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## Effect of Patenting and Competition Law on the Pharmaceutical Industry and the Public Health issue in India: Contemporary Analysis

Avinash Kumar\*\*

Prof. (Dr.) Sanjay Prakash Srivastava\*\*

### Abstract

*Right to health has always been considered a subject of paramount importance. But the excessive importance to the pharma products, patent rights and exclusion of the patent provisions from the purview of Competition Law, this has resulted in the high prices of medicines leads to non-accessibility of maximum number of social strata in India. The product which is made for the consumers, are not reaching to them due to the excessive price of pharma products.*

*In the paper, researchers would like to suggest a balancing way to accommodate Competition law and policy into the existing patenting procedure, so as to benefit the consumers by making competitive environment in the pharma industry.*

**Keywords:** Pharma patents, Patent Rights, Competition Law, Patenting Procedure, Public Health

### 1. Introduction

*Right to Health*<sup>1</sup> is a special right, which have been incorporated<sup>2</sup> in almost all the Constitution of the world including that of India<sup>3</sup> and have been recognized by the national, regional and in the many international documents. However, despite the number of provisions in the national and international instruments; there are papers, pledging public

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\*\* Avinash Kumar, is research scholar at Central University of South Bihar. He has completed his LL.B. (2014) and LL.M. (2016) from University of Delhi and had been elected as Students' Union President of the Faculty of Law, University of Delhi. Some minor parts of this paper draw from the author's previous work. [E-mail: avinashsanil@gmail.com].

\*\* Prof (Dr) Sanjay Prakash Srivastava is professor of Law at Central University of South Bihar. [E-mail: spsrivastava@cusb.ac.in].

<sup>1</sup> Right to health indicates the individual's health issues, but in the larger context, it relates to public health issue.

<sup>2</sup> Incorporate as either fundamental right or the legal right.

<sup>3</sup> Though not explicitly but the Constitution also recognizes this right under Art 21. Judiciary is also highly sensitive in this regard therefore in the case of *N. D. Jayal v. Union of India*; the Hon'ble court held that *Right to access to quality and affordable medicines is an important component of the right to health. This right came to be specifically recognized as part of right to life under the Constitution of India.* The court further held that *the right to access to medicines gets violated in the midst of many anticompetitive practices.*

health issues across the globe.<sup>4</sup> Pharmaceutical (“*hereinafter pharma*”) Sector is a very critical sector in maintaining public health and life of the people. Why it is so, has been answered by World Health Organization (“*hereinafter WHO*”), it says that due to the pressure to maintain sales, “*there is an inherent conflict of interest between the legitimate business goals of manufacturers and the social, medical and economic needs of providers and the public to select and use drugs in the most rational way.*”<sup>5</sup>

Enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being<sup>6</sup> thereby public health issue is the greatest concerns of the state.<sup>7</sup> The issues come when public health budgets and individual patients struggle with high prices for pharmaceutical products<sup>8</sup> due to non-competitive market. The above issue may be solved with the removal of patenting procedures or by not allowing patenting of pharmaceutical products. But on the other hand, it is proved that after disallowing the patenting of pharma products, the pharma industry would stop expanding on the research and development (“*hereinafter R&D*”) of new medicines (say the life-saving medicines for the advanced disease).

Hence, the issue needs the greater concern of the legislature, researcher and academician, as they are expected to find a solution or a balancing approach so as to maintain the competitive environment as well as encouragement for the inventors. Competition/antitrust law has rarely been used to address excessive pricing of pharmaceutical products<sup>9</sup> while the Intellectual Property Rights Law (*hereinafter IPR*) have achieved success in protecting the rights of the inventors but has failed to achieve a balanced approach to protect the actual user, as the IPR laws has nothing to do with the actual user.

## 2. Right to Health

The right to health is an inclusive right. Art.21 of the Constitution provides that, “No person shall be deprived of his life or personal liberty except according to procedure established by

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<sup>4</sup> Irrational use and the spiraling cost of drugs; Costs of medical treatment have increased so much that they are one of the primary reasons driving people into poverty. Yes, there have been schemes such as the Jan Aushadhi campaign to provide 361 generic drugs at affordable prices and different price regulation policies, but their implementation has been patchy and varied in different states. Corruption also increases the irrational use of drugs and technology, e.g. kickbacks from referrals to other doctors or from pharmaceutical and device company lead to unnecessary procedures such as CT scans, stent insertions and caesarean sections, the study said. For more details see <https://www.livemint.com/Opinion/qXD81719wXXDQVpGyyARrO/Seven-charts-that-show-why-Indias-healthcare-system-needs-a.html> (accessed on 01.02.2019).

<sup>5</sup> Available at <http://www.who.int/trade/glossary/story073/en/> (accessed on 15.02.2019).

<sup>6</sup> Preamble to the WHO Constitution.

<sup>7</sup> Difficulties are not limited to low income countries, but this has also been observed in the developed countries.

<sup>8</sup> Prices for newly introduced therapies to treat hepatitis C, cancer, joint disease and other medical conditions have entered the stratosphere.

<sup>9</sup> Pharma industry is *prima-facie* not functioning in a competitive market framework due to the unique characteristics prevailing in the industry, behavior of actors and markets characterized by asymmetries in information and structural uniqueness. Many practices in the pharmaceutical supply chain involve concerns of competition. Healthy competitive policy in pharmaceutical sector is needed to ensure quality services.

law” which also include right to health, which substantially include the access to affordable good-quality medicines. In Part VI of the Constitution also, there are several provisions in respect of health. Further, Art 48 makes the state duty bound to provide raised standard of living and adequate nutrition to people. This also includes equal and timely access to basic health services, the provision of health-related education and information, health services, goods and facilities must be provided to all without any discrimination. There are other national instruments including Mental Health Act, Prevention of Food Adulteration Act, The Drug and Cosmetic Acts, Pre-Natal Diagnostic Technique Act, Occupational Safety and Health Laws etc. which deals with the public health issues. But it is found that none of the above statutes have dealt with the provisions relating to competitive prices of the drug.

Besides the national instruments, there are various international instruments which deal with the public health issues. The promotion of human rights is one of the principal purposes of the United Nations. The Declaration of Alma Ata 1978<sup>10</sup> strongly emphasized upon the need for urgent action by all governments, all health and development workers and the world community to protect and promote the health of all the people in the world. Many WHO resolutions have timely emphasized the need for universal access to healthcare.<sup>11</sup> Art.6 of the Convention on the Rights of the Child states that “States Parties recognize that every child has the inherent right to life” and “States Parties shall ensure to the maximum extent possible the survival and development of the child.”<sup>12</sup> The Committee on the Rights of the Child has spoken to the issue of HIV/AIDS in particular as it affects children being orphaned and, in turn, as it affects their very survival as well as their health and development.<sup>13</sup>

Even the regional instruments do provide for the protection of human life e.g. Art.2 of European Convention on Human Rights provides that the state must never arbitrarily take someone’s life and must also safeguard the lives of those in its care. The state must carry out an effective investigation when an individual dies following the state’s failure to protect the right to life.<sup>14</sup> Art. 4 of the African Charter establishes the right of every human being to respect for life and integrity of his person.<sup>15</sup> Inter-American Commission on Human Rights (“hereinafter IACHR”) recently in *Odir Miranda v. El Salvador*, 2009 heard the case relating to the failure of states to provide medications based on allegations of violations of Art.4 of

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<sup>10</sup>The declaration was adopted at the International Conference on Primary Health Care, Almaty (formerly Alma-Ata), Kazakhstan, 6–12 Sep 1978. It was the first international declaration underlining the importance of primary health care.

<sup>11</sup> Available at [http://www.cci.gov.in/sites/default/files/PharmInd230611\\_0.pdf](http://www.cci.gov.in/sites/default/files/PharmInd230611_0.pdf) (last seen on 11.08.2018).

<sup>12</sup> Convention on the Rights of the Child, Nov. 20, 1989 G.A. Res 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc.A/44/49 (1989) at art. 6(2).

<sup>13</sup> Concluding Observations of the Comm. on the Rights of the Child: Côte d’Ivoire, U.N. Comm. on the Rights of the Child, 27th Sess., 721st mtg. 5, U.N. Doc. CRC/C/ 15/Add.155 (2001) (positive assessment of national plan).

<sup>14</sup> In *McCann v. The United Kingdom* [1995] 21 EHRR 97, para 197, the European Court of Human Rights has described Art.2 as one of the most fundamental provisions in the Convention.

<sup>15</sup> African (Banjul) Charter on Human and Peoples’ Rights, adopted on June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

the American Convention.<sup>16</sup>

### 3. Pharmaceutical Industry in India

India being the 2<sup>nd</sup> largest country in the world has been the largest market for the pharma industry too. It ranks 4<sup>th</sup> in terms of volume and 13th in terms of value globally.<sup>17</sup> India has become a prime destination for manufacturing of branded, generic medicines with strong export element,<sup>18</sup> also fulfilling approx. 95% of pharma needs of the country.<sup>19</sup> India and Japan are the only countries where western MNCs do not dominate the pharma industry.<sup>20</sup> Until 1970s India was highly dominated by the non-domestic MNCs and characterized by relatively high drug prices.<sup>21</sup> The above achievements since its inception are considerably great.

In the last few decades, the number of the pharma industry has increased to more than 20000 units. The Mashelkar Committee has identified 5877 companies, based on the number of production (licensed) units in the country.<sup>22</sup> The leading 250 pharmaceutical companies control 70% of the market with market leader holding nearly 7% of the market share. Indian pharma industry, today, is a high technology and knowledge intensive industry with wide-ranging capabilities in not only drug manufacturing technologies, but also in the area of R&D. One of the industry's key strengths is its expertise in manufacturing generic drugs.<sup>23</sup>

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<sup>16</sup> In this case the petitioners alleged that El Salvador's refusal to purchase the triple therapy and other medications that prevent death and improve the quality of life of persons living with HIV/AIDS failed to guarantee them the rights to life and health. The IACHR concluded that the case was admissible and stated explicitly that although it is not competent to determine violations of article 10 of the Protocol of San Salvador, the IACHR will take into account the provisions related to the right to health in its analysis of the merits of the case, pursuant to the provisions of Art.26 and 29 of the American Convention.

<sup>17</sup> Available at [http://circ.in/pdf/Pharmaceuticals\\_Sector.pdf](http://circ.in/pdf/Pharmaceuticals_Sector.pdf) (accessed on 04.01.2019).

<sup>18</sup> It is estimated that around 40% of the generic drugs in the US are supplied by India.

<sup>19</sup> FICCI Report 2005.

<sup>20</sup> Sudip Chaudhuri, *The WTO and India's Pharmaceuticals Industry- Patent Protection, TRIPS, and Developing Countries*, Oxford University Press, 2005, pg. 18

<sup>21</sup> Domestic firms supplied less than 25% of the total market.

<sup>22</sup> As per the law, each unit of a single company not only needs a license for production, but also for drugs manufactured. If this estimate is correct, then that would mean that there are a huge number of illegal and unregulated manufacturing units in the country which in turn leads to any number of issues relating to spurious drugs, correct manufacturing techniques and so on. The latter issues being beyond the scope of this study will not be further pursued herein, but this may well be a matter meriting close consideration by the authorities. For more details see Report of the Expert Committee on A Comprehensive Examination of Drug Regulatory Issues, including the Problem of Spurious Drugs, Ministry of Health and Family Welfare, India, 2003 pg.3, para 13.

<sup>23</sup> Unfortunately, there is no precise definition. Generic is a term, which is used in a number of different contexts, primarily three. A drug's generic name is the pharmacological name of the compound assigned either by WHO's International Non-proprietary Names Committee or by the US Adopted Name Council. Drugs whose patents have expired are also included in the category of generics. (See Zafarullah Chowdhury, *The Politics of Essential Drugs: The Makings of a Successful Health Strategy: Lessons from Bangladesh*, Zed Books Ltd. London, 1995, p. 8). Also copies of patented drugs in the erstwhile process patent regime in India were loosely termed as generic copies of patented drugs. Generic drugs are broadly classified into commodity generics and branded generics. Commodity generics, which have been on the market since 1950s are simply generic name products marketed by a wide variety of companies. Branded generics are either unpatented drugs sold under a brand name or patent-expired products sold under a generic name prefixed by the company's initial(s) a practice which helps differentiation from other

#### 4. Key issue in Pharma Industry in India

The key issue in pharma industry is about patenting of drugs/ medicines, and exemption from competition law. Patent rights provide the incentive for originators, allowing them exclusivity to produce the patented drug for a limited period. Competition law provides the stick, preventing originators from abusing their exclusivity and protecting the entry of generics into the market at the expiry of patents.<sup>24</sup> There is reasoning in favor of both, but it is not clear as to who should be given preferential treatment. Puzzlement is there as to if we give excessive importance to the Competition Law and Policy, the patent rights holders would be discouraged for doing Research and Development, as in competitive environment it is difficult to recover the amount invested in Research and Development.

It is pertinent that unlike other consumer goods, the consumers are not free to choose pharma products, the medicines and its brands. The medicines are prescribed by the doctor and consumers might not have any idea, despite the availability of other cheaper and better substitutes available in the market.<sup>25</sup> The doctor creates the artificial demand of the expensive drugs. There is a high probability that the manufacturer of generic drugs which do not have strong marketing may be forced out of the market and thereby result in elimination of competition.<sup>26</sup>

#### 5. Patenting of Pharma and its Effect on Consumers

Far or less, the pharma industry has been dominated by the patent holders and the stakeholders did not allow the competitors to produce the generics of patented drugs. The situation became miserable, when the expectation that newly introduced competition law would find a way, was totally conflicting the expectation. The patent things were excluded

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generic manufacturers and is supposed to provide an assurance of quality. (See Zafarullah Chowdhury, *The Politics of Essential Drugs: The Makings of a Successful Health Strategy: Lessons from Bangladesh*, Zed Books Ltd. London, 1995, p. 8)

<sup>24</sup> Kale Warsha and Pearl Marcus, *Lessons from Europe: Competition law in India's pharmaceutical sector*, Friday, 07 August 2009, available at <http://www.legallyindia.com/20090807126/Legal-opinions/Lessons-from-Europe-competition-law-in-India-s-pharmaceutical-sector> (accessed on 11.01.2019).

<sup>25</sup>The affordability of these alternate versions was the principal benefit of process patents and a matter of vital significance in a country with such a high percentage of underprivileged citizens, self-reliant domestic drug industry emerged with the capacity to manufacture and provide at a low cost a wide array of bulk and finished drugs.

<sup>26</sup> Round table conference on Generic Medicine II, Report available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M\(2014\)2/ANN3/FINAL&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M(2014)2/ANN3/FINAL&doclanguage=en) (accessed on 12.01.2019).

from the purview of competition law and policy under Sec 3<sup>27</sup> and Sec 62<sup>28</sup> of the Competition Act, 2002. The patent company was allowed to make violations of Sec 3 (5) of the Act or to say they were allowed to have agreements violating competition law and principles.

The patent company start paying to the competitor for not introducing the generic medicines;<sup>29</sup> even though the patent period expired (such payments are known as reverse payments). The agreement between the branded and generic medicine companies is an example of the politics of drugs which was clearly visible in the below case.<sup>30</sup> Abbott had a patent on Hytrin. In 1998, Abbott's sales of Hytrin amounted to over 8 million prescriptions (\$542 million) in the US. Abbott's patent on Hytrin was nearing its expiry. Abbott projected that Geneva's entry with a generic version of Hytrin would eliminate over \$185 million in Hytrin sales in just six months. Abbott paid Geneva approximately \$4.5 million per month to keep Geneva's generic version of Abbott's proprietary drug off the U.S. market, potentially costing consumers hundreds of millions of dollars a year. The above case is as per the patent laws but in clear conflict with the competition law and policy, being anti-competitive prohibiting entry of the other market players into the market.

It is noteworthy that only generic entry in the pharma sector may reduce the price after the expiry of the patent. The abuse of IPRs where the patent holder refuses to grant compulsory license and a backdoor mechanism to retain patent on it for a minimum period of three years

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<sup>27</sup> Nothing contained in this section shall restrict –

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under:

(a) the Copyright Act, 1957 (14 of 1957);

(b) the Patents Act, 1970 (39 of 1970);

(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);

(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);

(e) the Designs Act, 2000 (16 of 2000);

(f) the Semiconductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);

(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

<sup>28</sup> Application of other laws not barred - The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

<sup>29</sup> There is no precise definition of generic. Generic is a term, which is used in a number of different contexts, primarily three. A drug's generic name is the pharmacological name of the compound assigned either by WHO's International Non-proprietary Names Committee or by the US Adopted Name Council. Drugs whose patents have expired are also included in the category of generics. (See Zafarullah Chowdhury, *The Politics of Essential Drugs: The Makings of a Successful Health Strategy: Lessons from Bangladesh*, Zed Books Ltd. London, 1995, p. 8). Also copies of patented drugs in the erstwhile process patent regime in India were loosely termed as generic copies of patented drugs. Generic drugs are broadly classified into commodity generics and branded generics. Commodity generics, which have been on the market since 1950s are simply generic name products marketed by a wide variety of companies. Branded generics are either unpatented drugs sold under a brand name or patent-expired products sold under a generic name prefixed by the company's initial(s)-a practice which helps differentiation from other generic manufacturers and is supposed to provide an assurance of quality. (See Zafarullah Chowdhury, *The Politics of Essential Drugs: The Makings of a Successful Health Strategy: Lessons from Bangladesh*, Zed Books Ltd. London, 1995, pg. 8).

<sup>30</sup> *Abbott Laboratories v. Geneva Pharmaceuticals*, July 1, 1999 US Court of Appeals for the Federal Circuit.

is adopted in the name of data exclusivity. The Patent Act does not provide for prevention, as this act only concern itself with granting patent monopoly and not its abuse.

Further, evergreening of patents basically give the patent holder the chance to retain monopoly over its product after the patent period has expired by bringing about small changes and then claiming a patent right for another twenty years<sup>31</sup>. The patent holder in order to retain its royalty payments sometimes buys out competitors or frustrates competitors out of the market for a longer period of time. In India evergreening of patents is prohibited by IPA which prohibits grant of patent rights to a product which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance, or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant are not considered as invention<sup>32</sup> under the Act. The IPA has another mechanism to prevent patent monopoly under section 84 by the grant of Compulsory License<sup>33</sup>. This is to ensure that the patents do not impede the protection of public health and nutrition and patents rights are not abused by patentees. Compulsory licensing serves to strike a balance between two disparate objects of rewarding patentees for their invention and making patented products particularly pharmaceuticals available and affordable to larger public. This is granted to companies to produce generic versions of patented drugs.<sup>34</sup> However, in all cases compulsory license is not granted and it is here that CCI can play an effective role. If pharmaceutical companies do engage in overpricing patented products or are unreasonable with respect to licensing terms and so on, competition law may be resorted to for redressal.

It is also notable that due to the MNCs dominated role in pharma sector in early times, under Designs Act, 1911, only those foreign players could have entered into India that had technological capabilities to bring medicines. However, due to the strong patent regime the cost of medicine was highly unaffordable.<sup>35</sup> Since 2001, automatic approval was allowed up to 100 percent foreign equity in the pharma sector<sup>36</sup> this somehow was responsible for the domestic industry maintaining its competitive edge. But still the price was high and access

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<sup>31</sup> Maitreyi Das, Impact of the TRIPS Agreement on competition in the Pharmaceutical Sector in India, CCI Archive retrieved from URL: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.398.5945&rep=rep1&type=pdf> accessed on 11.04.2018).

<sup>32</sup> Section 3 (d), Patent Act, 1970

<sup>33</sup> Compulsory licensing is an effective way to deal with such abuse of monopoly rights. The experience in India's previous product patent regime indicates that the practical aspect of license issuance needs to be given due attention if there is to be any likelihood of actualizing the grant of compulsory licenses. It has been recommended that it would be more appropriate to give the competition authority the responsibility of granting compulsory licenses in consultation with the patent office rather than the other way around.

<sup>34</sup> India's first compulsory license was granted by patent office to Natco Pharma Limited for producing generic version of Bayer's Corporation patented medicine Nexavar, used in the treatment of liver and kidney diseases.

<sup>35</sup> In fact, average drug prices in India were among the highest in the world.

<sup>36</sup> Ibid.

to such products was not guaranteed to all the social strata.<sup>37</sup>

The miserable condition existing in the pharma industry led the government to accept the Ayangar Committee report which recommended adopting patenting system prevailed in Germany which confers exclusive right to the inventor of a pharma product to manufacture and sell products according to a given process. The government enacted the Patents Act, 1970, which allowed process patent protection for pharma products for a period of 7 years. This law fortified domestic manufacturing of essential drugs and to adopt a competitive environment in Pharma sector. The Act also allowed Indian manufacturers, specialized in reverse engineering to apply for the process and produce indigenous drugs. The Patent Act since its inception did not provide for product patents, but TRIPS Agreement as a cornerstone in setting common obligatory standards has mandated that both products and process patents in all fields of technology shall be available.

Hence the 2005 Amendment to the Patents Act reintroduced product patents for pharmaceuticals.<sup>38</sup> The 2005 Amendment further strengthens the patent regime which further aggravated the price of patented drugs.<sup>39</sup> It was expected that product patent regime would increase R&D, but this expectation was not fulfilled. India continued to import pharmaceuticals from other countries. With India becoming a member of TRIPS in 2005, India revised its patent law to bring the same in line with its obligations under the TRIPS. The flourishing domestic generic pharmaceutical industry has to wait for the patent to expire before it was able to introduce a generic.

In the case of *FTC v. Actavis*,<sup>40</sup> the US Supreme Court rejected the argument that a reverse payment during the term of a patent would be automatically shielded from antitrust scrutiny, absent patent fraud. It was held that while a patentee has the right to exclude others from infringing its patent, compensation to foreclose any *possible* challenge to that patent and keep competitive pricing at bay might have significant adverse effects on competition. By such a judgment US Supreme court made a balance between competition law enforcement and the rights of a patentee.<sup>41</sup>

The further developments took place in pharma industry was good for the consumers as these eliminated incentives to the foreign MNCs and encouraged domestic pharma companies specializing in manufacturing generic versions of patented drugs developed. The domestic companies were supported by R&D undertaken by the Government. Hindustan Antibiotics Ltd. and Indian Drugs and Pharmaceuticals Ltd. (public company) engaged in significant

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<sup>37</sup> "Unused Patents" (1964) Weekly Notes, *Economic & Political Weekly*, Vol. 16(21), p. 42 accessed on Nov. 4, 2015 from [http://www.epw.in/system/files/pdf/1964\\_16/21/unused\\_patents.pdf](http://www.epw.in/system/files/pdf/1964_16/21/unused_patents.pdf).

<sup>38</sup> Available at [http://www.cci.gov.in/sites/default/files/PharmInd230611\\_0.pdf](http://www.cci.gov.in/sites/default/files/PharmInd230611_0.pdf) (accessed on 11.07.2018).

<sup>39</sup> India signed this agreement in 1994. Though in the beginning nothing substantial could be done, but with the amendments in the statutes as per the spirit of TRIPS agreement, the reflection of the above international instrument affected the national pharma industry too.

<sup>40</sup> 526 US 756 US SC Washington DC.

<sup>41</sup> <http://www.conventuslaw.com/archive/india-pay-for-delay-agreements-on-the-cci-radar/> accessed on 8-2-2016

R&D and their efforts spilt over the private sector. In addition, research efforts of laboratories such as Central Drug Research Institute, Indian Institute of Chemical Technology and National Chemical Laboratory provided various technical support to these industries.

Still the above provisions, though protected the patent right holder, but could not do anything in favor of consumer at large. The above provisions under Sec 3 and Sec 62 of Competition Act may be limited to the extent of non-violations of competition principles or this may be formulated as the pharma industry is allowed to have the agreement in violation of constructive competition principles, but may not be allowed to have the anti-competitive agreements.

## **6. Competition Law and Pharmaceutical Industry**

Competition law is the best means of ensuring access to the broadest range of goods and services at the most competitive prices. Result in reduced costs and wider choice to consumers and a healthy competition in this sector would help consumer to have equitable access to healthcare facilities. Thereby, Competition provisions should be made applicable for the most part to the health delivery system as well, there is no existing regulatory mechanism addressing anti-competitive conduct in the health delivery system. As the role of pharma industry in day to day life of the individual growing up, the gap needs to be addressed.

The general scheme specifies that Patents by allowing a dominant position can block out competition but on the other hand patent is also necessary. Hence, competition law has to work in tandem with all such diverse set of laws, policies and regulation governing the pharma sector.<sup>42</sup> There are many practices in the pharma industry which appear to be anti-competitive. Such practices may be categorized into primarily two classes: IPR related breaches, abuse of competition norms.

It is evident that there is high market concentration in these markets.<sup>43</sup> Since the consumers' demand is essentially supply driven, pharmacist has no incentive to be price-sensitive.<sup>44</sup> It needs no reiteration that consumer sovereignty simply does not exist in the pharmaceutical market. The usual assumption that market mechanisms stabilize prices does not hold entirely true for the pharma industry.<sup>45</sup>

### **6.1 Anti-Competitive Practice**

Anti-competitive practices in any sector is prohibited and thereby it is also prohibited in the

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<sup>42</sup> available at [http://www.cci.gov.in/sites/default/files/PharmInd230611\\_0.pdf](http://www.cci.gov.in/sites/default/files/PharmInd230611_0.pdf) (accessed on 11.12.2018).

<sup>43</sup> Sakthivel Selvaraj, *How Effective is India 's Drug Price Control Regime?* Harvard School of Public Health, 2007, available at: <http://www.hsph.harvard.edu/research/takemi/files/RP256.pdf> (accessed on 15.02.2019).

<sup>44</sup> Fuchs V. R., *Physician-Induced Demand: A Parable*, Journal of Health Economics, Vol. 5, 1996, Available at [http://dx.doi.org/10.1016/0167-6296\(86\)90011-1](http://dx.doi.org/10.1016/0167-6296(86)90011-1) (accessed on 15.12.2018).

<sup>45</sup> Amit Sengupta, *Study of National Health System in India with regards Access to HealthCare and Medicines*, April 2010, available at [http://www.haiap.org/wordpress/wp-content/uploads/2008/08/Dr.-Amits-Project\\_india.pdf](http://www.haiap.org/wordpress/wp-content/uploads/2008/08/Dr.-Amits-Project_india.pdf) (accessed on 11.01.2019).

pharma sector. In order to deal with anticompetitive practices in the pharma industry and the health delivery system, there are multiple legal and policy options such as competition law, patent law and drug price control, which may be utilized effectively.

Pharma value chain entering into collusion for profits and high trade margins, nexus between doctors and pharma companies, diagnostic tests ties (doctor gets a cut from each reference), a physician referring his patients to a specialist for further treatment, eliminating small pharma players, price fixing, depriving patients of the best possible medicines and services at the lowest possible prices, collusive agreements, and tied selling, are the few examples of anti-competitive and can be covered by competition law. Though not all the practices can be covered under Sec 3 (5) of the Competition Act but most of the above practices may be categorized as the anti-competitive by giving the broader implications of the Competition Act.

#### *6.1.1 Anti-Competitive practices by Doctors*

The most significant unethical practice by doctors are irrational drug prescription. Ideally the cheapest, most readily available drugs should be prescribed. Doctors usually prescribe comparatively more expensive drugs. Because it impinges upon one of the basic tenets of competition policy, which is to avail of the best possible services at the lowest prices feasible. Profit considerations would obviously vitiate such decision-making and herein lies the impingement on free and fair competition.<sup>46</sup>

#### *6.1.2 Anti-Competitive practices by Pharmacists*

Pharma company owners in the guise of a trade association e.g. All India Organization of Chemists and Druggists (AIOCD)<sup>47</sup> are forming a huge cartel.<sup>48</sup> The AIOCD is known to launch boycotts against drug companies to grab higher profit margins. Associations have been known to demand that drug companies obtain a *no-objection letter* from each state trade association, before a new drug could be sold there. AIOCD has also forced some drug companies to sign "memorandums of understanding" in which they agree to increase profit margins of pharmacies.<sup>49</sup>

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<sup>46</sup> Profit should not be the driving factor behind doctors not prescribing the least expensive medicine on the market or the reason for referring their patients to particular diagnostic centers, pharmacies or to other doctors.

<sup>47</sup> Nitya Nanda and Amirullah Khan, Competition Policy for the Pharmaceuticals Sector in India, CUTS International in Pradeep Mehta (ed.), Towards a Functional Competition Policy for India, 2004, p. 189.

<sup>48</sup> Almost 60% of all pharmacists are members of AIOCD. Pharmaceutical companies often enter into agreements which results in the boycott of manufacturer's products till a favorable margin is arrived at and where the enhanced margins imply higher prices for the consumers. Hence directly or indirectly determine purchase or sale prices. This result of the increase in the price proves to be detrimental to consumers. In such a scenario, companies are in a position to lure the doctors or the chemists to sell their brand in lieu of commission or higher margin, respectively. However, this may also lead to position of the consumers vulnerable in the hands of the pharmacists pushing for brands with higher margins. There is a need to penalize and deter such behavior.

<sup>49</sup> See generally, Daniel Pearl and Steve Stecklow, Drug Firms' Incentives Fuel Abuse by Pharmacists in India, Wall Street Journal, 2001.

Exacerbating the situation are market distortions and skewed competition norms, unique to the pharma industry, with particular reference to market concentration, barriers to price competition, and lack of freedom in consumer choice.

Another practice of the pharma companies would certainly come under Section 3(4), is the practice where the chemically identical but cheaper varieties of drugs are just not available in chemist stores, enabling higher-priced brands to maintain high market shares. This may be because of *exclusive supply agreements*, defined in Section 3(4) as “any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person”. Such agreements, better known as exclusive dealing agreements, are classic vertical restraints with possible appreciable adverse effect on Competition. Unlike the tying of consumer choice, these agreements are between firms at different stages of the supply chain, and would fall squarely under Section 3(4). The wider interpretation may be given to Sec 3 of the Competition Act to include the above Anti-Competitive practices.

#### *6.1.3 Anti-Competitive Practices by Hospitals*

There have been cases of agreements entered by hospitals with drug manufacturers to exploit consumers. A case that was brought in a consumer forum in Andhra Pradesh revealed that a private hospital had entered into a contract with a drug manufacturer to supply drugs to the hospital at prices, which were above the market price. Hidden costs, which is an issue in many hospitals is also anti-competitive in nature as the consumer pays more than warranted.

#### *6.1.4 Tied Selling<sup>50</sup>*

Tied selling of medicines is found to be a major problem as consumers have been asked to buy medicines from a particular shop. In case of private doctors or private hospitals there has been a higher incidence of tied-selling of medicine. Incidence of tied-selling of diagnostic are reported higher by tests private doctors or private clinics. tied selling of diagnostic testing is prevalent in hospitals as well; all this makes think that that the doctor might be getting a part of the profit from such center as a commission.

While IPR are expressly excluded from the purview of anti-competitive agreements in Sec 3 there is no such exclusion provided in sections dealing with abuse of dominant position and combinations. These two provisions empower competition authority to grant compulsory license or take any other appropriate action in case of abuse of IPR through explicit provisions.

### **6.2 Merger and Acquisition**

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<sup>50</sup> Tied selling is restricting choice of consumers by providing goods with some other goods or services which may or may not be related and tied selling it is also required that this should not be as per the consumer. Explanation of the Sec. 3(4) in the Competition Act, 2002 “tie-in arrangements” includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

Mergers and Takeovers in the pharmaceutical sectors have grown considerably in the past few years.<sup>51</sup> Except the existing anti-competitive practices within the national domain, and few cases of abuse of dominant position, the concerns of the pharma industry is the recent aggressive M&A specially the MNCs merging with the national pharma industry.<sup>52</sup> Also, the collaborations and agreements are making the above concerns more sharp.<sup>53</sup>

Though sometimes M&A is beneficial for the national economic or economic integration, but sometimes it is considered bad in law and policy, as and when done with the intention of curbing competition or if it really curbs the competition. Though mergers do not distort the competition but the recent M&A was seen as a threat for Indian competition.<sup>54</sup> The regulation of combination under Sec 5 & 6 of the Competition Act has not been introduced rigorously as this may adversely affect the economy. For the application of Sec 5 & 6, it is necessary that the company would touch the threshold limit prescribed by the Competition Commission. It is noteworthy that the threshold limit prescribed under the competition act, though revisited regularly<sup>55</sup> by the commission are general in nature and deals with every sector.

Firstly, the issue becomes a concern when a foreign country having strong market position merges with an Indian Company, as it has a tendency to create dominance and it is feared that dominance might be abused.<sup>56</sup> It is apprehended that it may eliminate a significant direct

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<sup>51</sup> Matrix laboratory was acquired by US-based MylanInc in August 2006, Dabur Pharma acquired by Singapore based Fresenius Kabi in April 2008, Ranbaxy Labs. Ltd. Acquired by Japan based Daiichi Sankyo in July 2009, Shantha Biotech by France based Sanofi Aventis in July 2009, Piramal Healthcare acquired by US-based Abbott Labs in May 2010 are some such examples.

<sup>52</sup> Pharma MNCs are projected to capture a 35 per cent market share of the market by 2017, compared with 28 per cent in 2009.

<sup>53</sup> During the first half of 2011, Bayer and Zydus Cadila agreed to set up a joint venture called Bayer Zydus Pharma (BZP), for the sales and marketing of pharmaceutical products in India. Other recent collaborations include Sun Pharma working with MSD (Merck & Co) to market and distribute Merck's Januvia (sitagliptin) and Janumat (sitagliptin+metformin) under different brand names in India. In May 2011, Par Pharmaceutical Companies entered into a definitive agreement to acquire privately-held Edict Pharmaceuticals, a Chennai-based developer and manufacturer of solid oral dosage generics.

Hikma Pharmaceuticals announced in April 2011 that it had agreed to acquire a minority interest in Unimark Remedies, a privately-held Indian manufacturer of active pharmaceutical ingredients and API intermediaries (Espicom Business Intelligence Report, 2011.)

<sup>54</sup> Maira Committee report 2011. available at: <https://dontradeourlivesaway.files.wordpress.com/2012/06/maira-committee-report.pdf> Accessed on 17-2-2016

<sup>55</sup> The commission revised the threshold limit several times and further a High-level Committee under the chairmanship of Arun Maira was set up by the Planning Commission to look into the takeovers of pharmaceutical companies. The Committee is set to recommend approval by the CCI for all pharmaceutical M&A deals. As per the Maira Report, the government will use the CCI and the Foreign Investment Promotion Board (FIPB) to keep a watch on acquisitions in the pharma sector to stave off the possibility of cartelization and dominance by multinational companies. It was decided to make antitrust rules tighter for such deals, bringing more pharma mergers and acquisitions (M&A) within CCI's ambit. (Sangeeta Singh and Aman Malik, —Pharma deals set to face closer scrutiny. Available at: <http://www.livemint.com/2011/10/10233455/Pharma-deals-set-to-face-close.html> accessed on 15/4/2017.

<sup>56</sup> Prachi Gupta, Competition Issues in the Pharmaceutical Sector, Competition Law Reports, October 2013. Available at: URL <http://www.cci.gov.in/sites/default/files/annual%20reports/ar2014.pdf> ACCESSED On 8-2-2016

competitor in a relevant sector, particularly where there are a few substitutes and new entry is difficult.

