manubarwala[*] & Rushabh Saumen Vidyarthi[**]

Abstract — The article aims to bring to fore the position related to good Samaritan laws in India. The authors aim to highlight the legal trepidation which 'helpers' of accident victims get mired in and thereby suggest measures which would bolster confidence among passerby's or witnesses of accidents to come to the rescue of the victim. The primary focus of the article aims at effectuating laws for protection of 'good Samaritans'.

The Supreme court of India in the case of Save life foundation& Anr. Versus union of India & Anr Strengthened guidelines for protection of good Samaritans of road accident victims. The judgment is a premiere judicial decisions encouraging enactment of 'Good Samaritan laws' in India. While this is axiomatically beneficial, unfortunately only deals with cases of road accident victims and ignores any other category of 'accidents' like crimes or calamities such as drowning or electric shocks.

Interestingly, Karnataka is the only state in India which has formulated a bill relating to Good Samaritans i.e. the Karnataka Good Samaritan and Medical Professional (Protection and Regulation during Emergency situations) Bill, 2016. The bill was drafted in light of the Supreme Court Judgment. The bill aims at

[*] (5th Year) Pravin Gandhi College of Law, Mumbai.
[**] (2nd Year), Rizvi Law College, Mumbai.

protection of accident helpers instead of looking at the helper with a lens of suspicion.

However, we find an absence of penal provisions in India, which would penalize a passerby who may turn a blind eye to an accident victim and would not offer help. For example, In Germany we have a provision in the German Penal Code which speaks of imprisonment of a person who refuses aid to another person. For instance, a person witnessing another person drowning and turning a blind eye may be prosecuted under this law. Few European Countries like have also enacted similar laws. The authors recommend enforcement of such laws in India.

I. INTRODUCTION

The Webster's dictionary defines a 'Good Samaritan' as one who compassionately renders assistance to the unfortunate[1]. Conventional logic mandates that an individual rendering assistance to an imperiled stranger is performing a noble act, and hence shouldn't be put at any disadvantage or burden in context of that act performed. It would be, but, a fair and reasonable expectation for a 'Good Samaritan' acting altruistically to not expect any brickbats by way of the legal mechanism being unleashed upon him as a response to his benevolent act. However, the law of the land, as it stands currently in India, does not carve out any particular exception protecting a 'Good Samaritan' from civil or criminal liability. This article aims to bring to fore the statutory and policy framework related to the protection of Good Samaritans in India.

The article at length discusses the seminal judgment *Savelife foundation* v. *Union of India*[2] (hereinafter referred as the 'SLF case') laid down by the Supreme Court of India. Through the course of the article a critical analysis of the The Karnataka Good Samaritan and Medical Professional (Protection and Regulation during Emergency Situations) Bill, 2016[3] is also conducted. The aforementioned bill[4] was passed in the aftermath of the SLF case and interestingly happens to bring the only semblance of a statutory presence to this otherwise neglected arena. Employing a comparative approach by analysing the Good Samaritan protection framework across jurisdictions; an

1 *Webster's Third New International Dictionary*, 979 (1965).
2 (2016) 7 SCC 194.
3 The Karnataka Good Samaritan and Medical Professional (Protection and Regulation during Emergency Situations) Bill, 2016.
4 *Ibid.*

attempt is made to ameliorate the present position. Taking inspiration from similar frameworks across European countries like - England & Wales, Ireland, Germany, France and Italy, and countries like China and USA; the essential ingredients and contours of a well balanced Good Samaritan protection law are discussed.

II. POSITION IN INDIA

A. Judicial Intervention

In India, at present there exists no legislative or policy framework on protection of benevolent Good Samaritans aiding and assisting imperiled persons; whether accident victims, victims of a crime or any other category of imperiled person[5]. The Supreme Court of India's decision in the landmark case of *Savelife foundation* v. *Union of India*[6] is the only judicial precedent operating in the domain of good samaritan protection.

The petitioner, hereinafter referred to as, Save Life Foundation (SLF) is an innovative, non-profit organization, working to improve road safety and emergency care across India[7]. SLF has been a vociferous advocate for the enactment of suitable legislations protecting bystanders and good samaritans, in order encourage them to come forward and help injured people on the road[8]. SLF is also working on a draft model Good Samaritan Law for India.[9] SLF first approached the Supreme Court of India in the year 2012[10], seeking directions for the enactment of various guidelines pertaining to Good Samaritan laws in the country. Amongst other things, a prayer was also sought proposing a few amendments to the Motor Vehicles Act, 1988. In the SLF case, a few recommendations were made by the Supreme Court. In our opinion, this judgment can easily be regarded as a seminal decision by the Supreme Court on Good Samaritan Laws in India. The judgment strengthens guidelines issued by the Central Government by way of a notification on 12th May, 2015[11]. The Union Government found it apposite to protect the interest of good Samaritans and laid down fifteen point

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5 Rupa Subramanya, "Delhi Rape: Why Did No One Help?", The Wall Street Journal, January 5, 2013.

6 *Supra* note 2.

7 "Good Samaritan Law: A Comparative Study of Laws That Protect First Responders Who Assist Accident Victims", May 2014, A research note by Dechert for SaveLIFE Foundation.

8 *Ibid*.

9 *Supra* note 3.

10 *Supra* note 2.

11 Ministry of Road Transport and Highways, [Notification No. 25035/101/2014-RS], Notified on 12th May 2015, http://dghs.gov.in/WriteReadData/userfiles/file/Gazette%20notification%20regarding%20protection%20of%20Good%20Samaritans-%20MoRTH.pdf.

guidelines for the same[12]. The guidelines exempt helpers from civil or criminal liability.[13] There are also provisions listed for providing compensation to helpers in order to encourage the public at large from providing help.[14] In light of a Supreme Court judgment,[15] more favourable for helpers private or public hospitals are restricted from detaining the helpers for non payment of medical charges, unless the Good Samaritan is a relative of the victim. Good Samaritans are also exempted from the payment of hospital charges. There also exists a provision that a bystander who makes call to a police station shall not be compelled to reveal his name.[16] In addition to these provisions, examination of the bystander (in case he voluntarily states to be an eye witness) shall be done on a single occasion.[17] However, the aforementioned guidelines can at best be termed, in our opinion, as ephemeral measures, which would only temporarily ameliorate the problem of lack of Good Samaritan legislation in India. The guidelines restrict their scope to 'road accidents' only. They completely ignore other aspects, necessary in a sound Good Samaritan Protection law. The need for protecting a good Samaritan assisting victims of, drowning, crimes involving bodily injuries amongst others is completely ignored. Hence, the guidelines offer no protection for Good Samaritans aiding and assisting imperiled persons apart from those who have met with road accidents. This is a very narrow approach. India is in fervent need for the enactment of Good Samaritan Laws. The fear among the minds of people of getting caught up in police investigations and being persecuted at the hands of the legal machinery is very pertinent[18]. Apart from a disquieting feeling of being a witness in a court case there can also be a legitimate apprehension in the minds of bystanders of being caught as a witness in an everlasting legal battles. There is also worry among the bystanders of having to endure the medical expenses, as hospitals would not treat the patients without fees[19]. This is in spite of the Supreme Court making observations, that saviors of road accident victims must be treated with respect and must not be harassed at the hands of the police machinery.[20] That road accident victims may get help from bystanders in light of

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12 *Ibid*.

13 Ministry of Road Transport and Highways, [Notification No. 25035/101/2014-RS], Notified on 12th May [Notification No. 25035/101/2014-RS] 1. (3)

14 Ministry of Road Transport and Highways, [Notification No. 25035/101/2014-RS], Notified on 12th May [Notification No. 25035/101/2014-RS] 1. (2)

15 *Parmanand Katara* v. *Union of India*, (1989) 4 SCC 286.

16 Ministry of Road Transport and Highways, [Notification No. 25035/101/2014-RS], Notified on 12th May [Notification No. 25035/101/2014-RS] 1. (4)

17 Ministry of Road Transport and Highways, [Notification No. 25035/101/2014-RS], Notified on 12th May [Notification No. 25035/101/2014-RS] 1. (7)

18 "Towards a Law for Good Samaritans", *The Hindu*, March 25, 2016.

19 Preeti Jha, "If No-One Helps You After a Car Crash in India, This is Why", BBC News, 7 June, 2016.

20 *State* v. *Sanjeev Nanda*, (2012) 8 SCC 450.

the above mentioned guidelines, however victims of violence have a lesser chance of being helped.[21]

B. Karnataka Model Bill

The State of Karnataka in the year 2016 came out with a draft Good Samaritan protection Bill, entitled, The Karnataka Good Samaritan and Medical Professional (Protection and Regulation during Emergency Situations) Bill (hereinafter referred as 'The Bill').[22] Interestingly, Karnataka became the first state in India to come up with a proposed Good Samaritan Law[23]. The Bill acts as a relief for benevolent good samaritans and proposes measures encouraging the rescue of imperiled persons by unknown individuals. The statement of objects and reasons of the Bill explicitly appreciates "confidence building" amongst 'Good Samaritans' as the need of the hour in order to encourage them come forward and help victims.

A good Samaritan under the bill[24] is exempted from any civil or criminal liability for any act or omission in good faith. The bill also explicitly lays down rights of Good Samaritans[25] which primarily are; exempting him from furnishing any of his personal information, exempting him from any procedure related to admission of a person in the hospital and even exempting him from being liable for any medical expense. All of these measures would surely act as incentives encouraging benevolent Good Samaritans towards helping imperiled individuals. The bill also makes it mandatory for hospitals to aid and assist victims.[26] While this comes across as a major positive takeaway from the judgment[27], in absence of an enacted legislation, the guidelines and the judgment alone would not suffice.

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[21] Gaurav Vivek Bhatnagar, "Good Samaritans Don't Help Accident Victims For Fear the Law Won't Back Them", The Wire, 13 August 2016.

[22] The Karnataka Good Samaritan and Medical Professional (Protection and Regulation during Emergency Situations) Bill, 2016, L.A. Bill No. 35 of 2016 (11th Mar, 2018, 10 A.M.), http://savelifefoundation.org/wp-content/uploads/2016/11/Karnataka-Good-Samaritan-and-Medical-Professional-Protection-and-Regulation-during-Emergency-Situations-Bill.pdf.

[23] "Karnataka Leads the Way, Readies Good Samaritan law", *The Times of India*, November 10, 2016.

[24] The Karnataka Good Samaritan and Medical Professional (Protection and Regulation during Emergency Situations) Bill, 2016, S. 3.

[25] The Karnataka Good Samaritan and Medical Professional (Protection and Regulation during Emergency Situations) Bill, S. 4(1).

[26] S. 6.

[27] Mukesh Ranawat, "Assisting the Injured", *The Hindu*, 16 November, 2016.

III. GOOD SAMARITAN POLICY IN OTHER JURISDICTIONS

A. Position In European Countries

i. France

Early principles of French law promulgated in 1804[28] quickly gained traction and influenced the workings of legal systems across Europe. The substratum of civil law is based on the duty to rescue. That is, it speaks for punishment of someone who does not aid or assist but does not propound protection from liability of one who does. However, the French law seeks not only prosecution under criminal law of the person giving inappropriate help but also allows damages to be taken under civil law. A passerby witnessing an accident incase does not offer help despite there being no risk to him or an other third party is liable for imprisonment[29]

Such failure to provide assistance to a person in danger, such a breach of duty to rescue constitutes not only a criminal offence, but also a civil wrong. Article 1382 of the Civil Code of the French law of Torts states that:

> *"Any act which causes harm obliges the one whose fault caused the harm, to make reparation for it".*
>
> *Consequently, the rescuer who provides assistance, by doing so causes harm, whatever it is, to the victim or a third party, will be liable, again, at least under the civil law (possibly under criminal law also) e.g. for "battery". The French law thus appears very harsh against rescuer, who faced with the difficult situation has the dilemma of whether or not to act, and face the possibility of being sued either for his act or for his omission.*

ii. Germany

In Germany "Unterlassene Hilfeleistung" (failure to provide assistance) is an offence under the German Penal Code[30]. The code prescribes for an imprisonment up to one year.[31] However, one must take into notice this law

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[28] Micheal Broers, "Napoleon was a European to his Core — Except When it Came to England", *The Irish Times*, 6 March, 2018.
[29] Arts. 223-6, French Penal Code.
[30] S. 323(c) German Penal Code.
[31] *Ibid.*

is not confined to road accidents only but deals with any emergency or natural calamity. For example failure to aid a person who is drowning may also attract an arrest.[32]

iii. Italy

Italian laws when compared to other European countries are seen to have an absence of a direct "Good Samaritan Law". However, Italy enforces enforces general obligation to notify Authorities[33] in cases where if subjects are found are objectively (such as an abandoned ten year old) or subjectively (such as a person who is unable to take care of one's self due to illness or other causes) incapacitated. Those who break this law can be sentenced up to one year imprisonment or fined up to $2500.[34] Mandatory assistance must also be provided for the people who are unconscious, injured or peril. In this case, one must provide for emergency assistance to the person or notify the authorities. If the personal injury is the result of such negligence, the penalty is greater; if the result is death, the penalty is doubled.[35]

iv. Position in Ireland

Ireland enacted an active legislation relating to Good Samaritans in the year 2011.[36] This was after an amendment made to the Civil Law (Miscellaneous Provisions) Act, 1961. The Act defines a Good Samaritan as a person who without any monetary gain or any other form of reward comes to the rescue of an imperiled human being.[37] However the Act excludes a volunteer from the definition.[38] The act was also of a prospective nature thereby not interfering with disputes prior to the enactment of the Act.[39] The law aims to exonerate from charges of negligence a Good Samaritan in cases where he comes to rescue of an imperiled person who is in serious peril or there are chances of him/her being in serious peril or is apparently suffering from an illness.[40] In spite of a volunteer not being included in the definition of a Good Samaritan, a volunteer is also exonerated from being personally liable for negligence.[41]

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[32] Justin Huggler, "Four Wanted in Germany for Failing to Save Man under 'Good Samaritan' Law", *The Telegraph*, 31 October 2016.
[33] Art. 593, Criminal Code (Italy).
[34] *Ibid.*
[35] *Supra* note 33.
[36] Civil Law (Miscellaneous Provisions) Act 2011.
[37] Civil Law (Miscellaneous Provisions) Act 2011, Part IV-A S. 51-A (1).
[38] *Ibid.*
[39] Civil Law (Miscellaneous Provisions) Act 2011, Part IV-A S. 51-B.
[40] Civil Law (Miscellaneous Provisions) Act 2011, Part IV-A S. 51-D (1).
[41] Civil Law (Miscellaneous Provisions) Act 2011, Part IV-A S. 51-E (1).

v. Position in England and Wales

The concept of owing a duty of care towards your neighbour first came to light in England by way of a famous judgment dealing with tort law.[42] The parliament in England first laid down legislation relating to Good Samaritan law in 2015.[43] Defining the applicability.[44] The Act lays down three parameters wherein the negligence may have happened.[45]

B. Position in China

In China a citizen is not roped into China excuses its citizens from civil liability in case of them harming a person whom they are trying to save, in good faith.[46] China's new General Rules of Civil Law provide that those who attempt to aid others in emergency situations shall not held liable under any circumstances.[47]

IV. THE EXISTING POSITION IN INDIA LEAVES MUCH TO BE DESIRED.

A. Essential Components of a Good Samaritan Law

The international scenario depicts a certain pattern with regards to the essential components constituting a well balanced Good Samaritan protection law. The following five components have been deemed essential;[48] with most states in the US having at least two of the five components present. First and foremost, it is essential to have the class or classes to whom the law is applicable very clearly identified and spelled out. Secondly, a 'good faith state of mind' is also seen as a requirement, thus instances where the 'helper' has acted malafide or in bad faith are excluded while granting immunity (as seen above in the case of Ireland[49]). Although it is presumed that a Good Samaritan protection law would extend only to those who offer assistance without any profit motive, i.e.- only to those who act with altruistic motives, yet it is observed in legislations of many US states

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42 *Donoghue* v. *Stevenson*, 1932 AC 562.
43 Social Action, Responsibility and Heroism Act, 2015.
44 Social Action, Responsibility and Heroism Act, 2015. Ch. 3, 1.
45 *Supra* note 35.
46 Alex Linder, "China's New Good Samaritan Law Finally Goes into Effect, but Does it Go Too Far?", Shanghaiist, 13 October, 2017.
47 China general rules on Civil Law, Art. 184.
48 Brandt, Eric A. (1984) "Good Samaritan Laws — The Legal Placebo: A Current Analysis", Akron Law Review: vol. 17: Issue 2 , Art. 9.
49 *Supra* note 28.

that a specific inclusion of 'acting gratuitously'[50] is included as a qualifying measure for the applicability of the law. Some states in the US specifically define the places within which the immunity would apply to good samaritans while providing emergency aid[51]. Immunity ceases to apply to the good samaritan the moment he/she provides aid outside the confines of the designated areas. Some Good Samaritan statutes in states in the US also specify a minimum acceptable standard of conduct other than the common law reasonable-man-under like-circumstances standard[52].

i. Applicability to specific classes

The Karnataka Bill meets three of the aforementioned five criteria. However, in the case of Karnataka, the devil lies in the details. The Preamble of the Bill makes a broader reference to the categories of individuals it is applicable to, namely- 'Good Samaritans' and 'Medical Practitioners'[53]. Moreover, Section 2 (m) of the Bill[54], explicitly defines the categories of individuals constituting 'Medical Practitioners'[55]. At this stage a reference to US State of Connecticut is necessary. In Connecticut's general statute[56], the enumerated category falling under the liability exception includes - Physicians, dentists, nurses, medical technicians, persons trained in CPR, firemen, policemen, school personnel, ski patrol men, lifeguards, ambulance personnel and environmental protection officers. In our opinion, it would be desirable if a more detailed enumeration of the categories of individuals was done in the Karnataka Bill and subsequent similar legislations across States in India for the sake of clarity and unambiguous application.

ii. Acting in good faith and minimum acceptable standard of conduct

The Karnataka Bill, in its scheme of things, incorporates the 'acting in good faith' clause. Section 3 of the Bill[57] exempts a good samaritan from

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50 ARK. STAT. ANN. § 72-624 (1979).

51 CAL. Bus. & PROF. CODE § 1627.5 (West 1974).

52 CONN. GEN. STAT. ANN. § 52-557b (West Supp. 1983), which specifies a minimum standard of conduct of gross, wilful or wanton negligence.

53 The Karnataka Good Samaritan and Medical Professional (Protection and Regulation during Emergency Situations) Bill, 2016, Preamble.

54 The Karnataka Good Samaritan and Medical Professional (Protection and Regulation during Emergency Situations) Bill, 2016, S. 2 (m).

55 Medical Professional under S. 2 (m) means a doctor, surgeon, physician, nurse, hospital attendant, paramedical staff or any other person licensed or certified, responding to a medical emergency as part of their professional or statutory duty or part of their employment, with the rendering of actual medical treatment.

56 CONN. GEN. STAT. ANN. § 52-557b.

57 The Karnataka Good Samaritan and Medical Professional (Protection and Regulation during Emergency Situations) Bill, 2016, S. 3.

civil or criminal liability provided he acts in good faith. However, the Bill does not lay down a minimum acceptable standard of conduct expected on the part of the Good Samaritan. Moreover, no effort has been made to define the contours of what good faith is. Good faith being a subjective concept is left completely to the subjective interpretation of the judiciary. In effect, the bill provides no protection greater than the protection offered to a good samaritan under common law. The authors recommend the insertion of a few illustrations in order to explicitly highlight the legislative intent regarding the contours of what 'good faith' stands for. Would an intoxicated individual attempting to help an imperlied person, but failing in the process, fall within the good faith exception?. The aforementioned situation falls in the text book grey area of interpretation. It would certainly be unreasonable to expect the legislature to foresee every conceivable scenario and state the same in the act. Yet, the least that could be done is to expound the legislative sentiment of good faith through the use of a few illustrations. The illustrations would at best convey to the judiciary whether the legislative intent was to have a wider and more liberal interpretation or a more narrow and constricted interpretation.

iii. Acting altruistically

The Karnataka Bill specifically lays down a requirement of a 'Good Samaritan' acting in good faith, without any expectation of a reward in return for the service rendered[58]. Thus the Karnataka Bill incorporates the 'acting altruistically' clause in letter and spirit.

iv. Designated places for the operation of immunity

The Karnataka Bill does not specifically designate the places from where the immunity from civil and criminal liability starts. It would serve the object of protecting 'Good Samaritans' better if this legislative vacuum could be filled.

B. Relooking Blanket Confidentiality

The Karnataka Bill as a protective measure exempts 'Good Samaritans' from furnishing their personal information including - name, telephone number, and address at the hospital including for the preparation of the medical form[59]. Neither can a 'Good Samaritan' be required for examination

[58] The Karnataka Good Samaritan and Medical Professional (Protection and Regulation during Emergency Situations) Bill, 2016, S. 2 (i).

[59] The Karnataka Good Samaritan and Medical Professional (Protection and Regulation during Emergency Situations) Bill, 2016, S. 4.

by the police, unless he is proven to be an eye witness of the crime, accident or emergency situation[60]. Moreover, the Bill makes disclosing personal information of the aforementioned nature completely voluntary on part of the 'Good Samaritan'[61]. The aforementioned steps seem to have been incorporated in order to encourage 'Good Samaritans' towards voluntarily helping aid and assist imperiled individuals. However, in the process of encouraging and protecting 'Good Samaritans' the draftsmen seem to have ignored the possibility of misuse of this provision. In the eventuality of an imperiled person dying without a dying declaration and the individual bringing the deceased person, leaving without parting with any personal information, tracing that person can be a hassle. Mischief mongers and potential criminals can surely exploit this loop hole towards their advantage. The draftsmen fail to appreciate a hypothetical situation of a murderer (misrepresenting himself as a 'Good Samaritan') bringing an imperiled person (who is in fact a victim of the murderer's crime) to the hospital and going home scott free on account of no personal information having been shared.

It would be deemed desirable if it is made incumbent upon a 'Good Samaritan' to furnish his personal information vide a recognised government identification like a Aadhaar card, Pan card or driving license. In order to provide the necessary protective umbrella around a 'Good Samaritan' we propose that the data collected be looked into by the investigative agencies only in the eventuality of an imperiled individual dying without a dying declaration. Even in such situations we propose a further protective measure in the form of a time bound preliminary inquiry by a Magistrate against the 'Good Samaritan'. In our opinion, as much important it is to protect and encourage individuals to act as responsible 'Good Samaritans' it is equally important to protect future victims from scheming criminals, ept at misusing the loopholes of the criminal justice system.

V. CONCLUSION

India is a vast country with an ever blooming population. The number of road accidents in India is particularly high[62] The Supreme Court of India in the SLF case appreciates the crucial 'Golden Hour' during which most accident victims have a high survival chance provided they receive timely medical assistance. It is the need of the hour to have responsible citizens discharging their humanitarian duties by aiding and assisting imperiled individuals be it - accident victims, victims of crime or victims on account of emergencies. An attempt towards analysing thread bare the existing legal

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[60] *Ibid*.

[61] *Supra* note 50.

[62] Dipak K. Dash, "400 Road Deaths Per Day in India; Up 5% to 1.46 Lakh in 2015", *The Times of India*, April 21, 2016.

and policy framework around 'Good Samaritan' protection laws was made through the course of this article. Certain shortcomings present in the Karnataka Bill were identified and an attempt was made in addressing them through suggestions. It is hoped that draftsmen and legislators across the vast expanse of India's 29 states and 6 union territories wake up towards the pressing reality of the need to protect 'Good Samaritans'. Ultimately, a nation well protected is a nation well prospered.

INDEPENDENT DIRECTORS AND KOTAK COMMITTEE REPORT: THE CHANGING DYNAMICS

—*Akshita Pandey*[*] *& Mincy Mathew*[**]

Abstract — Independent directors are an integral part of corporate governance regime, in effectively all jurisdictions. With the companies increasingly seeking appointment of independent directors to address any and all corporate governance failures and increased attention paid to the institution by regulatory authorities, the role of an independent director in corporate India has become extremely significant. In October, 2017, committee, formed by the SEBI, under the chairmanship of Mr. Uday Kotak released its report. The report constitutes one of the most comprehensive measures to regulate and amend corporate governance framework in India. The purpose of this paper is to examine the changes to the institution of independent director in the light of the recent amendments to the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 pursuant to the submission of the Report of the Committee on Corporate Governance. This Article undertakes to analyse of the rationale of the amendments and their impact on the working of the companies. Based on the analysis, the Article offers conclusions and suggestions.

I. INTRODUCTION

In February 2018, Fortis hospitals, India's second largest hospital chain, ran into serious troubles with regulatory authorities. The allegation against

[*] 4th Year, National Law Institute University, Bhopal.
[**] 4th Year, National Law Institute University, Bhopal.

the Singh brothers was that they siphoned funds at least to the amount of Rs 500 crore ($78 million) out of the publicly-traded hospital company they control, without board approval.[1] Additionally, the shareholders alleged that the four independent directors had not adequately exercised their respective fiduciary duties towards all shareholders and had failed to maintain expected levels of corporate governance.[2] Investor consultancy firm IiAS in its statement alleged that "all four members of the current board have been associated either with the Fortis group, Religare group, or Ranbaxy for long tenures in the past".[3] The Singh brothers are promoters in Fortis Healthcare and Religare, and were former promoters of pharmaceutical major Ranbaxy Laboratories.[4]

It is one of many instances which raise serious concerns regarding the state of corporate governance framework in India. Corporate governance, as defined by the Cadbury committee report, is 'the system by which the companies are directed and controlled." Presumably, the primary focus of corporate governance is on the accountability of the Board to the company and shareholders.[5] In recent years, governance reforms have increasingly relied on independent directors to ensure higher standards of governance.[6] Independent directors are considered as an important preserve against the opportunism of management and controlling shareholders[7], and therefore, their presence on corporate boards is recommended by national corporate governance codes and supranational institutions.[8] Following the worldwide trend, the Securities and Exchange Board of India (*hereinafter*, 'SEBI') released a circular on February 2000, mandating that all large public

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1 Ari Altstedter, George Smith Alexander & P.R. Sanjai, "Singh Brothers are Said to Have Taken $78 Million Out of Fortis", *The Economic Times* (July 24, 2018, 6:37 P.M.), https://economictimes.indiatimes.com/industry/healthcare/biotech/healthcare/singh-brothers-are-said-to-have-taken-78-million-out-of-fortis/articleshow/62847327.cms.