Secondly, Pharma industry being less in value and assets never falls under the threshold limit and even if the M&A of the pharma industry effects the competition that cannot be regulated. In the 2011 Competition Bill the sector wise threshold limit was introduced which could not be passed by the parliament. The legislature should pass section wise threshold limit to tackle the above situation. The commission has failed to examine the pharma industry as the threshold limit is very high.<sup>57</sup> Since 2011, the CCI has passed orders in six M&A deals in the pharma sector. All six of them got approved.<sup>58</sup> The combination between Ranbaxy and Sun Pharma created some issue as examination of Combinations was undertaken under Sec 29 of the Competition Act. The CCI initially raised objections to this merger citing reason that the merger may adversely affect the competition.<sup>59</sup> However, Commission subsequently cleared the merger with a condition that the companies have to divest eight drugs together – Tamlet brand for Sun Pharma and Eligard, Terlibax, Rosuvas, Raciper, Terlibax, Triolvance and Olanex for Ranbaxy.

### **6.3 Role of Competition Commission**

To protect the customers as a competition law expert CCI should test all haphazard ways of commercial life to iron out distortions and market strategies that are not desirable for healthy competition. CCI should look at this issue in depth and by giving wider interpretation to Section 3(4)(a) or Section 4(1)(c) of the Act bring within its scanner these issues. Further while regulating combination in this sector it is recommended that threshold limit should be brought down. CCI should work in coordination with NPPA to bring competition issues in drug prices and maintain a competitive environment in pharmaceutical market.

CCI never interferes in the workings of other regulatory bodies, but it is felt that in this sector the government regulations themselves create an obstruction for the competition, and therefore it is strongly felt that CCI should assume a position in all stages of drug procurement. One of the impediments in application of competition law is found that it is very difficult to determine relevant market in the case of the pharmaceutical industry.

In *M/S Santuka Associates Pvt. Ltd. v. AIOCD & Ors*,<sup>60</sup> Santuka Associates Pvt. Ltd. alleged the abuse of dominant position by the AIOCD u/s 19 of the Competition Act on grounds, *inter alia*, limiting and restricting the supply of drugs, threatening and coercing drug manufacturer USV to terminate its Clearing & Forwarding Agency arrangement with the informant.

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<sup>57</sup> Kumar Amitabh, *Creating a culture of competition*, The Financial Express, January 28th, 2005 available at [http://www.cci.gov.in/images/media/articles/culture\\_competition\\_28\\_1\\_2005\\_FE\\_20080409115245.pdf](http://www.cci.gov.in/images/media/articles/culture_competition_28_1_2005_FE_20080409115245.pdf).

<sup>58</sup> Merger of SBI PPL with PPL; merger of ORLL into OCPL; merger of Mitsui & Co. Ltd and Arch Pharma labs; G & K Baby Care private limited and Danone Asia Pacific Industry; OCPL and CHIPS; PHPL into PEL

<sup>59</sup> <http://www.dnaindia.com/money/report-cci-says-sun-s-takeover-of-ranbaxy-may-hurt-competition-2016279> accessed on 18-2-2016

<sup>60</sup> 2013 COMPLR 223 (CCI)

AIOCD was asked to cease and desist all anti-competitive practices within 60 days from the date of receipt of the order by virtue of Sec 3 and was directed to:

- i. Declare no requirement of obtaining a NOC for appointment of stockists and the pharmaceutical companies, stockists, whole sellers were at liberty to give discounts to the customers;
- ii. Inform all Chemists & Druggists and all its members and associations that they were free to give discounts to the customers;
- iii. Inform that PIS charges were not mandatory and PIS services could be availed by manufacturers or pharmaceuticals firms on a voluntary basis.

In *Hiranandani Hospital Case*<sup>61</sup> CCI examined the conduct of super speciality hospital of Mumbai which refused maternity service to the complainant. Cryobank International India and Hiranandani hospital had exclusive partnership and nexus. The investigation division of CCI concluded that Hospital was a dominant player in the field of maternity services in and around the Powai area of Mumbai; the Hospital had abused its dominance by restricting the patient's choice. The agreement between Hiranandani hospital and Cryobank was declared null and void. The commission also imposed a penalty of 3.8 crore.<sup>62</sup> In June 2015 CCI imposed a 60 crore penalty on pharma major GlaxoSmithKline and Rs 3 Crore on Sanofi India for indulging in unfair trade practices. It is visible that the cases of violation of competition principles are much more and the CCI has not been so effective in charging them.

## 7. Regulation of the Pharma Industry in India

Unlike other sectors, the pharma industry is influenced by a host of practices including price regulations, drug procurement by government agencies, insurance, nexus among players in the pharma industry and service providers (cartelisation), patent laws, safety policies, drug regulation, drug advertising regulation, drug promotion regulation etc. Hence, the regulatory mechanism plays a crucial role to work with all such diverse set of laws, policies and regulation.<sup>63</sup> The purpose for regulating the pharma industry is not to tear down the existing structure but to focus on promoting competitive outcomes and efficiency rather than promoting competition *per se*. The promotion of generic drugs in select categories (e.g. the life-saving medicines needs greater concerns), mandatory price negotiations for patented drugs, checking anti-competitive practices like tied-selling, providing adequate incentives for

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<sup>61</sup> Case no 39 of 2012.

<sup>62</sup> <https://www.indianbarassociation.org/wp-content/uploads/2013/02/The-Role-of-Competition-Commission-of-India-in-consumer-welfare.pdf> accessed on 12-2-2016

<sup>63</sup> Available at [http://www.cuts-ccier.org/pdf/Regulatory\\_Framework\\_and\\_Challenges\\_in\\_Indian\\_Pharmaceutical\\_Sector.pdf](http://www.cuts-ccier.org/pdf/Regulatory_Framework_and_Challenges_in_Indian_Pharmaceutical_Sector.pdf) (accessed on 04.09.2019).

research and development (“R&D”),<sup>64</sup> regulation of data exclusivity,<sup>65</sup> monetary trade margins in pharma industry are few select categories which needs to be regulated. This required from both the perspective of maintaining consumer welfare so as to reach the benefit to the people from all social strata and also to the business community. Any imbalance in the pharma industry may adversely affect the public health.

## **8. Conclusion and Suggestion**

The paramount consideration of any law is the welfare of people, whether directly or indirectly and this should also be taken into consideration while bringing the patent law and the Competition Act. Though the interest of the consumers has received the paramount importance in the Competition Law, but due to some complexity patent laws was excluded from the purview of the Competition law. Now this has led to a problem of high price of the drugs. If the general welfare of consumers is not included in the wisdom of regulating the pharma industry, in a country like India people from lower social strata (which represent the maximum population) would suffer. In such a situation, there is no use of developing the lifesaving medicines.

In most countries, regulation of drug prices is considered necessary to contain public expenditure due to the government’s role in funding social health and insurance schemes that cover hospitals and outpatient drugs. A substantial portion of the population is covered through health insurance and public health schemes, whereby consumers are not affected directly by the high prices of drugs or the high costs of medical services but are made to pay for the increased costs through a high insurance premium. As opposed to this, a substantial portion of the population in India is market-dependent and has to meet all their expenses on this account out of their own pocket, making price regulation of pharmaceutical products unavoidable.

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<sup>64</sup> However, the pharmaceutical industry also relies on large costs of R&D for development of a successful product, and oftentimes the success rate for any given R & D project is rather low. To encourage innovation some form of incentive as patent protection is required to be given, otherwise companies would not invest in R&D. However, in most of the cases there is a conflict between these two sets of Rights, i.e. Patent monopoly and consumer benefit. Therefore, by ensuring a healthy and effective competition policy a balance is required to be made between these two sets of interest.

<sup>65</sup> No data exclusivity should be granted as it is not in the best interest of the country and it is not required under TRIPS.

## Protection of Tobacco growing Farmers: A Medico-legal Perspective

Dr Rajib Kumar Majumdar\*  
Dr Arvind P. Bhanu\*\*

### *Abstract*

*Constitution through its Article 19 read with Article 14 gives equal opportunity to one and all to earn their livelihood through practice of profession or trade as they deem fit. In the same breath the Constitutional euphemism regarding the right to health, healthy environment and a life free from diseases rests upon restricting any practice which is antithetical to the right. In tobacco growing, usage and trade both these characteristics of the Constitutional and the Legal Paradigms are strained at its extremes. On one hand it is important for the people suffering from cancer due to tobacco consumption while on the other hand is the spectre of the agrarian crisis arising out of such an action in respect to the plight of the tobacco farmer, if his chosen way of livelihood were to be taken away from him under the Right to Live provision of the Constitution. This leads to unemployment which is going to be generated through banning tobacco and hence rendering the farmers out of job by withdrawing the Constitutional guarantee for reasonable sustenance. This research paper tends to study both the aspect both scientifically and legally by taking reference of the observation certain pliable suggestions which are to be garnered.*

**Keywords:** *Constitution, tobacco, cancer.*

### **1. Introduction**

While Constitution gives right to health, right to clean environment free from pollution and right to clean and safe drinking water<sup>1</sup> and a very important aspect of life i.e., the right to self-determination, Article 19 of the Constitution gives protection to a person to pursue the profession of his choice to earn his livelihood. It is pertinent to note that the either tobacco smoke from the tar produced or accumulated due to burning or processed tobacco leaf that are consumed are prominent carcinogens. Significant mortality rate amongst the individuals in the society is reported on this account. This includes a passive

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\*Neurosurgeon, Medico-legal Consultant and Research Scholar, Amity Institute of Advanced Legal Study, Noida.

\*\*Professor of Law & Acting Director, Amity Law School, Delhi.

<sup>1</sup> Under Article 21 of Constitution of India.

smoker as well i.e., a person who himself does not smoke but due to his close proximity to an individual smoker is exposed to the same rigor of danger as the smoker himself. It is also very objective to argue that statutory warning regarding harmful effects of chewing and smoking of tobacco [*read: processed tobacco*] leading to cancer restricts the tobacco farmer only. Statutory warnings on carcinogenic effect of tobacco leading to death or disability are, primarily, meant to not attract the protective provision of Constitution to safeguard the interest of a tobacco growing farmers.

On a metaphoric note the above argument seems sound enough. However, it is contrary to the legitimacy provided to quarry miner through license to mining that is required to provide material for roads and construction of unwanted buildings, that have become the hallmark of modern-day development. This segment has been reported to contribute to many folds increase in the solid matter environmental pollution which according to a recent report has resulted in 12 lakh deaths in Northern India in the year 2017-2018. This statistical variant far more exceeds the deaths attributed to carcinogenic effects of tobacco fumes in the same period.<sup>2</sup> However we do not observe any serious efforts and activism to stop mining, preserve the older trees which prevent the airborne dust particles from reaching the respiratory system of an individual or not to resort to constructing unwarranted cemented roads which have led to depletion of ground water [a recent report has indicated that unwarranted road construction has led to Chennai facing drought like situation in the summers].<sup>3</sup>

## **2. The Causative Factor of Cancer**

### ***2.1 Tobacco Leaf vs Processed Part***

It is important to analyze as to whether the tobacco leaf in totality or the processed part contributes to the causation of cancer. It has, scientifically, been stated that the nicotine content of tobacco leaf when burnt and reduced in the form of tar is the main culprit in causation of the malady. Hence, is it valid to burden upon the shoulders of a farmer the consequences of the consumption of the product of processing, which in actuality has been grown as a vegetation?

### ***2.2 Products to increase Yield as other sources of Cancer***

It is also a pertinent fact that in order to increase the yield, large number of products of daily consumption like tomatoes, potatoes and eggplant are subjected to such high toxic levels of pesticides and/or hormones that their contribution to Cancer causation is equivalent, if not more than tobacco. Yet these farmers not only get state protection but

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<sup>2</sup> Available on [www.ndtv.com](http://www.ndtv.com). (Accessed on 3.1.2019). See also <https://www.indiatoday.in/story>. (Accessed on 3.1.2019)

<sup>3</sup> Available on the [www.Ht.com](http://www.Ht.com). (Accessed on 3.1.2019)

also minimum guarantee to sell their toxic products.<sup>4</sup>

### ***2.3 Nicotine the only culprit or other sources also responsible***

Scientifically speaking, nicotine, the key ingredient of tobacco is also present in many products of daily consumption.<sup>5</sup> It is a natural dietary substance and has only higher concentration in tobacco to act as a pesticide.<sup>6</sup>

### ***2.4 Nicotine having other beneficial effects also***

For centuries, gardeners have used homemade mixture of tobacco and water as a natural pesticide to kill insect pests. Cedric Brien and his colleagues have reported in ACS Journal of Industrial and Engineering Chemistry Research,<sup>7</sup> the scientifically proven effect of tobacco as a pesticide. In light of the encouraging results of tobacco leaves as organic pesticide to replace more harmful and toxic chemical pesticide, cultivation of tobacco leaves will provide an alternate, cheap and less environmental pollutant than organic pesticides. It does, therefore, forcefully warrant a protection of the farmers growing tobacco leaves under statutory Constitutional provisions. However, this should be done within the ambit of strict enforcement of Rule of Law to prevent its abuse or its use as an intoxicant stimulant promoting the growth of cancer.

## **3. Role of Constitution in maintaining health and its effect on tobacco farming**

Article 47 of the Constitution is one of the Directive Principles which dictates the State to enhance the nutritional status of an individual, thereby increasing his standard of living. This provision also makes mandatory, the improvement of public health as a primary state responsibility. This responsibility of the State shall endeavor to bring about prohibition of intoxicating drinks and drugs.<sup>8</sup>

### ***3.1 Potential vs Actual role of Tobacco in causing Cancer***

There is raging discussion regarding the potential and actual nuisance of tobacco in causation of cancer and the resultant death. There is a school of thought to ban tobacco totally to mitigate the suffering. This has resulted in many proponents of the above school to withdraw the Constitutional protection under Article 16 to a tobacco farmer. This view is quintessentially growing by leaps and bounds and gathering a lot of storm. It is to be noted that the tobacco plant *Nicotiana* has probably been responsible for more deaths than any other herb. Present estimate is three million world-wide deaths due to tobacco

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<sup>4</sup> Joao Pragna "Does natural tobacco have nicotine". Available on <http://www.quora.com> (Accessed on 29.11.2018).

<sup>5</sup> *ibid.*

<sup>6</sup> *Supra* note 3.

<sup>7</sup> Available on <http://www.acs.org>. (Accessed on 1.3.2019).

<sup>8</sup> Anne Charlton, "Medicinal uses of tobacco in history." *Journal of The Royal Society of Medicine*, (Royal Society of Medicine Press) sourced from [www.ncbi.nlm.nih.gov](http://www.ncbi.nlm.nih.gov) (Accessed on 2.3.2019).

smoking, which will more than treble by the year 2030.<sup>9</sup> It has mostly been postulated that the nicotine content of tobacco in abundance actually increases the carcinogenic potential of the plant. So, to an extent the views propagated by the above group have relevance. It becomes more important when the viciousness of cancer leads to a much-variegated social turmoil. However, is a total ban economically viable? Particularly when tobacco farming provides employment to a vast majority of the population and the tax on the processed substance gives a lot of revenue to the state. There is another school of thought which postulates that, based upon the statistical figures there are other professions wherein the end product leads to an equivalent mortality yet hardly anybody talks about it.<sup>10</sup>

### **3.2 Dietary Fads vs Tobacco as leading Health Effects**

A scholarly research article by Jacobi et al in American Journal of Pathology, has actually punctuated the potential and actual health promoting abilities of the tobacco plant.<sup>11</sup> In a recent study by the Lancet, it has been postulated that unhealthy diet is becoming the leading culprit in premature deaths and even surpasses the death caused combined due to tobacco, high blood pressure or any other high risk group taken together. It was seen that in the year 2017, dietary related deaths in India were second only to malnutrition leaving tobacco related deaths far behind.<sup>12</sup> Globally poor diet caused 10.9 million deaths which is far more than the total deaths caused due to tobacco intake.<sup>13</sup> However, it must be reiterated that, in no way tobacco farming or tobacco finished products are being eulogised or being given any form of clean chit. It was- it is - and it will be- considered as a top health hazard for human beings.

The intention of the paper is to consider the tobacco farmers plight, if the cultivation were to be banned all together and objectively analyze for a way forward. As a large segment of people find livelihood through this genre, pragmatic approach towards finding alternate usage of tobacco thereby weaning off from the intoxicating usage of the finished product is a prime objective.

### **3.3 Role of the state in containing the bad effects of tobacco**

The government is actually making it's say in the Supreme court for applying a rare doctrine" *Res Extra Commercium*" meaning outside commerce in the case of tobacco

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<sup>9</sup> Pete R. Lopez AD, Boreham J, Thun M, Heath C Jr, Doll R." Mortality from smoking world wide", Br Med Bull 1996; 52:12-21 US National Library of Medicine, National Institute of Health, Sourced from Pub Met 29.11.2018.

<sup>10</sup> Supra note 3.

<sup>11</sup> Johannes Jacobi, James J. Jang, Uma Sundram, Hayan Dayoub, Louis F. Fajardo, John P. Cooke," Wound Healing in Genetically Diabetic Mice; *American Journal of Pathology*, Available on [http://ajp.amjpathol.org/div.org/10.1016/S0002-9440\(10\)64161](http://ajp.amjpathol.org/div.org/10.1016/S0002-9440(10)64161). (Accessed on 1.2.2019).

<sup>12</sup> Sushmi Dey, "Unhealthy diet bigger killer than tobacco" *Sunday Times of India* 7.4.2019

<sup>13</sup> id

trade. This doctrine dates back to the era of Roman Law which actually denies an industry's legal ability to trade, thereby authorizing authorities to impose tougher restrictive regulations. The same doctrine followed in 1970s enabled certain states to ban alcohol completely. Tobacco industry may face the same consequence if this doctrine were to be applied. The Government Counsel Mr. R. Balasubramanian said that "effect of tobacco are much more than that of alcohol, hence invoking the necessity of the doctrine of *Res Extra Commercium* has assumed importance" but also made it clear that, it actually never meant to ban tobacco but only to dismantle the legal rights of the industry. This would enable the State to enforce strict regulations and any legal remedy otherwise available to the tobacco industry would not allow the latter to circumvent the strict regulations. However, while enforcing strict regulations it is pertinent to consider an important court ruling in the case *Re Virginia Tobacco Growers v. Union of India* and others, wherein the Hon'ble Court of Andhra Pradesh considered the case under Article 19(g), meaning "Reasonable Restriction" clause being applied to tobacco farmers and interjected that the decision of the Board (a nominated body and not a democratically elected body) was harsh and a workable solution has to be worked out as the so called "Crop Holiday" imposed by the board could affect adversely the employability of multitudes of farmers and farm laborer's.<sup>14</sup> There are other statistical figures also which actually obviates the fact that there are other ecological disasters being perpetrated with great elan and those are neither punished, nor reprimanded but instead they are encouraged in the name of developmental activities. One such rampant activity is deforestation which is occurring and is being encouraged to occur, in many instances at the behest of the State itself and it has led to an increase in nearly 500 new epidemics.<sup>15</sup> This aspect also needs a very serious discussion when restricting one trade is being thought because of the adverse effect it causes whereas an equally noxious trade is being quietly overlooked grossly, thereby violating the Law of Natural Justice.

#### **4. International and National Tobacco Regulatory Mechanisms: Some Representations**

##### ***4.1 International Scenario***

In Pakistan, it has been reported that tobacco farmers get better adjusted and economically aided and rewarded as local laws protect them. They thus become economically attractive than sugarcane, rice and other commodities as in the case of the latter it is only the government which aids them whereas in case of tobacco farming it is both the government as well as the companies making the end products which aids the farmers.<sup>16</sup> This has been

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<sup>14</sup> *Virginia Tobacco Growers v. Union of India and Others* 2000(6) ALD 720,2001(1) ALT 20.

<sup>15</sup> Dainik Bhaskar, 7.4.2019.

<sup>16</sup> Business Recorder founded by M.A. Zuberi; Protected by Local Laws, Regulations, tobacco farmers getting better returns, Recorder Report Aug 21 2016. Islamabad Available on <https://fp.brecorder.com> (Accessed on 21.12.2018).

aided by the Government policies through Pakistan Tobacco Board by installing key mechanisms for protecting farmer's welfare like annual demand forecasting, minimum support price, mandatory purchase of surplus crop by manufacturers and timely farmer payments<sup>17</sup>. This however does not mean that the strict control imposed through timely and meticulously examination through government appointed inspectors and conforming to health standards have been neglected. This takes place and, in many cases, there has been even penalization if the same was not adhered to. An important case *Turner v State of Maryland* should be mentioned wherein the defendant was fined for not agreeing to pay heed to deficiencies brought forward by Inspector in bad practices involved. However, the defendant went in for appeal wherein it was held that the inspection was not only for measuring the quality of the product but also to assess its health impact, portability and commercial activity. This also included as wide a net as any restriction for safe consumption of the product. Hence the Inspector was within his rights to levy the penalty. In case the other party refused to comply a suitable fine could be imposed.<sup>18</sup>

#### **4.2 National Scenario**

In India, a lot of anomalies can be seen regarding regulations imposed upon legal tobacco farming.<sup>19</sup> Recently, the nonprofit farmers body asked the Finance Minister to protect the interests of the Indian tobacco farmers while formulating GST Laws as the last prevailing taxation framework had rendered the FCV tobacco farmers jobless. This, in turn, had promoted smuggling of cigarettes to an alarming proportion.<sup>20</sup> It has to be seen in the larger perspective of the harmful effects of the end product and many articles written and judgements passed are actually based upon the effect that the smoke emanating from the pod of the cigarette causes to a human body and not the tobacco plant as such which the farmer is growing. An important case is *Gundling v Chicago* where the deadly effect of the smoke which the finished product of the dried tobacco leaves or other end products which were the culminating product of the process of manufacturing taking place in the factory was considered in depth and it was averred that the end carcinogenic effect was the actual happening of the process through which the raw tobacco leaves were subjected so as to obtain the addictive product and as such all the stricter provisions of the law to be directed towards this happening.<sup>21</sup>

#### **4.3 Recent International legal trends in formulating tobacco laws**

As per the Regulation of the tobacco manufacturer under the US Laws, President Barack Obama in the year 2009 (June 22, 2009) signed the law promulgated unto the Family

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<sup>17</sup> id.

<sup>18</sup> *Turner v. State of Maryland*, 637 A.2d/17,(Md 1992).

<sup>19</sup> Thehindubusinessline.com (Accessed on 2.1.2019)

<sup>20</sup> id

<sup>21</sup> *Gundling v. Chicago*, 177183;20S Ct633;44LED725(9.4.1900)SCB:176 iii 340;52 NE Also See "Medico Legal: Power to regulate the sale of cigarettes" 35J. *Am Med Ass* 298-299(4.8.1900).

Smoking Prevention and Tobacco Control Act of USA. This granted Food and Drug Administration (FDA) a comprehensive authority to regulate the manufacture, marketing and sale of tobacco and its related products. The new law (H.R.1256) thus ensures and enhances its power to take action to reduce the remnants of one of the leading preventable causes of death in the United States. This legal frame envisages a summary or overview, the standard isolation of tobacco product, how to restrict tobacco marketing, how to restrain the tobacco labelling pattern and display warning adequately upon tobacco products, explicit disclosure regarding the tar, nicotine and other smoke constituents, various forms of litigations available, how to pre-empt and the latest addition of how to prevent illicit trade in tobacco products.<sup>22</sup> FDA has been from time to time promoting and enhancing its already fully existing anti-smoking laws and regulations.<sup>23</sup> Recently, it has added the Children's Health Insurance Plan and Reauthorization Act (CHIPRA) of 2009, the Family Smoking Prevention and Tobacco Control Act of 2009 and ACA of 2010.<sup>24</sup>

#### ***4.4 Contribution of India with regards to recent developments in tobacco laws***

On becoming a party to WHO in 2005 (Feb 27, 2005), India promulgated the Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution Act 2003 (COTPA). This includes provisions like smoke free places, prohibiting tobacco advertising, promotion and sponsorship through most forms of mass media, health warning in picture forms on Tobacco Packaging and Labelling<sup>25</sup> thus giving power to certain enlisted officers to carry out search and seizure provisions promulgated in the Act.<sup>26</sup> Various articles cited in the said law are FCTC Article 8(Smoke free places Fact Sheet), FCTC Article 13(Advertising Promotion and Sponsorship Fact Sheet), FCTC Article 11 (Packaging and Labelling Fact sheet).<sup>27</sup>

#### ***4.5 Occupational Risks involving tobacco workers and growers***

Tobacco handling leads to a multitude of well-known complications, notably amongst them being green tobacco sickness, intoxication by pesticides, respiratory and skin related problems and Cancer.<sup>28</sup> When skin is exposed to an excessive amount of nicotine a typical disease results and this is called as Green Tobacco Sickness. This is preventable through

<sup>22</sup> Available on <https://publichealthlawcenter.org> >files (Accessed on 2.2.2019).

<sup>23</sup> Available on [www.ncbi.nlm.nih.gov](http://www.ncbi.nlm.nih.gov) (Accessed on 2.11.2018)

<sup>24</sup> Children's Health Insurance Programme Reauthorization Act of 2009, H.R.2.111 th Congress, 2009, 1st Session(Feb4 ,2009);Patient Protection and Affordable Care Act of 2010, H.R.3590,111 th U.S Congress 2<sup>nd</sup> Session(Mar 2010);Family Smoking Prevention and Tobacco Control Act, H.R.1256, 111 th Congress, 1st Session(June 22, 2019) Available on [www.ncbi.nlm.nih.gov](http://www.ncbi.nlm.nih.gov) .(Accessed on 12.12.2018).

<sup>25</sup> Section 13 of COTPA also COTPA G.S.R 1866(E).

<sup>26</sup> [tobaccocontrolaws.org](http://tobaccocontrolaws.org) (Accessed on 12.12.2019).

<sup>27</sup> Id.

<sup>28</sup>Shafey .O., et al. "The Tobacco Atlas , 3<sup>rd</sup> ed. Atlanta(GA):American Cancer Society and World Lung Foundation 2009. WHO Report on the Global tobacco Epidemic,2008, Geneva, WHO,2008.See Also Reuters, 29<sup>th</sup> April 2014 Available on [http://UK.reuters.com/article/2014/2014-04-24/Japan\\_tobacco-forecasts-17-profit-drop-on-restricting-costs.html](http://UK.reuters.com/article/2014/2014-04-24/Japan_tobacco-forecasts-17-profit-drop-on-restricting-costs.html). (Accessed on 21.11.2018).

the use of appropriate protective clothing. However, a significant effect occurs during Bidi processing and the resultant smoke which emanates during maturation, leads to multitudes of respiratory problems. This more so occurs in the process of Bidi rolling where workers have to sit in a hunched-up position for a long period which may lead to involvement of bones and muscles in addition to lung infection. This assumes higher concern as most of these workers are women and children.<sup>29</sup> Although a wide range of labour laws prohibit child labour in industries, yet in tobacco industry child labour is quite rampant hence the requirement of the stricter laws and even their stricter enforcement as has been already discussed in the paper. Two important and leading cases in this context are *US V. American Tobacco Company*<sup>30</sup> which was a leading case on unlawful trade practices where despite Federal Laws banning child labour, the tobacco Industry was involved in the same and had to bear a heavy punitive award and *Athanasaw v. US* where criminal case involving child labour was instituted as this involved slavery reminiscent of Pre Civil War.<sup>31</sup> Thus it can be seen that two very important social issues associated with tobacco farming i.e., bonded labour and child labour can form the basis of the Constitutional provisions being violated and hence the argument regarding the limitation of Constitutional guarantee under Article 16 be restricted can hold some ground when argued.<sup>32</sup>

## **5. Beneficial Uses of Tobacco**

Tobacco has been historically grown for purposes other than addictive products. In fact, in the past tobacco was being utilized for various purposes which were beneficial. These can be counted as:<sup>33</sup>

### **5.1 Killing Pests**

Tobacco is a natural pesticide against centipedes, caterpillars and snails which cause immense damage to the crops.

### **5.2 Relieve allergies**

Poultice of tobacco leaves applied to skin inflammation can help soothe itching and pain. Nicotine in tobacco actually draws out the allergens and repairs skin to normalcy.

### **5.3 Insect Repellent**

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<sup>29</sup> Pereira Vasconcelos de Oliveira P, et al. First reported outbreak of green tobacco sickness in Brazil. *Cadernos de Saude Publica*.2010;26:2263-69.

<sup>30</sup> *US v. American Tobacco Company* 221 US 106;31 ,S Ct 632;(29 May1911)

<sup>31</sup> *Athanasaw v. U.S.*, 227 US 326;33S Ct 285;56 Led 528(24 Feb1913).

<sup>32</sup> Otanez M. Social disruption caused by tobacco growing. Study conducted for the second meeting of the study group on economically sustainable alternatives to tobacco growing, Mexico City,17-19 June 2008.y

<sup>33</sup> Available on [www.realliving.com](http://www.realliving.com) (Accessed on 12.3.2019).

Boiling a package of chewing tobacco in a gallon of water and spraying this liquid can act as a natural insect repellent.

#### 5.4 Clears nasal passages

The native Americans boiled tobacco with desert sage and inhaled the steam which actually cleared up the lungs.

### 6. Conclusions and Suggestions

Hon'ble Court in Southern Karnataka overruled the labelling rules done by the government when the tobacco industry put its case successfully on the grounds of unreasonableness, thereby violating its trading rights.<sup>34</sup> The government however appealed in the Supreme Court and the ruling by the Karnataka Court was stayed upon. At the same time the Government of India put forcefully its case in the Supreme Court of India to use a rare doctrine "*Res Extra Commercium*" in order to deny the tobacco industry its legal right to trade by drawing a similar parallel with the Supreme Court's curbs upon the alcohol industry in the 1970s leading to the banning of alcohol consumption in two States. While citing this example, the government counsel extended it further by declaring tobacco a far more dangerous product than alcohol in terms of health hazard.<sup>35</sup> However, in the same breath the government also made it clear that there was no intention on the part of the government to ban tobacco altogether. The aim of the move, as forwarded by the government, was to curb tobacco, the smoke of which killed more than 900000 people/year. An important case, however in this context is *Virginia Tobacco Growers v Union of India and another*<sup>36</sup>, where the Andhra High Court actually delivered a very balanced verdict. On one hand it held the Board directive under Article 19 1 (g) to be ultra-restrictive thereby jeopardizing the livelihood of lakhs of farmers and farm laborer's involved in this profession but also made a special mention to make a just balance to be struck in relation to any restriction or curb and the public good that is done to the people at large. Thus, Courts, while judging the reasonableness of restrictions should keep in mind not only the interests of the citizens but also the problems faced by the community at large and a balance has to be struck between the individual interest and the community interest.

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<sup>34</sup> Available on <http://www.reuters.com/articles/US-india-tobacco....id USKBN1F125Q> Accessed on 1.1.2019.

<sup>35</sup> Available on <http://www.thewire.in/government/roman-law-doctrine-india-stub-tobacco-industry-rights>. (Accessed on 2.4.2019).

<sup>36</sup> *Virginia Tobacco Growers v Union of India and another* 2000(6)ALD 720, 2001(1), ALT20.

## **Institutional Credibility of Indian Higher Judiciary in light of Post retirement Vocations for Judges: A Constitutional Dilemma**

**Dr. Ashutosh Hajela\***

### ***Abstract***

*There has been a tremendous increase in the Judges of the Constitutional Courts being absorbed in various assignments post retirement from their judicial offices, tribunals being one of the major workstations for them. Since the power of such appointments lies in the hands of the government which also happens to be a potential litigation before the Judges, there is perceived a conflict of interest and duty on the part of the Judges who are to be picked up for the job as well as on the part of the appointing authority. The success and credibility of the judicial institution lies majorly on the perception about its integrity to the world by and large. The fact of appointments of the judges without any 'cooling period' causes raising of eyebrows against the integrity and credibility of the Judges in question as well as against the judicial institution as a whole. The Constitution of India also prescribes limited bars on post retirement vocations to be pursued by the Judges of the Constitutional Courts due to which such appointments keep on being made. The need of the hour is to impose 'safety valves' in the system in the larger interest of the justice delivery system.*

**Keywords:** Retired Judges, Tribalization, Judicial Independence, Cooling in Period

### **1. Introduction**

The fairness, neutrality and credibility of any judicial system lies implicitly in the fact that "Justice should not only be done but it must also be seen to be done."<sup>1</sup> The Judicial System is persistently flocked by the citizens as well as others as their last hope in matters of distress. The Institution commands immense faith of the masses and its credibility stands maintained only in terms of a fair, neutral and pursuant effective justice delivery. In order to bring the desired level of sacrosanct element in the judicial institution, the Judges manning the august institution need to be "above suspicion."<sup>2</sup> It is, therefore,

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\* Associate Professor, ALS, Delhi.

<sup>1</sup> *R v. Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, [1923] All ER Rep 233.

<sup>2</sup> "Caesar's wife must be above suspicion"

<http://www.oxfordreference.com/view/10.1093/acref/9780199539536.001.0001/acref-9780199539536-e-281>  
visited on 21.04.2017

imperative in the best interest of justice that the Judges must exhibit not even the remotest signs of prejudices<sup>3</sup> while discharging their judicial functions. The slightest doubt on the neutrality of the Judges while handling litigations and contestations is bound to mar the credibility of the judicial institution, by and large, before the masses.

## 2. Re-Employment Prospects of Judges

The current times have shown proliferation in the post retirement vocations being offered to the Judges of the High Courts as well as to that of the Supreme Court of India. The retired Judges of the Constitutional Courts are required at several forums like Appellate Tribunal for Electricity,<sup>4</sup> Armed Forces Tribunal,<sup>5</sup> Competition Appellate Tribunal,<sup>6</sup> National Consumer Disputes Redressal Commission, National Forest Commission, National Green Tribunal, Telecom Disputes Settlement and Appellate Tribunal, etc. to illustrate a few. Beyond the Tribunals, bodies like the Press Council of India,<sup>7</sup> the Law Commission of India,<sup>8</sup> etc. have also been led by the retired Judges of the Constitutional Courts. It is pertinent to note that the tribunals or other such agencies do contain a stipulation that the Chairpersons or the presiding officers/members therein shall be retired judges of the High Courts or the Supreme Court of India. Further, the power of appointment of the Chairman, Presiding Officers and the members of such forums lies with the Central or the appropriate government.<sup>9</sup>

**Conflict of Interest and Duty:** It is owing to the chain of these factual circumstances that the neutrality of such judges in the discharge of their judicial functions at the end of their tenure of Judge-ship may be questioned. It is a matter of fact that the government

<sup>3</sup> The term 'bias' is deliberately not being used since under the accepted principles of natural justice, a remedy lies against the persons infected by some or the other type of 'bias'.

<sup>4</sup> Electricity Act, 2003: Section 113: "A person shall not be qualified for appointment as the Chairperson of the Appellate Tribunal or a Member of the Appellate Tribunal unless he—(a) in the case of the Chairperson of the Appellate Tribunal, is, or has been, a Judge of the Supreme Court or the Chief Justice of a High Court; and (b) in the case of a Member of the Appellate Tribunal, is, or has been, or is qualified to be a Judge of a High Court; or....."

<sup>5</sup> Armed Forces Tribunal Act, 2007: Section 6: (1) "A person shall not be qualified for appointment as the Chairperson unless he is a retired Judge of the Supreme Court or a retired Chief Justice of a High Court.(2) A person shall not be qualified for appointment as a Judicial Member unless he is or has been a Judge of the High Court."

<sup>6</sup> Section 53D, The Competition Act, 2002: (1) The Chairperson of the Appellate Tribunal shall be a person who is, or has been a Judge of the Supreme Court or the Chief Justice of the High Court.