2 "Fortis Shareholders Favour Removal of Brian Tempest as Director on the Board", *The Hindu Business Line* (July 24, 2018, 6:45 P.M.), https://www.thehindubusinessline.com/companies/fortis-shareholders-favour-removal-of-brian-tempest-as-director-on-the-board/article23967539.ece.

3 Aneesh Phadnis & Sohini Das, "Fortis Investors Call Meet, Demand Removal of Four Directors from its Board", *Business Standard* (July 24, 2018, 6:50 P.M.), https://www.business-standard.com/article/companies/fortis-investors-call-meet-demand-removal-of-four-directors-from-its-board-118041900035_1.html.

4 Krishna Kant & Sudipto Dey, "Why the Billionaire Singh Brothers could be Entering Endgame Phase", *Business Standard* (July 24, 2018, 6:50 P.M.), https://www.business-standard.com/article/companies/why-the-billionaire-singh-brothers-could-be-entering-endgame-phase-118021201529_1.html.

5 Amarchand Mangaldas & Suresh A. Shroff & Co., Corporate Governance 2 (CCH India, 2009).

6 Umakanth Varottil, "Evolution and Effectiveness of Independent Directors in Indian Corporate Governance", 6 Hastings Bus. L. J. 281, 281 (2010).

7 Paolo Santella, Carlo Drago & Giulia Paone, "Who Cares About Director Independence?" (forthcoming 2007), https://ssrn.com/abstract=971189.

8 *Ibid*.

listed companies in India are to have a minimum number of independent directors.[9]

In June 2017, SEBI formed a committee on corporate governance under the Chairmanship of Mr. Uday Kotak (*hereinafter*, 'Kotak Committee') with a view to enhance the standards of corporate governance of listed entities in India. The committee submitted its report on October, 2017 and subsequently, SEBI via its amendment to the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (*hereinafter,* 'LODR') accepted certain recommendations of the committee. The scope of the article is restricted to the analysis of the proposed recommendations and the subsequent amendments in relation to independent directors as under the Kotak committee report.

The agenda of the article is threefold. The first part deals with the recommendations of the Kotak committee report with respect to independent directors that have been accepted by SEBI by way of amendments to the LODR or by notification. An analysis of the changes has been undertaken with a view to understand their significance on companies. The second part deals with recommendations that have not been accepted and analyses the rationale behind the same. An attempt has been made to study the possible implications as well as reasons behind their non-acceptance. Part three deals with the possible impact of these recommendations and consequent amendments and what issues may arise as a result of their operation. Based on the analysis, the Article offers conclusion and suggestions.

II. PART A

Independent director is an American invention, and its popularity in Asia is a classic example of a significant legal transplant from the United States to Asia.[10] The idea of this institution stems from the fact that close business relationships with the company or vested interests may affect their judgment in neutral assessment of performance.[11] The policymakers in the US conceived that in a classic Berle-Means corporation, where there is dispersed shareholding, independent board can act as a corporate governance tool and effectively address the agency conflict between managers and owners.[12] In

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[9] Securities and Exchange Board of India, SMDRP/POLICY/CIR-10/2000 (February 21, 2000), http://www.sebi.gov.in/circulars/2000/CIR102000.html.

[10] Dan W. Puchniak & Kon Sik Kim, "Varieties of Independent Directors in Asia: A Taxonomy" (NUS — Centre for Asian Legal Studies Working Paper No.17/01, 2017), https://ssrn.com/abstract=2930785.

[11] Enrichetta Ravina & Paola Sapienza, "What Do Independent Directors Know? Evidence from Their Trading", 23 Rev. Financial Stud. 962, 963 (2010).

[12] Harald Baum, "The Rise of the Independent Director: A Historical and Comparative Perspective" (Max Planck Private Law Research Paper No. 16/20, 2016), https://ssrn.com/abstract=2814978.

fact, a managerial control over business can lead no significant monitoring or removal concerns, and managers are free to engage in inefficient activities.[13]

In India, on the other hand, a traditional culture of family owned firm prevails with predominantly concentrated ownership structure, generally in the hands of promoters or other block holders.[14] In such a scenario, a controlling shareholder does not need an external rule-maker to protect him from a management team that he himself has the power to appoint.[15] Thus, the principal corporate law concern is that such a shareholder may be able to expropriate the assets of other shareholders or behave in a manner detrimental to the interests of the company.[16]

The law governing the independent directors is provided in Companies Act, 2013 and in LODR, 2015. Kotak committee, constituted to recommend changes to the LODR, recommended nine major changes to the current framework under the head of independent directors. Below, the Article highlights and analyses the changes accepted by the Board, with respect to independent directors.

A. Eligibility Criteria for Independent Directors

Section 149 of the Companies Act and Regulation 16 of the LODR Regulations governs the criteria for independence of independent directors. The law lists out the negative features that describe the absence of certain relationships to establish director independence. Like many legal borrowings, the independent director is viewed by different parties as a solution to different specific concerns.[17] As noted above, independent directors in United States emerged as a solution to the problem of managerial domination of the Board.[18] In India, however, the primary concern of the independent directors is to bear in mind the interests of minority shareholders.[19] This expectation is also evident in the definition adopted for 'independence' which, generally provide that independent directors should be independent

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[13] Yaron Nili, "The 'New Insiders': Rethinking Independent Directors' Tenure", 68 Hastings L. J. 97, 102 (2016).

[14] "OECD Survey of Corporate Governance Frameworks in Asia" 5, (2017), http://www.oecd.org/corporate/corporategovernanceinasia.htm.

[15] Donald C. Clarke, "The Independent Director in Chinese Corporate Governance", 31 Del. J. Corp. L. 125, 159 (2006).

[16] Vikramaditya S. Khanna & Shaun J. Mathew, "The Role of Independent Directors in Controlled Firms in India: Preliminary Interview Evidence", 22 Natl Law Sch. India Rev. 35, 44 (2010).

[17] *Supra* note 16.

[18] *Supra* note 15.

[19] *Supra* note 6, at 287.

from significant shareholders.[20] Taking this into account, through the 2018 amendment, the words "member of the promoter group of the listed entity" has been added in Regulation 16(ii) to exclude the appointment of family associates of promoters as independent directors.

Another amendment in the independence criteria is amendment of Regulation 16(viii) to stipulate that a person to be appointed as an independent director must not be a non-independent director of another company on the board of which any non-independent director of the listed entity is an independent director. This addition has been to curb board interlocks.[21] Reciprocal interlocks occurs wherein each director serves as an independent director at a firm with at least one executive that sits as an independent director on that director's own board.[22] These types of interlocks raise significant regulatory concerns about whether such a director can be truly independent, including the potential concerns about back-scratching.[23] The Committee argues that such interlocks accompany the risk of structural vulnerability associated with quid pro quo.[24] In this sense, the broadening of the definition of independence is a welcome measure.

A concerted move in the direction to improve corporate governance is to impose a requirement on the independent director, to provide a declaration regarding his independence to the Board. Thus, the amended Regulation 25(8) provides an obligation to declare: Firstly, that the independent director is independent as under Regulation 16 and independent from the management, to be provided in the first meeting of the board in which he participates as a director and thereafter at the first meeting of the board in every financial year; Secondly, whenever there is any change in the circumstances which may affect his status as an independent director. The declaration shall state that he meets the criteria of independence as provided in Regulation 16(1)(b) and that he is not aware of any circumstance or situation, which exist or may be reasonably anticipated, that could impair or impact his ability to discharge his duties with an objective independent judgment and without any external influence.[25]

The rationale of the Committee was that 'given the nebulous nature of the determination of independence, it was felt that a self-assessment of

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[20] *Supra* note 10.

[21] Securities and Exchange Board of India, Report of the Committee on Corporate Governance 26, (2017), https://www.sebi.gov.in/reports/reports/oct-2017/report-of-the-committee-on-corporate-governance_36177.html.

[22] Michal Barzuza & Quinn Curtis, "Board Interlocks and Corporate Governance" 39 Del. J. Corp. L. 669, 676 (2014).

[23] *Ibid*.

[24] *Supra* note 21.

[25] *Supra* note 21, at 27.

independence be required of every independent director'.[26] In practice, however, this may become practically problematic. Even in US, due to relatively low pay, increased time demands and liability exposure, it has become difficult to recruit and retain qualified independent directors.[27] Individual directors, especially independent directors, are more risk averse as the potential liability is significantly greater than the pay that independent directors receive for their work.[28] In this vein, increased disclosure requirements may attract potential liability, making independent directors apprehensive of taking the job. Additionally, the consequences of false disclosure (intentional or unintentional) are unknown and, consequently, this may lead to dearth of competent independent directors willing to assume that risk.

In this regard, a corresponding obligation is imposed on the board to certify the veracity of the declaration of the independent director. Accordingly, under Regulation 17(9) the board of directors of the listed entity must take on record the declaration and confirmation submitted by the independent director after undertaking due assessment of the veracity of the same. The evaluation of independent directors shall be done by the entire board of directors which shall include - (a) performance of the directors; and (b) fulfillment of the independence criteria as specified in these regulations and their independence from the management. In the above evaluation, however, the directors who are subject to evaluation shall not participate. In the annual report a confirmation that in the opinion of the board, the independent directors fulfills the conditions specified in these regulations and is independent of the management, is to be included. Regulatory requirement has been included with the rationale that true independence is a function of behavior, and an objectiveness being brought to board deliberations and overall decision making.[29]

Along the same lines, the NYSE listing standards provides that "no director qualifies as 'independent' unless the board of directors affirmatively determines that the director has no material relationship with the listed company".[30] However, the listing standards have faced its fair share of criticism. One major criticism is that such self-designation of director independence remains uncontested on the account that there is no vet-

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[26] *Supra* note 21, at 27.

[27] Stephen M. Bainbridge, "A Critique of the NYSE's Director Independence Listing Standards" (UCLA School of Law, Research Paper No. 02-15, 2002), https://ssrn.com/abstract=317121.

[28] Francois Brochet, & Suraj Srinivasan, "Accountability of Independent Directors — Evidence From Firms Subject to Securities Litigation" (forthcoming 2013), https://ssrn.com/abstract=2285776.

[29] *Supra* note 21, at 26.

[30] NYSE Listed Company Manual §§ 303A.02, http://nysemanual.nyse.com/LCMTools/PlatformViewer.asp?selectednode=chp_1_4&manual=%2Flcm%2Fsections%2Flcm-sections%2F.

ting or auditing done by the stock exchanges or the Securities Exchange Commission; this may cultivate a false sense of trust in the independence of the directors.[31] At the same time, companies do not provide detailed information to shareholders and prospective investors regarding the reasoning justifying the designation of a director as independent.[32]

B. Alternate Director

Section 161 of the Companies Act, 2013 permits appointment of alternate directors for independent director, unless he is qualified to be appointed as an independent director under the provisions of the Act. The committee argues that the qualities of an independent director are unique to a relevant employee and not replaceable with an alternate.[33] Additionally, Section 173(2) of Companies Act, 2013 read with Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014, mandates that the participation of directors in a meeting of the Board may be either in person or through video conferencing or other audio visual means as may be prescribed. In this regard, the committee puts forth the opinion that with the law specifically allowing the directors to attend meeting from any location, the requirement of keeping an alternate is no longer relevant.[34] Accordingly, in Regulation 25, a new sub- Regulation (1A) has been inserted to include that 'no person shall be appointed as an alternate director for an independent director of a listed entity with effect from April 1, 2018'.

C. Resignation

Director resignations provide an abrupt and often unanticipated change in board structure, in the context of board independence, and an argument is that director resignations may be more meaningful to shareholders than are appointments.[35] This is because directors' resignations can signal governance failure in a firm.[36] Recent trends around the world show that the independent director tend to throw in the towel just before the announcement by a company that it is facing financial problems[37] or immediately

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[31] Yaron Nili, "Out of Sight Out of Mind: The Case for Improving Director Independence Disclosure", 43 J. Corp. Law 35, 40 (2017).

[32] *Ibid*.

[33] *Supra* note 21, at 32.

[34] *Ibid*.

[35] Manu Gupta & L. Paige Fields, "Board Independence and Corporate Governance: Evidence From Director Resignations", 36 J. Bus. Finance Account. 161, 162 (2009).

[36] Preet Deep Singh & Chitra Singla, "Impact of Independent Directors' Resignations on Firm's Governance", (Indian Institute of Management, Ahmedabad, W.P. No. 2016-03-36, 2016), https://vcenter.iima.ac.in/assets/snippets/workingpaperpdf/8968550572016-03-36.pdf.

[37] "The Role of Independent Directors in Improving Corporate Governance", Securities and Futures Commission, (July 14 2018, 6:12 P.M.), https://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=06PR218.

upon a wrongdoing being detected or alleged.[38] There is no research establishing the direct correlation between resignation of independent director and stock prices of the company, in India. Alternatively, the negative movement of stock prices has also been witnessed in companies wherein the auditors have resigned abruptly just before signing of the financial results. Examples include Deloitte resigning as auditor of Manpasand Beverages[39], Price Waterhouse resigning as auditor of Vakrangee Ltd.[40] and Atlanta Ltd.[41] amongst others. Interestingly, a ripple effect has been observed too where the resignation of auditors is followed by the resignation of independent director.[42]

Broadly, the reasons of resignation of directors (equally applicable for independent director) can be classified into two: i) jumping ship and ii) cleaning house. The former refers to the process where directors resign in view of the governance failures that are construed as stigmatizing events having the potential to mar a director's reputation even if he or she is not culpable for any wrongdoing.[43] The latter involves the board governance failure as a threat to organizational legitimacy, which can erode the support of important external constituents. As a result the board 'cleans house', prompting director departures as a way to mitigate the unfavorable judgments of outside audiences and protect the firm's access to needed resources.[44]

However, it must be noted that an independent director resigning may not necessarily provide reasons. Directors might offer a "busy" related reason for leaving a board when the firm is in trouble, rather than criticizing the firm, because they seek to maintain their reputations as cooperative with

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38 George Smith Alexander & Anto Antony, "ICICI Bank Board Said to be Divided over CEO Chanda Kochhar's Future", *Livemint* (July 19, 2018, 3:30 P.M.), https://www.livemint.com/Companies/fnCSHoQ2D5qDs67fpdpBaJ/ICICI-Bank-board-is-said-to-be-divided-over-CEO-Chanda-Kochh.html.

39 Menaka Doshi, "What to Make of the Auditor Resignations at Vakrangee and Manpasand Beverages", Bloomberg Quint (May 30, 2018, 7:13 P.M.), https://www.bloombergquint.com/business/auditor-resignations-at-vakrangee-and-manpasand.

40 *Ibid*.

41 K.R. Srivats, "Price Waterhouse Quits as Statutory Auditor of Atlanta", *The Hindu Business Line* (May 30, 2018, 11:32 P.M.), https://www.thehindubusinessline.com/companies/price-waterhouse-quits-as-statutory-auditor-of-atlanta/article24039180.ece.

42 Vinod Mahanta & Sachin Dave, "Manpasand Decoded: 30 Auditors Resigned from Indian Companies this Year", *The Economic Times* (Jun 02, 2018, 8:47 P.M.) https://economictimes.indiatimes.com/industry/services/consultancy-/-audit/30-auditors-resigned-from-indian-companies-this-year/articleshow/64422972.cms.

43 Jeremy J. Marcel & Amanda P. Cowen, "Cleaning House or Jumping Ship? Understanding Board Upheaval Following Financial Fraud", 35 Strat. Mgmt. J. 926, 927-928 (2014).

44 *Ibid*.

management.[45] This practice is widespread and is often perceived as evidence of a greater malaise.

It is in this backdrop that the Kotak Committee suggested insertion of a new provision in the LODR under which an independent director was mandated to provide reasons for resigning from a company as a mark of his last fiduciary duty. The Companies Act, 2013 stipulates disclosures of detailed reasons of resignation of a director to be made to the Registrar. Such disclosure can, however, be made anytime within 30 days.[46] The Committee observed that there was no such requirement of disclosure being made to stock exchanges. To overcome this lacuna and to safeguard interest of all stakeholders it was recommended that the company disclose full reasons for resignation in its annual report.[47] The new provision states that in the event of resignation of independent director, the detailed reason for such resignation is required to be disclosed to the Stock Exchange, in seven days along with a confirmation from the independent director as to the adequacy and accuracy of the reasons provided.[48]

This is a welcome move that further strengthens SEBIs objective of investor protection. It enables not only the investors but also other market participants to understand the rationale behind such a drastic step of resignation. This has the potential to contain the free fall of shares prices as an aftermath. The most significant impact will be bringing of the information asymmetry between the board and the stakeholders. However, it has to be borne in mind that this in no way enables the independent director to escape any liability that arises on them as a result of their conduct during the tenure.

D. Directors and Officers insurance

As a general premise, fear of legal liability deters individuals from serving as independent directors and these concerns have led to recommendations for greater protection of independent directors from securities lawsuits.[49] In the wake of the Satyam fraud, the company's independent directors suffered substantial reputational harm and faced significant public scrutiny for their failure to detect such a large and ongoing fraud and

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[45] Michaël Dewally & Sarah Peck, "Upheaval in the Boardroom: Outside Director Public Resignations, Motivations, and Consequences", 16 Journal of Corporate Finance 38, 41 (2010).

[46] Companies Act, 18 of 2013 § 168(1).

[47] *Supra* note 21, at 29-30.

[48] SEBI, (Listing Obligations and Disclosure Requirements) Regulations, 2015, No. SEBI/LAD-NRO/GN/2015-16/013, Schedule III, Part A, Clause A.

[49] Francois Brochet & Suraj Srinivasan, "Accountability of Independent Directors — Evidence from Firms Subject to Securities Litigation" (forthcoming 2013), https://ssrn.com/abstract=2285776.

for their unanimous approval of the controversial and later-abandoned transactions to acquire two firms controlled by Satyam's promoters.[50] Further, Nimesh Kampani, who was the independent director of Nagarjuna Ltd and had resigned prior to surfacing of the allegations, was charged by the state government for failure to pay deposits along with the promoter and faced the possibility of arrest and jail.[51] These highly publicized examples have heightened fear of increased liability associated with the post of independent director in corporate India.

Under the Companies Act, 2013, the liability of an independent director or a non-executive director exists only for acts of omission or commission by a company that occurred with the director's knowledge attributable through board processes and the director's consent or connivance or where he or she failed to act diligently.[52] However, liability of a director under these legal standards is not clearly identifiable. This is because questions such as whether a director acted diligently and whether knowledge could be attributed to a director by mere presence at board meetings are not clearly defined.[53] Moreover, liability faced by independent and nominee directors under various other enactments remains a legitimate concern.[54]

In these circumstances, an indemnification provision becomes imperative to protect the directors from such liability. An indemnification provision is where a corporation is 'free to indemnify a director against expenses incurred in connection with litigation based on alleged failure in the director's duty to the corporation, regardless of the existence of a legal obligation to do so'.[55] Usually, in case the insured company cannot meet its indemnification obligation, then Directors and Officers insurance (*hereinafter,* 'D&O insurance') policy pays the directors.[56] D&O insurance operates as a contractual mechanism to move the risk from individual directors and officers to the corporation they manage and then to a third-party insurer, with the ultimate result that individual managers are almost never burdened with personal liability for causing corporate losses.[57]

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[50] *Supra* note 16, at 41.

[51] OECD, "Related Party Transactions and Minority Shareholder Rights", (July 10, 2018) https://www.oecd.org/daf/ca/50089215.pdf.

[52] Companies Act, 18 of 2013, § 150(12).

[53] Vyapak Desai & Ashish Kabra, "Director and Officer Liability in India", Nishith Desai Associates, (June 26, 2018) http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Articles/Director_and_Officer_Liability_in_India.pdf.

[54] *Ibid*.

[55] Joseph Bishop, "Current Status of Corporate Directors' Right to Indemnification", Yale Law School Faculty Scholarship Series 1056, 1062 (1956).

[56] Martin E. Lowy, *Corporate Governance for Public Company Directors*, 73 (Wolters Kluwer, 2003).

[57] S.J. Griffith, "Unleashing a Gatekeeper: Why the SEC Should Mandate Disclosure of Details Concerning Directors' & Officers' Liability Insurance Policies", (University of Penn., Inst. for Law & Econ Research Paper No. 05-15, 2005).

With an increase in risk, D&O insurance coverage is considered necessary to attract qualified persons to board service as it protects their personal wealth from the risk of shareholder litigation.[58] A typical D&O insurance policy may include three types of coverage:

I. The Side A coverage is designed to protect direct, personal interests of directors, including the litigation expenses and protects directors from costs that the company is legally prevented from paying on their behalf.[59]

II. The Side B coverage does not entail protection of individual managers but rather reimburses the corporation for indemnifying its directors and officers.[60]

III. The Side C coverage provides for the losses directly sustained by a company for its own liability.[61]

Usually, a D&O policy provides coverage only when a claim has been made against a company; a claim is a term defined under each D&O policy and almost universally includes lawsuits, written demands for monetary or non-monetary relief, etc.[62] D&O insurance does not cover actions that are knowingly fraudulent or actions that are illegal.[63] Thus, the policy contains exclusions pertaining to claims that arise out of actions of a director that can be classified under the category of fraud, wilful misconduct and other forms of intentional criminal conduct.[64]

The Companies Act 2013 in reference to D&O insurance states that if an insurance policy has been taken out by a company on behalf of any of its directors or officers including the CEO or CFO, indemnifying any of them against any liability (i.e. negligence, default, misfeasance, breach of duty or breach of trust) which may be proved in relation to the company, the premium paid is not to be treated as part of the remuneration payable to any such directors or officers.[65] In effect, the Act permits D&O insurance for directors or officers.

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58 *Ibid*.

59 Michal Barzuza & Quinn Curtis, "Board Interlocks and Outside Directors' Protection", 46 Journal of Legal Studies 129, 140 (2017).

60 *Supra* note at 58.

61 John C. Tanner, "So Long, D&O Coverage: Policy Rescission — What the Insured Can Do", 14 Business Law Today 56, 59 (2005).

62 Michael Spisto, "D and O Insurance for Directors and Officers — What is this and is it a Viable Option in South African Law?", 29 The Comparative and International Law Journal of Southern Africa 61, 61 (1996).

63 R. Macminn, "Directors, Directors and Officers Insurance and Corporate Governance", 35 Journal of Insurance Studies 159, 164 (2012).

64 Umakant Varotill, "Directors' Duties and Liabilities in the New Era", National Stock Exchange (July 12, 2018) https://www.nseindia.com/research/content/res_QB5.pdf.

65 Companies Act, 18 of 2013, § 197.

The Committee introduced D&O insurance with the rationale that independent directors have significant responsibilities and liabilities in their capacity as board members and such liabilities act as a deterrent for several good quality IDs from joining corporate boards.[66] Accordingly, LODR Regulations were amended to include Regulation 25(10) whereby it was mandated for companies to take D&O Insurance for all their independent directors of such quantum and for such risks as may be determined by its board of directors. The same was made mandatory for top 500 listed entities by market capitalisation w.e.f. October 1, 2018.

Accordingly, the Regulation provides the Board the power to determine the quantum of the coverage and the risks, for the independent directors. In practice, however, this may become problematic. One of the responsibilities of an independent director is to dissent on inefficient management decisions and the regulation, by giving the Board unfettered power to determine D&O Coverage, puts the independent directors in a disadvantageous position. Even so, with independent director posts being abandoned due to lack of adequate incentive, a mandatory insurance coverage can go long way in making the post attractive.

E. Women independent director

The introduction of the 2013 Act mandated certain classes of companies to appoint at least one women director.[67] Majority of these companies fulfilled the criteria by inducting a women member from the promoter family.[68] The Committee recommended that every listed entity have at least one independent woman director on its board of directors with the objective of ensuring gender diversity across the board.[69] A SEBI Press Release accepting the same provides at least one woman independent director in the top 500 listed entities by market capitalization by April 1, 2019 and in the top 1000 listed entities, by April 1, 2020.[70] The move highlights the seriousness of the market regulator towards increasing the role of women in boardrooms. A problem, however, may arise with respect to the adequacy of qualified women to hold the post.

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66 *Supra* note 21 at 30-31.

67 *Supra* note 66, at § 149(1).

68 Rica Bhattacharyya & Sachin Dave, "No Independent Woman Director at 40% of NSE Companies", *The Economic Times* (July 20, 2018, 3:37 P.M.) https://economictimes.indiatimes.com/jobs/no-independent-woman-director-at-40-of-nse-companies/articleshow/61011676.cms.

69 *Supra* note 21, at 33-34.

70 Securities and Exchange Board of India, Decision on Recommendations of Kotak Committee on Corporate Governance (July 15, 2017, 11:53 P.M.) https://www.sebi.gov.in/web/?file=https://www.sebi.gov.in/sebi_data/attachdocs/mar-2018/1522245405214.pdf#page=1&zoom=auto,-23,418.

III. PART B

The following are important changes that were not accepted by SEBI:

A. Lead Independent Director

The Sarbanes-Oxley Act mandates that independent directors on the board of a US public company must meet not only as part of the full board but also separately and apart from management and non-independent directors.[71] With the separation of the CEO and board chair roles, the concept of a lead independent director developed. Similarly in U.K. this practice is mandated for FTSE 350 companies by the UK Corporate Governance Code, which requires that the offices of the CEO and Chairman be separate.[72] Further, the Chairman is required to be chosen from amongst the independent directors on the board.[73]

The Kotak Committee drawing from the practices in other countries recommended that the position of a lead independent director be created to facilitate coordination, engagement and effectiveness of the IDs. The position was sought to be made mandatory in companies where the chairperson is non-independent. An additional requirement of the independent director also being a member of the Nomination and Remuneration Committee along with a host of other functions was also provided for. However, there is an important distinction between the reason for which a lead independent director is appointed in the aforementioned countries and the reason for which the Committee made the recommendations. The former was done with focus on preventing concentration of power while the latter lays emphasis on better interaction of independent directors amongst themselves and the Board. A lead independent director was also expected to better coordinate the meetings of independent director. Nonetheless, this recommendation does not form part of the LODR amendments.