<sup>7</sup> Justice Markandey Katju, Judge, Supreme Court of India (Retd.) has been the Chairman of the Press Council of India. Information as available at: <http://presscouncil.nic.in/OldWebsite/chairman.htm> visited on 24.04.2017

<sup>8</sup> 20<sup>th</sup> Law Commission of India had been headed by Justice A.P. Shah, Chief Justice, Delhi High Court (Retd). Information available at: <http://lawmin.nic.in/la/LAW%20COMMISSION%20OF%20INDIA.pdf> visited on 24.04.2017. The Chairman of the current 21<sup>st</sup> Law Commission of India also happens to be Justice (Dr.) B.S. Chauhan, Judge Supreme Court of India (Retd). Information available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=138008> visited on 24.04.2017.

<sup>9</sup> Section 113(2), Electricity Act, 2003: "The Chairperson of the Appellate Tribunal shall be appointed by the Central Government after consultation with the Chief Justice of India. (3) The Members of the Appellate Tribunal shall be appointed by the Central Government on the recommendation of the Selection Committee....."

happens to be a litigator before the constitutional courts in a substantial number of cases and issues and it is the same government which holds the power of appointing the Chairpersons, the presiding officers and the members of various tribunals, commissions and other similar bodies from the retired judges of the same courts. This manifestly gives rise to a conflict of interest<sup>10</sup> and duty on both the sides<sup>11</sup> be it that of the Judge in question or the government wielding that authority. The Judge, having a duty to judiciously dispose off the matter before him, may be having an interest in securing his post retirement vocation(s). In a similar vein, the Government, being duty bound to meticulously and analytically cause appointments to the tribunals and other bodies, may have an interest in appointing a particular Judge as the Chairperson. In either of the cases what lies at the stake of the credibility of the judicial institution and the faith of the masses in the same, none of which must be compromised at all in the ultimate interest of the society.

It has been emphatically remarked by Mr. Shanti Bhushan, the former Union law minister and senior Supreme Court advocate that:

“[The] judges should not accept posts that are in the realm of the government as that could dilute their independence. If judges know that once they retire, they could be offered sinecures, they will yield to temptation. They will then try to please the political parties in crucial cases.”<sup>12</sup>

### **3. Injury to Rule against Bias**

It is imperative at this juncture to assess the “real likelihood of bias” or the “reasonable suspicion of bias” in all such matters where the retired judges are offered post retirement vocations by the government which happens to be a litigating party before such judges at some point of time. The very term ‘bias’ clearly reflects the psychological element of ‘predisposition’ or ‘prejudice’ of the Judge in question towards the issue(s) at hand. It has been held by the Supreme Court of India that “It [bias] is, in fact, a condition of mind,

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<sup>10</sup> In the matter of appointment of Justice P Sathasivam, the ex CJI as Kerala’s Governor, the bar association of the Supreme Court of India as well as that of the High Court in Kerala had appealed before the president of India against his appointment on the premise that “there was impropriety in a person who had served as CJI being appointed as governor by the president”. Information available at: <http://indiatoday.intoday.in/story/sathasivam-kerala-governor-cji-home-ministry-supreme-court/1/380730.html> visited on 26.04.2017

<sup>11</sup> Several protesting voices had been heard when Justice P.Sathasivam got appointed as the Governor of Kerala after retiring as the Chief Justice of India. Frontline had written that “It has led to legitimate apprehensions that a post which has so far been considered inappropriate for a retired CJI by both the executive and the judiciary might become a handy tool for the executive to woo those members of the judiciary who are close to retirement.” See V. Venkatesan, “Justice as Governor?” Frontline, October 3, 2014 available at: <http://www.frontline.in/the-nation/justice-as-governor/article6412702.ece> visited on 26.04.2017

<sup>12</sup> Avijit Chatterjee, “Stormy Sinecures”, *The Telegraph*, September 24, 2014 available at: [https://www.telegraphindia.com/1140924/jsp/opinion/story\\_18866574.jsp#.WQgXwbj3Bkg](https://www.telegraphindia.com/1140924/jsp/opinion/story_18866574.jsp#.WQgXwbj3Bkg) visited on 02.05.2017

which sways judgments and renders the judge unable to exercise impartiality in a particular case.”<sup>13</sup> It is pertinent also to closely appreciate the degree of the ‘likelihood’ of bias on the part of the Judges that in all probability is bound to pose a threat to the credibility of the judicial institution. It had been observed by Lord Denning M. R. in *Metropolitan Properties Co (F.G.C.) Ltd. v. Lannon* that

*“If right-minded persons would think that there is a real likelihood of bias [on the part of an inquiring officer], he must not conduct the inquiry.....There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer would be prejudiced ...If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision.”*<sup>14</sup>

It is thus amply clear that reasonable men from amongst the masses may suspect some ‘foul’ play when some Judge of a Constitutional Court gets appointed to a Tribunal or a Commission or a similar body bypassing the others who may have been ‘more’ worthy and meritorious to hold the post in question. The instance of the appointment of the former<sup>15</sup> Chief Justice of India as the Governor of Kerala within five months of his retirement<sup>16</sup> may act as a catalyst to provoke the reasonable men of the society to ponder over the neutrality of the higher judiciary in India. This appointment had been a subject matter of intense debate amongst the members of the Bar as well as amongst the Judges, too. The renowned jurist, Fali S Nariman, expressing his anguish over the issue has referred to it as “most improper and unfortunate.”<sup>17</sup> He has further emphatically expressed his opinion over the development stating that “judge seeking jobs or a seat in Parliament... gravely affects the concept of independence of the judiciary, proudly and repeatedly proclaimed - alas only by sitting Judges of the Supreme Court - as a basic feature of the Constitution”.<sup>18</sup> Several voices in identical tones have been aired by other eminent jurists and former judges of the constitutional courts.<sup>19</sup>

<sup>13</sup> *State of West Bengal v. Shivananda Pathak*, (1998) 5 SCC 513, 524 at Para 25

<sup>14</sup> WLR at p. 707 quoted by Justice Mathew in *S. Parthasarathy v. State of A.P.* (1974) 3 SCC 459, 465-66 as cited in *Principles of Administrative Law*, M.P Jain & S.N Jain, Wadhwa (Nagpur), 6<sup>th</sup> Edition, 2007 at p. 526

<sup>15</sup> Date of Retirement: 26.04.2014 Information as available at: [http://www.supremecourtindia.nic.in/judges/list\\_retired\\_chief\\_justices.htm](http://www.supremecourtindia.nic.in/judges/list_retired_chief_justices.htm) visited on 27.04.2017

<sup>16</sup> Date of taking Oath as the Governor of Kerala: 05.09.2014 Information as available at: [http://www.rajbhavan.kerala.gov.in/index.php?option=com\\_content&view=article&id=45&Itemid=41](http://www.rajbhavan.kerala.gov.in/index.php?option=com_content&view=article&id=45&Itemid=41) visited on 28.04.2017

<sup>17</sup> “Ex-CJI Sathasivam is Governor, jurists say it may lead to more political intervention”, Express News Service, September 04, 2014 Information as available at: <http://indianexpress.com/article/india/india-others/ex-cji-sathasivam-appointed-kerala-governor/> visited on 27.04.2017

<sup>18</sup> Information as available at: <http://indianexpress.com/article/india/india-others/ex-cji-sathasivam-appointed-kerala-governor/> visited on 27.04.2017

<sup>19</sup> Former CJI V.N. Khare has also expressed his reservation over the appointment of the ex CJI as the governor stating that the same may amount to “more political intervention in the coming years.” Information as available at: <http://indianexpress.com/article/india/india-others/ex-cji-sathasivam-appointed-kerala-governor/> visited on 27.04.2017

#### **4. Constitutional Prescriptions in context of Post Retirement Vocations for Judges**

It's Appointment<sup>20</sup> of such nature which raise a question on the credibility of the judicial institution on the basis of likelihood of bias on the part of the judges<sup>21</sup> in question. Ironically, the Constitution of India which has devised strong mechanism to keep the judiciary insulated from any pressure operating upon it prescribes no bar on the Judges of the High Courts and the Supreme Court of India to accept post retirement vocations. The Indian Constitution has devised a strong armory around the judges of the higher judiciary to sufficiently ensure that the judges discharge their judicial functions without being inhibited by any fear or being motivated by any favors. The Constitutional provisions ensure that the salary, perks and allowances of the Judges of the Constitutional Courts are not varied to their disadvantage.<sup>22</sup> Similarly, the Constitution of India mandates security of tenure<sup>23</sup> to all the judges of the higher judiciary so as to keep them totally insulated against any threats that may impair their impartial judicial functioning.

However, as far as the potential, though remote, threats to the credibility of the High office of the Judges operating during the final years of the holding of the office are concerned, the Constitution of India is almost silent. Nevertheless, the Constitution, with a view to safeguard judicial independence even after the retirement of the judges, does contain certain prescriptions but they do not seem to be adequate. The only inhibition

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<sup>20</sup> It is pertinent to recollect that Justice Ranganath Misra, Judge, Supreme Court of India, had been appointed the Head of the commission to look into the anti-Sikh riots of 1984 post assassination of the then Prime Minister of India, Smt Indira Gandhi on 26 April, 1985 under Section 3 of the Commission of inquiry Act, 1952. The Commission had held the police to be "guilty of various acts of commission" as well as the police administration, the Delhi Administration and the Central Government to have not "been able to carry out timely and effective intervention." The Commission, however, exonerated the Congress Party of any "involvement in the instigation and aiding of the riots." It reported that some of the Congress leaders indulged and participated in the riots, on their own, and having been propelled by their own considerations. See Introduction to Justice Nanavati Commission of Inquiry Report available at: [http://www.mha.nic.in/hindi/sites/upload\\_files/mhahindi/files/pdf/Nanavati-I\\_eng.pdf](http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/Nanavati-I_eng.pdf) visited on 02.05.2017

<sup>21</sup> Justice Ranganath Mishra, post his retirement as a Judge of the Supreme Court of India, had been appointed chairman of the National Human Rights Commission by the Congress government. It was a bit later that he got to serve as a Rajya Sabha M.P from Odisha by the Congress. See List of Rajya Sabha Members at Serial No. 664 available at: <http://164.100.47.5/Newmembers/mpterms.aspx> visited on 02. 05.2017

Also see "Judging the Judges-The courts in a changing world: Politics and Play", Ramachandra Guha, The Telegraph, Calcutta, March 07, 2015 available at: [https://www.telegraphindia.com/1150307/jsp/opinion/story\\_7255.jsp#.WQLFmbj3Bkg](https://www.telegraphindia.com/1150307/jsp/opinion/story_7255.jsp#.WQLFmbj3Bkg) visited on 27.04.2017

<sup>22</sup> Article 125, Constitution of India: "(1) There shall be paid to the Judges of the Supreme Court such salaries as may be determined by Parliament by law and, until provision in that behalf is so made, such salaries as are specified in the Second Schedule.

(2) Every Judge shall be entitled to such privileges and allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such privileges, allowances and rights as are specified in the Second Schedule: Provided That neither the privileges nor the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment."

<sup>23</sup> Article 124 (2) Constitution of India: "Every Judge of the Supreme Court shall.....hold office until he attains the age of sixty-five years"

against the judges of the Supreme Court as contained under the Constitution of India lies in the form of bar against “plead[ing] or act[ing] in any court or authority within the territory of India.”<sup>24</sup> Similarly with reference to the Judges of the High Courts, the Constitution imposes only a partial restraint on their post retirement vocations in the form of a bar against “plead[ing] or act[ing] in any court or authority other than the Supreme Court of India and the other High Courts.”<sup>25</sup> The picture that emerges out of the express constitutional provisions apparently projects that the independence of the judiciary can be ‘endangered’ only when a retired Judge of the High Court or the Supreme Court of India starts ‘practice-in-law’ before another Judge who would presumably give ‘preferential’ treatment to such ‘judge turned legal practitioners’, owing to their previous ‘status’, thereby compromising the integrity and credibility of the august institution. It is ironical that the Constitution of India did not foresee the damage to the credibility of the Institution by acts of the retired Judges of the constitutional courts accepting the Chairmanship of various Commissions, Tribunals and other identical bodies.

### **5. Tribunalisation under the auspices of the Constitution of India**

The Constitution of India, further, speaking through Article 323A and 323 B, enables setting up of “Administrative Tribunals” and “Tribunals for other purposes” by enactment through parliamentary process. The Constitution empowers the parliament to establish tribunals and also carry out the necessary rule making for the same, viz, jurisdictional limits,<sup>26</sup> powers exercisable, and rules of procedure applicable to them.<sup>27</sup> It is thus that the Parliament has come to enact various legislations, setting up different varieties of tribunals and requiring retired judges of the High Courts as well as that of the Supreme Court of India to act as their chairpersons or presiding officers or their members. The blow to the functional autonomy and independence of the judiciary that is struck by the political executive, here, is by way of offering the judges nearing their retirement, assignments to secure their ‘purse’ and ‘status’ after they have demitted their constitutional offices. It has been witnessed that some of the Judges fall ‘prey’ to such offers while some strongly resist them. Justice V.R. Krishna Iyer, the noted Judge and jurist, had aptly remarked in this context that

*“Judicial afternoons and evenings are sensitive phases, the incumbent being bothered about post-retirement prospects. The Executive plays upon this weakness to bend the integrity or buy the partiality of the elderly*

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<sup>24</sup> Article 124(7), Constitution of India: “No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India.”

<sup>25</sup> Article 220, Constitution of India: “No person who, after the commencement of this Constitution, has held office as a permanent Judge of a High Court shall plead or act in any court or before any authority in India except the Supreme Court and the other High Courts.”

<sup>26</sup> Article 323A (2) (b), Constitution of India: “specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals”

<sup>27</sup> Article 323A (2) (c): Constitution of India “provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals.”

*brethren.”*<sup>28</sup>

In an identical tone, the former Chief Justice of India J.S. Verma, while speaking his mind over the threat to judicial independence and functional autonomy arising from the ‘lure’ of post-retirement jobs, had categorically stated that

*“Recent instances where sitting judges have been recommended for appointments to government posts much before, they actually retire are very disturbing. I have always held that the post-retirement conduct of judges should be regulated to ensure that they have not been influenced by any extraneous factor of post-retirement jobs during their tenure.”*<sup>29</sup>

**Statistical Findings:** It is pertinent to categorize the appointments of the judges of the Constitutional Courts in order to critically appraise the impact of such conduct(s) and action(s) on the perception of institutional independence functional autonomy and institutional credibility of the august higher judiciary in India.

## **6. Resignation and subsequent appointments**

There have been witnessed instances wherein the Judges of the Constitutional Courts have resigned from their high office to pursue their march from judiciary to the other wings of governance. The perception of the common man towards such conduct on the part of the Judges incisively goes against the fair image of the august institution. It is emphatically being reiterated that the success of the judicial system in any system of governance lies heavily upon the element of fairness and neutrality of the institution as it appears before the masses who happen to be ‘layman’ in the field instead of the ‘proved delinquency’ on the part of the Judge (s). It has been aptly observed that “identifying anything about the ‘correctness’ of a ruling requires deep textual analysis, which is infeasible on a large scale”<sup>30</sup> by even the legal professionals, leave side the laymen.

It is pertinent to recall that Bombay High Court Chief Justice M.C. Chaglahad resigned from his office to grace the post of ambassador to the US in 1959<sup>31</sup>. In a similar vein, the

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<sup>28</sup> “A red herring for judicial independence,” Arghya Sengupta, The Hindu, September, 9, 2014 available at: <http://www.thehindu.com/opinion/lead/lead-article-a-red-herring-for-judicial-independence/article6391843.ece> visited on 02.05.2017

<sup>29</sup> Justice J.S. Verma during S. Govind Swaminathan Memorial Lecture at the Madras High Court in 2010 as cited in “Stormy Sinecures” Avijit Chatterjee, The Telegraph, September 24, 2014 available at: [https://www.telegraphindia.com/1140924/jsp/opinion/story\\_18866574.jsp#.WQgXwbj3Bkg](https://www.telegraphindia.com/1140924/jsp/opinion/story_18866574.jsp#.WQgXwbj3Bkg) visited on 02.05.2017

<sup>30</sup> “Jobs for Justice(s): Corruption in the Supreme Court of India”, Madhav S. Aney, School of Economics, Singapore Management University, Shubhankar Dam, School of Law, City University of Hong Kong and Giovanni Ko, Division of Economics, School of Humanities and Social Sciences, Nanyang Technological University, available at: <http://www.isid.ac.in/~epu/acegd2016/papers/MadhavSAney.pdf> visited on 20.04.2017

<sup>31</sup> “Stormy Sinecures”, Avijit Chatterjee, The Telegraph, September 24, 2014. Inputs available at: [https://www.telegraphindia.com/1140924/jsp/opinion/story\\_18866574.jsp](https://www.telegraphindia.com/1140924/jsp/opinion/story_18866574.jsp) visited on 25.07.2017

Also See “From Lordship to Excellency”, K.N. Bhat, The Asian Age, September 5, 2014 Inputs available at: <http://www.pressreader.com/india/the-asian-age/20140905/281994670679888> visited on 25.07.2017

Chief Justice of India, Justice Subba Raohad, as well, resigned from his office in the year 1968 in order to contest the election to the office of the President of India; however, he could not emerge successful in getting through<sup>32</sup>. Additionally, Justice Baharul Islam, while being a judge of the Supreme Court of India, had been chosen as the Rajya Sabha candidate by some political party.<sup>33</sup> Identically, Justice K.S. Hegde had also resigned from the high office of the judge of the Supreme Court in the year 1973, thereby getting elected as a member of the Lok Sabha.<sup>34</sup> He, later, became the Speaker of the House in 1977.<sup>35</sup>

## 7. Appointments on retirement

The other category of appointments is witnessed where the judges of the Constitutional Courts are found holding offices soon after their retirement from the high office. Such conduct on the part of the retired judges also creates a common perception that in the ending phase of the judicial career, the judges might have been approached by the executive in connection with the post in question. This again raises 'eyebrows' against the integrity of the Judge in picture as well as the credibility of the judicial institution as a whole.

It is pertinent to note that Justice M. Hidayatullah, the retired Chief Justice of India, had contested for the post of Vice-President of India and had been elected to the office thereafter.<sup>36</sup> In a similar vein, Justice Ranganath Mishra, the former Chief Justice of India also got appointed as the Member of Parliament (Rajya Sabha) by the Congress.<sup>37</sup>

Besides, there is a list of various tribunals, bodies, commissions and other similar forums which are headed by the retired Judges of the Constitutional courts. A peripheral view of the statutory backing to most of them shall reflect the implications of the scheme upon the independence and integrity of the judicial institution. The National Human Rights Commission, as an illustration, is required to be headed by a person who 'has been' the Chief Justice of India.<sup>38</sup> It is further required to have members, the eligibility of which stands with a person who has been a Judge of the Supreme Court. The said appointment is to be made by the President<sup>39</sup> of India after seeking recommendations from a Committee comprising of the Prime Minister, the Speaker of the House, the Minister-in-

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<sup>32</sup> "Stormy Sinecures", AvijitChatterjee, The Telegraph, September 24, 2014. Inputs available at: [https://www.telegraphindia.com/1140924/jsp/opinion/story\\_18866574.jsp](https://www.telegraphindia.com/1140924/jsp/opinion/story_18866574.jsp) visited on 25.07.2017

<sup>33</sup> See "From Lordship to Excellency", K.N.Bhat, The Asian Age, September 5, 2014 Inputs available at: <http://www.pressreader.com/india/the-asian-age/20140905/281994670679888> visited on 25.07.2017

<sup>35</sup> Inputs available at: <http://speakerloksabha.nic.in/former/hegde.asp> visited on 31.07.2017

<sup>36</sup> Inputs available at: <http://vicepresidentofindia.nic.in/former-vice-president/sh-m-hidayatullah> visited on 28.07.2017

<sup>37</sup> Inputs available at: <http://164.100.47.5/newmembers/Website/Main.aspx> visited on 31.07.2017

<sup>38</sup> Section 3 (2)a, The Protection of Human Rights Act, 1993

<sup>39</sup> Section 4 (1), The Protection of Human Rights Act, 1993

charge of the Ministry of Home Affairs in the Government of India, the Leader of the Opposition in the House of the People, Leader of the Opposition in the Council of States and Deputy Chairman of the Council of States.<sup>40</sup>The process, thus, to be adopted in the appointments, itself, causes a question mark on the attempt of State to “take steps to separate the judiciary from the executive”<sup>41</sup> as mandated by the Constitution of India.

The ‘involvement’ of the retired Judges of the High Courts and the Supreme Courts in various commissions and bodies also needs to be critically assessed to estimate the intensity and impact on the common man’s perception on the institutional credibility of the higher judiciary in India.<sup>42</sup> The matter needs urgent attention in the best interests of the justice delivery system in India.

## **8. Perceptions about Independence of Judiciary: Words of Caution**

It is pertinently important at this juncture to dive into the times of deliberations during the drafting of the Constitution of India amongst the top lawyers, leaders and statesmen of the country on the issue of safeguarding the perception of the image of the judicial institution as well as safeguarding judicial independence as a whole. There had been substantive discussions during the drafting of the Constitution of India on the issue of allowing the Judges to pursue offices post relinquishing of the constitutional office of the Judge and the implications thereof on the independence of the institution. Prof K.T. Shah had wanted the Constitution of India to mandatorily contain an inhibition against the judges of the Constitutional Courts from holding executive offices. He had proposed that

*“No one who has been a Judge of the Supreme Court, or of the Federal Court or of any High Court for a period of [five] years continuously shall be appointed to any executive office under the Government of India of the Government of any State in the Union, including the office of an Ambassador, Minister Plenipotentiary, High Commissioner, Trade Commissioner, consul, as well as a Minister in the Government of India or*

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<sup>40</sup> Section 4 (1), The Protection of Human Rights Act, 1993: Proviso

<sup>41</sup> Article 50, the Constitution of India.

<sup>42</sup> Justice A.K. Mathur has been the Chairperson of the Armed Forces Tribunal. Justice S.B. Sinha has been at the helm of affairs of the Telecom Disputes Settlement and Appellate Tribunal. Further, Justice K.G. Balakrishnan has been the Chairperson of the National Human Rights Commission; Justice G.P. Mathur, as well, has been a member of the Commission. Justice P.V. Reddy has been the Chairperson of the Law Commission of India. Justice H.K. Sema has been the Chairperson of the Uttar Pradesh Human Rights Commission. The West Bengal Human Rights Commission has been headed at a point of time by Justice Asok Kumar Ganguly as its Chairperson. Justice Mukundakam Sharma had been appointed as the Chairperson of the Vansadhara Water Disputes Tribunal while still serving as a Judge of the High Court. The Mahadayi Water Disputes Tribunal happens to be headed by Justice J.M. Panchal as its Chairperson. Justice Brijesh Kumar has been the Chairperson of the Krishna Water Disputes Tribunal. Justice Tarun Chatterjee has been roped in to head the Commission meant to resolve border dispute between Arunachal Pradesh and Assam. Justice H.S. Bedi. has been chosen to probe the Gujarat fake encounters in the capacity of the monitoring authority. Inputs as available at: <http://www.thehindu.com/news/national/Tribunals-headed-by-retired-Supreme-Court-judges/article12542603.ece> visited on 31.07.2017

*under the Government of any State in the Union.*"<sup>43</sup>

Prof Shah believed that since the executive had, in the past, tried to 'tempt' the Judges by showing lucrative postings on the executive side, any 'job-opening' for the retired Judges would only provide an opportunity to the executive to 'tame' the Judges through convenient modes. Prof Shah's apprehensions were supported by several members of the Constituent Assembly. Pandit H. V. Kamath, had felt that keeping open a room for the post retirement vocations in favor of the Constitutional Judges would impinge judicial independence and integrity. Head emphatically observed that:

*"If a judge aspires to or is made to feel that he can look forward to a job as an Ambassador, High Commissioner, Minister and things like that, he is human and after all we have our own weaknesses and it is human enough to suppose that he will not be above temptation that may be placed in his way by the Executive."*<sup>44</sup>

Kamath had, during the Constituent Assembly debates, strongly expressed the imperative of an independent judiciary armed with fearless judges. He had stated that

*"Our judges wherever they might be-in the States or in the Centre-must be models of judicial independence, fearless in their judgments and action without fear or favor of the State authorities or the Central authorities. If about Judges in harness or in office a condition like this is not laid down, then it is likely that we may not find them as strong, as true, as we would like them to be."*<sup>45</sup>

In a similar vein, various other members of the Constituent Assembly like Prof Shibban Lal Saxena,<sup>46</sup> Dr. P.K.Sen,<sup>47</sup> Naziruddin Ahmad,<sup>48</sup> etc.had been equally apprehensive of

<sup>43</sup>Language of Proposed Article 193-A. See Amendment No 2624 as moved by Prof K.T. Shah; Constituent Assembly Debates Vol VIII 7<sup>th</sup> June, 1949 <http://parliamentofindia.nic.in/ls/debates/vol8p17a.htm> visited on 26.07.2017

<sup>44</sup> Constituent Assembly Debates Vol VIII 7<sup>th</sup> June, 1949 <http://parliamentofindia.nic.in/ls/debates/vol8p17a.htm> visited on 26.07.2017

<sup>45</sup> Constituent Assembly Debates Vol VIII 7<sup>th</sup> June, 1949 <http://parliamentofindia.nic.in/ls/debates/vol8p17a.htm> visited on 26.07.2017

<sup>46</sup> Prof. Shibban Lal Saxena: "If the temptation of being appointed to other high positions after retirement is not removed, it will also be liable to be abused by the Executive or by any party in power and they may hold out such temptations which might affect the independence of the judiciary. I personally feel that the amendment is very salutary and healthy..... I hope that somewhere in our Constitution the principle enunciated here will be embodied so that the judiciary may be above temptation and nobody may be able to influence it. " See Constituent Assembly Debates Vol VIII 7<sup>th</sup> June, 1949 <http://parliamentofindia.nic.in/ls/debates/vol8p17a.htm> visited on 26.07.2017

<sup>47</sup> Dr. P.K. Sen: "The man who has held the office of a Judge should not be under the necessity of seeking office afterwards, and for that purpose wooing political parties and causes or other persons, and thereby lowering the dignity of the office which he has held..... I think it is absolutely essential that a Judge should be precluded from trying to get some office or other after he has vacated office. For that reason this provision is important, especially in this country, where we have known of person having filled offices in the Judiciary and then in the Executive and then again in the Judiciary. This sort of thing should be stopped." See Constituent Assembly Debates Vol VIII May 24, 1949 <http://parliamentofindia.nic.in/ls/debates/vol8p7b.htm> visited on 26.07.2017

<sup>48</sup> Mr. Naziruddin Ahmad: "To ask a Supreme Court Judge to take up any position of profit under the Government with the consent of the President would be to introduce a pernicious principle. Judicial officers,

the wider implications of the switching of the roles of the judges from the judiciary to the executive on judicial independence. However, Dr. Ambedkar could not fathom<sup>49</sup> the ‘fear complex’ of the members and he, not finding substantive merit in the proposals, set aside all of them. It is thus that the road was paved to the current day provisions in the Constitution of India imposing only partial restraints on the post retirement vacations for the Constitutional Judges only in the area of the Judges taking up practice at the courts of law.

However, the moot point is that the apprehensions of the members of the Constituent Assembly have come true in the contemporary times. Integrity of the judicial institution has come to be scrutinized at more than one occasion due to the instances of Judges having been in the driving seat of executive departments post their judicial innings. As has been aptly put forth by Mr. K.N. Bhat, Senior advocate at the Supreme Court of India and former Additional Solicitor General of India, It has to be realized that

*“The judiciary is too significant and sensitive an institution to be made to undergo ‘agnipareeksha’. It must not be put in situations where its integrity and honor are up for scrutiny. Public confidence is its life- blood. Even occasional suspicion of impropriety is all that is needed for it to curdle.”<sup>50</sup>*

The fact needs to be acknowledged that times have changed and public confidence in institutions involved in governance is changing. The citizens in contemporary times are more alert and more analytical in forming their perceptions. It is pertinent to note at this juncture that a petition had been filed before the Madurai Bench of the Madras High Court against Justice K.S. Radhakrishnan for having accepted the “Man of the Year” award from an animal rights organization, PETA (People for the Ethical Treatment of Animals). Justice Radhakrishnan had, through his judgment<sup>51</sup>, banned ‘Jalikkattu’ festival in Tamil Nadu on grounds of cruel treatment to the bulls involved in the game. The petition had been filed by one Salai Chakrapani, a Jallikattu enthusiast, who had contended that the fact of PETA awarding the author Judge of the judgment clearly reflects bias on the part

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especially of the highest rank should never be induced to accept any Government job. When they retire, they should never like up to Government for some sort of job after their judicial career is ended” See Constituent Assembly Debates Vol VIII May 24, 1949 <http://parliamentofindia.nic.in/ls/debates/vol8p7b.htm> visited on 26.07.2017

<sup>49</sup> Dr. B.R. Ambedkar: “The judiciary decides cases in which the Government has, if at all, the remotest interest, in fact no interest at all. The judiciary is engaged in deciding the issue between citizens and very rarely between citizens and the Government. Consequently the chances of influencing the conduct of a member of the judiciary by the Government are very remote...” See Constituent Assembly Debates Vol VIII May 24, 1949 <http://parliamentofindia.nic.in/ls/debates/vol8p7b.htm> visited on 26.07.2017

<sup>50</sup> See “From Lordship to Excellency”, K.N. Bhat, The Asian Age, September 5, 2014 Inputs available at: <http://www.pressreader.com/india/the-asian-age/20140905/281994670679888> visited on 25.07.2017

<sup>51</sup> Animal Welfare Board of India v. A. Nagaraja & Ors. Civil Appeal No. 5387 of 2014 (2014) 7 SCC 547 as available at: <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41513> visited on 27.07.2017

of the Judge since PETA had been a party in that case.<sup>52</sup> Notwithstanding the fact that the Supreme Court had stayed the proceedings<sup>53</sup> initiated against Justice Radhakrishnan (retd.), the question of acceptable' conduct of the Judges after their retirement from the high office needs to be addressed satisfactorily.

The Constitution of India contains strategic formula to prohibit taking of jobs by many officers after occupying high constitutional posts, keeping in view the sanctity of the post in question. The Constitution, for instance, debars the Comptroller and Auditor General of India from taking up any job<sup>54</sup> post relinquishment of the office. In a similar manner, the Constitution prescribes fetters on the Chairman of the Union Public Commission and that of the State Public Service Commission along with the members of the Commission as far as other employments under the Government of India or those of the State are concerned.<sup>55</sup> It is pertinent to recall at this juncture that Dr. Ambedkar had failed to accept the similarity in situations prevailing around the Public Service Commission and the Judiciary. Dr. Ambedkar had harboured a consistent opinion that the Judiciary decides and that it shall be deciding matters between the citizens, themselves and very rarely between the citizens and the government. It is thus, he ruled out any probability of the government wanting to 'influence' the judiciary. He had emphatically stated his view over the issue, holding that

“The judiciary decides cases in which the Government has, if at all, the remotest interest, in fact no interest at all. The judiciary is engaged in deciding the issue between citizens and very rarely between citizens and the Government. Consequently the chances of influencing the conduct of a member of the judiciary by the Government are very

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<sup>52</sup> Inputs as available at: <http://www.thehindu.com/news/national/Former-judge-who-banned-Jallikattu-moves-SC-against-Madras-HC-notice/article17287881.ece> visited on 27.07.2017

<sup>53</sup> Inputs as available at: <http://www.tribuneindia.com/news/nation/peta-award-to-retired-judge-sc-stays-proceedings-against-ex-judge-in-madras-hc/363580.html> visited on 27.07.2017

<sup>54</sup> Article 148 (4), the Constitution of India: “The Comptroller and Auditor-General shall not be eligible for further office either under the Government of India or under the Government of any State after he has ceased to hold his office.”

<sup>55</sup> Article 319, the Constitution of India: “Prohibition as to the holding of offices by members of Commission on ceasing to be such members.- On ceasing to hold office- (a) the Chairman of the Union Public Service Commission shall be ineligible for further employment either under the Government of India or under the Government of a State; (b) the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State; (c) a member other than the Chairman of the Union Public Service Commission shall be eligible for appointment as the Chairman of the Union Public Service commission or as the Chairman of a State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State; (d) a member other than the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of that of any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State.

remote.”<sup>56</sup>

However, it needs to be acknowledged that the current times have seen a proliferation in the number of cases before the Judiciary in which the government happens to be a party. As a necessary corollary to this, the government would like to explore and utilize every open opportunity to ‘influence’ the judges. It is in the best interests of justice that such vents be plugged conveniently and the ‘safe distance’ between the executive and the judiciary be maintained as prescribed under the Constitution of India.<sup>57</sup>

## 9. Suggestions

There is no denial of the fact that the tribunals happen to be the need of the hour keeping in full view the current rate of litigation in different fields. It is equally important that such tribunals be manned by persons of high judicial experience as well as impeccable integrity. It shall, therefore, be unwise to advocate a total ban on using the expertise and experience of the retired Judges of the Constitutional Courts in the tribunals and commissions. The problem at hand can be conveniently tackled by causing an increase in the age of retirement for the Judges of the High Courts as well as that of the Supreme Court of India. Hypothetically speaking, if the Judges of the Constitutional courts are allowed to hold the office till the age of seventy two<sup>58</sup>, their passion’ for any post retirement vocation will automatically fade away by that age. The Constitution of India, already envisions the situations wherein the services of a retired Judge of the Supreme Court of India or that of the High Courts may be pressed in action<sup>59</sup>. This may provide

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<sup>56</sup> See Constituent Assembly Debates Vol VIII May 24, 1949 <http://parliamentofindia.nic.in/ls/debates/vol8p7b.htm> visited on 26.07.2017

<sup>57</sup> Article 50, the Constitution of India, “Separation of judiciary from executive. - The State shall take steps to separate the judiciary from the executive in the public services of the State.”

<sup>58</sup> B.R. Ambedkar had, during the Constituent Assembly deliberations, admitted the international practices as far as the retirement age of the Judges across various judicial systems was concerned. He acknowledges the position prevalent in England where a person could hold office up to seventy years of age. He had also acknowledged the position as prevalent in the US affording almost a life term to the office of the Judge in the US Supreme Court. See Constituent Assembly Debates Vol VIII 7<sup>th</sup> June, 1949 <http://parliamentofindia.nic.in/ls/debates/vol8p17a.htm> visited on 26.07.2017

“In leading Supreme Courts abroad, the retirement age is above 65. In the High Court of Australia (which is the apex court there) it is 70, in the Supreme Court of Canada 75, in the Supreme Court of Ireland 70, in the Supreme Court of Israel 70, in the Supreme Court of New Zealand 68, in the Constitutional Court of South Africa 70 or after 12 years of service, and in the U.K. Supreme Court 75..... Uniquely, there is no retirement age for judges of the Supreme Court of the United States of America and they can serve until death, though judges retire at the age of their choice. Justice Souter retired at 69, Justice Blackmun at 85 and Justice Thurgood Marshall at 82. Chief Justice Rehnquist of the U.S. Supreme Court died in 2005 when he was 80, after serving it for 33 years. On average, the retirement age is found to be 78 in the U.S. Supreme Court.” Inputs at: “The Age of Judicial Reform: T R Andhyarujina, The Hindu, September 1, 2012 available at: <http://www.thehindu.com/opinion/lead/the-age-of-judicial-reform/article3845041.ece> visited on July 28, 2017.

<sup>59</sup> Article 128, the Constitution of India. “Attendance of retired Judges at sittings of the Supreme Court.- Notwithstanding anything in this chapter, the Chief Justice of India may at any time, with the previous consent of the president, request any person who has held the office of a Judge of the Supreme Court or of the Federal Court or who has held the office of a Judge of a High Court and is duly qualified for appointment as a Judge of the Supreme Court to sit and act as a Judge of the Supreme Court, and every such person so requested shall,

two way benefit to the judicial institution. Firstly, the Institution shall be able to receive the worthy services of seasoned judges for a greater period of time. Secondly, these Judges on Bench for a longer period of time may be sent on deputation, to act as Chairpersons/Presiding Officers of the various Commissions, tribunals or other such bodies. In this way, any apprehension on the neutrality and credibility of the presiding officers/chairpersons shall be totally ruled out. A Constitutional amendment needs to be brought about to do the needful in this regard, coupled with the corresponding amendments in the statutes governing the various tribunals and other similar bodies. Further, in order to keep the retired Judges away from the 'temptation' of continuity of income as well as to mitigate their financial insecurity, the pension payable to them may be abundantly increased.<sup>60</sup> A suitable amendment in the Constitution<sup>61</sup> needs to be incorporated for the same. Another viable option in this regard may be by way of introduction of a "suitable" Cooling Off period for all the Judges of the Constitutional period during which they may not be allowed to accept any office or post offer able by the government. As rightly pointed out by Adish C Agarwala, the Chairman, All India Bar Association, this would "dissuade judges on the verge of retirement from hobnobbing with people which can lead to questions of impropriety."<sup>62</sup> A period of two years after relinquishing the judicial office seems sufficient to snap off the vital ties of the judge in question with the government, the appointing authority.

It is thus that the perception of the masses pertaining to the institutional integrity and credibility of the judicial institution may be restored and substantively strengthened. The same shall also mitigate any 'underhand' dealings of the executive with the Judges at the verge of their retirement. The sanctity of the Judicial Institution needs to be preserved by meticulous and cautious policy making in the best interest of administration of justice. It is urgently imperative that all the stakeholders in the justice delivery system viz., the lawyers, judges, jurists, the law makers chalk out a concerted plan on the changes required to be made in the present scheme of utilizing judicial manpower in various arenas without impinging on judicial independence and without causing any stigma on the credibility of the institution.

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while so sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a Judge of that Court Provides that nothing in this article shall be deemed to require any such person as aforesaid to sit and act as a Judge of the Court unless he consents so to do."

<sup>60</sup> As per Dr. B.R. Ambedkar during Constituent Assembly debates: "In the United States, so far as pensions are concerned, the pension of a Supreme Court Judge is the same as his salary: there is no distinction whatsoever between the two. In England also pension, so far as I understand, is something like seventy or eighty percent of the salary which the Judges get. See Constituent Assembly Debates Vol VIII 7<sup>th</sup> June, 1949 <http://parliamentofindia.nic.in/ls/debates/vol8p17a.htm> visited on 26.07.2017

<sup>61</sup> Schedule II of the Constitution of India

<sup>62</sup> Avijit Chatterjee, "Stormy Sinecures", *The Telegraph*, 24 September, 2014 available at: [https://www.telegraphindia.com/1140924/jsp/opinion/story\\_18866574.jsp](https://www.telegraphindia.com/1140924/jsp/opinion/story_18866574.jsp) visited on 10.08.2017

## Acid Attack: A Gender-Based Violence Against Women in India

Dr. Priti Rana\*

### *Abstract*

*Acid Attack has emerged as a contemporary form of violence which is generally targeted against women with the intention of deforming her face and body and even to kill her. Increasing number of acid attacks over the years have created an alarming situation which needs to be redressed. Rejection of love or marriage proposals, refusal to pay dowry, rejection of sexual advances are some of the motivation behind the commission of such heinous offence. This paper explains the various physical, psychological and socio- economic consequences which ensue upon the victims of the acid attack and make their life worse than death. Furthermore, the paper delineates the various legal provisions to combat the menace of acid attack and how the recent amendments have changed the Indian legal system with respect to acid attacks. Efforts have been made in this paper to highlight the deficiency in the role played by the judiciary and police while dealing with acid attacks. Towards the end, the author has tried to give certain suggestions that might prove helpful in curtailing the perils of such an attack.*

**Keywords:** Acid Attack, Heinous offence, Legal Provisions, Amendments, Judiciary

### 1. Introduction

“Violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women.”<sup>1</sup> There is a wide spread violence against women around the world, based on considerations of their sex alone. Acid attack is one such manifestation of violence against women which is becoming a growing phenomenon in India. Though acid attack is a crime which can be committed against any man or woman, it has a specific gender dimension in India. Most of the reported acid attacks have been committed on women, particularly young women for spurning suitors, for rejecting proposals of marriage, for denying dowry etc. The reason behind this is that, the attacker cannot bear his rejection, loss of honour and shame,

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\* Assistant Professor, Faculty of Law, University of Delhi.

<sup>1</sup> The United Nations Declaration on the Elimination of Violence against Women, General Assembly Resolution, December 1993.

insecurity, jealousy, aggression and frustration; his so-called male ego comes in between all this, and as a result he takes revenge by destroying the body, specially the face of the women who dared to refuse him. It leaves the victim charred, blinded, and mutilated, it melts human flesh and even bones, causing excruciating pain and terror and scarred for the rest of their lives. A woman burnt by acid is like a living corpse. Those who commit such vengeful acts seek to sentence the victims to a plight worse than death.

Acid attack<sup>2</sup>, more formally known as vitriolage, is an act of intimate terrorism that involves the premeditated throwing of sulfuric, nitric, or hydrochloric acid onto another with the main intention of disfigurement.<sup>3</sup> These acids are mainly used as they are cheaply and readily available. Rampant sale of acid, without taking or asking for any proper documents during the time of sale, is seen to be the main reason of this crime being spread like a fire. This sadistic, cruel and heinous crime is on the rise now-a-days and innocent girls and women are becoming victims of acid attack. Acids have been thrown usually by the medium of moving motorcycles or on public roads, as it provides the easiest medium of escape even in broad daylight. Therefore, acid throwing<sup>4</sup> is an aggressive crime growing rapidly by which the person doing the crime seeks to inflict severe mental and physical trauma on the innocent victim. Women in different parts of India have been facing acid attacks from men for several reasons, as a result the lives of many women have been destroyed.

Thus, it can be said that men resort to acid attacks as a means to intimidate women and to impose their authority on her. Such kind of attacks nurtures his male ego and makes him feel that he is living up to the image of man created by the patriarchal society.

## **2. Meaning and Definition of Acid Attack**

Acid throwing is called an acid attack. Defined as the act of throwing acid or a similarly corrosive substance on to the body of another within the intention to disfigure, maim, torture, or kill. The research conducted by UNICEF reveals, "Acid attack is a serious problem all over the world, even children are becoming victims of acid attack in many cases. In an Acid attack, acid is thrown at the face or body of the victim with deliberate intent to burn and disfigure. Most of the victims are girls, many below the age of 18, who have rejected sexual advances or marriage proposals".<sup>5</sup> Acid attack or vitriolage is defined as the act of throwing acid onto the body of a person "with the intention of injuring or

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<sup>2</sup> Section 3(b) of Scheme for Relief and Rehabilitation of Offences (By Acids) on Women and Children- National Commission for Women, defined acid attack as "any act of throwing acid or using acid in any form on the victim with the intention of or with knowledge that such person is likely to cause to the other person permanent or partial damage or deformity or disfigurement to any part of the body of such person."

<sup>3</sup> Jane Welsh, It was like burning in hell. A comparative study of Acid Attack, Department of Anthropology

<sup>4</sup> Acid shall mean and include any substances which have the character of acidic or corrosive or burning nature that is capable of causing bodily injuries leading to scars or disfigurement or temporary or permanent disability

<sup>5</sup> [http://www.unicef.org/india/United\\_Nations\\_Secretary.doc](http://www.unicef.org/india/United_Nations_Secretary.doc).

disfiguring [them] out of jealousy or revenge."

Aim of most acid attacks is not to kill, but to disfigure and debilitate, something more brutal than murder. In such cases, the perpetrator wants the victim to live and suffer physically and emotionally for the rest of their life.<sup>6</sup> These attacks are used as a weapon to silence and control the victim by destroying what is constructed as the primary constituent of their identity, i.e., their body.

Thus, acid throwing is an extremely violent crime by which the perpetrator of the crime seeks to inflict severe physical and mental suffering on his victim. As stated above this kind of violence is often motivated by deep-seated jealousy or feelings of revenge against a woman. The acid is usually thrown at the victim's face. The perpetrator wants to disfigure the victims and turn them into a monster. Perpetrators of the crime act cruelly and deliberately. Acid violence is a premeditated act of violence as the perpetrator of the crime carries out the attack by first obtaining the acid, carrying it on him and then stalking the victim before executing the act.<sup>7</sup>

Furthermore, an acid attack has long-lasting consequences on the life of the victim who faces perpetual torture, permanent damage and other problems for the rest of her life. Victims normally feel worthless, afraid and modified and become social outcasts because of their appearance. They may become too traumatized and embarrassed to walk out of their house and carry out simple tasks let alone get married, have children, get a job, go to school, etc. Even if they are willing to pursue a normal life, there is no guarantee that society itself will treat them as normal human beings given their appearance and disabilities after an attack. They may not be able to work, or be able to find a job, and thus perpetually struggle to survive.

### **3. Consequences of Acid Attack**

Acid attack victim faces long-term consequences, after the attack, their lifestyle changes completely in one day, even their loved one's also start ignoring the acid attack victims. Due to their horrific physical appearances, society also looks at the acid attack victims as an alien. Acid attack victims themselves feel worthless and embarrassed to come out from their houses due to their drastic changes in their appearance, their remaining life is ruined after such incidences. After that attack they are not able to work due to their deformities, they do not get job opportunities as it is difficult for them to survive in society. Damage caused by acid attacks was irreparable and it affects the victim woman both physically and psychologically.

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<sup>6</sup> Parvathi Menon, Sanjay Vashishtha, Vitriolage and India- The Modern Weapon of Revenge.

<sup>7</sup> Sujoy Dhar, India's acid attack victim (2013, August 20) The Global Times, (Retrieved from <http://www.globaltimes.cn/DesktopModules/DnnForge%20%20NewsArticles/Print.aspx?tabid=99and tab module=94&article id=805020&module id=405 and Portal Id=0>)

### **3.1 Physical Consequences**

Acid eats through two layers of the skin, i.e. the fat and muscle underneath, and sometimes not only eats through to the bone but it may even dissolve the bone. The depth of injury depends on the strength of the acid and the duration of contact with the skin. Burning continues until the acid is thoroughly washed off with water. Thrown on a person's face, acid rapidly eats into eyes, ears, nose and mouth. Eyelids and lips may burn off completely. The nose may melt, closing the nostrils, and ears shrivel up. Acid can quickly destroy the eyes, blinding the victim. Skin and bone on the skull, forehead, cheeks and chin may dissolve. When the acid splashes or drips over the neck, chest, back, arms or legs, it burns everywhere it touches. The biggest immediate danger for victims is breathing failure.<sup>8</sup> Inhalation of acid vapors can create breathing problems in two ways: i.e. by causing a poisonous reaction in the lungs or by swelling the neck, which constricts the airway and strangles the victim. When the burns from an acid attack heal, they form thick scars which pull the skin very tight and can cause disfigurements. For instance, eyelids may no longer close, the mouth may no longer open; and the chin becomes welded to the chest. The victim may require many operations over a period of two to three years.

### **3.2 Social and Economic Consequences**

Victims face a lifetime of discrimination from society and they become lonely. They are embarrassed that people may stare or laugh at them and may hesitate to leave their homes fearing an adverse reaction from the outside world.<sup>9</sup> Victims who are not married are not likely to get married and those victims who have got serious disabilities because of an attack, like blindness, will not find jobs and earn a living. Discrimination from other people, or disabilities such as blindness, makes it very difficult for victims to fend for themselves and they become dependent on others for food and money.

### **3.3 Psychological consequences**

Victims of attacks do not only undergo severe physical trauma but also undergo traumatic changes in the way they feel and think. Psychological trauma is caused by both the terror victims suffer during the attack, as they feel their skin burning away, and after the attack by the disfigurement or disabilities that they have to live with for the rest of their lives. Victims suffer psychological symptoms such as depression, insomnia, nightmares, fear about another attack and/or fear about facing the outside world, headaches, weakness and tiredness, difficulty in concentrating and remembering things, etc. They feel perpetually depressed, ashamed, worried, and lonely. Victims suffer severe psychological symptoms for years, if not forever, because they are reminded every day of their physical scars. The

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<sup>8</sup> Dr. Harish Verma.(2012). Acid Violence against Women and its Socio-Legal Implications: The Indian Perspective, Civil and Military Law Journal, 48(3), 197-207.

<sup>9</sup> *Ibid.*

feeling of lack of hope and worth may never leave them.<sup>10</sup>

Thus, the consequences of an acid attack handicap the victim in almost every possible way. An attack of this nature not only leaves the victim grotesquely disfigured but also traumatized for the rest of her life. It becomes extremely difficult to cope with life after an acid attack. The victim loses her identity and becomes socially isolated.

#### **4. Legal Scenario with Respect to Acid Attacks**

The United Nations General Assembly passed the Declaration on the Elimination of Violence against Women in 1993. India has ratified this Declaration and is under an obligation to implement the same. Article 4 (f) of this declaration recommends member states to develop preventive approaches for violence against women by legal measures.<sup>11</sup> This article would further suggest that the quantum of compensation being awarded to the victims of such gruesome and inhuman crime is negligible. There should be separate provisions for granting exemplary damages to the victims of such crime. Furthermore, The CEDAW Committee has also recognized that states must act with due diligence to prevent violations of human rights. Under Article 253 of the Indian Constitution the Parliament has the power to make laws to give effect to these international agreements. Therefore, it can be said that India has an obligation to effectively curb the menace of vitriol age.

Initially there was no specific provision to deal with the menace of vitriol age. The perpetrators of these offences were charged for causing hurt<sup>12</sup> or grievous hurt using dangerous weapons or means. Causing grievous hurt invites the maximum punishment of life imprisonment and the charge of hurt invites the maximum punishment of three years. But these provisions were insufficient to deal with the perils of acid attack. There are three main reasons behind the same- i) the definition of grievous hurt as given under the Indian Penal Code is not inclusive of certain circumstances of acid attack as the definition clearly specifies and defines the nature of injuries which constitute the offence of grievous hurt. Grievous hurt<sup>13</sup> has been defined as emasculation of the victim's reproductive and sexual organs, permanent privation of the sight of either eye, permanent privation of the hearing of either ear, privation of any member or joint, the destruction or permanent impairing of any member or joint, permanent disfiguration of the head or face, fracture or dislocation of a bone or a tooth, and any hurt that endangers life or which causes the sufferer to be during the space of 20 days in severe bodily pain, or unable to follow [her

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<sup>10</sup> NCW Report retrieved from <http://ncw.nic.in/pdfreports/gender%20sensitization%20of%20police%20officers.pdf>

<sup>11</sup> Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (February 2, 1994).

<sup>12</sup> Section 324 of the Indian Penal Code, 1860

<sup>13</sup> Section 326 of the Indian Penal Code, 1860

or his] ordinary pursuits.

Therefore, if the perpetrator of acid attack causes only skin damage to the victim with no substantial damage to the other organs, it would not come within the pigeon hole of grievous hurt. Moreover, if no irreversible damage is caused to the victim it would not come within the purview of grievous hurt. ii) the definition of grievous hurt does not subsume the contempt, sympathy and stigma that the victims of acid violence face and nor does it take into consideration the loss of earning capacity of the victim. iii) if the accused was not charged under grievous hurt, he was penalised under the offence of causing hurt. But causing hurt only invites a meagre punishment of three years which is very inconsequential as compared to the heinous consequences which the victim of acid attack has to face. Whether to charge the perpetrator of acid attack with grievous hurt or with hurt was a very debatable issue and left a void for enactment of new laws to tackle with this grave situation. Furthermore, it was also pertinent to note that there was a lacuna in the existing law as there was no provision penalizing attempt to throw acid. In light of steep increment in such incidents, there was an urgent need to enact effective, efficacious and specific legislation on the issue of acid attacks.

### **5. Lacuna in the Indian Penal Code**

Indian Penal Code has provided relief to the victims of acid attack under Sections 320, 322, 325 and 326. But it is seen that these sections do not fulfill the gravity that is required for the seriousness of these offences. Moreover, the term “acid attack” is not defined anywhere, and the provisions also restrict them to corrosive substances. The definition of grievous hurt’ as given under Section 326 of the India Penal Code is not inclusive of certain circumstances of acid attack as the definition clearly states the injuries that constitutes grievous hurt. Therefore, if the perpetrator causes only skin damage to the victim of acid attack, with no substantial damage to other organs, it would not come under the ambit of grievous hurt. Further no provisions are there if there is a loss of income of the victim. Now if the accused is not charged under grievous hurt, then it will fall under hurt, which in turn invites a minimal punishment of three years imprisonment which is very inconsequential to the huge loss suffered by the victim. Further there was also a lacuna that, there was no provision for penalizing the accused for throwing acid. In light of the above discussion, it was felt that there was a need to enact an effective, efficacious, and specific legislation on the issue of acid attack and to cover all the loopholes that was present in the old existing law.

The Criminal Amendment Act, 2013 which was passed on the recommendations of the Verma Committee Report, brought into light the seriousness to deal to this acid attack offence. It inserted two new sections i.e. Sections 326A and Section 326B in the Indian Penal Code. Therefore, the new amendment is a welcoming step towards reining in this crime. For the purpose of rehabilitation, victims may also be given compensation as under

Section 357A of the Criminal Procedure Code, 1973. Another laudable step which has been brought by the Criminal Amendment Act, 2013 was the inclusion of Section 357C to the Code of Criminal Procedure. It states that all hospitals, public or private, whether run by the Central Government, the State Government, local bodies, shall immediately provide first-aid or medical treatment, free of cost to the victims of any offence covered under Sections 326A, 376, 376A, 376B, 376C, 376D or 376E of the Indian Penal Code, and shall also inform the police immediately.

A new direction was given to the movement against acid attack by the Criminal Law (Amendment) Act of 2013 which also enunciated the importance of bringing in provision to deal with gravity of this offence. Section 326A penalizes voluntarily causing grievous hurt by use of acid, etc. It states- Whoever causes permanent or partial damage or deformity to, or burns or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine: Provided that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim: Provided further that any fine imposed under this section shall be paid to the victim. Furthermore, Section 326B also penalises the attempt to throw acid. It states whoever throws or attempts to throw acid on any person or attempts to administer acid to any person, or attempts to use any other means, with the intention of causing permanent or partial damage or deformity or burns or maiming or disfigurement or disability or grievous hurt to that person, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine. Explanation 1.— For the purposes of section 326A and this section, ‘acid’ includes any substance which has acidic or corrosive character or burning nature, that is capable of causing bodily injury leading to scars or disfigurement or temporary or permanent disability. Explanation 2.— For the purposes of section 326A and this section, permanent or partial damage or deformity shall not be required to be irreversible. Therefore, the new amendment is a welcoming step towards reining in this crime. For the purpose of rehabilitation victims may also be given compensation under Section 357A of the Code of Criminal Procedure, 1973 which provides for victim compensation scheme. Another refreshing step which has been brought about by the Amendment Act, 2013 has been integration of Section 357C to the Code of Criminal Procedure which came into effect on February 3, 2013. The Section states that all hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under section 326A, 376, 376A, 376B, 376C, 376D or section 376E of

the Indian Penal Code, and shall immediately inform the police of such incidents. This Section is testimony to the fact that the Government is trying to provide proper first aid and medical healthcare facilities to the victims of acid attack.

## 6. Role of Police and Judiciary

The investigation agency i.e. the police should play a proactive and pivotal role to curb criminals and crime. But in India this concept occurs in only pen and paper. The action that the police take is inadequate and insufficient, especially when it comes to tackle or stop the violence against women. For example, one of the most common responses of police with respect to violence against women is that it is victim-precipitated.<sup>14</sup> They keep asking all sorts of irrelevant questions like about the dress code, why roaming in the darkness etc, thereby increasing the trauma of the victim. They are insensitive in their behaviour to deal with the victims of rape and other sorts of violence, inspite of Supreme Court's strict guidelines on the issue. Acid victims also feel reluctant to report acid attacks because they fear the harassment and ridicule from the police officers. Officers may frame acid violence investigations in terms of a woman's sexual history and questions of morality.<sup>15</sup> Several acid attack victims reported that their attackers bribed the police in order to influence the investigation. In order to deal with the insensitivity of the police officers in cases of violence against women, Criminal Amendment Act, 2013 introduced a proviso in Section 154 which deals with the recording of the First Information Report. According to this provision, in cases of violence against women, statement of the victim should be recorded before a women police officer. But there are very less of women police officers in the Department. Women police officers should also be trained to deal with the matter sensitively. Moral training should also be emphasized. They should be taught the value of their job, to not only fight against crime, but also to help the fellow citizens.

Before the passing of the Criminal Amendment Act, 2013, the persons accused of acid attack were not heavily punished, rather they were booked under hurt which invited a minimum punishment of 3 years, moreover they were also released on bail easily. Adequate compensation was not paid to the victims. In *Ravinder Singh vs. State of Haryana*<sup>16</sup> acid was poured on a woman by her husband for refusing to give her divorce. The husband was involved in an extra-marital affair. Due to this attack the victim suffered multiple acid burns on her entire body, which later led to her death. The accused was charged under Section 307 of the IPC. However, life imprisonment was not imposed even though the victim died. In *Syed Shafique Ahmed vs. State of Maharashtra*<sup>17</sup> a personal enmity with his wife was the reason behind a gruesome acid attack by the husband on his wife as well as another person. This caused disfiguration of the face of both the wife as

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<sup>14</sup> Supra note 6.

<sup>15</sup> Campaign and Struggle against Acid attack on Women (CSAAAW), Burnt not defeated 21-22 (2007).

<sup>16</sup> *Ravinder Singh v. State of Haryana* SC 856 AIR (1975)

<sup>17</sup> CriLJ 1403 (2002)

well as that of the other person and loss of vision of the right eye of the wife. The accused was charged under Sections 326 and 324 of the IPC and was awarded Rs. 5000 as fine and 3 years imprisonment. This case again shows that the punishment that is often awarded does not take into account the deliberate and gruesome nature of the attack and rests on the technicalities of injuries. This shows the callousness and insensitive nature of the judiciary. But times have changed, and after the case of Laxmi Agarwal, wherein a PIL was filed in the Supreme Court, the Court also laid down some important guidelines, which are listed below:

- *Counter sale of acid is completely prohibited, until and unless the seller maintains a register which contains the name of the buyer.*
- *No acids should be sold to a person who is below 18 years of age. Proper ID card should be shown by the buyer at the time of purchasing the acid.*
- *All the stock of acids should be declared by the seller with the concerned Sub-Divisional Magistrate within a period of 15 days. If it is not declared, then the goods will be confiscated by the Sub-Divisional Magistrate and a fine of Rs. 50000 will be imposed on him.*
- *The acid victim should be given a compensation of at least 3 lakhs from the concerned State/Central Government as the after care and rehabilitation cost. Of this amount, a sum of Rs 1 lakh shall be paid to the victim within 15 days of occurrence of such incident to facilitate immediate medical attention and the rest 2 lakhs must be given within two months as early as possible.*

The role of judges is also immense. They should see that the cases are expeditiously settled down and proper relief is given to the victims. Indian judiciary has come a long way to tackle acid attacks but the problem still persists. Only time will change the mindset of the people. Therefore, from the above discussion it can be concluded that, though pertinent laws on acid attack are prevalent, but they bear no fruits without any effective implementation machinery. For a law to be effective, all the organs of the state needs to work hand in hand, otherwise the pains and sufferings of the victims will be everlasting.

## **7. Conclusion**

Acid attack is possibly one of the most heinous crimes which a human being can commit. It takes an elaborate degree of sadism and depravity to indulge in something as cruel and inhuman. The criminal justice system needs to be stricter in its handling of acid attack cases. The Government of India is taking some positive proposal on the acid attack victims which are a welcome sign which would add upon the objectives of the Criminal Justice System. The compensatory Jurisprudence should also include within its preview the accidental victims of acid attack. The distribution and sale of acid should be banned except for commercial and scientific purposes. Acid should be made a scheduled banned

chemical which should not be available over the counter. The particulars of purchasers of acid should be recorded. The concept of Restorative Justice should be effectively implemented in the justice system. The idea of restorative justice is emerging as an answer to these issues. Justice has to necessarily move from retributive and deterrent to Restorative. Restorative justice is fundamentally concerned with restoring relationships, with establishing or re-establishing social equality in relationships. At a more concrete level, restorative justice “involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.”

## Impact of Judicial Activism on Good Governance In India

Shweta\*  
Tauseef Ahmad

### *Abstract*

*In Indian democracy there are three important pillars i.e judiciary, executive and legislature. Judiciary plays a very important role in maintaining the balance between the three pillars of democracy. It is the final interpreter of the Constitution and laws. The Supreme Court of India has continuously been interpreting the mandate for good governance contained in the Constitution. There is no universal definition of good governance but the basic key attributes of good governance are rule of law, accountability and transparency and judiciary plays a very important role in good governance through judicial activism. This article focuses on how judiciary helped to bring justice closer to common man and plays an important role in good governance.*

**Keywords:** *Judiciary, Executive, Legislature, Rule of Law, Good Governance*

### **1. Introduction**

India being a multicultural, multi-ethnic, multi-linguistic and multi-religious society, unity in diversity was aim of Indian constitution and our whole constitution summarize in 85 words of Preamble. The Preamble to our Constitution portrays the foundational principles: justice, liberty, equality and fraternity.<sup>1</sup> These foundational principles are spirit of constitution and the concept of justice, liberty and equality has to be seen together and they are complementary to each other and one cannot attain its purpose without the other. Together these three concepts will ultimately promote fraternity in the society and in order to fulfill the aspirations of every section of society, constitution provided fundamental rights to citizens of India and it is duty of three organs i.e. legislature, executive and judiciary to maintain these foundational principles and protect the fundamental rights of citizens.

Judicial activism and Good Governance are much debated topics in all the democracies. In our democracy there are three pillars and judiciary are one of the important pillars in our democracy. It is the final interpreter of Constitution and laws. Constitution which is a magna carta of socio-economic transformation, the apex court has continuously been interpreting the mandate for good governance enshrined in the Constitution on the altar

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\* \* Research Scholar, JMI

\* Ph D Scholar, JMI

<sup>1</sup> *Indian Young Lawyers Association v. The State of Kerala and Ors* (2018) SC.

of contemporary situations and challenges facing the country, whether due to global winds of change or from within.<sup>2</sup>

Our constitution is welfare-oriented constitution and welfare of people is motto of every democracy. So, it is expected from the legislature and executive to ensure the welfare of the people through their policy making process and implementation process respectively and, in every democracy, there are two principles that is separation of powers' and 'checks and balances'. Judiciary helps in maintaining check and balance among the three pillars of democracy. In case of violation of any rights of an individual through any law or action of the executive, the judiciary actively participates for the protection of the rights of that individual. That active participation of judiciary is known as judicial activism. So, judicial activism is connected to constitutional interpretation, statutory construction and separation of powers.<sup>3</sup>

## 2. Judicial Activism

In every democracy there is one basic and fundamental question what is role or function of judge. Is it the function of a judge merely to declare law as it exists-or to make law? And this question is very important because the scope of judicial activism depends on it. Earlier, judges do not make law. He merely interprets the law. Law is existing and eminent. The judges merely find it. He merely reflects what the legislature has said. This is the photographic theory of the judicial function. We have doctrine of separation of powers. Legislature is responsible for enacting the laws, executive is responsible for implementing and administering laws and judiciary is responsible for interpreting the laws. The law-making function does not belong to judiciary, it belongs to legislature. It helps the judges to escape their accountability for what they decide. They can plead helplessness by saying that it is a law made by the legislature and they have no choice but to give effect to it. The tradition of the law and the craft of jurisprudence offer such judges plenty of dignified exits from the agony of self-conscious wielding of power. And hence the incredibly persistent attempt on the part of lawyers and judges to convince the people about the truth of the lie that judges does not make law. Lord Reid asserted in a famous address, "We must accept the fact that for better or worse judges do make law and tackle the question how they approach the task and how should they approach it." Lord Denning also demonstrated that judges cannot afford to be timorous souls. They cannot remain impotent, incapable and sterile in the face of injustice. It is for the judge to give meaning to what the legislature has said and it is this process of interpretation which constitutes the most creative and thrilling function of a judge. Law making is an inherent and

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<sup>2</sup> Judicial Activism should not lead to the dilution of Separation of Powers, *available at*: <https://www.livelaw.in/judicial-activism-not-lead-dilution-separation-powers-president-pranab-mukherjee-judges-retreat/> (last visited on February 2, 2019).

<sup>3</sup> Harsh Vardhan Singh Jugtawat, "Judicial Activism in India: A Little Done and Vast Undone", 1 *IJLI* 59 (2016).

inevitable part of the judicial process. The judge infuses life and blood into the dry skeleton provided by the legislature and creates a living organism appropriate and adequate to meet the needs of the society. The judges mould the law according to the needs and the situation of society. They have an opportunity to give it its shape and direction. That is what the Supreme Court has been trying to do in India. The Supreme Court has developed a new normative regime of rights and insisted that a state cannot act arbitrarily but must act reasonably and in public interest on pain of its action being invalidated by judicial intervention.<sup>4</sup>

The Supreme Court started legal aid movement and developed different strategies to assist people. First was encouraged legal awareness then Court organized legal aid camp. Court would take lawyers to rural areas so that they try to solve rural people difficulties and they would advise them. Court added another dimension to solve the problems related to administration i.e. Lok Adalat. Then the last strategy which changes the Indian Legal System due to which roots of judiciary became more powerful than ever before. The purpose behind this is to provide access to justice to the poor and underprivileged segment of society. *Hussainara Khatoon v. State of Bihar*<sup>5</sup> is the best example of PIL where a PIL was filed for the protection of fundamental rights of some prisoner and judiciary respond positive to it. In this process Supreme Court has rewritten some parts of Constitution. For example, the due process clause which was rejected at the time of framing of Constitution was indirectly brought back to constitution through *Maneka Gandhi v. UOI*<sup>6</sup> judgment. This expanding right has encompassed, within itself, the right to bail, the right to a speedy trial, immunity against cruel and unusual punishment, the right to dignified treatment in custodial institutions, the right to legal aid in criminal proceedings and above all the right to live with basic human dignity. The new interpretation of Article 21 of the Constitution of India in *Maneka Gandhi*<sup>7</sup> case and change in the precedents set by *Ryland v. Fletcher*<sup>8</sup> case to provide for absolute liability. But in both of these cases objective of Supreme Court was to empower the citizens and to provide them justice in the form of damages, respectively. According to Merriam Webster's Dictionary of Law, *Judicial Activism* is the practice in the judiciary of expanding and protecting individuals' rights through decisions that depart from the established precedent or are independent of or in opposition to supposed constitutional or legislative intent.

In the words of Justice J.S. Verma, "Judicial Activism must necessarily mean the active process of implementation of the rule of law essential for the preservation of a functional

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<sup>4</sup> Judicial Activism in India, available at: [https://media.law.wisc.edu/m/4mdd4/gargoyle\\_17\\_1\\_3.pdf](https://media.law.wisc.edu/m/4mdd4/gargoyle_17_1_3.pdf) (last visited on February 1, 2019).

<sup>5</sup> 1979 AIR 1369.

<sup>6</sup> (1978) SC 710.

<sup>7</sup> *ibid.*

<sup>8</sup> LR 3 HL 330 (1868).

democracy.”<sup>9</sup>

In simple words judicial activism means Judiciary is ‘Active’ and true import of expression ‘activism’ in relation to the administration of justice is a situation when courts try to fill the vacuum in the actions of legislature and executive. It asks these bodies to take action or to make provisions for certain situations. Actually, judiciary’s power to grant *writs*, especially *mandamus*, *habeas corpus* and *quo warranto* by their very nature are orders to executive given by the judiciary. But when these powers are actively and excessively used then it is called ‘judicial activism’. This is done by judiciary by way of judicial decisions, direction and guidelines etc. Judicial Activism is a creative, innovative and dynamic role of judiciary where new laws come into existence. It means when the Court plays a positive role the court is said to be exhibiting the judicial activism. Through intense judicial activism, Supreme Court has become a symbol of hope for the people of India.

Judicial activism at world level is regarded as unwarranted, and seen as a work of judges with elitist attitude. But in India unlike legislature and executive stakeholders, common public has never frowned at judicial activism. In fact, it is an inherent limit of all ‘positive laws’ and common law precedents that they cannot provide solution for all kinds of problems which have their origin in more complex transactions and multi-dimensional state of affairs, given to highly dynamic modern societies. In such situations, judges cannot say that law does not have any solution for these new problems. They have to deliver the justice anyhow.

### **3. Reasons for the Emergence of Judicial Activism in India**

It is very difficult to state precise reasons for the emergence of judicial activism under any constitution. Further there cannot be any universal acceptance of these reasons to be correct, in view of the conflicting interests and ideologies of various groups of the society concerned with judicial activism in particular, and judicial power in general. The following are some of the well accepted reasons which compel a court or a judge to be active while discharging judicial functions assigned to them either by a constitution or any other organic law<sup>10</sup>.

There are three pillars in our democracy i.e. legislative, executive and judiciary. All works for the welfare of society and the welfare of society is their prime objective. Legislature has to make necessary legislation according to the needs of society and executive has to perform their administrative functions sincerely and with integrity. When two pillars i.e. legislative and executive fails to discharge their respective functions. It would lead to

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<sup>9</sup> Razia, “Judicial Activism and The Protection of Minorities” 1 *IJRDO* 1 (2016).

<sup>10</sup> Evolution and Growth of Judicial Activism available at [http://shodhganga.inflibnet.ac.in/bitstream/10603/32340/8/09\\_chapter%203.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/32340/8/09_chapter%203.pdf) (Last visited on February 2, 2019).

erosion in confidence in the constitution and democracy among the citizens. In such an extraordinary scenario the judiciary may legitimately step into the areas usually earmarked for the legislature and executive. The result is the judicial legislation and government by judiciary.

When the legislature fails to enact a necessary law to meet the societal needs, a vacuum is created. The vacuum is created by the inactivity, incompetence, disregard of law, negligence, corruption, utter indiscipline and lack of character among the two organs of governance viz. the legislature and the executive. Hence the remaining organ of the governance system, i.e. the judiciary is left with no other alternative but to expand its horizons and fill up; the vacuum created by the executive and the legislature.<sup>11</sup>

Judges are the guardian of Constitution. Constitution is grundnorm. If legislature enacts any law which violates the foundational principle of Constitution than it is the duty of the judiciary to preserve the foundational principles of Constitution and struck down such law.

Another reason is that the present generation of politicians is more concerned with getting political mileage for themselves by making lofty declarations of new welfare schemes each year but implementation part is not their priority. Old schemes are being merged with newly declared schemes, which always create confusion in beneficiaries as well as in the government servants who are responsible to implement these schemes. This confusion and lack of resources is a breeding ground for corruption. Ultimately people have to move the courts for getting these welfare schemes implemented.

These are some of the important reasons to understand why our governments are not working efficiently and why public have to look towards the courts. When legislature and executive organs of state fail to fulfill their constitutional obligations efficiently or if certain constitutional objectives, especially the objectives of rendering social, economic and political justice to the masses, are not pursued then judiciary can justifiably assert its judicial power, to achieve these constitutional aims. In this process, the judiciary sometimes has to play the role of the legislature by giving binding guidelines.<sup>12</sup>, role of policy maker, it ordered inter linking of rivers, and the role a monitor to supervise the execution of its guidelines. Sometimes it sets up special investigating teams also e.g. in the case of Gujarat riots Supreme Court set up a special investigating team under its own monitoring. On such occasions these actions are called 'judicial activism'. In most of the cases judicial intervention has been lauded by the people and it has increased the faith of people in the governing system of the country. But sometimes over activism of judiciary has also proved as an exercise of a new kind of limitless legislative or executive power, against whose actions even judicial review is also not possible. Sometimes Supreme

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<sup>11</sup> Ibid.