B. Independent director Compensation

In order to serve as the shareholders' legal fiduciaries and expend independent time and effort in their roles, it is essential that IDs are adequately compensated for their activities.[74] In countries such as USA, UK, Canada, Australia, Singapore, etc. compensation for IDs is not just composed of

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[71] Joseph J. Penbera, "What Lead Directors Do", MIT Sloan Management Review, July 2009.

[72] Financial Reporting Council, The Corporate Governance Code, ¶A.2.1. (The roles of Chairman and Chief Executive should not be exercised by the same individual.)

[73] *Ibid.* at ¶ A.3.1. (The Chairman should on appointment meet the independence criteria set out. A Chief Executive should not go on to be Chairman of the same company.)

[74] Nithya Narayanan & Manali Gogate, " 'Skin in the Game': A Case for Incentivising Independent Directors", Journal on Corporate Governance 695, 698 (2012).

cash, but also includes other forms of compensation such as stock awards and stock options.[75] Section 149(9) of the Companies Act, 2013 states that an independent director shall not be entitled to any stock options. A SEBI notification provided respite to companies that had already issued stock options to their IDs before the 2013 Act came into operation.[76] But this provision effective closed a very attractive form of compensation to independent directors. In a world where self-interest is the best motivator this is a step back in ensuring that IDs play a critical role in effective corporate governance. The logic behind this step could be understood by the threat to independence the shareholding of an independent director possesses.

Currently, section 197 of the 2013 Act provides for the remuneration of directors to be within the limits prescribed and that the remuneration of IDs may also be determined. Regulation 17(6)(a) of LODR requires the board of directors to recommend all fees or compensation paid to non-executive directors, including independent directors subject to approval of shareholders in general meeting. The Committee noted that apart from the safeguard of the sitting fees of independent director not be less than that of the other directors provided for by the Companies Act there exists no mechanism to ensure that independent directors receive a certain specific remuneration.[77] The Committee recommended that the total minimum compensation for an independent director be Rupees five lakh for the top 500 companies by market capitalisation.[78] Exclusion for the same has been provided in the event of the company not making a profit.[79] Minimum sitting fees for board meetings, audit committee meetings and other committee meeting was also included. These, however, were not accepted and SEBI chose to maintain the status quo.

IV. PART C

With the rise in corporate governance failure in various companies in India, the present focus of legal policy and reform must be to envisage a framework best suited in Indian context. Undoubtedly, Kotak Committee report is one of the most comprehensive measures undertaken to regulate and amend corporate governance framework, particularly the institution of independent directors.

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[75] KPMG and the Associated Chambers of Commerce and Industry of India, "Role of Independent Directors-Issues and Challenges", (July 4, 2017, 5:54 P.M.) www.kpmg.com/IN/en/.../Role_of_Independent_Directors.pdf.

[76] SEBI's recent FAQ on Way Forward for Options Granted to Independent Directors Under SEBI (Share Based Employee Benefits) Regulations, 2014, (July 17, 2018, 4:44 P.M.) http://www.esopdirect.com/newsletter/Newsletter_SEBI_FAQ_Ind%20Director_Final.pdf.

[77] *Supra* note 21, at 33-34.

[78] *Ibid*.

[79] *Ibid*.

While the Kotak Committee report is laudable in its approach to align the corporate governance standards with other jurisdictions, such an alignment does not guarantee board effectiveness. There are certain concerns specific to the India, relating to the appointment of independent directors which has not been addressed by the Committee report. As noted earlier, India, as opposed to US, faces the problem of dominant shareholder who can expropriate assets to the detriment of the minority shareholders. The controlling shareholder either has majority control or effective voting control and accordingly, it has the power to nominate, vote for and replace at its discretion the entire board of directors, including the independent directors.[80] In effect, an independent director who is fully dependent on the promoter may appear less independent.[81] Therefore, the law must necessarily focus on envisaging a mode of appointment of independent directors, so that they are less dependent on the controlling shareholder.

One argument is that to improve firm performance, the law must ensure that independent directors are powerful and not just independent from the management. In this vein, increased access to information may be provided to them so that they can report certain types of violations effectively.[82] Accordingly, the law should explicitly allocate certain powers to the independent directors, for them to bypass the management to ensure better access to information. Another aspect missing in the recommendations is addressing the issue of structural bias. Structural bias i.e. bias originating not from pecuniary or familial association but other relationships including friendships, social groups, can generate a sense of 'beholdenness' and can subsequently affect the independence of independent directors.[83] Regulatory standards must include structural bias as an important criterion when determining independence of an independent director.

V. CONCLUSION

The Kotak Committee was constituted with the primary purpose that it will identify the malaise that has spread through the institution of independent directors due to which numerous irregularities were discovered in the corporate governance practices of several companies. The Committee has done a commendable job undertaking the study of a labyrinth of regulations, rules and acts to identify vulnerabilities and suggest changes. The amendments by SEBI partly accepting the recommendations have revamped the provisions governing independent directors. Specifically, the committee report strives to increase disclosure requirements of the company and

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80 *Supra* note 16, at 48.

81 *Ibid*.

82 *Supra* note 15, at 153.

83 Usha Rodrigues, "The Fetishization of Independence", (University of Georgia School of Law Research Paper Series Paper No. 07-007, 2007), http://ssrn.com/abstract=968513.

the independent directors, separate the independent directors from the controlling shareholder and provide protection to the independent directors as a way to incentivize the post. This Article takes a nuanced approach in analyzing the amendments, the rationale behind it, and explaining the effect on the parties involved.

However, only a few recommendations have been accepted while some noteworthy recommendations such as appointment of a lead independent director, minimum compensation to independent directors *inter alia* have not been considered in the subsequent amendment. This Article highlights the demerit of not including such significant recommendations and most notably, it is felt that these aspects should not have been left out especially at a time when SEBI is trying to bring about legal and policy reform for independent directors in the wake of recent and highly publicised corporate governance failure.

However, it must be noted that the report is a commendable step by SEBI having far reaching consequences for independent directors. The committee, by conducting a comprehensive review of rights and liabilities of independent directors, has stressed on important values including transparency, accountability and independence. The Kotak Committee has undertaken a very thorough study which is of significance to academicians, regulators and companies alike.

THE SOUL HAS NO GENDER THEN WHY SHOULD THE LAW!

—*Mrs Ankita Kumar Gupta*[*]

Abstract — 'Law' is a measure to provide sense of security but seldom the measure becomes a weapon to target innocents. It is when the protected class starts misusing the security given to them to fulfill their unjust demands or to satisfy ego hunger. Use and misuse of law are two sides of a coin and can never be ignored. So, it becomes the duty of the Constitutional Machineries to consider the fact while framing and enforcing laws, that the prospective offenders can be victims too. Hence, equal protection must be provided to tackle misuse of the law against the innocents.

The present paper is an attempt to highlight the need of gender neutral law on protection against Sexual Harassment at Workplace along with effective measurements against false allegations of the Sexual Harassment at Workplace.

I. SEXUAL HARASSMENT AT WORKPLACE & GENDER NEUTRALITY

Sexual harassment is neither an innocent flirtation nor a mutual expression of attraction between man and woman. Somewhere, sexual harassment is a workplace stressor that poses a threat to one's psychological and physical integrity and security, in a context in which he/ she has little control because of the risk of retaliation and the fear of losing their livelihood.

[*] Assistant Professor, Vivekananda School of Law and Legal Studies, Vivekananda Institute of Professional Studies

It is the 'Power' which is the core cause of Sexual Harassment. It is a prevalent phenomenon that people in power tend to use it in their favour whether to fulfill their blatant whims and fancies or to coerce people subordinate in hierarchy to hold power. This power-game can exist in more popularly characterized male bosses sexually harassing female subordinates or less popularly characterized female bosses sexually harassing male subordinates or where the parties might be of the same sex. The number of men who are sexually harassed are much lower than number of women who are sexually harassed at workplace. But Sexual Harassment at workplace is 'Never Okay' whether for women or for men.

According to the United States Equal Employment Opportunity Commission (EEOC) Harassment can include "sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature. Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex. For example, it is illegal to harass a woman by making offensive comments about women in general. Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex. The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.[1]

Australian Human Rights Commission defines Sexual Harassment as an unwelcome sexual advance, unwelcome request for sexual favours or other unwelcome conduct of a sexual nature which makes a person feel offended, humiliated and/or intimidated, where a reasonable person would anticipate that reaction in the circumstances. Examples of sexually harassing behaviour include:

- Unwelcome touching;
- Staring or leering;
- Suggestive comments or jokes;
- Sexually explicit pictures or posters;
- Unwanted invitations to go out on dates;
- Requests for sex;

[1] According to U.S. Equal Employment Opportunity Commission; available on http://www.eeoc.gov/laws/types/sexual_harassment.cfm, accessed 10th January 2018.

- Intrusive questions about a person's private life or body;
- Unnecessary familiarity, such as deliberately brushing up against a person;
- Insults or taunts based on sex;
- Sexually explicit physical contact; and
- Sexually explicit emails or SMS text messages.[2]

In India, Section 2(n) of the Sexual Harassment of Women at Workplace Act[3] provides "sexual harassment" includes any one or more of the following unwelcome acts or behaviour (whether directly or by implication) namely:—

i. Physical contact and advances; or
ii. A demand or request for sexual favours; or
iii. Making sexually coloured remarks; or
iv. Showing pornography; or
v. Any other unwelcome physical, verbal or non-verbal conduct of sexual nature;

As the nation mourns over growing sexual crimes against women, the similar crime against men often go unnoticed. The number of such cases, however, officially registered with the police is yet small. The low number is attributed by legal experts to fear of society reprisal who insist many such cases go unreported.

A behavior can be termed as sexual harassment when it involves physical contact, a demand or request for sexual favours, sexually coloured remarks, circulating pornographic material, and any other physical, verbal or non-verbal conduct of a sexual nature. Sexual harassment as per legislation signifies harassment in employment situations, related to sex or gender, which has a negative effect on the working environment. The most common way of sexual harassment is the quid pro quo (this for that) offer of work-favor in exchange for sexual favour.

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2 According to Australian Human Rights Commission, available on https://www.humanrights.gov.au/publications/sexual-harassment-workplace-legal-definition-sexual-harassment, accessed 10th January 2018.

3 S. 2(n); Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013.

Sexual Harassment is very different from sexual assault, rape or other sexual offences. Sexual harassment at workplace does not have to be sexual in nature all the time. The definitions sexual harassment would also cover offensive remarks or offensive advances. These advances can be made by either males or females and hence the law in this behalf not only should cover female victims but should also cover male victims.

There are cases of men harassing other men; these unwelcome behaviors could range from the use of feminine pronouns and sexual taunts, to simulated sex acts and threats of a sexually aggressive nature. A hidden world of sexual harassment, with female managers exploiting their power over men in the office, has been unveiled. The common stereotype cases are of the male executive putting pressure on his secretary, but there are also cases where the victims of sexual harassment are men.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act 2013 came long after the guidelines issued by the Hon'ble Supreme Court in the *Vishaka* Judgment[4] that came in the year 1997. But even after a gap of almost fifteen years the Act[5] doesn't appear to be effective and is not futuristic at all. In short the law fails to address the problem of sexual harassment at workplace because the workforce not only includes women but men too. In the developing country like India laws are required to be gender neutral and not just an imprint of past guidelines or international conventions.

It is an agreed fact that the number of men being sexually harassed at workplace is considerably low as compared to the number of cases where women are being sexually harassed at workplace. It is also a fact that the sexual harassment of men at workplace might not only be handful cases which are not reported properly but also being limited to some very specific industries like media industry, corporate industry etc. But does the low numerical figure of industry specific men sexual harassment at workplace should be the reason of the not having any law for their protection at all. Or is it even justified in a Country like India where people are given special right because they form a part of Minority population. But when it comes to recognizing rights of men we never want to consider that the category of offenders whom we once thought are victimizing women can ever become victim themselves. Unfortunately Laws in India have always been a product of either signed international convention or nerve racking incident like Nirbhaya in Dec 2012. Shouldn't our laws be futuristic enough to deal with all problems where either the victim category might make a large portion of the society or a handful proportion of the society?

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[4] *Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241 : AIR 1997 SC 3011.

[5] Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013.

A social activist and a budding lawyer Mr Sanjjiiv Kkumar have filed a writ petition in the High court of Delhi under Art 226 of the Constitution of India demanding Gender neutral Rape Laws. In his petition he alleges that the Criminal Laws (Amendment) Ordinance 2013 which was published in the official gazette was gender neutral as regards Sec 375 of the Indian Penal Code which talks about Rape and Sec 354A of the Indian Penal Code which talks about Sexual Harassment At workplace but when the Criminal Amendment Act 2013 came the gender neutrality of these Sections was removed. Also he argues that the 9 Judge bench leading judgment[6] on 'Right to Privacy' ruled that 'Right to Privacy' which includes consent and bodily integrity is now a part of the fundamental right available under right to life and liberty under Article 21 of the Constitution of India

II. UGC'S GENDER NEUTRAL SEXUAL HARASSMENT AT WORKPLACE REGULATION 2015

The Ministry of Human Resource Development on 2nd May 2016 notified in the Official Gazette the University Grants Commission (Prevention, Prohibition and Redressal of Sexual Harassment of Women Employees and Students in Higher Educational Institutions) Regulations, 2015. The UGC in exercise of its power under Sec 26 (1) (g) and Sec 20 (1) of the University Grant Commission Act 1956 made these regulations applicable to all the Higher Education Institutions in India.