<sup>12</sup> *Vishaka and others v. State of Rajasthan and others* (1997) 6 SCC 241.

Court also behaves like an unanswerable sovereign who is not liable to anybody.

#### **4. Recent Legislations enacted through Judicial Activism**

Judicial activism has done a great service to society which can be inferred through following decisions:

##### ***4.1 Right to marriage – Fundamental Right***

In *Shakti Vahini v. Union of India*<sup>13</sup>, Supreme Court recognizes the right to marry a person of one's choice. Supreme Court held when two adults consensually choose each other as life partners; it is a manifestation of their choice which is recognized under Article 19 and 21 of the Constitution. Such a right has constitutional sanction and thus the consent of community or family is not necessary.

##### ***4.2 Sexual intercourse with minor wife is rape***

In *Independent Thought v. Union of India and Anr*<sup>14</sup>, Supreme Court held that sexual intercourse with minor (below 18 years) wife is rape. The Judgment has done away with the protection that husbands enjoyed under Section 375 exception 2 of the Indian Penal Code that allows husband to have sexual intercourse with a minor wife, provided that she is not below 15 years of age.

##### **4.3 Right to Privacy is a Fundamental Right**

In *Justice K.S. Puttaswamy (retd.), and anr. v. Union of India and others*<sup>15</sup>, Supreme Court held that right to privacy is protected under Article 21 of the Constitution of India.

##### ***4.4 Triple Talaq Unconstitutional***

In *Shayara Bano v. Union of India*,<sup>16</sup> Supreme Court of India declared the practice of triple talaq as unconstitutional by 3: 2 majority. It is violative of Article 14 and 21 of Constitutional.

##### ***4.5 Passive Euthanasia – making of living wills***

In *Common Cause v. Union of India* (March 9, 2018), the 5 constitutional bench while recognizing passive euthanasia, the Supreme Court has allowed “advance directive or living will”, by which patients can spell out whether treatment can be withdrawn if they fall terminally ill or are incompetent to express their opinion.

##### ***4.5 LGBT community is entitled, as all other citizens***

In *Navtej Singh Johar and Ors. v. Union of India Through Secretary Ministry of Law and*

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<sup>13</sup> (2018)7 SCC 192.

<sup>14</sup> (2017)10 SCC 800.

<sup>15</sup> (2017)10 SCC 1.

<sup>16</sup> (2017) 9 SCC 1.

*Justice*<sup>17</sup>, Supreme Court declared Section 377 is unconstitutional and held members of LGBT community are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the constitution. They are entitled to be treated as a human being.

#### **4.6 Husband is not master of wife**

In *Joseph Shine v. Union of India*<sup>18</sup>, Supreme Court said Husband is not the master of wife and struck down Section 497 of IPC as it violates of Article 14, 15 and 21 of the Constitution.

### **5. Meaning of Good Governance**

The concept of governance is as old as human civilization. What is “Governance”? It simply means the process of decision making and the process by which decisions are implemented. The quality of governance depends, in large measure, upon the indulgence shown by subjects.

Governance is an act of governing. And meaning of the verb ‘govern’ is, “to legally control a country or to be responsible for introducing new laws, organizing public services, etc.”<sup>19</sup> And when this term i.e. ‘governance’ is qualified by the adjective of ‘good’, then it conveys that act of governance should be in such a way which is good for the common man. Beneficial and convenient laws should be made, and public services should be organized in such a way which is citizen friendly. Policies of government should be designed and should be implemented efficiently, progressively, responsibly and these should become instrumental in empowering common man.

Expression ‘good governance’ was first time used by <sup>20</sup>The World Bank, in its report in 1989; World Bank used this term in reference to African, Sub-African and Asian countries.

Noteworthy, is after 1950s World Bank gave huge loans to ‘third world countries’ to boost up their infrastructural and overall development. But these countries could not use these grants effectively. Though many of these countries had democratic governments, but the attitudes of these governments was more or less dictatorial in nature, which resulted in corruption and mismanagement; Funds were not properly used; And the governments of these countries were not even able to repay these loans. At three occasions i.e. Toronto Round, Trinidad Round and Naples Round World Bank had written-off the loans given to these countries. But after 1985, once again these countries demanded writing-off of fresh loans, then World Bank denied and for all future loans it made

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<sup>17</sup> (2018) 10 SCALE 386.

<sup>18</sup> (2018)2 SCC 189.

<sup>19</sup> Oxford Advanced Learner's Dictionary, 556 (Oxford University press through Indira Printers, 6<sup>th</sup> edn,2000 ).

<sup>20</sup> B.L.Fadia and Kuldeep Fadia, Public Administration 753 (6<sup>th</sup> edn., 2008).

'introduction of good governance' a pre-condition.<sup>21</sup> In 1992 also in its report World Bank gave emphasis on 'good governance'. From these two reports of **World Bank** following points can be logically derived as part of 'good governance':

1. Efficient management of Public Sector.
2. New legal setups for development
3. Mechanism for fixation of responsibility, in case of lapses in administration
4. Setting up of administration in a more democratic way.
5. More efficient utilization of Natural as well as Human Resources
6. Enhancement in the capacity of public servants for more efficient governance.
7. Participation of civil society in administration of public welfare schemes.

For achieving these goals government of India took many new policy initiatives, which resultantly gave birth to many complexities. Participation of masses in administration was increased by many new measures such as Panchayati Raj Institutions, and bureaucracy has been made answerable for its all acts and omissions, by the way of Right to Information Act 2005. All these initiatives were taken to empower 'common man' and to reduce arbitrariness on the part of bureaucracy, so that efficient administrative system could be ensured and loans given by the World Bank could be utilized efficiently.

As per the **United Nations Commission on Human Rights**, the key attributes of good governance include transparency, responsibility, accountability, participation and responsiveness to the needs of the people. good governance has been said at various times to encompass: full respect of human rights, the rule of law, effective participation, multi-actor partnerships, political pluralism, transparent and accountable processes and institutions, an efficient and effective public sector, legitimacy, access to knowledge, information and education, political empowerment of people, equity, sustainability, and attitudes and values that foster responsibility, solidarity and tolerance.<sup>22</sup>

As per **UN Economic & Social Commission for Asia & the Pacific** "Good Governance has 8 major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making.

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<sup>21</sup> Ibid at 754.

<sup>22</sup> Good Governance and Human Rights, available at: <https://www.ohchr.org/en/issues/development/goodgovernance/pages/goodgovernanceindex.aspx> (last visited on February 2, 2019).

It is also responsive to the present and future needs of society.”<sup>23</sup>

In more general sense three things can be included in the sphere of good governance.

1. Rule of Law
2. Accountability
3. Transparency

These three are basic parameters of any democracy. Indian judiciary has always tried to ensure that governments should follow Rule of Law. There should be accountability and transparency in the functioning of executive as well as legislature.

**Y. K. Sabharwal CJI.**, during one of his lectures<sup>24</sup> on “Role of Judiciary in Good Governance” has outline parameters of ‘good governance’ as under:

*Key attributes of good governance include transparency, responsibility, accountability, participation and responsiveness to the needs of the people. Good governance is thus linked to an enabling environment conducive to the enjoyment of Human Rights and promoting growth and sustainable human development. The expectation of every civil society of its Government is that it would fulfill its commitments and provide an equitable atmosphere contributing to individual’s growth. A Government is expected to be fully accountable to its people and transparent in the use of public resources. It enforces the Human Rights including economic, social and cultural rights and has no place for corruption of any kind since dishonesty is anathema to economic well being as it transmits public money allocated for development unjustly into private coffers depriving the citizenry of its use for their welfare. In a nutshell, Good Governance entails effective participation in public policy-making, the prevalence of the rule of law and an independent judiciary, besides a system of institutional checks & balances through horizontal and vertical separation of powers, and effective oversight agencies.*<sup>25</sup>

## 6. Role of Judiciary in Good Governance

Judiciary in India enjoys a very significant position since it has been made the guardian and custodian of the Constitution. It is a watchdog against violation of fundamental rights guaranteed under the Constitution and thus insulates all persons, Indians and aliens alike, against discrimination, abuse of State power, arbitrariness etc. Due to the proactive role of the judiciary, liberty and equality have well survived in India. The rule of Law which is one of the most remarkable attributes of good governance prevails in India because of

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<sup>23</sup> Good Governance – United Nations ESCAP, available at: [https://www.unescap.org/ttdw/ppp/ppp\\_primer/314\\_good\\_governance.html](https://www.unescap.org/ttdw/ppp/ppp_primer/314_good_governance.html) (last visited on February 4, 2019).

<sup>24</sup>Justice Y. K. Sabharwal, Role of Judiciary in Good Governance, available at : [https://highcourthd.gov.in/sub\\_pages/left\\_menu/publish/articles/articles\\_pdf/goodgovernance.pdf](https://highcourthd.gov.in/sub_pages/left_menu/publish/articles/articles_pdf/goodgovernance.pdf).

<sup>25</sup> Ibid.

independence judiciary.

The judicial system has an important role to play ultimately in ensuring better public governance. There may be a plethora of regulations, rules and procedures but when disputes arise, they have to be settled in a court of law. There is no area where the judgments of Supreme Court have not played a significant contribution in the governance – good governance – whether it be – environment, human rights, gender justice, education, minorities, police reforms, elections and limits on constituent powers of Parliament to amend the Constitution. This is only illustrative.<sup>26</sup>

Today common public looks at judiciary with great hope for justice. This is because faith of people in other limbs of government has been eroded to a great extent. People are feeling that higher courts can provide remedy against every arbitrariness and high handedness of bureaucracy and other government instrumentalities. And in many cases judiciary has provided relief and justice even to the marginalized sections of society. In a series of landmark judgments, for instance, *S.P. Gupta v. Union of India*<sup>27</sup> the Supreme Court of India, by introducing public interest litigation (PIL), has granted access to persons motivated by ‘public interest’ to seek remedy through judicial intervention against misuse of power and indolence of the sluggish government departments. Supreme Court liberalized the requirement of *locus standi* and provided access to the poor and illiterate masses, through public spirited organizations and individuals. Court also redefined the concept of justiciability and included within judicial purview acts and omissions that were not considered to be fit for the resolution through judicial process according to traditional concepts of justiciability. In many such cases relief was provided by the Supreme Court where due to the gross failure of state machinery and due the neglect on the part of public functionaries or government officials in the discharge of their public duties, common folks were suffering.

The Supreme Court has, over the years, elaborated the scope of fundamental rights consistently, strenuously opposing intrusions into them by agents of the State, thereby upholding the rights and dignity of the individual, in true spirit of good governance. In case after case, the Court has issued a range of commands for law enforcement, dealing with an array of aspects of executive action in general, and of police at the cutting-edge level in particular. Some instances:

In *Hussainara Khatoon and others v. Home Secretary State of Bihar*<sup>28</sup> Supreme Court held that speedy trial is a part of Article 21 of the Constitution which guarantees the right to life and liberty and “the procedure established by law” for depriving a person of life or personal liberty (Article 21) also should be “reasonable, fair and just”. It emphasized that

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<sup>26</sup> Ibid.

<sup>27</sup> AIR 1982 SC 149.

<sup>28</sup> AIR 1979 SC 1360.

speedy trial is of the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes a denial of justice.

In *Prem Shankar Shukla v. Delhi Administration*<sup>29</sup>, the Supreme Court found the handcuffs and fetters on prisoners violating the guarantee of basic human dignity, which is part of the constitutional culture in India and thus not standing the test of equality before the law (Article 14), fundamental freedoms (Article 19) and the right to life and personal liberty (Article 21).

In *Ichhu Devi Choraria v. Union of India*<sup>30</sup>, the court declared that personal liberty is the most precious possession and that life without it would not be worth living. Terming it as its duty to uphold the right to personal liberty, the court condemned detention of suspects without trial observing that “the power of preventive detention is a draconian power, justified only in the interest of public security and order and it is tolerated in a free society only as a necessary evil.”

In *Nilabati Behera v. State of Orissa*<sup>31</sup>, the Supreme Court asserted the jurisdiction of the judiciary as “protector of civil liberties” under the obligation “to repair damage caused by officers of the State to fundamental rights of the citizens”; holding the State responsible to pay compensation to the near and dear ones of a person who has been deprived of life by their wrongful action, reading into Article 21 the “duty of care” which could not be denied to anyone. For this purpose, the court referred to Article 9 (5) of the International Covenant on Civil and Political Rights, 1966 which lays down that “anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”.

In *Joginder Kumar v. State of UP and Others*<sup>32</sup>, the court ruled that “the law of arrest is one of balancing individual rights, liberties and privileges on the one hand and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties of the single individual and those of individuals collectively...”.

In *Delhi Domestic Working Women’s Forum v. Union of India & Others*<sup>33</sup>, the Court asserted that “speedy trial is one of the essential requisites of law” and that expeditious investigations and trial only could give meaning to the guarantee of “equal protection of law” under Article 21 of the Constitution.

In *People’s Union for Civil Liberties v. Union of India and another*<sup>34</sup>, the dicta in Article 17 of the International Covenant on Civil and Political Rights, 1966 was treated

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<sup>29</sup> 1980 SCC 526.

<sup>30</sup> 1980 SCC 531.

<sup>31</sup> 1993 SCC 746.

<sup>32</sup> 1994 SCC 260.

<sup>33</sup> 1995 SCC 14.

<sup>34</sup> AIR 1997 SC 568.

as part of the domestic law prohibiting “arbitrary interference with privacy, family, home or correspondence” and stipulating that everyone has the right to protection of the law against such intrusions.

In *D.K. Basu v. State of West Bengal*<sup>35</sup>, the Court found custodial torture “a naked violation of human dignity” and ruled that law does not permit the use of third degree methods or torture on an accused person since “actions of the State must be right, just and fair, torture for extracting any kind of confession would neither be right nor just nor fair”.

In *Vishaka & Ors. v. State of Rajasthan & Ors*<sup>36</sup>, Supreme Court said that “gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognized basic human right. The common minimum requirement of this right has received global acceptance. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein and for the formulation of guidelines to achieve this purpose.... in the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at all workplaces, guidelines and norms are hereby laid down for strict observance at all workplaces or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 for enforcement of the fundamental rights and it is further emphasized that this would be treated as the law declared by the Supreme Court under Article 141 of the Constitution.”

*Social Action Forum for Manav Adhikar v. Union of India* (decided on 14-09-2018) Supreme Court has modified its directions issued in Rajesh Sharma case for preventing misuse of Section 498A of Indian Penal Code. A three judges’ bench led by CJI has withdrawn the earlier direction issued by a two-judge bench that complaints under Section 498A IPC should be scrutinized by Family Welfare Committees before further legal action by police.

The aforesaid cases are only a few examples from numerous judgments concerning human rights.

***Ensuring Rule of Law:***

When parliament made an amendment which provided that election of ‘prime minister’

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<sup>35</sup> AIR 1997 SC 610.

<sup>36</sup> (1997) 6 SCC 241.

will not be called in question any court, then Supreme Court struck it down<sup>37</sup>; because it provided special treatment to prime minister, which was against the principles of 'equality' enshrined in article 14 of the Constitution of India. It was a clear manifestation of Rule of Law i.e. all citizens are equal in front of law.

In *Maneka Gandhi v. Union of India*<sup>38</sup>, Justice P.N. Bhagwati held under Article 21 of Constitution of India, procedure established by law should be a just, fair and reasonable. Every law passed by legislatures and procedures established thereby should follow the principles of natural justice.

Indian judiciary took serious note of corruption cases related to politicians.

In *B. R. Kapur v. State of Tamil Nadu*<sup>39</sup> case, where J. Jailalitha was involved, it was held that acquittal in appeal does not remove the fact that in the period between conviction and acquittal in appeal, legal status of the concerned person was a convicted criminal'. Apex court held if any politician is convicted then up to acquittal in next appeal that politicians will be held as disqualified to contest any election under Section 8 of Representation of People's Act 1951.

Recently Supreme Court in its judgment in *Lily Thomas v. Union of India*,<sup>40</sup> has held that those political representatives, who are found guilty of offence punishable, more than two years will lose their seats in legislative assembly or the parliament, as the case may be, with immediate effect. After this judgment Sh. Rashid Masood, member of Rajya Sabha is first person who has lost his member of parliament after being convicted in a scam related to admission in Medical Colleges. A few days after this former Chief Minister of Bihar state, Shri Lalu Prasad Yadav has been found guilty in 'fodder scam case', by a special C.B.I. court and he also has lost his Lok Sabha seat.

It has been seen in post emergency period Supreme Court has become especially tough in cases related to politicians. The Apex Court in *Vineet Narain v. Union of India*<sup>41</sup> took upon itself the task of monitoring the investigations regarding the Hawala transactions. In *Gujarat riots* case, Special Investigating Team (SIT), has been appointed by the Supreme Court. Judiciary has started taking tough stance in the cases related to high profile accused. For recent example we can see that courts have not granted bail easily to Mr. Suresh Kalmadi, Mr. A.Raja and Mrs. Kanimodi. In another recent case Supreme Court denied extension of bail to Mr. Om Prakash Chautala. Earlier the court had, while extending interim bail of Chautala on August 12 asked the AIIMS Director to constitute

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<sup>37</sup> *Indira Gandhi v. Raj Narain*, AIR 1975 SC 865.

<sup>38</sup> AIR 1978 SC 710.

<sup>39</sup> AIR 2001 SC 3435.

<sup>40</sup> AIR 2000 SC 1650.

<sup>41</sup> AIR 1996 SC 3386.

a medical board and file a report giving specific answers to a query as to whether Chautala needs hospitalization.<sup>42</sup> The Supreme Court bench comprising of Justices H L Dattu and S J Mukhopadhaya on September 11 dismissed Chautala's plea seeking extension of bail given to him on medical grounds, saying the opinion of a high-level medical board shows his hospitalization is no longer required.<sup>43</sup> Court has shown that nobody is above the law of the land.

In *Tehseen S. Poonawalla v. Union of India & Ors*<sup>44</sup>, Supreme Court condemned the lynching incidents across the country. The Bench headed by Chief Justice Dipak Mishra said the horrendous acts of mobocracy cannot be allowed to become a new norm in the Country.

In *Govt. of NCT of Delhi v. Union of India & Anr* (decided on July 4, 2018), the Supreme Court held that the Lieutenant-General of the Delhi had to act as per the aid and advice of the Council of Ministers of Delhi Government except in matters of land, police and public order. It held that the LG cannot interfere in each and every decision of the Delhi Government. Although decisions of the Government have to be communicated to the LG, there is no need to obtain the concurrence of LG in all matters. The Court also held that Delhi was not a 'State', and occupied a special status under the Constitution.

In *Subhash Kashinath Mahajan v. State of Maharashtra & Anr*<sup>45</sup>, Supreme Court issued directions to prevent the misuse of provisions of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 (SC/ST Act).

In *Lok Prahari v. State of Uttar Pradesh & Ors*<sup>46</sup>, Supreme Court Quashing an amendment made in an Uttar Pradesh state law to permit former Chief Ministers to occupy government bungalows and held that such a legislation is "arbitrary, discriminatory and unsupported by the Constitution".

### ***Ensuring Accountability***

At many instances' judiciary has forced many state governments to fulfill their responsibilities. In Delhi government of National Capital Territory of Delhi, was forced to introduce C.N.G. in public transport system. In 2017 Supreme Court sets standards for firecrackers and ban on fire cracker in Delhi/NCR<sup>47</sup>. In 2018, The Supreme Court has ruled against imposing complete ban on firecrackers but has said that only less polluting green crackers can be sold, that too only through licensed traders. The Court has banned

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<sup>42</sup> Teachers' recruitment scam: Chautala surrenders before Tihar jail authorities, *available at*: <https://indianexpress.com/article/india/politics/teachers-recruitment-scam-chautala-surrenders-before-tihar-jail-authorities/> ( last visited on February 1, 2019).

<sup>43</sup> *Ibid.*

<sup>44</sup> (2018) 6 SC 72.

<sup>45</sup> (2018) 6 SCC 454

<sup>46</sup> (2018) 6 SCC 1.

<sup>47</sup> *Arjun Gopal v. UOI* 2017 SC.

online sale of firecrackers, restraining e-commerce... e-commerce websites from carrying out its sale. The Court also fixed duration for bursting of crackers. On the day of Diwali and other religious festivals, it will be between 8 PM and 10 PM. On Christmas Eve and New Year, it will be allowed only between 11.45 PM and 12.45 AM. The Court has also ordered that crackers can be burst only in designated areas<sup>48</sup>.

Indian judiciary has tried to make government more responsible and accountable to its people. Court came to the rescue of grossly under-paid workers;<sup>49</sup> in one case it took action on the basis of simple letter written by jail mate. Supreme Court gave Public interest litigation a new dimension – namely that of ‘epistolary jurisdiction’, through it court took action to provide humane treatment to prisoners<sup>50</sup>. It ordered release of bonded laborers who were just in the condition of hereditary slaves.<sup>51</sup>

Judiciary took the note of the plight of under-trial detainees as well<sup>52</sup>this was a decision which apparently made executive accountable and answerable, because there were many prisoners in jails against whom even preliminary inquiry was not conducted and still, they were in jail for many years. Besides these many other examples are present where judiciary has demonstrated its pro activeness e.g. victims of Bhopal gas disaster<sup>53</sup> pavement dwellers,<sup>54</sup> and many other such cases.

In *Parmanand Katara v. Union of India*,<sup>55</sup> the Court held that no medical authority could refuse to provide immediate medical attention to a patient in need, in an emergency case. This public interest litigation had arisen because many hospitals were refusing to admit patients in medico-legal cases. Hence, the Supreme Court declared that access to healthcare, is a justiciable right. In another prominent P.I.L., the Supreme Court ordered the relocation of these hazardous industries which were located near residential areas in New Delhi. In this case, it carved out the citizens’ ‘right to clean environment’ which was derived from the ‘protection of life and liberty’ enumerated in Article 21.<sup>56</sup>

In *Consumer Education and Research Centre v. UOI*<sup>57</sup>, Court held that Right to Good Health and Pollution Free Environment is a Fundamental Right.

The court has also recognized access to free education as a fundamental right.<sup>58</sup> This decision paved a way for a Constitutional amendment which inserted Article 21-A into

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<sup>48</sup> *Arjun Gopal and others v. UOI* 2018 SC.

<sup>49</sup> *People’s Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473.

<sup>50</sup> *Sunil Batra v. Delhi Administration*, AIR 1978 SC 1675.

<sup>51</sup> *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802.

<sup>52</sup> *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC 1360.

<sup>53</sup> *Union Carbide Corporation v. Union of India*, (1991) 4 SCC 584.

<sup>54</sup> *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545.

<sup>55</sup> AIR 1989 SC 2039.

<sup>56</sup> *M.C. Mehta v. Union of India* (1996) 4 SCC 750.

<sup>57</sup> AIR 1995 SC.

<sup>58</sup> *J.P. Unnikrishnan v. State of Andhra Pradesh*, (1993) 1 SCC 645.

the Constitution of India; And because of the alleged 'Judicial Activism' right to elementary education for children aged between 6-14 years, was guaranteed. "The Courts have also pointed to Directive principles in interpreting the prohibitions against forced labour and child labor. The enforcement of these rights leaves a lot to be desired, but the symbolic value of their constitutional status should not be underestimated."<sup>59</sup>

Commenting on such good judgments Prof. Upendra Baxi said that by the advent of the concept of 'public interest litigation' Supreme Court of India became Supreme Court for Indians.

In its zeal to deliver justice to people, Supreme Court not only gave path breaking judgments, but also started monitoring implementation of its guidelines and decisions.

### ***Ensuring Transparency***

Recently it has been seen that in coal block allotment case Supreme Court has made government to present all relevant documents since 1993, along with the guidelines which were followed while allocating coal blocks to private parties.<sup>60</sup>

During coal block case court has given stress on bringing accountability in administration. Since the last decade of the twentieth century Human Rights movement has been very active in India. Indian judiciary has also heard cases of human rights violation always at urgent basis.

The SC in *Justice K.S. Puttaswamy v. Union of India*,<sup>61</sup> famously known as the *Aadhaar Card* decision paved a way for debate on whether privacy can be conclusively regarded as a fundamental right or not. The nine-judge bench of the SC on 24<sup>th</sup> August 2017, delivered its verdict by unanimously affirming right to privacy is a fundamental right under the Indian Constitution.<sup>62</sup> The judgment can undoubtedly be seen as a historic and a landmark verdict of all times, and it can be regarded as one of the prime civil rights judgments delivered by the SC in the history. The SC, however, elucidated that like most other fundamental rights, the right to privacy is also not an absolute right.

Recently Supreme Court asked the Centre and states to maintain transparency in appointments of Chief Information Commissioner and Information Commissioners and

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<sup>59</sup> Lecture by Hon'ble Mr. K.G. Balakrishnan, Chief Justice of India, Judicial Activism under the Indian Constitution (Trinity College Dublin, Ireland – October 14, 2009), [http://nja.nic.in/P-950\\_Reading\\_Material\\_5-NOV-15/1.judicial\\_activism%20balakrishnan.pdf](http://nja.nic.in/P-950_Reading_Material_5-NOV-15/1.judicial_activism%20balakrishnan.pdf).

<sup>60</sup> The Supreme Court on Wednesday directed the Centre to place before it the records of all screening committee meetings on coal block allocations between 1993 and 2011 along with the guidelines which were followed while allocating coal blocks to private parties, <http://indiatoday.intoday.in/story/sc-asks-govt-to-clarify-rules-adopted-in-coal-block-allocation/1/309385.html>.

<sup>61</sup> (2015)8 SCC 735.

<sup>62</sup> The Supreme Court Right to Privacy Judgment- 1 Foundations, available at <https://indconlawphil.wordpress.com/2017/08/27/the-supreme-courts-right-to-privacy-judgment-i-foundations/> (last visited on February 4, 2019).

upload the details of search committees and applicants on the website.<sup>63</sup>

### **7. Instances When Judicial Activism Has Crossed Its Limits**

But sometimes in the name of good governance judiciary has certainly crossed its limits and has interfered in those areas which are not subject to judicial review. For instance, Supreme Court in July 2009 issued a notice to the Union government seeking an explanation of the steps taken by it to ameliorate the plight of Indian students in Australia, who were facing racially motivated attacks, at that point of time. Foreign policy is a sphere which is considered to be non-justiciable, where courts cannot interfere. Even then, this interference by Indian courts did not attract criticism.<sup>64</sup>

“Next, and almost equally striking, example is a Supreme Court notice questioning the proliferation of Mayawati statues, allegedly, worth crores of rupees, in Uttar Pradesh. Like foreign policy, budgetary allocations (butter, guns or statues?) are non-justiciable. But judicial interference in this matter too has not been deprecated, nor is it worthy of serious censure.”- The Hindu.<sup>65</sup> An activist approach by judge has always a tendency to be biased in favor of his own ideological convictions.

In the words of Prof. Upendra Baxi<sup>66</sup>, “*Judicial activism makes sense only when its performers remain recognizably as ‘judges’. When seen otherwise, say politicians in judicial robes or as partisans of social and even human rights movements, unburdened by the craft and task of adjudication, they forfeit their legitimacy.*”

Former Chief Justice K.G.Balakrishnan, in his lecture at Trinity College Dublin’, Ireland.- October 14,2009., has strongly advocated the ‘judicial activism’ in the following words:

*The expansion of ‘judicial review’ (which is often described as ‘judicial activism’) has of course raised the popular profile of the higher judiciary in India. However, arguments are routinely made against the accommodation of ‘aspirational’ directive principles within the ambit of judicial enforcement. There are two conceptual objections against the justiciability to these positive obligations. The first is that if judges devise strategies to enforce the directive principles, it amounts to an intrusion into the legislative and executive domain. It is reasoned that the articulation of newer fundamental rights is the legislature’s task and that the judiciary should refrain from the same. Furthermore, it is posed that executive agencies are unfairly burdened by the costs associated with these positive*

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<sup>63</sup> Maintain Transparency In Appointments Of CIC & Information Commissioners: SC To Centre, available at: <https://www.livelaw.in/maintain-transparency-in-appointments-of-cic-information-commissioners-sc-to-centre/>

<sup>64</sup> Abhinav Chandrachud, “Dialogic Judicial Activism in India”, *The Hindu*, July 18, 2009.

<sup>65</sup> Ibid.

<sup>66</sup> Upendra Baxi, *Judicial Activism in India*, (Oxford University Press ed. 2002).

*obligations, especially keeping in mind that these obligations were enumerated as directive principles by the framers on account of practical considerations. This criticism mirrors the familiar philosophy of 'judicial restraint' when it comes to constitutional adjudication. However, the second objection to the reading in of positive obligations raises some scope for introspection amongst judges. It can be argued that the expansion of justiciability to include rights that are difficult to enforce takes away from the credibility of the judiciary in the long-run. The judicial inclusion of socio-economic objectives as fundamental rights can be criticized as an unviable textual exercise, which may have no bearing on ground-level conditions. In turn the unenforceability and inability of state agencies to protect such aspirational rights could have an adverse effect on public perceptions about the efficacy and legitimacy of the judiciary.*

All huge aims and sacred motives which judiciary states to justify its over activeness while delivering decisions against legislative bodies and executive, prove to be hollow cries when it comes to the judicial accountability. Supreme Court has declared itself out of the purview of Right to Information Act (R.T.I. Act). It was dragging its feet back when matter of 'judges declaring their properties' came for consideration.

Union law minister Ravi Shankar Prasad said the judiciary must leave lawmaking to Parliament and calling upon judges to respect the constitutional principle of separation of powers. Prasad's comments come in the backdrop of the government's criticism of judicial activism, a point of friction between the executive and the judiciary.

*"We are proud of the judiciary and are committed to its independence. If the executive makes a mistake, the judiciary must step in. But my problem is with governance. Governance and policymaking must be left to those who are entrusted with the task,"*

There are some occasions where it seems as if Higher judiciary, under the garb of judicial activism, is actively cornering benefits for itself. In **State of Uttar Pradesh v. Jeet S. Bisht**<sup>67</sup>, where petitioner, a consumer, approached Allahabad High Court, to fill two seats of members in district consumer forum, so that his grievance against electricity board should be redressed. But High Court, instead of working actively for the particular consumer's rights, provided guidelines to state government for setting up new benches at state level on the lines of Central Administrative Tribunal, and make provision for the appointment of Retd High Court judges as the presiding officers of these benches. State government appealed in Supreme Court against this decision of the Allahabad High Court. Supreme Court moved one step even forward, and provided guidelines for all state governments of India, to make similar provisions and setup consumer forums in the same manner where Retd Supreme Court judges will be made presiding officers. At times it seems that higher judiciary is not working in 'public interest'; rather it is working in 'self-

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<sup>67</sup>(2004) 11 SCC 352.

interest’.

In lower judiciary, corruption is rampant at high scale, but higher judiciary never showed that much activeness in tackling this menace which it shows in curbing corruption related to bureaucracy and related to elected political representatives.

## 8. Conclusion

Judicial activism is a necessary sin of modern legal system. In highly dynamic society situations in social and economic field change with a very fast speed, whereas administration is of very sluggish and static nature. Due to this many innocent people do suffer, which invites an active role of judiciary to provide relief. On the other hand in a developing country like India where 70% population lives in villages, a great number of people is still uneducated out of these majority are below the poverty line, hence under privileged; though literacy rate is more than 64%, but the level of education is very low among these people; many people are living in tribal areas. For these reasons these citizens of the country are not in a position to access the court of laws for getting justice. Supreme court by providing relaxation in conditions of *locus standi*, and by introducing P.I.L. has really opened the doors of justice for these poor and secluded people. Though P.I.L is many a times has been misused by many people to get cheap popularity, but even then, many works of wider public effect have been done by this medium. Many critics have condemned attitude of higher judiciary by labeling it as ‘judicial populism’. These days every Chief Justice of the Supreme Court tries to deliver at least two or three path breaking judgments before getting retired. Sometime in this effort they deliver judgments which are not ‘path breaking’ but only controversial, e.g. Supreme Court judgment in National Eligibility Test-cum-Entrance Test (NEET)<sup>68</sup> case has given a judgment which actually has worked against the convenience of students. But, some judgments, in the near past are really of revolutionary nature, which have a long-term effect on the political system as a whole. Earlier court held that it is mandatory that all the contestants to elections should disclose how many criminal cases are pending against them. This helped people in knowing more about their would-be representatives. And now verdicts which provided for cancellation of seats on getting convicted for more than two years, and for ‘None of The Above’ button in E.V.M.s, will definitely help in decriminalization of Indian politics.

But, as the judiciary is also comprised of ‘human beings’, and there are some good as well as some bad ‘human beings’ in every field; judiciary is no exception to this rule. Judges are not ready to hold themselves accountable for their performance, which is a wrong attitude. Judges should change this attitude, as they say, “charity begins at home”. On the whole we can conclude that Indian judiciary enjoys very strong powers as well as

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<sup>68</sup> *Christian Medical College, Vellore v. Union of India*, 2013 (9) SCALE 226.

faith of Indian masses, so it casts an equally burdensome responsibility on it to work in exemplary manner. If judiciary will bring transparency in its works then it will not only enhance the faith of people in itself but also will become more effective in providing justice to people and in reviewing the performance of the other two limbs of the state. India is a country of poor masses which are mostly living in villages, where even today feudalistic tendencies are present. This feudalistic mindset is equally present in bureaucracy and in politics, which is main reason for the presence of discrimination on the basis of caste, religion, ethnicity, race, sex and region. And due to these reasons centrifugal forces are also prospering in India, which are a threat to the security of the country. Naxalite movement which is present in many states of India is an example of armed revolt, which originated, from people's struggle against injustice. This anti state movement is effectively recruiting its fighting cadre from villages because at village level still landlords are making socio-economic and even physical exploitation of poor tribal people and people related to lower caste.

In such a scenario, judiciary should actively try to provide justice to poor masses, so that they should not fall in the trap of Naxalites.

But it is a truth that higher judiciary itself is engrossed with feudalistic mentality, which is quite visible by the apparent fact that presence woman is negligible in judiciary. Nepotism is also increasing in the appointment of judges in higher judiciary<sup>69</sup>.

Hence we can say that 'judicial activism' in its essence is a double edged sword which if used with care and caution then can yield very good results which may help in spreading justice as well as good governance in the country, but if used with negligence, willfully or otherwise, can harm the whole system of governance and will destroy the faith of people in judiciary.

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<sup>69</sup> *Nepotism in judiciary: Punjab and Haryana HC judge's relative resigned from the AG office*, available at: [http://articles.timesofindia.indiatimes.com/2013-09-08/india/41873359\\_1\\_haryana-ag-punjab-and-haryana-law-officers](http://articles.timesofindia.indiatimes.com/2013-09-08/india/41873359_1_haryana-ag-punjab-and-haryana-law-officers) (last visited on February 7, 2019).