The Regulation 3(d) of the UGC Sexual Harassment Regulation 2015 provides that 'it will be the responsibility of all the Higher Education Institutions to act decisively against all gender based violence perpetrated against employees and students of all sexes recognizing that primarily women employees and students and some male students and students of third gender are vulnerable to many forms of sexual harassment and humiliation and exploitation'.[7]

Though UGS's Sexual Harassment Regulation, 2015 gives preference to women employees but still it doesn't blindly leaves the male employees or male students or students of third gender who could also be prospective victims of Sexual Harassment at workplace. This might be a minor step towards the recognition of gender neutral Sexual Harassment Regulation but still it proves to be a ray of hope for the prospective Male Victims who are

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6 *K.S. Puttaswamy* v. *Union of India*, 2018 SCC OnLine SC 1642.

7 Regulation 3(d) of the University Grants Commission (Prevention, Prohibition and Redressal of Sexual Harassment of Women Employees and Students in Higher Educational Institutions) Regulations, 2015, available at https://www.ugc.ac.in/pdfnews/7203627_UGC_regulations-harassment.pdf, accessed 10th January 2018.

still unrecognized under the Laws enacted by the legislature of their own Country.

III. FALSE ALLEGATIONS OF SEXUAL HARASSMENT AT WORKPLACE

Sexual Harassment at Workplace is categorically a subjective type of an offence which means the Sexual Harassment can lie in the eyes of the beholder and it is mainly because of this that there lies a major responsibility that all the evidence is fairly deliberated upon because it not only involves the image of the Victim but also the so called offender in this case who might have been falsely implicated.

While everyone seems to be talking about how the Sexual harassment of women at Workplace have devastating effects on the mental health of the women, her career, her efficiency to work no one seems to be concerned about what kind of devastating effects it have on men who can equally be prospective victims of Sexual Harassment at workplace at the ends of their female co-workers or on men who have been falsely implicated as offenders in a particular case. Soon we are going to end up in a familiar situation not so unknown to the Indian society where the people who have all the laws their favour despotically misuse these laws.

The truth of the matter is that the false accuser is a person who is making up stories to serve some goal which is aimed to be achieved against the falsely implicated offender. The impetus behind the false implication might be some personal gain, factitious disorder, need for an alibi or most commonly used 'Revenge'.

The Sexual harassment at workplace Act 2013[8] is rather a newly enacted law where the reported cases under the Act[9] are not huge. Institutions and organizations are trying their best to fulfill all the perquisites whether it's setting up of Complaint Committee or its spreading awareness. But here we are concerned for false allegations under the act which might be minimal. It is because the stakes involved are high. A casual false allegation against a person which is rooted out of revenge can cause 'social assassination' for a person whose whole life revolves around his respectful image in the society.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act 2013 has provisions for taking action against false allegation. Section 14 of the Act provides:-

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[8] Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013.

[9] *Ibid*.

A. '14. Punishment for false or malicious complaint and false evidence

(1) *Where the Internal Committee or the Local Committee, as the case may be, arrives at a conclusion that the allegation against the respondent is malicious or the aggrieved woman or any other person making the complaint has made the complaint knowing it to be false or the aggrieved woman or any other person making the complaint has produced any forged or misleading document, it may recommend to the employer or the District Officer, as the case may be, to take action against the woman or the person who has made the complaint under sub-section (I) or sub-section (2) of section 9, as the case may be, in accordance with the provisions of the service rules applicable to her or him or where no such service rules exist, in such manner as may be prescribed:*

Provided that a mere inability to substantiate a complaint or provide adequate proof need not attract action against the complainant under this section:

Provided further that the malicious intent on part of the complainant shall be established after an inquiry in accordance with the procedure prescribed, before any action IS recommended.

(2) *Where the Internal Committee or the Local Committee, as the case may be, arrives at a conclusion that during the inquiry any witness has given false evidence or produced any forged or misleading document, it may recommend to the employer of the witness or the District Officer, as the case may be, to take action in accordance with the provisions of the service rules applicable to the said witness or where no such service rules exist, in such manner as may be prescribed.'*

But the irony is that this section does not do Justice to the Harm that a false allegation is going to cause. Only taking action, 'according to the service rules' as prescribed by Section 14, would not do Justice. Where, Section 11 of the Act[10] talks about taking Criminal action against the offender under Sec 509 Indian Penal Code 1890 which provides one year of punishment or fine, it is unjust to just award civil liability on a false accuser.

An Allegation is a statement of belief that some wrong has been committed against the victim by the offender. These allegations are subjective

[10] Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013.

in nature. It is because of the subjective nature of the allegations of Sexual Harassment at Workplace; an unbiased fact-finding investigation is utmost required. The investigation is required to prove beyond reasonable doubt that what happened would come under the ambit of Sexual Harassment at Workplace. If the allegations have any merit it should be substantiated by proper evidence.

Ms. Nivedita Anil Sharma, Additional Session Judge, Delhi very correctly observed in *State* v. *Pherudin Khan* [11] in Para 131 of the Judgment that "No one discusses about the dignity and honour of a man as all are only fighting for the rights, honour and dignity of women. Laws for protection of women are being made which may be misused by a woman but where is the law to protect a man from such a woman where he is being persecuted and implicated in false cases, as in the present case. Perhaps, now it is the time to take a stand for a man."

IV. CONCLUSION

Several laws have been passed in the last 60 years in the name of protection of women and their empowerment. However, there are no laws to protect men from any form of abuse or harassment within or outside home. After the enactment of the Protection of Children from Sexual Offences Act 2012 a male child under the age of 18 years is protected from any kind of Sexual Offences. But the irony is that as soon as this male child is going to turn 18 years and one minute old he is going to be thrown out of the protection against any form of sexual offences. It is because suddenly this male child has turned into an 'Adult Man' who according to our Indian society doesn't need any protection.

Men are being subjected to severe discrimination under law, and their basic human rights are being violated every day in the name of more and more legal provisions that claim to empower and protect women.

Thousands of men are becoming victims of "legal terrorism" unleashed through laws like Section 498A IPC[12], Domestic Violence Act 2005[13], Adultery laws[14], laws against Rape[15] and Sexual Harassment[16], and even Divorce[17] & Maintenance[18] Laws.

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[11] *State* v. *Pherudin Khan*, Feb 12 2016, available at https://indiankanoon.org/doc/137982073/?type=print, accessed 17th Nov 2017.

[12] Indian Penal Code, 1860.

[13] Protection of Women from Domestic Violence Act, 2005.

[14] S. 497, Indian Penal Code, 1860.

[15] S. 375, Indian Penal Code, 1860.

[16] S. 354-A, Indian Penal Code, 1860.

[17] S. 13, Hindu Marriage Act, 1955.

[18] S. 125, Code of Criminal Procedure,1973.

A man goes through a traumatic experience when he is falsely implicated in allegations of Sexual Harassment at Workplace which has no merit. It is because what he loses is what he has spent a lifetime in earning 'Respect'. In the true sense it can be called as a 'Social Assassination'. The Constitution of India provides a fundamental right under the ambit of Article 21 which is 'Right to Dignity'. This Right to Dignity covers both the 'Dignity' of a women as well as a man. Then why is that some laws[19] suggest that 'Dignity of a Man' is weighed less than the 'Dignity of a Woman'.

[19] Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013.

Notes and Comments Category

ILLICIT IMPORT, EXPORT AND TRANSFER OF OWNERSHIP OF CULTURAL PROPERTY – LEGISLATIVE DEVELOPMENTS.

—*Debarati Pal*[*]

Abstract — The note aims to analyse the international developments pertaining to the Illicit Import, Export and Transfer of Ownership of Cultural Property in context with the domestic laws of India. India, a country which is rich in heritage surprisingly has a single legislation with no subsequent and significant amendments since the last two decades. The note evaluates the international conventions of the UNESCO and UNDROIT beside the national legislation, The Antiquities and the Art Treasures Act, 1972 and draws out the issues like the sale of which exists and aggravates the current problem of Illicit Import, Export and Transfer of Ownership of Cultural Property. The note succeeds in bringing out the differences in the legislative mechanisms and the impact of the legislative provisions of the international community as well as the national community. The note also brings out the contemporary problems in the said domain and suggests suitable recommendation to resolve the same.

India, a land of infinite cultures and traditions possess a redoubtable cultural heritage. The heritage spans from decades after decades enriched with ancient Hindu and Buddhist archaeology to Mughal architecture to the British colonial architecture. The Constitution of India, which is the primary document to ensure that our rights and liabilities are in place talks

[*] Assistant Professor, School of Law, University of Petroleum and Energy Studies, Dehradun. The author can be reached at dpal@ddn.upes.ac.in

of preservation and protection of our cultural heritage as our fundamental duty towards the country. Article 49 of the Indian Constitution states that "It shall be the obligation of the State to protect every monument or place of object of artistic or historic interest, declared by or under law made by the Parliament to be of national importance from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be." Article 51 A states that "It shall be the duty of every citizen of India to value and preserve the rich heritage of our composite culture."

However, there are documents which provide evidence that a lack of colossal legal architecture to protect the cultural objects from illicit trafficking, theft has led to a virtual damage on the cultural fabric of India. Also the "inter-generational equity" entailed with the preservation of the cultural heritage of India is diminishing at a marginal rate. The total value of reported and discovered thefts from 1998 to 2003 was 291,092,000 rupees (Rs.), equivalent to U.S. $6,295,253, and the value of items recovered is Rs. 5,099,050($110,275).[1] In June 2015, the ASI unearthed a trove of Indian antiquities in Singapore. The lot included 30 objects, including idols and paintings whose provenance could be traced to the 10th century. Most of these were sold by Kapoor's gallery[2] between 2007 and 2012 to Singapore.[3] According to the National Crime Records Bureau, between 208 and 2012 a total of 4,408 items were stolen from 3,676 ASI-protected monuments across the country, but only 1,493 could be intercepted by police. Overall, around 2,913 items are feared to have been shipped to dealers and auction houses worldwide[4]. Indian antiquities also regularly feature in scams involving the world's two largest auction houses – Sotheby's and Christie's. Employees of these organizations have been known to work along with Indian smugglers in the past to peddle stolen artefacts at auctions. Even websites like eBay claim to be selling Indian antiquities.[5]

I. THE LEGAL FRAMEWORK

A. International Scenario

The legal framework consists of the four main Conventions namely: The 1954 UNESCO Hague Convention on the Protection of Cultural Property in the event of Armed Conflict, Paris including the Protocols, the 1970 UNESCO Convention on Illicit import, Export and Transfer of Ownership of Cultural Property, Paris, the 1995 UNIDROT Convention on the

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1 Neeta Lal, "Smuggling India's Antiquities", *The Diplomat*, Sept, 16, 2015.
2 Subhash Kapoor, an Indian smuggler who is on trial. He owned "Art of the Past" gallery.
3 *Supra* note 4.
4 *Ibid*.
5 *Ibid*.

International Return of stolen or Illegally Exported Cultural Objects, Rome and the UN convention against Transnational Crime.

The 1954 UNESCO Convention has come into force after the post war realisation and reflection. This Convention aims to regulate and monitor the issue of the theft and illegal movement of cultural property during armed conflict through the active cooperation of the Member states. The objectives are manifested through Article 4(3) and Article 5(1). Article 4(3) talks about the Member states taking initiative to prohibit and prevent any form of 'theft, pillage or misappropriation of, and any acts of vandalism directed against cultural property."[6] Article 5(1) takes a liberal standpoint as it states that the Member states should "support the national authorities of the Occupied Countries to safeguard and preserve the cultural property." The 1954 Protocol also paved a step ahead stating that the Member states should return the cultural property to the Occupied States in the event of an armed conflict and after the hostilities has come to an end. Article 15 declares that the Member States should take necessary steps to criminalize actions of theft, pillage or misappropriation of cultural property during armed conflict.

The 1970 UNESCO Convention on Illicit Import, Export and Transfer of Ownership of Cultural Property[7] symbolises the effort taken by the international fraternity to regulate and protect the cultural heritage. This Convention identifies that the illicit excavation and exportation is a grave threat to a country, who is specifically rich in its cultural heritage but lacks in its robust regulatory mechanism. The concerted effort of the international community is praiseworthy because it is considered to be the first of its kind and it also urges and encourages proactive participation from the Member states to eradicate this peril. The 1970 UNESCO Convention primarily recognises the rights of the parties to retrieve the illegally exported cultural properties. It harps on the rationale of the "common heritage of mankind". The Preamble manifests this intention by emphasising on the significance of 'interchange of cultural property'[8] amongst nations for the purpose of scientific, cultural and educational advancement of the mankind as a whole. The Convention also states that the 'fullest possible information' should be provided by the Member states to the mankind since its origin and evolution for the comprehension of the true value of the cultural property and thus enabling the enrichment of the 'common heritage of mankind'. To add, the Convention endorses a holistic approach, when it expects the International Actors and the Member states to adopt a holistic

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[6] Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, The Hague, 14 May, 1954.

[7] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, Paris, 14 November 1970.

[8] According to Lyndel V. Prott, "The International Movement of Cultural Objects", International Journal of Cultural Property, 2005 May; 12(2): 225-48.

approach and foster respect for the import ban and export regulations on the cultural objects and properties of the other states through the implementation of import/export certification. The reciprocity is to be established by the Member states on one another by way of payment of compensation to an innocent purchaser with bona fide title. The major drawback of this Convention is that it has no retroactive effect. Therefore, it does not apply to states who have illegally exported cultural artefacts from another state before being a party to the Convention. The definition of cultural property[9] is limited to list of 11 specific categories of property. Also, in addition to the aforementioned list, an additional five conditions and attributes are listed by the Member states pertaining to the identification of cultural property which entails the subsequent prevention of illicit importation/exportation/transfer of cultural property and its consequent procedures for reparation of the said property to the country of origin.

The 1995 UNIDROIT Convention links the consequences of 'illicit trade in cultural objects and antiquities and the resultant loss of irreplaceable archaeological and scientific information'.[10] The underlying tone of the Convention is that of the nationalist theory of heritage versus the universalisation of heritage. It argues on behalf of the ownership perspectives of the local and indigenous communities who are specially affected by the loss of the heritage. To recollect the evolution, the 1954 Convention provides a protectionist approach while the 1970 Convention provides a preservationist approach, but the 1995 Convention talks about safeguarding the cultural property. Thus the convention accepts the need for trade-off between the artefact rich Member States and the market rich member states and takes a step ahead to regulate the market controls, which would eventually incentivise the former states to build their bargaining power. The control mechanism is threefold: development of registers of cultural objects, physical protection of archaeological sites and technical cooperation amongst Member states.[11] The Convention also provides a tooth to the ever increasing problem of illicit trafficking of Cultural Objects by providing access to the courts of one of the states either from the place of theft or from the place where the owner of the stolen cultural objects resides or is domiciled. The definition of the cultural heritage is different from that of the 1970 Convention. To opine, one would clearly comprehend the fairness behind the intention of the legislators. The definition of cultural objects in the main Convention is broad and generic[12]: the grounds for identification are either religious or secular and it endorses its importance in the disciplines of archaeology, prehistory, history, literature, art or science. The annexure to

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9 *Ibid*.

10 Prott, L.V., 1997, Commentary on the UNIDROIT Convention, Leicester: Institute of Art and Law.

11 *Ibid*.

12 Blake, J., 2015, *International Cultural Heritage Law*, OUP Oxford, 41.

this convention makes the list exhaustive. Also the Convention defines illegal export[13] and distinguishes it from voluntary removal of a cultural object by a Member state. The intention of the legislators before drafting the convention was to distinguish the concept of illicit theft of cultural objects and the illicit export of cultural objects. As we see, a quotient of absence/presence of consensus is involved in both the cases, which makes one a voluntary activity and another an involuntary activity. Undoubtedly, the notion is a philosophical one, which is crafted very meticulously in this Convention.

A severe setback prevalent in all the legal system is the statute of limitation which is strictly functional: in this context, the claim for restitution is three years from the date of the knowledge of the whereabouts of the cultural property and its possessor.[14] However, the time limit is not taken into account for the purpose of litigation, if the object stolen is of national importance and it intrinsic to a public monument or any other artefact[15]. Also, the convention is not retroactive in nature, therefore provides privilege to the Member States of Origin to retrieve their cultural object stolen during the World War.

The 2000 UN Convention considered the transnational criminal activity of illicit importation of cultural objects, which was largely ignored by the State Parties in the first few years[16] However, in the 5th Conference of the Parties (COP), the Member states Announced a list of emerging crimes related to the illicit theft of the cultural property: which included cybercrime, piracy, environmental crime etc.[17] Since it is related to all types of transnational criminal activity, the convention lays down generic principles and methods to combat transnational crime.

B. Indian Scenario

The Archaeological Survey of India (ASI) is the chief custodian of India's Archaeological heritage.[18] It protects more than five thousand monuments of national importance and sixteen World Heritage sites, including the Taj Mahal and Ajanta and Ellora.[19] It also has thirty-three museums located at sites of cultural or archaeological importance.[20] Other than the

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[13] *Ibid*.
[14] *Supra* note 11.
[15] UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, Rome, 1995
[16] *Supra* note 13.
[17] Arts. 4, 5, 7 and 10 of the UN Convention against Transnational Organised Crime, Palermo, 2000.
[18] Brodie, N., Kersel, M.M., Luke, C. and Walker Tubb, K., 2006, *Archaeology, Cultural Heritage, and the Antiquities Trade*, University Press of Florida, 238.
[19] *Ibid*.
[20] *Ibid*.

aforementioned monuments, the State archaeological departments are also the custodian of more than four thousand protected monuments.

The relevant law in this domain is the Antiquities and the Art Treasures Act, 1972 and the Antiquities and the Art Treasures Rules, 1973. The legislation aims to regulate the export trade in antiquities and art treasures. It also aims to prevent smuggling and fraudulent dealings of antiquities. The definition of antiquity is broad and generic. The Act provides for licensing of the cultural objects, regulates the functions of the authorised personnel in this regard, provides details for registration of the Cultural Objects. It also provides penalties for non – conformance of the Act in question. It mandates this legislation works closely with the Ancient Monuments and Archaeological Sites and Remains, Act, 1958 and with the Customs Act, 1962.

II. ISSUES

The issues are manifold: firstly, the identification, creation of an inventory and policing all its known cultural heritage would be impossible for a State, whose primary resources are spent on developing basic infrastructure to ensure quality of life to the citizens.

The second issue concerns with the tussle between the nationalist position of a state versus the "Common heritage of Mankind". Whether the indigenous community should be considered as the owner of the heritage and retain the property or the cultural property should be universally owned. This issue is more of philosophical in nature. However, if probed, it might provide leeway to illicit trafficking and theft of cultural objects.

The issue of sale of antiquities on the Internet is emerging as a serious threat to the international community as a whole. The experts have said that the dealers often create a temporary site which usually disappears after the culmination of the transaction. Therefore, monitoring such sites becomes impossible. The Information Technology Act, 2000 is silent on this issue.

The sanctions provided under the Antiquities and the Art Treasures Act, 1972 is weakly construed. The sanction does not fulfil any of the objectives of imposition of punishment.

In spite of the ideals of the UNESCO Conventions, the non-member States do not feel any obligation to recognise and respect the export control mechanism deployed by the Member states. Therefore, the initiatives become futile. A related sub issue is that the Market rich Country is the

Non Member State and the artefact rich country is the Member State. Thus the execution of the legislation becomes difficult.

The complex nature of cultural heritage law involves a lot of interdisciplinary aspects: Private international law, public international law along with complex issues of art history. The litigant is enmeshed with issues of time and costs which discourages Member States to ensue civil litigation.

III. CONCLUSION

In retrospect, if we analyse, the international Framework is quite robust while the national counterpart lacks in concretisation of the international principles in its domestic legislation. The Antiquities and the Art Treasures Act, 1972 should synchronise its provisions along with the Information Technology Act, 2000, the Competition Act, 2002 in order to regulate the export controls amicably. Also the relationship between the Antiquities and the Art Treasures Act, 1972 and the Ancient Monuments and Archaeological Sites and Remains Act, 1958 should be more prominent and should correlate more with each other in the context of identification of cultural property, creation of inventories of cultural property and imposing stringent sanctions for non –conformance. Taking into account, the richness of our cultural diversity, the amount of penalty should be socially and economically justifiable.

NON-ACADEMICIANS

DIMINISHING ROLE AND AUTHORITY OF THE GOVERNOR IN LIGHT OF NABAM REBIA & BAMANG FELIX V. DEPUTY SPEAKER, ARUNACHAL PRADESH

—*Annapurna Sinharay*[*]

Abstract — *The key actor in the Centre-State relations is the Governor - a bridge between the Union and the State. As a constitutional head of the State Government in times of constitutional crisis he should bring about sobriety. However, owing to a multitude of reasons, the public at large regards the Governor as lackeys of the central government today. The recent fiasco in Uttarakhand and Arunachal Pradesh has brought nothing but vicious disparagement to this much esteemed constitutional office. It will not be an exaggeration to say that no institution or Constitutional office has suffered greater erosion than the office of the Governor. The present case* Nabam Rebia & Bamang Felix *v.* Speaker, Arunachal Pradesh Legislative Assembly[1] *- though a sound judgment - has, in its own capacity, diluted the powers of the Governor.*

[*] Student : 2nd Year, Symbiosis Law School, Pune

[1] (2016) 8 SCC 1.

I. INTRODUCTION

The office of the Governor is a British transplant with a federalistic flavour[2]. The key actor in the Centre-State relations is the Governor - a bridge between the Union and the State. As a constitutional head of the State Government in times of constitutional crisis he should bring about sobriety[3]. Prior to the fourth general election, the constitutional office hardly attracted any controversy[4]. The Congress party boasted a majority at the Centre and also a majority in the states and therefore possibility of any centre-state dispute was unlikely. But this political situation witnessed a radical change after the fourth general election[5]. Even as the Congress retained its power in the Centre, it lost its stronghold in many states. This gubernatorial office, which was not ensnared in any political turmoil in the pre-1967 era, suddenly shot into the limelight. In States with non-congress Government, the Governor was taken as the Centre's reliable servant acting on the instructions of the Union Government. There were opportunities for the Governor to exercise his constitutional powers to destabilise or weaken the non-Congress Governments.

The public today generally regards the Governor as lackeys or employees of the Central Government, readily acting according to its behest. The recent fiasco in Uttarakhand and Arunachal Pradesh has again brought this office under unembellished disparagement. It will not be an exaggeration to say that no institution or Constitutional office has suffered greater erosion than the office of the Governor. The present case *Nabam Rebia & Bamang Felix* v. *Speaker, Arunachal Pradesh Legislative Assembly*[6] - though a sound judgment - has, in its own capacity, diluted the powers of the Governor.

II. CONSTITUTIONAL STATUS OF THE GOVERNOR: A RECORD OF JUDICIAL RESPONSES

In a federal polity, the Governor represents and functions the prime linkage between the Centre and the federating units, or states. He is supposed to be just, impartial and an edifice of dignity and sobriety in the muddy waters of politics. For this purpose, the Constitution has empowered the Governor in myriad ways – discretionary or otherwise. As the political panorama underwent a transformation in the '70s, an ever increasing influx of

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2 V.R. Krishna Iyer, *A Constitutional Miscellany*, Eastern Book Company, 2nd Edition (2003), p. 26.

3 D.J. De, *Constitution of India*, vol. 2, Asia Law House, 4th edn.

4 M.P. Jain, *Indian Constitutional Law*, vol. 2, 17th edn. 2010.

5 Norman D. Palmer, "India's Fourth General Elections", Asian Survey, vol. 7, no. 5 (May 1967), p. 275. accessed on JSTOR: https://www.jstor.org/stable/2642657.

6 (2016) 8 SCC 1.

politically natured cases flooded the courtrooms of the Supreme Court. A handful of them called into question the validity of certain actions of the Governor which then had to be interpreted in context of the Governor's powers. The same has been delineated below.

In *Sardari Lal* v. *Union of India*[7], Supreme Court had held, that the President or the Governor, as the case may be, on being satisfied could pass an order under Article 311(2) (c). It was further held, that the satisfaction of the President or the Governor, in the above matter, was his "personal satisfaction" and therefore could not be questioned.

The *Samsher Singh case*[8] was decided by a seven-Judge Bench, which examined the correctness of the decision rendered in the *Sardari Lal case*. While debating the issue, the Court examined the distinction between Articles 74 and 163. It relied on *Ram Jawaya Kapur* v. *State of Punjab*[9] to affirm that all functions discharged by the Governor, would have to be based on the aid and advice of the Council of Ministers (with the Chief Minister as the head). In handing down this decision the Supreme Court overruled Sardari Lal v. Union of India[10], another case wherein a Constitution Bench of five Judges held that the satisfaction required under Article 311(2) Second Proviso clause (c) is the personal satisfaction of the President.

M.P. Special Police Establishment case[11], the Supreme Court explained, that if the Governor is of the view, that the advice of the Council of Ministers was likely to be biased or partisan, or where there is a conflict of interest between the Council of Ministers on the issue under consideration, it would be open to a Governor to act at his own. And in such cases, even if advice is tendered by the Council of Ministers, the Governor could legitimately ignore the same. It must be pointed out, that the above position was reiterated in the R.A. Mehta case[12], wherein this Court while interpreting Article 163(2) concluded, that it would be permissible for the Governor to act without ministerial advice, even in the absence of an express provision in the Constitution.

Pratapsingh Raojirao Rane v. *Governor of Goa*[13] was yet another peculiar case in which the Governor dismissed the Chief Minister and appointed another person as the Chief Minister of Goa in exercise of powers conferred

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7 (1971) 1 SCC 411.
8 *Samsher Singh* v. *State of Punjab*, (1974) 2 SCC 831.
9 AIR 1955 SC 549.
10 *Supra* note 7.
11 *M.P. Special Police Establishment* v. *State of M.P.*, (2004) 8 SCC 788.
12 *State of Gujarat* v. *R.A. Mehta*, (2013) 3 SCC 1.
13 1998 SCC OnLine Bom 351 : AIR 1999 Bom 53.

by Article 164(1) of the Constitution. Both decisions were challenged by way of a writ petition in the Bombay High Court.