## Revisiting the Law of Sedition in The Present Democratic Era: A Critical Appraisal

Dr. Gaurav\*

### *Abstract*

*The crime of sedition has its roots in an era when statesmen and political leaders were considered to be largely above reproach by the common man, and when the institutions of government were far more parlous than at present. The laws relating to sedition has been one of the most debatable issues in India since pre-independent India. Eminent personalities like Bal Gangadhar Tilak, Mahatma Gandhi, and in recent years Arundhati Roy, Binayak Sen, and Aseem Trivedi all have been subjected to this controversial law. Sedition relates to the uttering of seditious words, the publication of seditious libels, and conspiracies to do an act in furtherance of a seditious intention. In modern time it is widely accepted that the right to freedom of speech is the essence of free society and it must be safeguarded at all time. The first principle of a free society is an untrammelled flow of words in an open forum. Liberty to express opinions and ideas without hindrance, and especially without fear of punishment plays significant role in the development of that particular society and ultimately for that state. It is one of the most important fundamental liberties guaranteed against state suppression or regulation. Most sedition charges are eventually dropped for a failure to substantiate allegations, but often not before those accused have spent time in prison or suffered police brutality. In this way, sedition laws have an inevitable chilling effect on those prepared to voice their criticisms. Therefore, it can be said that the application of sedition is contrary to the spirit of a democratic polity. In this article an attempt has been made to analyze historically and socially the offence of sedition along with the constitutional dimension.*

**Keywords:** *Sedition, Freedom of Speech and Expression, Disaffection, Hatred, Disloyalty*

### **1. Introduction**

Sedition as an offence came into existence in Indian legal system during the British colonial era. The crime of sedition has its roots in an era when statesmen and political leaders were considered to be largely above reproach by the common man, and when the

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\* Assistant Professor Law, Faculty of Law, Aligarh Muslim University, Aligarh.

institutions of government were far more parlous than at present. Coups and revolutions were a constant threat, and the resort to political violence was a common phenomenon. Seditious as a concept is largely antithetical to the underlying premises of modern democracy. As a result, seditious laws in many countries have either been repealed or have fallen into disuse for some time.

The laws relating to seditious has been one of the most debatable issues in India since pre-independent India. Eminent personalities like Bal Gangadhar Tilak, Mahatma Gandhi, and in recent years Arundhati Roy, Binayak Sen, and Aseem Trivedi all have been subjected to this controversial law. Law of Seditious relates to the uttering of seditious words, the publication of seditious libels, and conspiracies to do an act in furtherance of a seditious intention. Seditious, whether by words spoken or written, or by conduct, is a misdemeanor at common law punishable by fine and imprisonment.<sup>1</sup> Russel defines seditious as Seditious consists in acts, words, or writings intended or calculated, under the circumstances of the time, to disturb the tranquility of the State, by creating ill-will, discontent, disaffection, hatred, or contempt towards the person of the King, or towards the Constitution or Parliament, or the Government, or the established institutions of the country, or by exciting ill-will between different classes of the King's subjects, or encouraging any class of them to endeavor to disobey, defy, or subvert the laws or resist their execution, or to create tumults or riots, or to do any act of violence or outrage or endangering the public peace. When the offence is committed by means of writing, or print, or pictures, it is termed seditious libel.<sup>2</sup> Halsbury's Law of England defines seditious as a seditious intention is an intention--(1) to bring into hatred or contempt, or to excite disaffection against the King or the Government and Constitution of the United Kingdom, or either House of Parliament, or the administration of justice.<sup>3</sup>

Sir James Stephen defined a seditious intention as "an intention to bring into hatred or contempt, or to excite disaffection against the person of his Majesty, his heirs or successors, or the Government and the constitution of the United Kingdom by law established, or either House of Parliament, or the administration of Justice or to excite his Majesty's subjects to attempt otherwise than by lawful means, the alteration of any matter in Church or State by law established or to raise discontent or disaffection amongst his Majesty's subjects, or to promote feelings of ill will and Hostility between different classes of such subjects." But an intention to show that his Majesty has been misled or mistaken in his measures to point out errors or defects in the government or constitution, as by law established with a view to their reformation, or to excite his Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to their removal, matters which are producing, or

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<sup>1</sup> Pillai P.S.A, *Criminal Law* 477-478(LexisNexis, Nagpur, 10th ed., 2008)

<sup>2</sup> Russell on Crimes, p. 87, 9th Edition

<sup>3</sup> Halsbury's Laws of England (2nd Edition) Vol. 9, page 302

have a tendency to produce, feelings of hatred and ill will between classes of His Majesty's subjects, is not a seditious intention. It is the right of every citizen to discuss public affairs fully and freely but such discussions must not be directed to the incitement of unlawful acts or calculated to excite disaffection.<sup>4</sup>

## **2. Laws Relating to Sedition in India**

### ***2.1 Etymological Genesis***

The law of sedition was introduced in India in 1870 in response to increasing rebel movements. This law was amended in 1898 and, the framework of this section was imported from various sources like the Treason Felony Act (operating in Britain), the Common law of seditious libel, and English law relating to seditious words. Between 1870 and 1898, the British sought to suppress criticism through two legislation; the Dramatic Performances Act, 1876 that introduced pre-censorship of theatre, and the Vernacular Press Act of 1878 meant to control publishers and printers of the native press by introducing a system of security. The section corresponding to S.124A was originally S.113 of Macaulay's Draft Penal Code of 1837-39, but the section was omitted from the Indian Penal Code as it was enacted in 1860. This was a peculiar decision, given the circumstances of the First War of Indian Independence in 1857.<sup>5</sup> The section was amended in 1898 in order to expand the scope of the law by including the terms "hatred" and "contempt" along with disaffection. These amendments also brought in Section 153-A and Section 505 of the IPC. In 1908, after the political situation created because of the partition of Bengal, the British enacted the Newspapers (Incitement to Offences) Act, a law that enabled District Magistrates to confiscate printing presses that were used to publish seditious material.<sup>6</sup> The colonial government also enacted the Seditious Meetings Act to prevent meetings of more than 20 people from assembling.<sup>7</sup> According to Sir James Stephen "the great peculiarity of the English law of treason was to regard every thought of the heart as a crime which was to be punished as soon as it was manifest by any overt act."<sup>8</sup>

Mahatma Gandhi was convicted of sedition by the British Imperial Government in 1922. Arguing his own case, Gandhi told the judge that he had no affection for the British government and, moreover, he felt it was his duty to inform his fellow citizens as to why he had no affection for it. While convicting Gandhi, the British judge felt it necessary to apologize to Gandhi for his act, to which he was bound by his duty as a judge.<sup>9</sup> In a

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<sup>4</sup> Stephen James, *History of the Criminal Law*, 299 (1883) 4

<sup>5</sup> Noorani A. G., *Indian Political Trials: 1775-1947*, New Delhi: OUP, 2009.

<sup>6</sup> Section 3 of the Newspapers (Incitement to Offences) Act, 1908.

<sup>7</sup> Sections 4 & 5 of The prevention of seditious meetings Act, 1911.

<sup>8</sup> W.R. Donogh, *A Treatise on the Law of Sedition and Cognate Offences in British India; Penal and Preventative*, Thakker, Spink and Co. Calcutta, 1911, p 5.

<sup>9</sup> Binayak Sen, "Sedition law is against the spirit of democracy" *The Times of India*, Sep 16, 2012.

stunning statement, Gandhi commented on the law that was used to try him.

*“Section 124 A under which I am happily charged is perhaps the prince among the political sections of the IPC designed to suppress the liberty of the citizen. Affection cannot be manufactured or regulated by the law. If one has no affection for a person, one should be free to give the fullest expression to his disaffection, so long as he does not contemplate, promote or incite to violence. But the section under which Mr. Banker and I are charged is one under which mere promotion of disaffection is a crime. I have studied some of the cases tried under it, and I know that some of the most loved of India’s patriots have been convicted under it. I consider it a privilege, therefore, to be charged under that section. I have endeavored to give in their briefest outline the reasons for my disaffection. I have no personal ill-will against any single administrator; much less can I have any disaffection towards the King’s person. But I hold it a virtue to be disaffected towards a Government which in its totality has done more harm to India than previous system...”<sup>10</sup>*

British colonial era laws continue to have relevance in the legal systems of India. Ironically, a sedition law used by the British colonial government to suppress nationalist dissent in the subcontinent during the 19<sup>th</sup> and early 20<sup>th</sup> centuries is being applied today to curtail what some critics feel are reasonable criticisms of the government.

## **2.2 Statutory Provision**

**Section 124-A**<sup>11</sup> of the Indian Penal Code provides “whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.”

*Explanation 1.* The expression “dissatisfaction” includes disloyalty and all feelings of enmity.

*Explanation 2.* Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under the section.

*Explanation 3.* Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt, do not constitute an offence under the section”.

**Analysis of Section 124-A** The offence of sedition carries imprisonment for life as a

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<sup>10</sup> <http://kafila.org/> Accessed on 28/01/2015

<sup>11</sup> Substituted by Act 4 of 1898, s. 4, for the original s. 124A which had been ins. by Act 27 of 1870, s. 5.

sentence in its extreme form and rigorous imprisonment for up to three years if the court determines that the seriousness of the offence is mitigated by circumstances. This gives an enormous leeway to a court in the matter of sentencing and this in itself can be called into question for permitting excessive judicial discretion to a court.

The continued existence of the government established by law is an essential condition of the stability of the state. Hence, any act within the meaning of section 124-A, which has the effect of subverting the Government by bringing that Government into contempt or hatred, or creating disaffection against it, would be within the penal statute because the feeling of disloyalty to the Government established by law or enmity to it imports the idea of tendency to public disorder by the use of actual violence or incitement to violence<sup>12</sup>. In other words, any written or spoken words, etc., which have implicit in them the idea of subverting Government by violent means, which are compendiously included in the term 'revolution', have been made penal by the section in question. But the section has taken care to indicate clearly that strong words under lawful means used to express disapprobation of the measures of the Government with a view to their improvement or alteration would not come within the section. Similarly, comments, however, strongly worded, expressing disapprobation of actions of the Government, without exciting those feelings which generate the inclination to cause public disorder by acts of violence, would not be penal. In other words, disloyalty to the Government established by law is not the same thing as commenting in strong terms upon the measures or acts of Government, or its agencies, so as to ameliorate the condition of the people or to secure the cancellation or alteration of those acts or measure by lawful means that is to say, without exciting those feelings of enmity and disloyalty which imply excitation to public disorder or the use of violence.

This section requires two essentials: -

1. Bringing or attempting to bring into hatred or contempt or exciting or attempting to excite disaffection towards the Government of India.
2. Such act or attempt may be done (i) by words, either spoken or written, or (ii) by signs, (iii) by visible representation.

There are two ways in which one may be guilty of sedition. One must either actually incite the disaffection or have attempted to incite the disaffection. Either is sufficient for guilt. In the latter case, it is not of any relevance that the audience did not feel any disaffection.

During Pre-Independence, S.124A remained much the same as at its inception, with minor amendments, which were predominantly for the sake of clarifying and unifying the

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<sup>12</sup> Pillai P.S.A, *Criminal Law* 482 (LexisNexis, Nagpur, 10th ed., 2008)

way that it had been interpreted at common law.

Much discussion has centered on the meaning of the term “disaffection.” In the Bose Case, the judges interpreted it as merely the opposite of affection. But later it was held to be a positive feeling, not just the absence of affection.<sup>13</sup>

Justice Strachey took a particularly broad approach in his definition of disaffection as “hatred, enmity, dislike, hostility, contempt and every form of ill- will” to the Government.<sup>14</sup>

In *Emperor vs. Bashkir Balwant Bhopatkar*<sup>15</sup>, disaffection was interpreted not as a feeling for another individual, but a feeling one had for a ruler. Disaffection is however distinguished from disapprobation. The second and third explanation of S124A says that comments expressing disapprobation of “the measures” or of the “administrative or other actions” of the Government which do not excite disaffection are not seditious under the act.

In *Queen-Empress v. Jogendra Chunder Bose*<sup>16</sup>, the Calcutta High Court distinguished between “disaffection” (dislike or hatred) and “disapprobation” (disapproval), and expressly linked “disaffection” to “a disposition not to obey the lawful authority of the government”. The Court further held that it did not matter whether any disturbance was, in fact brought about by the words in question; in fact, it didn’t matter even if no actual disaffection was created; all that mattered was that the words were calculated to, and used with the intent of, creating disaffection.

The meaning of “disaffection” was then clarified in the Tilak case<sup>17</sup> by Strachey J. at the Bombay High Court who equated it to “disloyalty“, “ill-will” and “enmity“. He held that the strength of the feeling was immaterial; in particular, he held that one did not need to advocate mutiny, rebellion or disturbance in order to be hit by the Section; all that was needed was the advocacy of “feelings of enmity.”<sup>18</sup>

The offence does not consist in exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by the publication of seditious articles is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, his act would doubtless fall within this section, and would probably fall within other sections of the penal code. If he tried to excite feelings of hatred or contempt towards the Government, that is sufficient

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<sup>13</sup> *Emperor v Bal Gangadhar Tilak* (1908) 10 BOMLR 848.

<sup>14</sup> W.R. Donogh, A Treatise on the Law of Sedition and Cognate Offences in British India; Penal and Preventative, Thakker, Spink and Co. Calcutta, 1911, p 47.

<sup>15</sup> (1906) 8 BOMLR 421

<sup>16</sup> (1891) ILR 19Cal 35.

<sup>17</sup> *Queen Empress v. Bal Gangadhar Tilak* (1897) ILR 22 Bom 112.

<sup>18</sup> M.G. Divan, Facets of Media Law 40 (Eastern Book Co., Lucknow, 2nd ed., 2013

to make him guilty under this section.<sup>19</sup>

In 1942, the Federal Court in *Niharendu Dutt Majumdar Case*<sup>20</sup> held that “the acts or words complained of must either incite to disorder or must be such to satisfy reasonable men *that it is their intention*.” This was a break from the emphasis on the feeling incited, to the potential consequence of that feeling; that is disorder. In effect, this is and can be read as an acknowledgement that the domain of the courts is not “the thoughts of the heart”.

However, this rendering of sedition was overturned by the Privy Council in the *Sadashiv Case*, marking a return to the traditional interpretation.<sup>21</sup> They returned to Justice Stacey’s interpretation in the first *Tilak* case. Here he said, “*The offence consists in exciting or attempting to excite in others certain bad feelings towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small.*”<sup>22</sup> Clearly, the issue was not incitement to violence but incitement to feelings of disaffection.

### 3. Constitutional Dimension of Sedition

#### 3.1 Section 124-A and Article 19(1) (a) and Article 19(2) of the Constitution of India

The Preamble to the Constitution mandates liberty of thought, expression, belief, faith and worship and Article 19 (1) (a) gives citizens the right to freedom of speech and expression. The freedom of speech is regarded as the first condition of liberty. It occupies a preferred place and that it is the mother of all other liberties. Freedom of Speech and expression means the right to express one's own convictions and opinions freely by word of mouth, writing, printing, pictures or any other mode. In modern times, it is widely accepted that the right to freedom of speech is the essence of free society and it must be safeguarded at all times. The first principle of a free society is an untrammelled flow of words in an open forum. Liberty to express opinions and ideas without hindrance, and especially without fear of punishment plays a significant role in the development of that particular society and ultimately for that state. It is one of the most important fundamental liberties guaranteed against state suppression or regulation.<sup>23</sup> Under Article 13 a law which is inconsistent with or in derogation of the fundamental rights would be void. Under Indian law, the freedoms of speech and of the press do not confer an absolute right to express one's thoughts freely. Clause (2) of Article 19 of the Indian constitution enables

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<sup>19</sup> Ibid

<sup>20</sup> *Niharendu Dutt Majumdar v. The King Emperor*, AIR, 1942 FC 22

<sup>21</sup> *King Emperor v Sadashiv Narayan Bhalerao*, (1947) LR 74, IA 89.

<sup>22</sup> *Queen-Empress v. Bal Gangadhar Tilak* (1892) I.L.R. 22 Bom, 135.

<sup>23</sup> J.N. Pandey, *The Constitution of India* 184 (Central Law Agency, Allahabad, 49th ed., 2012)

the legislature to impose certain restrictions on free speech. It provides as under;

*“Nothing in Article 19(1) (a) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence”.*

However reasonable restrictions on these grounds can be imposed only by a duly enacted law and not by executive action.<sup>24</sup> Article 19(1) (a) of the Constitution of India provides Fundamental Right to all citizens the right to have freedom of speech and expression Section 124-A suppresses and punishes when a person whoever by words or by visible representation, etc.to excite disaffection towards the Government. On simple perusal, it seems that Article 19(1) (a) and Section 124-A are quite opposite to each other. There is no doubt that Article 19(1) (a) gives freedom of speech and expression, which includes the freedom of the press. In a democratic State, this fundamental right must be safeguarded.

In *Queen Emperor v. Bal Gangadhar Tilak*<sup>25</sup>, The trial of Bal Gangadhar Tilak was one of the first controversial trial in pre-independent India for the offence of sedition. The fundamental moral question that Tilak raised was whether his trials constituted sedition of the people against the British Indian government (Rajdroha) or of the Government against the Indian people (Deshdroha).

Tilak’s first trial began in 1897. The government claimed that some of the speeches that referred to Shivaji killing Afzal Khan, had instigated the murder the much-reviled Plague Commissioner Rand and another British officer Lieutenant Ayherst. The two officers were killed as they were returning from the reception and dinner at Government House, Pune, after celebrating the Diamond Jubilee of Queen Victoria’s rule. Tilak was convicted of the charge of sedition, but released in 1898 after the intervention of internationally known figures like Max Weber on the condition that he would do nothing by act, speech, or writing to excite disaffection towards the government. The crown claimed that Tilak had used the occasion of a Shivaji festival to undermine the British Government in India.<sup>26</sup> Tilak challenged the courts translations of the Marathi texts, a language that the majority of jurors did not know. In summing up, Tilak said to the jury that the articles “were not written with any seditious intention, and were not likely to produce that effect, and I do not think they have produced that effect on the readers of the Kesari, or would produce

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<sup>24</sup> *Bijoe Emmanuel v. State of Kerala*, (1986) 3 SCC 615.

<sup>25</sup> (1897) I.L.R. 22 (Bom.) 112

<sup>26</sup> A G Noorani, *Indian Political Trials; 1775-1947* Oxford University Press, New Delhi, 2005, p. 116.

on any intelligent Marathi readers.”<sup>27</sup> Judge Stacey, notorious for his anti-native stance and for misdirecting the Jury, presided over the case.<sup>28</sup> The Privy Council upheld the guilty verdict of the Jury. The sentence was later commuted upon the proviso that Tilak would do nothing by act or speech to incite disaffection for the Government.

The court observed that the offence of sedition as alleged does not consist in exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by the publication of seditious articles is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, his act would doubtless fall within this section, and would probably fall within other sections of the penal code. If he tried to excite feelings of hatred or contempt towards the Government, that is sufficient to make him guilty of sedition.

In *Brij Bhushan and Anr. v. The State of Delhi*,<sup>29</sup> the term “sedition” was discussed by Justice Fazl Ali:

*“The framers of the constitution must have therefore found themselves face to face with the dilemma as to whether the word “sedition” should be used in article 19(2) and if it was to be used in what sense it was to be used. On the one hand, they must have had before their mind the very widely accepted view supported by numerous authorities that sedition was essentially an offence against public tranquility and was connected in some way with public disorder; and on the other hand, there was the pronouncement of the Judicial Committee that sedition as defined in the Indian Penal Code did not necessarily imply any intention or tendency to incite disorder. In these circumstances, it is not surprising that they decided not to use the word “sedition” in clause (2) but used the more general words, which cover sedition and everything else which make sedition such a serious offence. That sedition does undermine the security of the State is a matter which cannot admit of much doubt. That it undermines the security of the State usually through the medium of public disorder is also a matter on which eminent Judges and jurists are agreed. Therefore, it is difficult to hold that public disorder or disturbance of public tranquility are not matters which undermine the security of the State.”*

In *Re. Surendra Narayan Adicharya*<sup>30</sup>, it was held that sending through the post a packet containing a copy of a manuscript of a seditious publication with a covering letter requesting the addressee to circulate it to others, when the same was intercepted by another person and never reached the proper address, it constitutes an attempt to commit

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<sup>27</sup> Cited from Stanley A. Wolpert, *Tilak and Gokhale: Revolution and Reform in the Making of Modern India*, University of California Press, Berkeley and Los Angeles, 1961, p. 101.

<sup>28</sup> W.R. Donogh, *A Treatise on the Law of Sedition and Cognate Offences in British India; Penal and Preventive*, Thakker, Spink and Co. Calcutta, 1911, p. 42.

<sup>29</sup> 1950 Supp SCR 245.

<sup>30</sup> (1911) 39 Cal. 522.

an offence under Section 124A of the code. After the Constitution of India came into operation the constitutional validity of Section 124A of the code was challenged as being violative of the fundamental right of freedom of speech and expression under Art 19(1) (a) of the Constitution.

In *Romesh Thappar v. State of Madras*<sup>31</sup> the petitioner contended before the Supreme Court that the said order of banning his paper 'Cross Roads' by the Madras State as it has contravened his Fundamental Right of freedom of speech and expression conferred on him by Article 19(1) of the Constitution. The Supreme Court held that clause (2) of Art 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to public security is involved, an enactment, which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional and valid to any extent. Finally, the Supreme Court allowed the application of the petitioner under Article 32 of the Constitution and quashed the order of Madras State prohibiting the entry and circulation of the paper in the State of Madras.<sup>32</sup>

Again, in *Tara Singh Gopi Chand v. State*<sup>33</sup> the constitutional validity of Section 124 A was put to judicial scrutiny. It was contended that the section goes against the letter spirit of Art 19(1)(a) of the Constitution that guarantees the freedom of speech and expression. The Court declared the section ultra vires to the Constitution as it curtailed the freedom of speech and expression in a manner not permitted by the Constitution. The Court was of the opinion that Section 124A has no place in the new democratic pattern of policy adopted by India and it imposed unreasonable restrictions on fundamental rights of speech and expression and therefore unconstitutional and should be struck down.<sup>34</sup>

In *Ram Nandan v. State of Uttar Pradesh*<sup>35</sup> the Court held that Sec. 124 an imposed restriction on the freedom of speech and expression not in the interest of the general public and thereby infringing the fundamental right of freedom of speech. It, therefore, declared Section 124-A as ultra vires to the Constitution as it cannot be saved by the expression 'in the interest of public order'. The Explanations to the section make it clear that criticism of public measures or comment on Governmental action, however strongly worded within reasonable limits and consistent with the fundamental right of freedom of speech and expression is not affected. It is only when the words have the pernicious tendency of intention of creating public disorder or disturbance of law and order that the law steps in.

In *Ram Nandan vs. State*<sup>36</sup>, the Allahabad High Court held section 124-A to be unconstitutional citing that the section restricts freedom of speech (Article 19(1) (a)) , in

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<sup>31</sup> 1950 SCR 594

<sup>32</sup> M.G. Divan, Facets of Media Law 47 (Eastern Book Co., Lucknow, 2nd ed., 2013)

<sup>33</sup> AIR 1951 East Punjab 27

<sup>34</sup> Pillai P.S.A, Criminal Law 560(LexisNexis, Nagpur, 10th ed., 2008)

<sup>35</sup> AIR 1959 All 101

<sup>36</sup> AIR 1959 All 101

disregard of whether the interest of public order or the security of the state is involved and is capable of striking at the very root of the Constitution which is free speech.

In the case of *Kedar Nath Singh v. State of Bihar*<sup>37</sup> it was held that the provisions of Section 124A are not unconstitutional as being violative of the fundamental right of freedom of speech and expression under Art 19(1)(a) of the Constitution.

In this case, the constitutionality of S. 124A was impugned. Thus, the Court was required to squarely deal with the relationship between sedition and the freedom of speech and expression. The Supreme Court upheld the constitutionality of the sedition provision contained in Section 124A of the IPC. The Court observed that “Every State, whatever its form of Government, has to be armed with the power to punish those who, by their conduct, jeopardise the safety and stability of the State, or disseminate such feelings of disloyalty as have a tendency to lead to the disruption of the State or to public disorder.”<sup>38</sup> *“The section should be construed as to limit their application to acts involving intention or tendency to create disorder or disturbance of law and order, or incitement to violence. If used arbitrarily, the sedition law would violate freedom of speech and expression guaranteed by the Constitution under Article 19.”*<sup>39</sup>

#### 4. Conclusion

Most sedition charges are eventually dropped for a failure to substantiate allegations, but often not before those accused have spent time in prison or suffered police brutality. In this way, sedition laws have an inevitable chilling effect on those prepared to voice their criticisms. Therefore, it can be said that the application of sedition is contrary to the spirit of a democratic polity. Earlier, the concept was that the king is sovereign. The change in the political arena of the world has compelled the lawmakers to rethink the past laws. Sedition laws were part of the legal system during the period when king was the sovereign. Currently the people are sovereign. The phrase “sovereignty in the people” captures the true identity of the sovereign in whom the rights of sovereignty are vested. While traditionally the state was treated as the sovereign, or the government acting on its behalf, domestic and international law supports the shift of sovereignty to the people. From the most liberal democracies to the most autocratic of states, most constitutions proclaim that the people are sovereign. The repeated use of sedition laws has made these laws one of the biggest threats to the freedom of speech and expression in this country. Along with other colonial laws such as criminal defamation, laws dealing with obscenity, and blasphemy laws, sedition laws undermine the right to dissent and the right to criticize state policy in large parts of the civilized Nations in the present world. The irony of the law is in the very fact that it allows for criticism of the government but doesn’t allow truth

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<sup>37</sup> AIR 1962, SC 955

<sup>38</sup> Para 18 of the Judgment

<sup>39</sup> J.N. Pandey, *The Constitution of India* 209 (Central Law Agency, Allahabad, 49th ed., 2012)

as its defense. When it is the duty of the people to comment fairly upon the government, how truth could be neglected as a defense of the crime. The nature of this crime is vested in the concept of sovereignty and the authority of it. It is not the government which is sovereign, it is the country which is sovereign, and it is the people which are sovereign. Now when the government is no more the sovereign, they don't have the right to possess the protection against sedition.

After all, the process of building up political alternatives has to be based on holding and advocating views that are contrary to those held by the current holders of power. Sedition serves the power holder very well, because any heterodox opinion can promptly be limited by being safely put away. Human rights workers and their organizations across the country have come together to press for repeal of the sedition law and other similar laws. Even the Universal Declaration of Human Rights (UDHR) provides that the will of the people shall be the basis of the authority of government.<sup>40</sup>

Relying on Locke and Rousseau's concept of a social contract and supported by constitutional and international legal guarantees of sovereignty in the people, governments do not have the power to act independently of their people. They serve as the representatives of the people, not the state, which is merely a territorial unit in which a political community lives. As representatives of the people, the government is tasked with protecting the political community from domestic and international threats to their security and the common good.<sup>41</sup>

While addressing the Parliament on the Bill relating to the First Constitution of India Amendment 1951, Nehru said,<sup>42</sup>

*".....now so far as I am concerned that particular Section is highly objectionable and obnoxious and it should have no place both for practical and historical reasons, if you like, in any body of laws that we might pass. The sooner we get rid of it the better. We might deal with that matter in other ways, in more limited ways, as every other country does but that particular thing, as it is, should have no place, because all of us have had enough experience of it in a variety of ways and apart from the logic of the situation, our urges are against it."*

The Allahabad High Court in *Ram Nandan v. State*<sup>43</sup> observed that *"we can't make presumption that public order will get disturbed due to the speech. The court very categorically pointed out the fact that the response of the people towards the words can't be ascertained. Hence, by the time, public order is not disturbed, we can't hold someone*

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<sup>40</sup> Article 21(3) of UDHR

<sup>41</sup> John Locke, *Second Treatise of Civil Government*, 65, Thomas Hollis ed. Hackett Publishing Co. 1980

<sup>42</sup> Parliamentary Debates of India, Vol XII, Part II (1951) p 9621 cited in Para 81, *Ram Nandan vs State* AIR 1959 All 1017.

<sup>43</sup> A.I.R. 1959 All 1017

*liable for sedition in presumption of disturbance of public order.”*

The definition in Section 124-A is troublesome; according to the explanatory notes, “disaffection” towards the government includes “disloyalty and all feelings of enmity.” Any criticism of the government could be seen as disloyalty, but part of the role of the media is precisely to criticize aspects of the government which does not seem to be functioning in ways that best serve the people. Political dissent is a necessary part of a vibrant democracy, ensuring dynamism and legitimacy. The courts have recognized this, and narrowed the circumstances in which the protection against sedition could be used.

The time seems apposite to have a discussion on this outdated offence and move in a concrete sense towards repealing or amending the law. By so doing we would be ridding Indian democracy of a provision that has no place in a country that prides itself on a Constitution that guarantees to all its citizens the fundamental right to dissent. It is the fundamental right of every citizen to have his own political theories and ideas and to propagate them and work for their establishment so long as he does not seek to do so by force and violence or contravene and provision of law. Since, now it is the people who are sovereign, there is no need of laws like sedition. Sedition prevents the government from criticism due to the sole reason that they are Sovereign. Since, they are no more sovereign, they are not entitled for this protection. The existence of the sedition law under Indian Criminal Justice system represents a failure to understand the importance of criticism within a democratic setup and the retention of the sedition law represents a disappointing regression; a return to the oppression of the people by the sovereign. This is the reason why sedition laws are getting repealed across the world. India has a long record of authoritarianism and the fact that sedition remains on the statute books confirms India’s status as a coercive state. It is in maintaining this balance that the idea of responsibility as part of a right comes into play. Thus, the tension between freedom of expression and intervention by authorities remains. The reasonableness of restrictions on freedom of speech is decided on a case by case basis. Any intervention by the state would be dictated by societal standards of acceptability. Therefore, a similar liberal approach is required to be taken by the government of India.

## An Insight into Real Estate & Emerging Trends

Arunima Jha K Raheja\*

### *Abstract*

*This legislative comment makes a humble attempt to study the Real Estate (Regulation and Development) Act, 2016 (RERA), with the help of the rules and regulations laid down in the RERA Act 2016. A part of the reason for continued growth of Indian economy, even in the midst of global financial crisis, and its sustained ability to attract global investments has been the dynamic regulatory regime ushered in after the economic liberalization process which started in 1991. Introduction of Real Estate (Regulation and Development) Act, 2016 (RERA), Infrastructure Investment Regulations (InvIT) and Real Estate Investment Trusts (REIT) Guidelines and Act is a testimony to that dynamic regulatory regime. On 25 March 2016, the Real Estate (Regulation and Development) Act, 2016 (RERA) received the assent of the President, and on 01 May 2017, the RERA came fully into force. For long, potential buyers have always complained that real estate transactions were lopsided in favor of the developers. RERA aims to make real estate purchase simpler, by bringing in better accountability and transparency in the primary market. Delays in projects is the biggest issue faced by the buyers today.*

*This legislative comment makes a humble attempt to study the Real Estate (Regulation and Development) Act, 2016 (RERA), with the help of the rules and regulations laid down in the RERA Act 2016.*

**Keywords:** *RERA act, Investment regulation, Real Estate, Transparency*

India's position as one of the fastest growing economies in the world is undisputed today. Infrastructure and real estate are two important sectors that underpin sustained economic growth and development, and have critical importance for India's growth both on economic and social parameters. The importance of these two sectors is also evident from experience – the 2008 financial crisis triggered primarily by stagnation or declaration of real estate sector in the US is a recent case in point. A part of the reason for continued growth of Indian economy, even in the midst of global financial crisis, and its sustained ability to attract global investments has been the dynamic regulatory regime ushered in after the economic liberalization process which started in 1991. Introduction of Real Estate (Regulation and Development) Act, 2016 (RERA), Infrastructure Investment Regulations (InvIT) and Real Estate Investment Trusts (REIT) Guidelines and Act is a

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\* Corp In-House Counsel

testimony to that dynamic regulatory regime. On 25 March 2016, the Real Estate (Regulation and Development) Act, 2016 (RERA) received the assent of the President, and on 01 May 2017, the RERA came fully into force. Each state and union territory will now have its own Regulatory Authority (RA) that will frame rules and regulations in tandem with the Act. RERA has been formulated to ensure transparency and protection in the market for purchasers. RERA Covers all residential and commercial projects, including shops, offices and buildings. It does not cover rental agreements in any form.

The Act makes it mandatory for the promoter to make an application to the Authority for registration of the on-going project within a period of three months from the date of commencement of the Act. The Act also provides that a project in which the completion certificate has not been obtained shall be considered as an ongoing project. Thereby consumers of under construction projects can seek protection under the Act. However, for the purpose of ongoing projects, if the real estate agent is already engaged by the promoter, then the real estate agent is required to register with the Authority within 45 days. Under the RERA, the registration fees for agents vary from state to state.

The Act addresses several lacunae in the real estate sector, principally by providing for mandatory registration of a real estate agent before he engages in any activity relating to marketing, advertising, sale or purchase of any apartments, establishing a disclosure framework and setting strict liabilities for promoter irregularities. Section 3 to Section 8 of the Act requires mandatory registration of real estate projects with RERA where the total area of the land proposed to be developed exceeds 500 square meters or where more than eight apartments are proposed to be developed inclusive of all phases. The Act also requires every phase of a project to be registered separately as a standalone project. The authority under RERA is required to either grant or reject the registration applications within 30 days.

Prior to the introduction of the RERA, the promoters were under no obligation to obtain insurance of a real estate project. However, under RERA, the Central Government has imposed an obligation on all promoters to mandatorily obtain insurance for title of the land and building as a part of the real estate project and insurance for construction of the real estate project, leaving it to the discretion of States to impose additional insurance obligations. The real estate sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. While this sector has grown significantly in recent years, it has been largely unregulated, with absence of professionalism and standardization and lack of adequate consumer protection. Though the Consumer Protection Act, 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is not adequate to address all the concerns of buyers and promoters in that sector. The lack of standardization has been a constraint to the healthy and orderly growth of industry. Therefore, the need for regulating the sector has always

emphasized in various forums.

For long, potential buyers have always complained that real estate transactions were lopsided in favor of the developers. RERA aims to make real estate purchase simpler, by bringing in better accountability and transparency in the primary market. Delays in projects is the biggest issue faced by the buyers today. Since the last 10 years, many projects have seen delays of up to 7 years. Projects launched after the turn of this decade have faced delays as well. Some have run into obstacles even before a brick was laid. RERA seeks to address the delay issue inter-alia other issues like pricing of the project, quality of construction etc.

It would be advantageous to refer to the RERA provisions along-with some of the cases filed in the real estate sector. The case of *Brig. (Retd.) Kamal Sood vs M/S. DLF Universal Ltd.*<sup>1</sup> raised some interesting issues before the National Consumer Dispute Redressal Commission (NCDRC), for instance:

1. Can a builder give alluring advertisement promising delivery of possession of the constructed flat to the consumer within the stipulated time, and, subsequently, on his failure, turnaround and contend that as governmental permissions, such as approval of zoning plan, layout plan and schematic building plan, were not given, the delay in construction should not be the ground for grant of compensation to the consumer?
2. Secondly, whether the consumer should suffer by paying escalation cost due to such delay?

The NCDRC observed that the aforesaid practices were unfair trade practice on the part of the builder to collect money from the prospective buyers without obtaining the required permissions such as zoning plan, layout plan and schematic building plan.

NCDRC stated that it was the duty of the builder to obtain the requisite permissions or sanctions such as sanction for construction, etc. in the first instance, and, thereafter, recover the consideration money from the purchaser of the flat/buildings.

Secondly, in such a case, if there is any express promise that the premises would be delivered within the stipulated time, and, if not done so, escalation cost is required to be borne by the builder.

A similar view was taken by the Commission in 2015 in the case of *Shri Yogesh Sharma & Anr., vs M/S Unitech Limited*<sup>2</sup>. The NCDRC in the case observed that the builder ought not to have accepted money and entered into an agreement with the buyers without approval of the building plans by GNIDA (Greater Noida Development Authority). If the opposite party chose to accept money from the flat buyers and enter into agreements,

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<sup>1</sup> Civil Appeal Nos.5739-5740 Of 2008

<sup>2</sup> Consumer Case No. 267 OF 2014

undertaking to give possession within a particular time frame, without having possession of the land and without approval of the building plans, it is only itself to blame for a situation in which the construction got delayed on account of the delay in approval of building plans and physical delivery of the land to it on the spot.