The questions before the High Court were whether the Governor had the power to prorogue the Legislative Assembly and to dismiss the Chief Minister. As regards the dismissal of the Chief Minister, it was held in paragraph 37 of the Report that the Governor was entitled to exercise his individual discretion in appointing the Chief Minister and that this was not subject to judicial review. In coming to this conclusion, the High Court proceeded on the basis that the Governor could withdraw his pleasure and thereby require the Chief Minister to vacate his office. The High Court referred to *Mahabir Prasad Sharma case*[14] and concluded that if the Council of Ministers refused to vacate its office then the Governor could withdraw his pleasure and that withdrawal of pleasure by the Governor was not open to judicial review.

III. *NABAM REBIA & BAMANG FELIX V. DY SPEAKER, ARUNACHAL PRADESH LEGISLATIVE ASSEMBLY – AN ANALYSIS*

The facts of the case are as follows: With the coronation of the new Governor of Arunachal Pradesh a slew of unsavoury events followed. Two MLAs belonging to INC resigned and they were subsequently removed from the House. In the 60 member Assembly, INC had 47 MLAs. The two MLAs whose resignations were accepted belonged to a group of 21 rebel MLAs, who did not constitute a valid split group under Schedule X Para 3 of the Constitution. Taking advantage of the rebel INC members, all the 13 non-INC members moved a resolution for removal of the Speaker. The non INC members also wrote a letter to the Governor that the Sixth Session of the Legislative Assembly which was already scheduled, should be preponed for taking up the issue of removal of the Speaker. The Chief Minister and the Speaker did not advise the Governor summon the Legislative Assembly for taking up the said motion. The Central Leadership of INC failing to control the 21 rebel MLAs, filed a petition under Para 2(1)(a) of Schedule X of the Constitution on 7-12-2015, seeking disqualification of the 13 MLAs of INC.

Given such a scenario, the Governor taking notice of the fact that the notice of the resolution for removal of the Speaker was pending, preponed the Sixth Session of Legislative Assembly by exercising suo motu powers under Article 174, that is, without the aid and advice of the Council

[14] *Mahabir Prasad Sharma* v. *Prafulla Chandra Ghose*, 1968 SCC OnLine Cal 3 : (1968) 72 CWN 328.

of Ministers. The Governor further by suo motu exercising powers under Article 175(2) sent the impugned messages to the Legislative Assembly. First message was that the Assembly should not be adjourned till the notice of resolution of the Speaker is decided one way or the other. The second message was that the said notice of resolution should be taken up as first agenda on list of business of Assembly. And the third message was that until the Sixth Session of the Assembly was prorogued, the Speaker should not alter party composition of the House.

The Speaker appealed to the Supreme Court and the matter was itemised before a 5 judge bench. They called into question the Governor's decision to hold the assembly one month early in December 2015. The Court identified two broad issues: first, whether the Governor's decision to advance the Assembly session was constitutional? and secondly, whether the Speaker's disqualification of MLA's when a motion for his removal was pending before the house was constitutional? However, the core constitutional question before the Court in the present case was about the scope of the Governor's discretionary powers in a system of responsible government. Its judgment is a significant addition to the jurisprudence dealing with the constitutional relationship between the Government, the state legislatures, and the courts. The same has been elaborated below:

Nature and scope of Discretionary Powers of the Governor: Article 154 provides that the executive power of the State is vested with the Governor, and is to be exercised by him either directly or through officers subordinate to him "in accordance with this Constitution." Article 163 further warrants that the Governor would exercise his functions, on the aid and advice of the Council of Minister with the Chief Minister at its head. The above edict is not applicable in situations where the Governor is expressly required to exercise his functions, "…by or under this Constitution …", "… in his discretion." The question that needed determination was, whether the underlying cardinal principle, with reference to the discretionary power of the Governor, is to be traced from Article 163(1) or from Article 163 (2). The respondents argued that the amplitude of discretionary powers of the Governor are evinced and manifested in Article 163 (1).

After canvassing a variety of legal literature placed at its disposal, the Bench held per curiam that the Governor cannot be seen to have such powers and functions as would assign to him a dominating position over the State Executive and the State Legislature. Accepting the respondent's contention will convert the Governor into an all pervading super constitutional authority. This position is not acceptable because an examination of the executive and legislative functions of the Governor, from the surrounding provisions of the Constitution clearly brings out that the Governor has not been assigned any significant role either in the legislative or in the executive

functioning of the State. The position adopted on behalf of the appellants, on the other hand, augurs well in an overall harmonious construction of the provisions of the Constitution. The Bench also made references to Justice MM Punchi Commission Report to come to its conclusion.

Distinguishing the phrases "in his individual judgment" from "in his discretion": In his concurring judgment, Justice Lokur threw light on the origins of Article 163. This is an excellent academic point and will add to enrich the mine of Constitutional philosophy. Article 163 traces its origins first to Section 50 of the Government of India Act, 1935 and then to Article 143 in the Draft Constitution. Two important expressions find mention in Section 50 of the Government of India Act namely, "in his discretion" and "in his individual judgment." The conspicuous absence of the clause "in his individual judgment" makes it clear that after Independence there was no intention to permit the Governor to exercise any discretion or to take any decision in his individual judgment. The Governor would always be bound by the aid and advice of the Council of Ministers. Limited elbow room was, however, given to the Governor to act "in his discretion" in matters permitted by the Constitution.

Over time, however, the judiciary read in "discretionary powers" into these provisions to specify certain situations where the Governor would be obliged to disregard the advice of the Council of Ministers or act on his own if the advice is not available. This judicial determination took root in *Samsher Singh* where the majority ruled that the Governor must only act on advice of the council of ministers. Over time, this list of "exceptional powers" has been expanded by cases and advisory reports such as the Sarkaria Commission and Justice Punchii Commission to include situations where the advice of the Council of ministers is not available, or situations dictated by propriety and constitutional necessity.

Nature of power exercised by the Governor under Article 174, proroguing and dissolving of the House: It was held that if Chief Minister enjoys confidence of the House, Governor cannot use his independent discretion under Art. 174 to summon, prorogue or dissolve the House without the aid and advice of Council of Ministers. As long as Council of Ministers enjoys confidence of the House, the aid and advice of the Council of Ministers is binding on the Governor. If the Governor doubts the majority support of the Council of Ministers, he can call for a floor test. In the present case, the floor test was never called. Thus, summoning (that is, preponing 6th Session of Assembly) by Governor using discretion (contrary to aid and advice of Council of Ministers) in the present case is unconstitutional and "illegal". Stating this, the Court quashed the order of the Governor so summoning Assembly. Subsequently, the status quo ante as it prevailed on 15-12-2015 was restored.

It was further held that only in a situation the Government in power on holding such floor test is seen to have lost the confidence of the majority, would it be open to the Governor to exercise the powers vested with him under Art. 174 at his own, and without any aid and advice. The word "as he thinks fit" under Art. 174 cannot be interpreted to confer an express discretion on Governor as contemplated under Art. 163(1). Though the draft of Art. 153(3) (of draft Constitution) used words "… shall be exercised by him in his discretion", entire Cl. (3) of said Art. 153 omitted in renumbered Art. 174. Thus, Framers of Constitution did not intend to confer such discretion on Governor. Further, in view of the principle of Cabinet responsibility/ Ministerial Responsibility, Governor who is simply a nominee and also a nominal head cannot have overriding authority over representatives of the people.

In his concurring judgment, Justice Lokur places his opinion. He says that the Governor's function in relation to Legislature under Pt. VI Ch. III of the Constitution are executive functions of the Governor whether relating to governance issues or issues pertaining to the Legislature are requires to be performed by him on the aid and advice of the Council of Ministers and Rules framed by the House. Even assuming that Governor has the constitutional power to summon the Assembly (and it is not merely an executive function) rule of law in our country, does not permit Governor to throw constitutional principles to the wind and summon the Assembly to meet whenever he deems appropriate. Hence, such "power" must be read down to at least a "reasonable power" to be exercised in accord and consonance with constitutional principles, law and rules. Thus, said powers under Articles 85 and 174 cannot be exercised independently or suo motu. Lastly, discretion of Governor under Art. 371-H is limited to issues of law and order.

Messages of Governor to State Legislature can only be those which are considered appropriate by Chief Minister and his Ministers: The Governor has neither any such discretion to send messages nor choose subject-matter of such message. It was further held that, even if there was a situation of political turmoil and turbulence, even if Governor aimed to protect democratic norms, when Speaker allegedly was manipulating situation to frustrate motion for his own removal, such message, held, could not have been sent by Governor using his independent discretion. Governor should remain aloof from political conflicts and issues. Communication of Governor to President regarding political situation may be justified, but Governor has no constitutional authority to resolve the same in the present case by illegally pre-poning Assembly and illegally sending messages under Art. 175(2). Hence, the said order and Messages were quashed.

Governor has no express or implied role under Art. 179 on the subject of removal of Speaker or Deputy: The issue of removal of the

Speaker (or Deputy Speaker) squarely rests under the jurisdictional authority of MLAs, who must determine at their own, whether the notice of resolution for the removal of the Speaker should be adopted or rejected. To decide this, the Bench looked into section 63 of the Government of India Act, 1935 which was a precursor to Article 175. While they did not doubt the bona fides of the Governor, they held that the Governor has no express or implied role under Article 179 on the subject of removal of the Speaker or Deputy Speaker. In the instant view of the matter concerning the removal of the Speaker, can neither be understood nor accepted, and may well be considered as unwarranted.

Power of issuing Ordinance cannot be exercised Governor on his own: When the House or Houses of the State Legislature are not in session, the Governor has the power to promulgate Ordinances under Art. 213. No such legislative power is vested in the Governor when the Houses are in session. But even the power to promulgate Ordinances cannot be exercised by the Governor on his own. Ordinances can be issued by the Governor only on the aid and advice of the Council of Ministers.

IV. CONCLUSION

While this case was being litigated the Union government dismissed the State government and imposed President's rule on 26th January 2016. The Court, for the first time in its history, effectively reversed President's rule and reinstated the previous State government with Nabam Tuki as Chief Minister. However, Chief Minister Tuki was soon voted out of power in a floor test and the Court's decision was inverted through political means. Hence, the judgment is likely to have less bearing on politics and more on academics. Even so, Nabam Tuki the petitioner lauded the Court's decision saying, "The Supreme Court has saved the nation."[15] In all, the decision of the Supreme Court in Nabam Rebia is a welcome development in the jurisprudence of the Court in adjudicating scenarios that necessitate a balance between exigencies of governance and the constitution. But the aftermath of it was to strip the office of the Governor of its already limited "powers" if one casts an eye at the bigger picture. It will not be an overstatement to say that no institution or constitutional office has suffered greater attrition than the office of the Governor. Political trends have now fuelled debate and generated a serious need to re-examine the Governor's role in relation to both constitutional theory and practical politics.

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[15] "SC Verdict Historic, Democracy has been Protected: Nabam Tuki", PTI Reporter, *The Hindu* http://www.thehindu.com/news/national/SC-verdict-historic-democracy-has-been-protected-Nabam-Tuki/article14487047.ece.

In the face of crises, the institution of Governor under the Constitution has repeatedly met with depravity. There is a need to put to effect the recommendations made by Justice Sarkaria and Justice Punchhi Commissions. Active politicians should not be appointed governors. When the state and the centre are ruled by different political parties, the governor should not belong to the ruling party at the centre. Further, the retiring governors should be debarred from accepting any office of profit. Law is only as good as its implementation. If these recommendations are not implemented, Governors will continue acting as pawns of the Union and the prestigious Raj Bhawan will become a sanctuary for retired party loyalists who will attenuate the office of the Governor further through their own self-serving acts.

The episode in Arunachal was preceded by a similar story of intrigues and conspiracy in Uttarakhand. And in both these cases, the Supreme Court decisions seemed to have diagnosed the problem partially and addressed it in a manner that benefitted the aggrieved party. But the remedy is more like curing the symptoms while closing your eyes to the malady.

FORM IV

STATEMENT ABOUT OWNERSHIP AND OTHER PARTICULARS

(See Rule 8)

1.	Place of Publication :	:	Chanakya National Law University, Nyaya Nagar, Mithapur, Patna-800001
2.	Periodicity of Publication	:	Yearly
3.	Printer's Name	:	Registrar, Chanakya National Law University
	Nationality	:	Indian
	Address	:	Nyaya Nagar, Mithapur, Patna-800001
4.	Publisher's Name	:	Registrar, Chanakya National Law University
	Nationality	:	Indian
	Address	:	Nyaya Nagar, Mithapur, Patna-800001
5.	Editor's Name	:	Hon'ble Justice Smt. Mridula Mishra (Retd.)
	Nationality	:	Indian
	Address	:	Chanakya National Law University, Nyaya Nagar, Mithapur, Patna-800001
6.	Ownership	:	Chanakya National Law University, Nyaya Nagar, Mithapur, Patna-800001

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Hon'ble Justice Smt. Mridula Mishra (Retd)

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