Another major bone of contention in the real estate sector was the establishment of a separate Regulatory Authority to deal with complaints and cases arising out of the real estate projects. The Act establishes a separate Real Estate Regulatory Authority consisting of a Chairperson and not less than two whole time members, appointed by the Government. The Act also provides that a Selection Committee shall be formed for the purpose of recommending and selecting the members and the Chairperson of the Authority formed under the Act.

The real estate sector of India is largely unregulated. If a consumer had a complaint against a developer, they would have to make rounds of consumer or civil courts. Now, in the case of any grievance, the consumer can go to the real estate regulator for redressal. RERA aims to address issues like delay in transfer of possession, dispute over prices, quality of construction and the construction material etc. Delay in projects is the biggest issue faced by the buyers. The enactment of RERA, is expected to make the fragmented, unorganized real estate market more transparent. This transparency will create a more favorable environment for investments like REIT funds which prefers a regulated market. With the changing trends and requirements from buyers and sellers, besides locating suitable properties, the real estate agents have also started undertaking some specialized roles to facilitate their customers like comparative price analysis of the property, marketing and selling of the property, guide on buying and selling of the property, legal paperwork etc. However, there are various unethical agents who will fill their pockets by utilizing the gap between the buyer and promoter. Section 9 of the Act provides for registration and duties of Real Estate Agents. As per the Act, the Real Estate Agent cannot facilitate the sale or purchase of or act on behalf of any person to facilitate the sale or purchase of any plot, apartment or building in a real estate project or part of it without obtaining registration from the Regulatory Authority to act as an agent. Section 40 states that interest or penalty or compensation imposed on a promoter or an allottee or a real estate agent by the adjudicating officer or the Regulatory Authority or the appellate authority can be recovered from such promoter or allotted or real estate agent as arrears as land revenue. Sections 59 and 70 of the Act deals with offences and penalties. Contravention of the orders or directions of the authority by promoters, real estate agents have been made punishable with fine, and in some cases, with punishment also. Sections 79 and 80 bar jurisdictions of civil courts in the matters covered under the Act.

In the State of Maharashtra, way before RERA, 2016 was introduced, the need for dedicated law to protect the interests of home-buyers was envisaged in the State of

Maharashtra and hence, Maharashtra Ownership of Flats Act, 1963 (MOFA, 1963) was enacted. However, with the introduction of central law on with the same objective, that is, RERA, 2016, the status of MOFA, 1963 needs to be discussed.

The real estate buyers more often suffer by ill practices by few errant developers/promoters ("Developers"), mainly being (i) inordinate delay in getting possession of the flat/unit, (ii) paying more than 20% of the purchase consideration in advance before executing and registering the agreement for sale under the provisions of Maharashtra Ownership of Flats Act, 1972 ("MOFA"), (iii) altering the layout plans and specifications of flat/ unit without being informed by the Developer, (iv) not registering the agreement for sale within a period of four (4) months after paying earnest/ advance monies, (v) not disclosing clear and marketable title of the Developers in relation to the subject property, (vi) not taking steps in formation of society/ condominium/ company ("Organization"), and (vii) not conveying the ownership of the subject property in favor of the Organization.

While it has been in discussion since enactment of RERA, as to whether MOFA is repealed or is still in force, it is important to note that RERA has repealed the Maharashtra Housing (Regulation and Development) Act, 2012 and not MOFA. RERA has carved out an overriding provision (Section 89) whereby its provisions will override all other laws, which are inconsistent with the provisions of RERA. As such the provisions of MOFA (such as Sections 4 and 7 amongst other provisions), which are inconsistent with the provisions of RERA, are overridden by provisions of RERA, though there is no specific notification to that effect. While RERA is actually intended to be a reform legislation, with an intent to bring more transparency and efficiency to the industry, at the same time, it is not going to be easy for the regulator or the state legislature to implement it immediately since the act is not aligned with all stakeholders in the industry. It will require interpretation which will lead to multiple litigation, as we see now.<sup>3</sup>

As a general principle, laws are to be applied prospectively. The Supreme Court of India, in *CIT v Vatika Township (P) Ltd*<sup>4</sup>, held that a new legislation ought not to change the character of past transactions carried out upon the faith of the then existing law. Therefore, the RERA Act, being a substantial new legislation, ought to operate prospectively. Further, the RERA Act is neither clarificatory nor declaratory of the existing laws. Rather, it is substantive, creating rights and liabilities and therefore, presenting all the more reason for its prospective application. The RERA Act has also made certain validly executed agreements void, thereby, taking away vested rights that have already accrued by way of such agreements. One of the foremost glitch encountered while making an investment in the Real estate is one-sided development agreements.

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<sup>3</sup> Nirav Jani, Partner, Hariani & Co

<sup>4</sup> Civil Appeal No.8750 Of 2014

In the case of *Belaire Owners' Association v. DLF Limited, HUDA & Ors*<sup>5</sup>, the CCI (Competition Commission of India) extensively dealt with the issue of abuse of dominant position and one-sided development agreements. In the case, the CCI made some noteworthy observations pertaining to one sided development agreements:

- That DLF had resorted to malpractice in the agreement.
- That unfair conditions were imposed on the buyer through the Provisional Booking agreement, which is signed by the buyer after having paid substantial costs, thereby, leaving no option to the buyer to object to loop-sided provisions of the agreement.
- DLF's right to change the layout plan without the consent of allottees, DLF's unilateral power to make changes in the agreement and the power to supersede without any right to the allottees.
- That there was evidence of unequal bargaining power between the parties and stated that the impunity with which these clauses have been imposed, the brutal disregard for consumer rights that has been displayed in its action of cancelling allotments and forfeiting deposits and the deliberate strategy of obfuscating the terms and keeping buyers in the dark about the eventual shape, size, location etc. of the apartment cannot be termed as fair.

Eventually, DLF was held liable for abuse of dominant position under the Competition Act, 2002 and was slapped with a penalty of Rs. 630 crores. The CCI in the case also directed DLF to suitably modify conditions imposed on its buyers. However, in appeal COMPAT (Competition Appellate Tribunal) stayed CCI's order regarding modification of the terms of agreement but barred DLF from implementation of the impugned agreement.

In the case of *Mr. Pankaj Agrawal v. DLF Gurgaon Home Developers Private Limited*,<sup>6</sup> the CCI took particular note of the development agreement mentioning about change in its construction plans without giving any option to the apartment buyers and termed it as abusive. CCI opined that just because there was an increase in some towers and decrease in other towers does not balance the effect which the apartment buyer has to go through. CCI stated that for buyers who have booked apartment in the towers where the number of floors have increased, the conduct of the Opposite Party was unfair. That when consumers/buyers invest in a particular project, they ought to know with some certainty, the final structure of the apartment. It is, therefore, quite clear that the conduct of the Opposite Party in making additions to the number of floors beyond the number intimated to the apartment allottee amounts to abuse of dominant position. That demanding

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<sup>5</sup> Case No. 19/2010

<sup>6</sup> Case No. 13 of 2010

additional payments on account of External Development Charges/Infrastructure Development Charges etc. on the increased super area of 2630 sq. ft. also amounted to an abuse of dominant position as the buyers were taken by surprise and they had no option but to succumb to the pressures of the Opposite Party. Eventually, COMPAT order also held such unilateral increase to be abusive as the only option left with the apartment buyers in such cases is to exit which is a costly option.

Apart from RERA, REITs and InvITs also provide an opportunity to participate in infrastructure and real estate financing through a stable and liquid instrument and also encourages better governance structures. It also provides smaller and non-institutional investor an opportunity to participate in infrastructure and real estate financing and reap the benefits of growth in these sectors, through marketable instrument, which is less prone to vicissitudes of speculation and volatility inherent in equity investments. An InvIT can only invest in infrastructure projects or companies with at least 90% of its assets comprising infrastructure projects, within the framework provided by InvIT Regulations. InvITs raise funds from a large number of investors and directly invest in infrastructure projects or through a special purpose vehicle. Two types of InvITs have been allowed: one, which invests in completed and revenue generation infrastructure projects; the other, which has the flexibility to invest in completed or under-construction projects. InvITs which invest in completed projects take the route of public offer of its units, while those investing in under construction projects take the route of private placement of units. Both forms are required to be listed on stock exchanges. Investments in both REITs and real estate funds have their benefits and drawbacks. The benefits of investing in REITs include their lower investment entry costs insofar that investors can invest as little as \$500 or the price of one share; secondly, REITs offer a highly liquid method of investing in real estate; thirdly, REITs are highly flexible, allowing investors to invest in a range of real estate from commercial properties to shopping malls. Real estate funds that invest in mortgage REITs provide higher yields than real estate funds that invest in equity REITs. Conversely, as equity REITs trade on assets and not on mortgage loans, capital gains are instead far more attainable for equity REITs.

With an aim to refine investments and facilitate growth in real estate investment trusts (REITs) and infrastructure investment trusts (InvITs), the Securities and Exchange Board of India (SEBI) issued a notification amending the SEBI (Real Estate Investment Trusts) Regulations 2014 (REIT Regulations) and the SEBI (Infrastructure Investment Trusts) Regulations 2014 (InvIT Regulations), which were notified on 27 December 2017.

REITs and InvITs, whose units are listed on a recognized stock exchange, have now been allowed to raise funds by way of issue of non-convertible debentures and bonds. Earlier, the REIT Regulations prescribed that a REIT shall hold at least two projects and not more than 60% of the value of its assets shall be held in a single project. However, no such

stipulation exists under the InvIT Regulations. It has now been decided to allow single asset REITs on similar lines as InvITs.

Earlier, the concept of 'strategic investors' existed only under the InvIT Regulations and disclosures were required for commitments received from strategic investors in the offer documents for issue of units. The REIT Regulations have now been amended to allow 'strategic investors to invest in the public issues of units by REITs.

Since the inception of REITs in the US in the 1960s, several countries around the world, developed as well as emerging markets, have introduced these instruments in their jurisdictions, however REITs and InvITs did not have an enthusiastic launch in India. While many large real estate infrastructure players have already started participating in the public issue of such trusts. It is expected that with the new norms introduced by SEBI, the popularity of such trust structures will be more boosted and facilitated better. For the last few decades, the Indian real estate sector has been lucrative for savvy investors, but it has not been without accompanying uncertainties. Introduction of REITs will help usher great liquidity in the commercial sector, including making the real estate sector more transparent.

The present market dynamics have led to resurgence of government-based initiatives and infiltration of global players in the local market. Through REITs, the real estate assets are broken into several parts and converted into a paper investment, which is securitized. REITs help make investments in real estate more accessible, long-term and income oriented. This also helps to build an efficient secondary market for developers to exit projects. The specialty of REITs lies in choosing to invest in completed properties to get a stable income stream, by-passing under-construction properties. This adds stability and assurity, ensuring whatever property the buyer is paying for will be delivered to him in promised time, restoring consumer faith on the industry. The upcoming REITs platform has attracted the attention of private equity players, who are now gearing up to expand their portfolio across Indian cities. While rental values have seen marginal appreciation, numerous retailers have started preferring the revenue-sharing model over the fixed-rent model in the last few years.

There are over 400 REITs listed in over 12 countries with a market capitalization of over \$1.5 trillion in 2016 (as per private sources). Two of the fastest-growing markets apart from the U.S. have been Australia and Japan, which have overtaken developed markets like France and the UK. Though the US accounts for almost 2/3<sup>rd</sup> market capitalization for REIT globally, early adopters like Australia, New Zealand and the Netherlands have also grown significantly. Apart from the five countries mentioned above, other developed

markets for REIT are Canada, Germany, Hong Kong and Singapore<sup>7</sup>. India is still in its nascent stage of REIT implementation and is yet to see any listing owing to regulatory, legislative and taxation related issues. The Size of REIT list-able A-Grade commercial real estate property is around Rs.2.75-3 lakh crore in Indian markets<sup>8</sup>. The Government may need to initially provide better tax-incentives for the investors so that the markets could develop.

So far, the common concerns of the NRIs investing in India, have been the opaque nature of the business, lack of information, no concept of standardized due diligence, untimely delivery and completion of projects with tedious or no legal recourse for buyers. Especially for NRIs the cumbersome nature of follow-ups with developers where projects were unfinished, was a big demotivation to invest in their home country. For NRIs, the investment sentiment is greatly boosted by the RERA, GST, Benami Act, REIT and government initiatives like demonetization. These measures have boosted transparency, and the amended rules and regulations have greatly simplified the purchasing processes. Lenient FEMA policies and relaxation of laws by the RBI regarding property buying by NRIs, have also resurrected the NRI interest in property purchases.

In view of the above, no doubt RERA doubt was the much-awaited legislation is in the interests of effective consumer protection, uniformity and standardization of business practices and transactions in the real estate sector. RERA ensures greater accountability towards consumers, and significantly reduce frauds and delays as also the current high transaction costs. It attempts to balance the interests of consumers and promoters by imposing certain responsibilities on both. It seeks to establish symmetry of information between the promoter and purchaser, transparency of contractual conditions, set minimum standards of accountability and a fast-track dispute resolution mechanism. An effective implementation of RERA will consequently lead to lower litigation due to stringent rules and regulations in the highly corrupt sector. Time bound approvals and transparency will also lead to greater flow of investment both domestic and foreign leading to reduction in cost of borrowing in the real-estate sector.

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<sup>7</sup> Madan Sabnavis, Ashish K Nainan Mridul Mishra "Real Estate Investment Trusts" *Care Ratings* Available at <http://www.careratings.com/upload/NewsFiles/SplAnalysis/REIT%20Report.pdf> (Last visited on February 14<sup>th</sup>, 2018).

<sup>8</sup> *Ibid.*

## Restorative Justice: The Need of The Hour (With Special Reference to Plea Bargaining)

Dr. Ashutosh Tripathi\*

### Abstract

*Plea Bargaining has taken a momentum in Criminal Justice and Restorative Justice around the world. India took an initiative to amend the criminal laws to add the provisions related to Plea bargaining in the Criminal Procedure Code through Amendment Act of 2005 in 2006 on the recommendations of the Law Commission report of 1996.*

*Present Article provides the insight of Plea Bargaining and basics of restorative justice with special reference to Plea Bargaining. Article explains concept of Plea Bargaining and focuses on the need of India to better implement it based on following quote-*

*“How can justice be found in the face of genocide, a crime so vast and evil that it defies simple justice? Is there any justice beyond retribution and revenge? Must some kind of justice be done before healing can take place? Something different has to be invented, a different way of defining justice, a different way of dispensing it.” – Jane Ciabattari<sup>1</sup>*

**Keywords:** Restorative Justice, Criminal Justice System, Plea Bargaining

### 1. Introduction

*“We have seen that in primitive societies this idea of “making up” for a wrong has wide currency. Let us once more look into the ways of earlier men, which may still hold some wisdom for us” – Margery Fry<sup>2</sup>*

Lorenn Walker, a Hawaii based Restorative Justice lawyer mentions an incident in one of her articles about a woman named Jane whose home was burglarized by her 19 year old neighbor, whom Jane had known since she was 4 years old and had even babysat her.<sup>3</sup> Jane had very good relations with the young woman’s parents and knew that she had drug problems and hence wanted her to get help. So, Jane and the young woman, along with their family members go for a restorative justice proceeding/ meeting. Not just Jane and

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\* Associate Professor, UPES, Dehradun

<sup>1</sup>Michelle Maiese, “Restorative Justice” (October 2003) retrieved from <http://www.beyondintractability.org/essay/restorative-justice>

<sup>2</sup> Elmar G. M. Weitekamp and Hans-Jürgen Kerner, *Restorative Justice: Theoretical Foundations* 329 (Routledge, 2012)

<sup>3</sup> Lorenn Walker, *Restorative Justice: Definition and Purpose* 3 (Sage Publications 2013)

the young woman, but also every other participant described how the incident had affected them. For example, her mother felt responsible and guilty for the act of her daughter and her drug problem. So, it was decided that the young woman would pay the necessary costs of repair to Jane and would stay sober and clean. So, through restorative justice mechanism, a decision was made and at the same the relations between the parties were also saved, which made everyone feel good about it. So, it could be termed as an outcome, which is more inclined towards a community.

In today's criminal justice system, where the victims or the individuals are represented by the state, the main focus is on identifying and punishing the wrongdoer and not on how the harm done to the victim and the community can be repaired.<sup>4</sup>

A crime causes not only physical but emotional harm to the people and those "people" not only includes the person who is a direct victim, but also the accused and both of their families and loved ones, and restorative justice gives an opportunity to be accountable and at the same time to heal. It basically works upon what we have learnt from our parents. Today various schools, religious institutions and societies are implementing restorative justice approach to deal with the wrongdoers.<sup>5</sup>

It gives you an opportunity to share their perspectives, face and answer each other each and find solutions together. Although a person can never undo whatever has been already done, but at least an effort could be made to make him understand the severity of his action and prevent any recurrence or further harm. There is one basis point that needs to be highlighted here that restorative justice cannot be implemented in a similar manner on everyone. There can be different forms of restorative justice, depending on the victim and situations. For some people, apologies and acknowledgement may be matter a lot, whereas for other compensatory actions may speak more.<sup>6</sup>

The twenty first century has been marked with a number of media trials and a very quick reporting of crime that has attracted an immediate reaction of the public at various levels. Whenever we hear about any such incident, we demand a strict punishment for the offenders and an even stricter one for the next incident that we hear, as if this will bring relief. It seems that turning towards harsher punishments is the only way we know right now to prevent crime and to provide justice. But we need to slow down and see if this "get-tough" approach is really fulfilling the purpose of justice? How far our punitive oriented justice system is successful and what lessons is it teaching us?<sup>7</sup> It's high time that this approach, that only a harsh punishment can prevent crime, should be cross checked

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<sup>4</sup> Ibid.

<sup>5</sup> Howard Zehr "Restorative Justice? What's That?" in *Restorative Justice Today* 7 (Sage Publications, 2013).

<sup>6</sup> Rita Takahashi "Restorative Justice almost 50 years later" in *Restorative Justice Today* 229 (Sage Publications, 2013).

<sup>7</sup> Paul McCold "Restorative Justice: The Role of the Community" paper presented to the Academy of Criminal Justice Sciences Annual Conference, Boston (31 March 1995).

and challenged.<sup>8</sup>

"And because people learn from the processes in which they participate, as well as from the objectives of those processes, we should give greater attention to what the process teaches and how it is experienced."<sup>9</sup>

One such participatory process lies in the new movement is Restorative justice that involves all parties. As opposed to the other approaches of justice, it is a powerful way that addresses not only the physical injuries but also pays attention to the psychological, social and relational injuries caused by the crime as well.<sup>10</sup>

Restorative Justice is not mere another method for trying to deal with the old criminal justice system but it is a "practice that contains the seeds for solving a new problem—the inadequacy of the criminal justice system itself and outdated the philosophy of revenge."<sup>11</sup>

So maybe there is a need for a new approach towards justice. restorative justice, as a young reform, holds a great potential in the twenty first century.<sup>12</sup> It provides us with an opportunity to build a far more reliable, transparent and effective justice system, which is not only punitive, but healing as well.<sup>13</sup> The main focus of our criminal justice system needs a shift from making an offender suffer to making him acknowledge and repair the harm he has done. No doubt that preventing crime and ensuring public safety will still remain the pivot concern, but the methods of achieving such goals need to be changed.

Howard Zehr, who is considered as the pioneer of the modern restorative justice, provides three main reasons for the requirement of implementation of restorative justice.<sup>14</sup> He comments that in the present justice system, victims are not only left out, but they are traumatized all over again by the proceedings. Also, the community and the society, which is also affected by the crime in one way or the other, are left out in this system. All of us need to take responsibility for this. And lastly, the present justice system fails to follow the principle of "Accountability". According to Zehr, "Accountability is to understand the harm you've caused and doing something to make it right but the present

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<sup>8</sup> Pepinsky, H. E., & Jesilow, P. (1985) "Myths That Cause Crime". Cabin John, MD: Seven Locks.

<sup>9</sup> Harris, M. K. "Moving into the new millennium: Toward a Feminist Vision of Justice" In R. Quinney & H. Pepinsky (eds.), *Criminology as Peacemaking* 83-97 (Bloomington, Indiana University Press, 1991)

<sup>10</sup> Restorative Justice Briefing Paper – 1 (Centre For Justice & Reconciliation at Prison Fellowship International, May 2005) retrieved from <http://www.d.umn.edu/~jmaahs/Correctional%20Assessment/rj%20brief.pdf>

<sup>11</sup> Marshall, T.F. (1992) Restorative Justice on Trial in Britain. In H. Messmer & H.-U. Otto (eds.), *Restorative Justice on Trial* (p. 26). Netherlands: Kluwer Academic Publishers.

<sup>12</sup> Mary Ellen Reimund "Is Restorative Justice On A Collision Course With The Constitution?" *Appalachian Journal of Law* (Spring, 2004).

<sup>13</sup> Umbreit, M.S., Vos, B. and Coates, R.B. "Restorative Justice in the 21st Century: A Social Movement Full of Opportunities and Pitfalls" April 21, 2005.

<sup>14</sup> Randi B. Hagi, "Howard Zehr: Pioneer Of Restorative Justice"; 20-07-2015; retrieved from <http://emu.edu/now/crossroads/2015/07/20/howard-zehr-pioneer-of-restorative-justice/>

justice system is ineffectively using punishments under the disguise of accountability.”<sup>15</sup>

## **2. Ways of Implementing**

There are various methods in which restorative justice can be implemented.

### ***(i) Modified Path***

The existing system of criminal law could be dismantled and a new system could be modified, based on the civil justice system, where parties are given significant importance, responsibilities are recognized and focus is on restoration, reimbursement and settlement rather than punishment.<sup>16</sup>

### ***(ii) Parallel and Alternative Road***

Another method is that, instead of modifying the existing criminal justice system, a new and parallel justice system could be established, where the parties will have the choice to take matter to Restorative justice system instead of the criminal justice system. This parallel system could serve as an alternative, left to the choice of the parties.<sup>17</sup>

### ***(iii) Interlinked Track***

This third model has been put to light by John Harley, where’s model of restorative justice system and criminal justice system are interlinked. Here, the initial proceedings of a case would be done by the formal criminal justice system only, but later, at an apt stage, they would be shifted towards the track of restorative justice system. Such a shift would depend upon various factors, such as the gravity of the crime, willingness of the victim to forgive, repentance and eagerness of the offender to repair the harm, etc.<sup>18</sup> There are certain steps that can be taken to work towards restorative justice:

- (i) Setting up of awareness workshops about restorative justice
- (ii) Responsive to requests and inputs.
- (iii) Set up a mechanism to evaluate what has been done.
- (iv) Frame measures in consultations with those who have been a victim or have been affected.
- (v) Consultation with other governments who are already following the principles of restorative justice.

In recent times, in India there is a moment going on for adopting the restorative justice in our criminal justice system especially with regard to the Plea Bargaining. Plea Bargaining

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<sup>15</sup> Ibid.

<sup>16</sup> Garry Johnstone, *The future of Restorative Justice* 134 (Routledge Publications, 2011).

<sup>17</sup> Garry Johnstone; “The future of Restorative Justice”; pg. No 135; Routledge Publications; 2011

<sup>18</sup> Id at 136.

is a concept, which took birth long back when the two extremes were considered, one aspect when the power is given to criminal Justice to court for compounding the offences. Once the power to compound the offence is exercised, the accused is treated as having been acquitted. The other extreme is that there is no provision or any possibility under the provision of the code for compensating the case but there is discretion of the court. Come what the circumstances prevail before the court, lesser sentence can't be awarded, even in a situation where the person might admit the guilt. Then the thought process begins for providing the middle path between the two extremes which lead to promulgation of plea bargaining. It involves active negotiation where an accused by confessing his guilt in a court may get the benefit of a lighter punishment than what is provided for the offence in question. It is considered one of the alternatives to deal with the huge arrears of criminal cases. In Black Law Dictionary, plea bargaining is a process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval. To reduce the delay in disposing criminal cases, the 154th Report of the Law Commission first recommended the introduction of 'plea bargaining' as an alternative method to deal with huge arrears of criminal cases.<sup>19</sup>

### **3. Concept of Plea and Plea Bargaining**

Plea is since qua to a criminal trial because it is the preliminary stage where the accused is informed of the charges against him and pleads to it, thereby formulating the issue to be decided by the court. A plea is not a mere formality. The purpose of the plea is to make a point for determination of guilt or innocence of the accused. There can be no trial or merits in a criminal trial until the accused has pleaded guilty or not. There the accused has an absolute right to an opportunity to plead and he has indefeasible right as to how he pleads to the charge framed against him. The general rule is that one who stands mute on charge when it is read over to him in a criminal prosecution does not permit the truth of the essential allegations, as charged, to stand; the allegations of facts in support of information must be proved, at least prima facie, by the state before a finding of guilty can be recorded by the court. Plea bargaining thus refers to pre-trial negotiations between the defense and the prosecution, in which the accused agrees to plead guilty in exchange for certain concessions guaranteed by the prosecutor<sup>20</sup>.

“Plea Bargaining” is different from the plea of the accused in the strict sense of the term plea”. At times accused, which is charged with a serious offence, does not choose to contest the same on facts but at the same time he does not wish to concede to the gravity of the offence. In such cases defending council may advise accused to take plea of guilty to the offence charged or to a milder alternative in the hope getting a less severe sentence, and for this purpose seek to discuss the position with their judge and the prosecution's

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<sup>19</sup> 154th Law Commission Report, 1996 on Code of Criminal Procedure, 1973, vol I.

<sup>20</sup> *Santobello v. New York*, 404 U.S. 257, 261 (1971)

council. Plea – bargaining is a “bargain” of the accused with the prosecuting agency in the matter of punishment on the condition that he would waive his right to be defended or to defend himself or to contest at the trial. In exchange for a plea of guilty, the accused would receive leniency in sentencing.

In 1970, the constitutional validity of plea bargaining was upheld in *Brady v United States*,<sup>21</sup> where it was stated that it was not unconstitutional to extend a benefit to an accused that in turn extends a benefit to the State. One year later, in *Santobello v New York*<sup>22</sup> the United States Supreme Court formally accepted that plea bargaining was essential for the administration of justice and when properly managed, was to be encouraged. Law on pleading guilty is an area having clarity and certainty. But the sphere of plea bargaining is quite sticky to explain. With a view to address the problem of the huge backlog of criminal cases, a new system was adopted by India by an amendment in 2005<sup>23</sup> whereby the Plea Bargaining was recognized as a part of the Code of Criminal Procedure, 1973. A plea bargain is generally an agreement between the defense and the prosecutor where the defendant pleads guilty and in exchange, the prosecutor reduces the charge or recommends a sentence of reduced nature.<sup>24</sup> Looking at the plethora of cases pending in the Criminal Justice System, it was a constant pressure on the judicial organs to impart justice without any delay. Hence, as a bold step plea bargaining came into play<sup>25</sup>.

#### **4. Indian Law on Plea Bargaining**

As noted earlier, in India, the system of plea bargaining is in its experimental stage. The system was introduced as a result of criminal law reforms introduced in the Criminal Law (Amendment) Act, 2005 (Act 2 of 2006). Section 4 of the Amendment Act introduced Chapter XXIA to the Code having Sections 265 A to 265 L. Though the Act was passed in 11th January, 2006, the provisions were notified and came into effect from 5th July, 2006.

##### **4.1 Applicability**

Section 265 A deals with applicability of the Chapter XXIA. Benefit of Plea bargaining can be extended in two circumstances. One is, if a report is forwarded by a Station House Officer of a Police Station after the completion of investigation to the Magistrate. The other is, if the Magistrate has taken cognizance of an offence on a complaint under Section 190 (a) followed by examination of a Complainant and witness under Section 200 or Section 202 and issuance of process under Section 204. Thus, it means, after the

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<sup>21</sup> 297 US 742-25 L.Ed. 2d 747

<sup>22</sup> DD Basu, *Code of Criminal Procedure* 1973 (LexisNexis, 4th Edition, 2010).

<sup>23</sup> *Ibid.*

<sup>24</sup> Pinaki Ranjan, “Concept of Plea Bargaining in American Jurisprudence vis-à-vis its applicability under Indian Law”, 2005 (1) *Unreported Judgment (Journal)* 40 (SC).

<sup>25</sup> 154th Law Commission Report, 1996 on Code of Criminal Procedure, 1973, vol I

commencement of proceedings upon a private complaint under Section 190 (a) of the Code. However, if the Accused is involved in an offence, which is punishable by death, life imprisonment or imprisonment for more than seven years, benefit cannot be extended.

Apart from that for offences affect socio- economic conditions of the country, which are notified by the Central Government or offences against women or offences against a child below the age of 14 years, benefit of plea bargaining is not available. Under Section 265 L, the provisions of plea bargaining is not applicable to any Juvenile or Child as defined under Juvenile Justice (Care and Protection of Children) Act, 2000. The Savings provision under Section 265J has extended an independent existence to the Chapter, in case of inconsistency with other provisions of the Code.

#### **4.2 Salient Features of Plea Bargaining**

A new chapter (chapter XXI A) on plea bargaining has been inserted in the criminal procedure code 1973. A notification to bring into effect the new provision has been issued and it has come into effect from 5th July, 2006. Plea bargaining was introduced through the criminal law (Amendment) Act, 2005 which was passed by parliament in the winter session of 2005. The salient features are as follows: -

The plea bargaining is applicable only in respect of those offences for which punishment of imprisonment is up to a period of 7 years. It does not apply where such offence affects the socio-economic condition of the country or has been committed against a woman and a child below the age of 14 year. The application of plea bargaining should be filled by the accused voluntarily. A person accused of an offence may file the application for plea bargaining in the court in which such offence is pending for trial.

The complainant and the accused are given time to work out a mutually satisfactory disposition of the case which may include giving to the victim by the accused compensation and other expenses incurred during the cases. Where a satisfactory disposition of the case has been worked out, the court shall dispose of the case by sentencing the accused to one fourth of the punishment provided or extendable, as the case may be such offence. The statement or facts stated by an accused in an application for plea bargaining shall not be used for any other purpose other than for plea bargaining. The judgment delivered by the court in the case of plea bargaining shall be final and no appeal shall lie in any court against such judgment.

Plea Bargaining does not solve the entire problem but reduces its severity of penalty. The introduction of plea bargaining is a shortcut aimed at quickly reducing the number of under-trial prisoners and increasing the number of convictions, with or without justice. It is undoubtedly a disputed concept since few have welcomed it while others have abandoned it. The consequences will be felt most obviously by the countless numbers of poor languishing in the country's prisons while awaiting trial. Taking into account the

advantages of plea-bargaining, the recommendations of the Law Commission Plea bargaining was clearly recognized as the need of the hour and by no stretch of imagination can the taint of legalizing a crime will attach to it. At this stage it can be safely held that 'Law is not a Panacea. It cannot solve all problems, but it can reduce the severity'. Plea bargaining in India endeavors to address the same, which despite its shortcomings can go a long way in speeding the caseload disposition and attributing efficiency and credibility to Indian Criminal Justice. Thus, we can say that the concept of Plea-bargaining acts as a distinctive tool for restorative justice or it is a way to alternate dispute redressal system.

## 5. Conclusion

In Spite of all the efforts that have been put into the present justice system, the dissatisfaction of the citizens with the legal system and its processes can be witnessed everywhere.<sup>26</sup> So even where providing such harsh punishments and putting the offender behind bars has not helped in reduction of crime over the centuries, maybe it's time to let go of the revengeful approach and to adopt a new one which aims at restoring the relations between the offender, victim and the community to ensure a lasting harmony and peace.<sup>27</sup> Speedy trial is the essence of criminal justice and there is no doubt that delays in trial itself constitutes a denial of justice. Initially, the concept of plea- bargaining was criticized by a group of society including legal experts and intellectuals by stating that it will demoralize the public confidence in the criminal justice system and also lead to lesser penalties to rich class, conviction of innocent people and therefore, it has become disputed concept now. Today, it is used by all great countries like USA, Europe, Canada and some authorities stated that the prevalent conditions in India are very different from US, even then to meet out the huge backlog of cases in India and ultimately it will have to be done with the consent of both the parties' i.e. accused and prosecution, then what undermines? Therefore, India cannot abstain itself for this law.

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<sup>26</sup> Judge Sophia H. Hall ; Restorative Justice: Restoring The Peace ; 21-APR CBA Rec. 30 CBA Record; April, 2007

<sup>27</sup> Harry Mika, "The Practice and Prospect of Victim-Offender Programs", 46 *SMU L. Rev.* 2191, 2193 (1993).

## Smuggling of Migrants Under Contemporary International Law: A Study with Special Reference to Bangladesh

Dr. Sant Lal Nirvaan<sup>1\*</sup>  
Nikita Goel<sup>\*\*</sup>

### Abstract

*Today the world has become a 'Global Village' and consequently some people aspire to live at secure places transcending all borders. Although the vast majority of the world's population live in their native countries, but in 2017, there were nearly 258 million recorded international migrants<sup>2</sup> up from 220 million in 2010 and 173 million in 2000.<sup>3</sup> This global issue has recently gained more attention in the South Asian Region, particularly in Bangladesh and Myanmar. Bangladesh shares a 4,222-km long border with India and a 288-km common border with Myanmar. Twenty-eight out of the 64 districts of Bangladesh have common borders with India, and two have borders with Myanmar. Several reports revealed that traffickers use 20 main points in 16 south/south-western districts of Bangladesh near the Indian border to run their trade. This brings India into the issue surrounding the migrants and India has a crucial place in this situation since India can be a major State to resolve the dispute. Moreover, the migrants take refuge in the Indian states of Jammu & Kashmir, Hyderabad and Delhi due to cultural similarity found in these states as well as due to economic opportunities. There is an increased risk to national security of the Indian State since the vulnerable migrants could be used by the terrorist outfits to use these migrants to fulfill their petty motives.*

**Keywords:** *Migrants, Smuggling, Trafficking, Refugees, Rohingya Muslims, Bangladesh, New York Declaration*

### 1. Introduction

Today the world has become a 'Global Village' and consequently some people aspire to live at secure places transcending all borders. Although the vast majority of the world's population live in their native countries, but in 2017, there were nearly 258 million

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\* Assistant Professor, Institute of Law, Kurukshetra University, Kurukshetra

\*\* L.L. M. (1<sup>st</sup> Year), Department of Law, Kurukshetra University, Kurukshetra

<sup>2</sup> Any person who changes his or her country of usual residence. United Nations, Department of Economic and Social Affairs, United Nations Recommendations on Statistics of International Migration, Revision 1, 1998.

<sup>3</sup> United Nations, Department of Economic and Social Affairs, International migrant stock: The 2017 revision

recorded international migrants<sup>4</sup> up from 220 million in 2010 and 173 million in 2000.<sup>5</sup> This global issue has recently gained more attention in the South Asian Region, particularly in Bangladesh and Myanmar. This problem is one of the most shocking domestic threats in Bangladesh, since, in the name of labour migrants are smuggled across borders and this has gained much more global attention. The Report of Government of Bangladesh, in relation to combating human trafficking in Bangladesh, stated that a notable portion of trafficking victims are men who were recruited by deceitful means and who are subsequently exploited under conditions of forced labor or debt bondage<sup>6</sup>. In addition to this, women and children from Bangladesh are also trafficked to other countries for commercial sexual exploitation. The UNDOC has identified the countries as both origin and a transit country for trafficking in person (Thomas and et. al. 2011). Despite having so called measures like the existing national and international legal frameworks, government organization's (GO) and non-government organizations (NGO) initiatives to address the problem, migrants smuggling in the name of labour migration from Bangladesh remains undetected and is gradually taking more serious form. Considering the grievousness of situation, this paper mainly conceptualizes the basic issues of trafficking and migrant smuggling from theoretical and practical perspectives as well as analyses the international community-based practices for addressing the issues of trafficking and migrant smuggling. This is essentially search community-based model that can be adapted in Bangladesh and other developing countries with a view to protecting migrant workers, particularly the potential labour migrants to save them from the victimization of forced labour, slavery or exploitations. The relevant stakeholders will find strategic guidelines to design their future activities to address the issue adapting in line with their own structure in Bangladesh and other affected countries.

There are various reasons for the migration of millions of people; some cross international borders by choice, to reunite with their family members or to benefit from a better education or a job that they could not find in their own country. Others have no choice but to leave their native country due to conflicts, environmental disasters or lack of opportunities to make a decent living. International migration of people is highly regulated by adoption of different approaches by each country or groups of countries. They meticulously determine how and under what circumstances foreigners could enter, live, study, or work within their borders. The demand for emigration or immigration does not always correlate with the respective systems that regulate people's transnational movements, thereby, many seek alternative arrangements to migrate to abroad. Some migrants look for ways to overcome migration barriers, while others try to shorten the

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<sup>4</sup> Any person who changes his or her country of usual residence. United Nations, Department of Economic and Social Affairs, United Nations Recommendations on Statistics of International Migration, Revision 1, 1998.

<sup>5</sup> United Nations, Department of Economic and Social Affairs, International Migrant Stock: The 2017 revision

<sup>6</sup> <https://www.migrationpolicy.org/country-resource/bangladesh>

processing time, lower the costs or eliminate the need to obtain official documentation that may be associated with regular migration. Migrant smugglers exploit these needs and offer their services for profit. They may work on their own, within a small network in one or two countries, or as part of large, complex multinational organizations. For some migrants, smugglers represent the only available avenue towards the longing of a better life, even if it's price may be high, the actual travel routes are complex and the risk of mistreatment and even death is considerable.

## 2. Smuggling of Migrants

Smuggling of migrants is a crime under international law, as per Article 3 (1) of the Protocol against the Smuggling of Migrants by Land, Sea and Air<sup>7</sup>, “*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 of which the person is not a national or a permanent resident*”.

Migrant smuggling has recently attracted the attention of the international community, particularly the Western governments, after these activities started to become increasingly global, diverse and complex<sup>8</sup>. During the last decade it has been observed that the Chinese migrants have been smuggled across the Pacific into the US and Afghan migrants into Australia<sup>9</sup>. Huge steel ships and large trucks have been used to smuggle large numbers of migrants, sometimes transporting hundreds in a single journey<sup>10</sup>; thereby, smuggling of migrants has been transformed into an illicit global trade, possibly the second most lucrative after drug trafficking, with profits estimated at between \$5 and \$10 billion annually<sup>11</sup>. The profits from these illicit activities may be used to fund other illegal activities, such as drug trafficking, arms trade or terrorist activities.<sup>12</sup> Europol has estimated that 90% of the irregular crossing of borders into the European Union through

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<sup>7</sup> It is commonly referred to as the Smuggling of Migrants Protocol—supplementing the United Nations Convention against Transnational Organized Crime.

<sup>8</sup>David Kyle and Rey Koslowski (eds), *Global human smuggling: Comparative perspectives* (Johnes Hopking University Press 2001) 5; Georgios A Antonopoulos and John Winterdyk, ‘*The Smuggling of Migrants in Greece an Examination of its Social Organization*’ (2006) 3 E J Crim 439; Anne Gallagher, ‘*The International Law on Human Trafficking*’ (Cambridge University Press 2010).

<sup>9</sup> Friedrich Heckmann and others, ‘*Transatlantic Workshop on Human Smuggling*’ (2000) 1 Geo Immigr LJ 167; Andreas Schloenhardt, ‘*Migrant Smuggling and Organised Crime in Australia: Research Paper*’ (The University of Queensland, Migrant Smuggling Working Group 2011) 6.

<sup>10</sup>Rebecca Tailby, ‘*Organised Crime and People Smuggling/Trafficking to Australia*’ (Australian Institute of Criminology 2001).

<sup>11</sup>Philip Martin, ‘*Smuggling and Trafficking: A Conference Report*’ (2000) 34 Intl Migration Rev p 969.

<sup>12</sup>Andree Kirchner and Lorenzo Schiano di Pepe, ‘*International Attempts to Conclude a Convention to Combat Illegal Migration*’ (1998) 10 Intl JRL 662,663; NiluferNarli, ‘*Human Trafficking and Smuggling: The Process, the Actors and the Victim Profile*’ in NiluferNarli (ed), *Trafficking in Persons in South East Europe - A Threat to Human Security* (National Defence Academy and Bureau for Security Policy at the Austrian Ministry of Defence 2006) 24.

2015 was facilitated by smugglers<sup>13</sup>.

Schloenhardt observes, 'Migrant smuggling is also both a criminal justice issue and a human rights issue<sup>14</sup>.' Since the activities of migrant smuggling involve the crossing of borders by sea, land or air, they violate immigration laws and the legislation governing the entry and exit of the native, transit and destination States. These activities challenge the sovereignty of the States by undermining their sovereign right to control who crosses their borders or remains within their territory. This makes migrant smuggling a criminal justice issue.

The Smuggling of Migrants Protocol aims to target smugglers, not the people being smuggled. Article 6 of the Smuggling of Migrants Protocol, requires the States to criminalize smuggling of migrants as well as enabling a person to remain in a country illegally in order to obtain, directly or indirectly, a financial or other material benefit, as well as to establish as aggravating circumstances acts that endanger the lives or safety or entail inhuman or degrading treatment of migrants. By virtue of article 5, migrants are not liable to criminal prosecution for the fact of having been smuggled.

### **3. Trafficking and Smuggling**

Trafficking and smuggling crimes are similar because of the unequal power relationship, smuggled migrants are particularly vulnerable to being trafficked at various points of their journey, including the starting point as well as at their destination.

But there are some differences between trafficking and smuggling which include- Human trafficking is a crime against a person while smuggling of migrant is a crime against the state. The offence takes an aggravated form when it is perpetrated in a way that endangers the lives or safety or entails ill-treatment of migrants. Smuggling of migrant is always trans-national, while trafficking may not be. Trafficking can occur regardless of whether victims move between states or within a State's borders.

### **4. Normative Framework**

The core framework for addressing trafficking in persons and smuggling of migrants, including the Trafficking in Persons Protocol and the Smuggling of Migrants Protocol. Several other international and regional frameworks include- the International Labour Organization (ILO) Conventions, such as Convention No. 105 on the Abolition of Forced Labour (1957); Convention No. 29 on Forced or Compulsory Labour (1930), the Protocol to the Forced Labour Convention (2014), and Convention No. 182 on the Worst Forms of Child Labour (1999). Furthermore, the Convention on the Rights of the Child, and the

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<sup>13</sup> According to Europol, in most cases, these services were provided by criminal groups, with criminal networks involved in migrant smuggling estimated to have had a turnover of between EUR 3-6 billion in 2015.

<sup>14</sup> Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Pacific Region* (Martinus Nijhoff Publishers 2003) 5.

Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography, prohibit trafficking in children for any purpose, including for exploitive and forced labour, and contain a number of provisions that underpin a child-rights approach. The Convention of the Elimination of All Forms of Discrimination Against Women (CEDAW) calls on states to address all forms of trafficking of women and girls. Also of relevance is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Refugees Convention and the 1967 Protocol thereto, as well as the International Law of the Sea framework.

### **5. Vulnerability of Migrants**

- Smuggled migrants could be vulnerable to abuse, violence and exploitation due to the unequal power relationship with smugglers, an inability to seek protection from the state and the lack of options in regard to exit strategies.<sup>15</sup> They are at a high risk of victimization through various crimes, including extortion, kidnapping, deprivation of food and water, sexual and gender-based violence and even homicide.<sup>16</sup>
- Besides, Migrants end up being the victims of collusion between smugglers and local moneylenders who provide loans to pay for the journey and then claim family land or property as collateral<sup>17</sup>.
- Many smuggled migrants could be at risk of extortion and abuse by state officials, such as border authorities or police officers, who, in some instances, have facilitated migrant smuggling or at least turned a blind eye to it in exchange for a bribe or a share of the profits generated.<sup>18</sup>

### **6. Issues Surrounding Migrant Smuggling**

The issue of migrant smuggling is a multi-layered criminal industry, migrant smuggling encompasses various issues such as irregular migration, human rights violations and border management.

Several issues challenge the effective implementation of the Protocol which includes: “(a) lack of legislation; (b) lack of data and research; (c) insufficient prevention and awareness; (d) inadequate policies and planning; (e) weak criminal justice system responses; (f) inadequate protection of the rights of smuggled migrants; and (g) limited international cooperation”.<sup>19</sup>

### **7. Mitigation of The Problem**

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<sup>15</sup> OHCHR, *Situations of migrants in transit (A/HRC/31/35)*, paras 55-58.

<sup>16</sup> UNHCR Tracks, *Abandoned at Sea, Stories of refugees and aid workers*, 2015.

<sup>17</sup> IOM, Thematic Paper, *Combatting trafficking in persons and contemporary forms of slavery*, 2017.

<sup>18</sup> UNODC, Issue paper, *Corruption and the smuggling of migrants*, 2013.

<sup>19</sup> UNODC, *International Framework for Action to Implement the Smuggling of Migrants* (New York, 2011), p.7.

The problem can be mitigated by- adequate identification of, and protection and assistance to migrants in vulnerable situations in the context of smuggling and victims of trafficking and contemporary forms of slavery.

In the context of smuggling, States have made considerable progress in developing the measures to protect the victims of trafficking and migrants in vulnerable situations. In some cases, identified victims of trafficking have access to temporary or permanent residency and work permits, safe accommodation, medical and psychological support and integration opportunities. However, trafficked persons who no longer have authorization to stay because their temporary residency permit attached to criminal proceedings has expired - are often not afforded the opportunity to apply for permission to remain.<sup>20</sup>

Research suggests that a proportion of victims of abuse and exploitation avoid seeking protection and assistance because they fear deportation on account of their irregular status. Moreover, the services available are still too often dependent on factors such as age, sex, nationality, migration status, and type of exploitation, location of exploitation and who identified the victim. Therefore, it is crucial that states increase their capacity to properly identify and subsequently protect and assist victims.

There are a number of entities, including the Global Migration Group (GMG), which have developed guidance designed to assist states and other stakeholders to protect migrants facing situations of vulnerability and situations of abuse experienced when resorting to the use of smugglers or exploitative facilitators.<sup>21</sup>

## **8. Migrant Smuggling from Bangladesh: Current Trends**

The Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime under Article 6 criminalize both smuggling of migrants and enabling a person to remain in a country illegally, as well as aggravating circumstances that endanger the lives or safety, or entail inhuman or degrading treatment of migrants<sup>22</sup>. This two-fold criminalization process has been alarmingly increased in recent years and grows under the dark figure of crime. One of the leading daily newspapers of Bangladesh following the investigative reports of Asia News Network stated that over the last eight years at least 250,000 people comprising from Bangladesh and Rohingya Muslims were smuggled to Malaysia through Thailand, and that the people became the victims of abuses, including torture, starvation, captivity,

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<sup>20</sup> Report of the Special Rapporteur on trafficking in persons (A/HRC/29/38), para. 28.

<sup>21</sup> GMG Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations (A/HRC/34/31); GMG, *Exploitation and abuse of international migrants, particularly those in an irregular situation: A human rights approach*, 2013; UNHCR, *'Migrants in vulnerable situations': UNHCR's perspective*, 2017.

<sup>22</sup> Triandafyllidou, A. and Maroukis, T. (2012), "Migrant Smuggling Irregular Migration from Asia and Africa to Europe." Published on 13 April 2012 by Palgrave Macmillan, London, For more see: (<http://www.palgrave.com/products/title.aspx?pid=494431>)

ransoms, forced labour, and humiliating deportation<sup>23</sup>. More than 700,000 Rohingyas crossed into Bangladesh in 2017 fleeing an army crackdown in Myanmar's Rakhine state, according to UN agencies.<sup>24</sup>The number of trafficking and migrant smuggling victims has recently increased dramatically. According to UNHCR periodic report, around 25,000 Bangladeshi and Rohingyas crossed the border through smugglers' boats from the Bay of Bengal, only in the first quarter of 2015, almost doubling the number over the same period in 2014. The latest report of UNODC explains that the Bangladeshi irregular migrants generally move to a South Asian country or a country in a neighboring region, such as Malaysia, the Maldives and Pakistan. Besides this Bangladesh nationals also aimed to migrate irregularly to Australia (small number), Italy, Oman, Sweden, the United Arab Emirates, and the United States (UNODC, 2015). According to the UN Refugee Agency (UNHCR), more than 723,000 Rohingyas Fled to Bangladesh since 25 August 2017<sup>25</sup>. On 28 September, 2018, Sheikh Hasina, the Prime Minister of Bangladesh spoke at the 73rd United Nations General Assembly and stated, "There are 1.1 million Rohingya refugees now in Bangladesh."<sup>26</sup>

It is crucial to identify the causes of such mass migration and the scholars identified mainly poverty, social exclusion, gender-based discrimination, widespread illiteracy, lack of awareness and poor governance as the key factors which contribute towards trafficking of persons in Bangladesh. Besides, the lack of adequate opportunities to migrate legally to their destination some potential migrant seeks desperately to move out and the traffickers and smugglers picks these opportunities. The effect of higher migration cost to human trafficking, forced labour, debt-bondage and they stated that inadequate scope for migration on a regular basis places potential migrant under a compulsion to make several unlawful deals with recruiting agencies/ intermediaries/individual brokers<sup>27</sup>. According to their study, the average migrant worker spends 309,259 BDT on their recruitment and migration. The Bangladesh Association of International Recruiting Agencies (BAIRA), companies are legally permitted to charge up to \$1,235 per worker for the recruitment for overseas employment, but many NGOs reported that workers are

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<sup>23</sup> "Thousands' of Rohingya and Bangladeshi migrants stranded at sea", The Daily Star, dated 15<sup>th</sup> May, 2015. (<https://www.thedailystar.net/world/thousands-rohingya-and-bangladeshi-migrants-stranded-sea-81720>)

<sup>24</sup> "Boats carrying 200 Rohingyas still at sea, Says Malaysia after latest arrival", The Daily Star, dated 9<sup>th</sup> April, 2019.

<https://www.thedailystar.net/backpage/news/boats-carrying-200-rohingyas-still-sea-1727035>

<sup>25</sup> Bangladesh: Humanitarian Situation Report No. 16 (Rohingya Influx), 24 December 2017, Report from UN Children's Fund. (<https://reliefweb.int/report/bangladesh/bangladesh-humanitarian-situation-report-no-16-rohingya-influx-24-december-2017>)

<sup>26</sup> "Bangladesh point finger at Myanmar for Rohingya 'genocide'", The Fox News, dated 28<sup>th</sup> September, 2018 (<http://www.foxnews.com/world/2018/09/27/bangladesh-point-finger-at-myanmar-for-rohingya-genocide.html>)

<sup>27</sup> Barkat, Abul; Hossain, Md. Ismail; Hoque, Ehsanul (2014), "The Cost Causes and potential redress for high recruitment and migration costs in Bangladesh". International Labour Organisation.

charged upwards of \$6,000.<sup>28</sup> This cost of migration is in fact related to the channel and medium of migration. It has been found that 80.6 % of workers migrated either through agent(dalal) or personal communications, whereas the government channels were chosen as mediums of migration by only 4.3 per cent. This finding shows an influential presence of the individual interaction and communication for migration out of the direct control of the government which is an issue of consideration for curbing the problems. The aftermath of trafficking and migrant smuggling is beyond the descriptions as the victims are highly vulnerable to abuse and exploitations. Explaining their vulnerabilities UNODC (2016) stated that the victims are treated as goods and the safety and lives of the victims are put at risk; they may suffocate in containers, perish in deserts or drown at sea. The victims are quite often tortured and degraded. Explaining the recent incidences of trafficking of Bangladeshi and Rohingya people, Foundation Charitable Incorporated Organization (FCIO) (dealing with human rights at Sea), explained that the victims were beaten and given very little food or water and that they survived in the jungle by eating leaves (HRS, 2015). The ultimate results of human trafficking or migrant smuggling is bonded labour, slavery, inhuman torture, even if they are able to escape to a another country they become an illegal migrants. Bangladesh shares a 4,222-km long border with India and a 288-km common border with Myanmar. Twenty-eight out of the 64 districts of Bangladesh have common borders with India, and two have borders with Myanmar. Several reports revealed that traffickers use 20 main points in 16 south/south-western districts of Bangladesh near the Indian border to run their trade. This brings India into the issue surrounding the migrants and India has a crucial place in this situation since India can be a major State to resolve the dispute. Moreover, the migrants take refuge in the Indian states of Jammu & Kashmir, Hyderabad and Delhi due to cultural similarity found in these states as well as due to economic opportunities. There is an increased risk to national security of the Indian State since the vulnerable migrants could be used by the terrorist outfits to use these migrants to fulfill their petty motives.

On the other hand, the number of illegal immigrants from Bangladesh jumping the border to sneak into the U.S. is on pace to double in the Laredo region of Texas is a worrying surge of migration from a country with terrorism dangers. Sometimes, the illegal immigrants may pay up to \$27,000 to international smuggling organizations for ferrying them from Asia into the western hemisphere, where they could make their way up through Central America and Mexico to the U.S. border, where they're led across the Rio Grande. Another four Bangladeshis were nabbed at the Border Patrol's Laredo Sector, which brings the total to 181 through a little more than six months of the fiscal year. That's already more than the 181 apprehended in all of fiscal year 2017. The increase is troublesome both because of the presence of Islamist terror networks in Bangladesh and

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<sup>28</sup> Rabbi Fazle, "Trafficking Of Bangladeshi Women and Children: Victimization Of Rights And Dreams", *Foreign Affairs, Insights and Reviews*. Dated 5<sup>th</sup> November, 2015.

because the immigrants are being coached on what to say when they are caught at the border, depriving agents of good intelligence.<sup>29</sup>

## **9. The Rights of Smuggled Migrants Under the Protocol**

Smuggled migrants are the 'potential victims' within the Migrant Smuggling Protocol. There is no consensus in the academic literature on the nature and extent of the rights of smuggled migrants within the Protocol. Broadly speaking, there are two conflicting views:

On one hand, Gallagher, Koser and Obokata point out that the Protocol contains limited reference to the protection needs of smuggled migrants<sup>30</sup>. This view suggests that the Protocol is deficient from the perspective of the rights of smuggled migrants or they exist within the Protocol implicitly. Since human rights are often couched in general and broad language, these rights inevitably need to be interpreted in practice.<sup>31</sup> This rule applies equally to the rights in the Migrant Smuggling Protocol. The interpretative notes to Article 16 confirm this view. They state that listing certain rights in the Protocol – such as the right to life and the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment – should not be interpreted as excluding or derogating from any other rights that are not specifically listed<sup>32</sup>. In the same context, Article 19(1) of the Protocol states that nothing in the Protocol shall affect the obligations and responsibilities of States under international law, including human rights law.

On the other hand, there is a view that has commended the Protocol for protecting human rights. Mallia states that through the provisions of the Protocol it can be noticed that there is a firm intention to protect the rights of smuggled migrants<sup>33</sup>. Dixon also argues that Article 16(3) of the Protocol grants to smuggled migrants the necessary rights to protect their lives and dignity, including the right to safe transport<sup>34</sup>. This view, which implies that the Protocol has a full framework for the protection of migrants, is arguably misguided. The reason for this is that the fundamental rights in the Protocol and other

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<sup>29</sup>“Smuggling cartels fuel surge in border jumpers from terror-prone Bangladesh”, *The Washington Times*, dated 18<sup>th</sup> April, 2018. (<https://www.washingtontimes.com/news/2018/apr/18/illegal-immigrants-bangladesh-aided-international-/>).

<sup>30</sup>Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 HRQ 975, 1003-04; Khalid Koser, 'Strengthening Policy Responses to Migrant Smuggling And Human Trafficking: Discussion paper prepared for the Civil Society Days of the Global Forum on Migration and Development' (Manila 2008) 2; Obokata, 'Smuggling of Human Beings from a Human Rights Perspective' 397-98.

<sup>31</sup> Johannes Knorz, 'The Theory and interpretation of Human Rights in Australia and Germany: A Comparative Analysis' (1997) 1997 Aus Int'l LJ 34, 37.

<sup>32</sup> Travaux préparatoires of the Protocol (n5) 541.

<sup>33</sup> Patricia Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (MartinusNijhoff Publishers 2010)118.

<sup>34</sup> Rosalind Dixon, 'Human Smuggling: the Rights of Smuggled and Trafficked Migrants under International Human Rights Law' (International Council on Human Rights Policy 2005).

provisions that can be used to infer additional rights should not be interpreted broadly.

The current provisions on protection are incorporated within the existing text of the Protocol as a result of pressure by an 'Inter-Agency Group', comprising UNHCR, IOM, and UNICEF<sup>35</sup>. The drafters of the Protocol were only interested in crime control, rather than the protection of smuggled migrants<sup>36</sup>.

It is to be expected that not all the States parties to the Protocol will protect smuggled migrants' rights given the vagueness and need for complex interpretation of the Protocol and the relevant human rights instruments. In particular, there is a widespread view among States that smuggled migrants are not victims and are not deserving of protection.

### **10. Legal Framework to Encounter Human Trafficking In Bangladesh**

Existing laws or acts to encounter human trafficking are as follows-

1. Overseas Employment and Migration Act, 2013.
2. The Human Trafficking Deterrence and Suppression Act, 2012.
3. The Women and Children Repression Prevention Act of 2000 (The act amended in 2003).
4. The Prevention of Oppression Against Women and Children 1995 (Special Act).
5. The Children Act, 1994.
6. The Penal Code, 1860.
7. The Suppression of Immoral Trafficking Act, 1933.

The prescribed penalties provided under these acts range from imprisonment for ten years to the death sentence; the most common sentence imposed on convicted sex traffickers is life imprisonment. The provided penalties are very stern and commensurate with those prescribed for other serious crimes, such as sexual abuse and rape. Article 374 of Bangladesh's penal code contained forced labor, but the prescribed penalties of imprisonment for up to one year or a fine are not sufficiently stringent to deter the offense. The judicial system of Bangladesh's handling of sex trafficking cases continued to be plagued by a large backlog and delays caused by procedural loopholes. Most sex trafficking cases are prosecuted by the 42 special courts for the prosecution of crimes of violence against women and children, which are generally more efficient than regular trial courts. The Bureau of Manpower Employment and Training (BMET) shut down,

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<sup>35</sup> *Supra note 24.*

<sup>36</sup> Jarrod Jolly, 'Fighting Crime or a Fight for Rights? Assessing the Human Rights Value of the UN Protocols on Trafficking in Persons and Migrant Smuggling' (2011) 4 QLS Rev 103,116; Erick Gjerdingen, 'Suffocation Inside a Cold Storage Truck and Other Problems with Trafficking as 'Exploitation' and Smuggling as 'Choice' Along the Thai-Burmese Border' (2009) 26 Arizona J Intl & CL 716.

cancelled the licenses, suspended registration and fined number of recruiting agencies. To complement an existing police anti-trafficking monitoring cell, the government created a 12-member police anti-trafficking investigative unit. National Police Academy provides anti-trafficking training to 2000 – 5000 police personnel every year to mitigate the problem.

## **11. Recommendations**

The non-exhaustive list of principled, practical and action-oriented commitments, in line with the New York Declaration for Refugees and Migrants, the 2030 Agenda for Sustainable Development and existing frameworks, which could be made by states and other stakeholders within the global compact for safe, orderly and regular migration:

- Identifying, assisting and protecting migrants in vulnerable situations in the context of smuggling and victims of trafficking and contemporary forms of slavery.
- Effective establishment and implementation of national legal frameworks to protect and assist migrants in vulnerable situations in the context of smuggling and victims of trafficking in persons and contemporary forms of slavery, irrespective of their migration status, in compliance with international law and sketching upon the guidance provided in the GMG Principles and Guidelines on the human rights protection of migrants in vulnerable situations.
- Establishing national mechanisms to adequately identify and ensure referrals, including legal, medical and psychological services that are gender and age sensitive.
- Establishing the “firewalls” between immigration enforcement, criminal justice and service providers, to ensure that migrant victims of abuse and exploitation could access proper justice and assistance.
- By opening effective and accessible regular migration channels including timely family reunification, labour mobility at all skills levels, educational opportunities, and humanitarian admission schemes. Strengthen the information dissemination about these pathways.
- Strengthen the capacity of front-line actors such as- the criminal justice practitioners, labour inspectors, asylum authorities, social service providers, medical personnel, law enforcement and border authorities.

## **12. Policy Recommendations with Reference to Bangladesh Matter**

- The opening of a legal channel of migration would entitle the vulnerable migrants to receive the minimum wage and other entitlements of the Indian workers. Thailand has such MOU with Myanmar, Cambodia and Laos that entitle migrant workers in Thailand to receive equal wages and benefits. For this, India and Bangladesh should

work bilaterally to solve this issue.

- Climate change adaptation should be done by the assessment of vulnerability and proper mitigation planning to minimize the impacts of sea-level rise.
- India must offer humanitarian assistance to these effectively stateless people like Rohingya Muslims, through bilateral negotiations with Bangladesh. India could absorb some of these crisis migrants or give them the status of refugees. By following well established policy framework for the migrants.
- The global community needs to extend support to climate refugees and assist them in obtaining the protected status under international law.

### **13. Conclusion**

In September 2016, the New York Declaration for Refugees and Migrants recognized that UN Member States should, “with full respect for our obligations under international law, vigorously combat human trafficking and migrant smuggling with a view to their elimination”<sup>37</sup>. Millions of migrants are left without shelter and end up being the victims of exploitation.

Under the domain of international law protocols are important instrument but these can become effective by – enhance collection, sharing, and analysis of disaggregated data, including on the modus operandi and economic models and conditions driving smuggling and trafficking networks, the number of migrant victims of trafficking in persons and other crimes, the factors that entice and allow criminals to target migrants, and the impacts of anti-trafficking and counter-smuggling measures. Besides this, set up of bilateral and multilateral mechanisms among judicial authorities, law enforcement, border control agencies and other relevant actors to share information, coordinate operational activities, and support investigation and prosecution efforts to tackle transnational organized crime can pave the way for the benign future and security of the migrants.

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<sup>37</sup> United Nations General Assembly, New York Declaration for Refugee and Migrants, A/RES/71/1, (New York, 2016).

## Theoretical Justifications Behind Recognition of Geographical Indications

S K Sulok<sup>1\*</sup>

### *Abstract*

*The present piece of writing is an essay which deals with the fundamental question of philosophical/theoretical justifications behind recognition of Geographical Indications (GI) which is a subset of Intellectual Property Rights. The question is very relevant in the modern context as there is greater attention being given to geographical indications in India in the present decade. Many GI's are being registered and it is seen as an important social and economic tool. Geographical Indications is one such intellectual property which is mostly possessed by the developing countries like India and they can greatly benefit from it.*

*So if we are able to understand the basic rationale behind recognition of geographical indications we will be able to understand its core concept and features which will in turn enable us to correctly frame the geographical indications law at the policy level. Such an attempt to understand the basic philosophy is rarely done and is the need of the hour. We also see trends whereby the western countries reject various geographical indications of other countries at their whims and fancies. The theoretical backing of the geographical indications can also go a long way to help oppose such rejections.*

*Thus, various philosophies are being used to see to what extent they could justify the geographical indications and their limitations in doing the same. This would highlight as to which all theories are apt for usage in connection with geographical indications and which are not.*

**Keywords:** *Intellectual Property Rights, Geographical indications, Philosophy of IPR*

### **1. Introduction**

In India in the past few months we have heard a lot of discussions on Geographical Indications (GI). A lot of GI's is being registered the latest being the Banganapalle Mango<sup>2</sup> from Andhra Pradesh. Efforts are being increasingly undertaken by the States for

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\* Research Scholar, Cochin University of Science and Technology, Kochi

<sup>2</sup> PTI, "Banganapalle Mango gets a GI tag", The Hindu, 04 May, 2017, available at <http://www.thehindu.com/sci-tech/agriculture/the-banganapalle-mango-gets-a-gi-tag/article18382533.ece>, (viewed on 02/05/2019).

registration of more and more GI's.<sup>3</sup> Geographical Indications today has thus become a hotly debated subject both in India as well as globally owing to both its social as well as economic significance in the modern era. GI, unlike other forms of Intellectual Property (IP) has two special characteristics, one is its greater social dimension and the other is that its custodians are mostly the developing or least developed countries. Hence it goes without saying that they face huge opposition from many developed countries that refuses to recognize them.

It is in this context that a fundamental question emerges in our mind as to why one should recognize GI's in the first place as an IP. This question is pertinent in the present time because unlike other forms of IP like Patents or Copyright GI is a collective property and its custodians are mostly the developing world. Further it would enable us to appreciate the concept of GI and how it is to be handled as an IP both at the policy level and at the implementation stage.

To be able to answer the question one needs to identify the basic theoretical justifications for recognition of Geographical Indications (GI), especially from a philosophical perspective. Only then can the recognition of GI be justified. Further, the understanding of the basic rationales or principles helps us to see how far the modern notion of GI adheres to these basic principles. For the present purpose the focus would only be on the basic rationales for recognition of GI. When we hear the term GI, the notion of collective ownership and management of property comes to our mind so the justifications identified is with a view to rationalize the recognition of the concepts of collective ownership and management.

For the purpose of analysis, the theoretical justifications would have to be looked from the basic jurisprudence theories which bring out the philosophical justifications.

## **2. Jurisprudential Justifications**

### ***2.1 Labour and Desert theory***

The main proponent of this theory is John Locke. Though at the outset it is to be said that John Locke here primarily deals with private ownership, rather than collective ownership or management of property, we nevertheless get certain hints which could be used to state that John Locke did envisage and recognize collective property.

In his theory he starts with the basic premise that at the beginning, everything was held in common. In this situation there was no concept of property as everything was owned by everybody. Since a person has a property in his own person, he by his labour could acquire anything and make it his property. In other words, he mixes his labour with an

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<sup>3</sup> PTI, "326 products registered as geographical indications so far", The Economic Times, 23 Oct., 2018, available at <https://economictimes.indiatimes.com/industry/miscellaneous/326-products-registered-as-geographical-indication-so-far/articleshow/66329918.cms>, (viewed on 02/05/2019).

object and creates property rights over it and the property rights must commensurate with the labour involved.<sup>4</sup> Locke was thus able to justify the acquisition of private property.

It is interesting to note that he envisages certain situations where collective ownership over property was in existence. For instance he states that in England where many people live under a government and there is existence of money and commerce, no one else can appropriate part of common land without consent of all his fellow commoners because such land was held in common by status by law and the law of the land was not to be violated. He further observes that although such land is held in common by some men it isn't held by all mankind rather it is the joint prop of this country/village. He further states that after such an enclosure what is left, from the point of view of the commoners, would not be as good when the whole was in common.<sup>5</sup>

He thus recognizes and justifies such common properties by resorting to the fact that there are limitations set by nature as to how much men can work and acquire private property. No man would be able to acquire more than a small part of the land and so it is impossible for one man to

infringe the right of another. Further, by the presumption of Abundance, even if such collective properties exist there would be enough and more left for others.<sup>6</sup>

Another situation envisaged was in certain parts of the world where there was increased use of people and animals and the use of money which had made the land scarce. In such areas the communities settled the bounds of their territory by law and within themselves regulated the property of private men in their society. Further the leagues, that have been made between different States disowning all claims to one another's land, have by common consent given up their claims to their natural common rights in undeveloped land in one another's domain and so have by positive agreement decided as to who owns what piece of the Earth.<sup>7</sup>

From the above we see that John Locke justifies and recognizes common ownership by a group of individuals and hence not only private acquisition of property is justified by individual labour but also group ownership over property is justified by group labour. Further Locke states that common land ought not to be divided amongst various individuals. Collective management by such groups can also be inferred from Locke's observations regarding England. Thus, we could see that Locke supports the common ownership of property and it serves as a form of justification to recognition of Geographical Indications.

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<sup>4</sup> Jonathan Bennett, *Second Treatise of Government by John Locke*, 2017 edn., p.11, available at <http://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf>, (viewed on 22/04/2019).

<sup>5</sup> Id. at 13.

<sup>6</sup> Id. at 13, 14.

<sup>7</sup> Id. at 17

When we extend this theory to GI, we see that the originators of a product deserve the right to property what has been created with their labour. So, GI holders have the right to the GI and further the theory recognizes common occupancy<sup>8</sup> and does not support unrestricted power to transfer which is a crucial aspect of GI<sup>9</sup>.

**Limitations:** It would be pertinent here to discuss the limitations of the Lockean theory when applied to GI. Some argue that it is hard to see from a Lockean perspective as to why the remote descendants of

GI holders should deserve an intellectual property right over products of which they are not the originators. Further the theory does not support a single GI right being granted to all regional producers. Rights associated under this theory are concerned with individuals and not regions and so if they move to another place the rights should move with them. The focus of the theory is on human contribution and not natural factors which often forms an important reason for the recognition of the GI. Furthermore, some argue that the theory may better suit GI's that have no natural factors associated with them, for instance, Swizz Watches.<sup>10</sup>

Having said the above limitations we see that they can be overcome to a large extent if we focus on the thinking of Locke as to the collective ownership of property. If we consider the property as being collectively owned by a group rather than individuals it would not be a matter of concern about the individuals who enter or exit the group. Further we cannot say completely that Locke's theory is purely individualistic in nature. The reference to collective ownership is evidence of the recognition of non-individualistic nature of rights associated with land. Locke's theory can also be interpreted to take into account the concept of 'terroir'. The 'land' Locke talks of is a combination of both the natural qualities associated with the land as well as the labour input made. So, there is no need to separate it and raise the argument that the theory does not extend to natural factors. Hence the theory no more justifies Swizz watch than it does Spanish Champagne. The Lockean theory can form a solid basis for granting of GI.

## 2.2 Firstness principle

This principle is also propounded by John Locke and states that whoever claims any object first gets the right over it.<sup>11</sup> This principle is generally used where there is a need

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<sup>8</sup> Kal Raustiala and Stephen R. Munzer, "The Global Struggle over Geographic Indications", *The European Journal of International Law*, Vol.18, no.2, 2007, pp. 337, 354.

<sup>9</sup> John Locke recognizes the right of acquisition of property by individuals but does not recognize an absolute power to transfer it to others as acquisition of property is to satisfy the basic human needs. Jonathan Bennett, *Second Treatise of Government by John Locke*, 2017 edn., p.43, available at <http://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf>, (viewed on 30/04/2019).

<sup>10</sup> Kal Raustiala and Stephen R. Munzer, "The Global Struggle over Geographic Indications", *The European Journal of International Law*, Vol.18, no.2, 2007, pp. 355, 356.

<sup>11</sup> Jonathan Bennett, *Second Treatise of Government by John Locke*, 2017 edn., p.11, available at <http://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf>, (viewed on 30/04/2019).

for creation of order and certainty. Often 'priority' helps us to determine things when other factors cannot, that is, giving the right to the person who acquired it first helps solve problems where multiple claims are made over an object. When we extend this principle to GI we find that the first developers of

GI are entitled to the right as they were the first ones to develop it and thus the firstness principle helps justify exclusion of the claims of the rest over it.<sup>12</sup>

**Limitations:** If we accept this theory as the basis for recognition of GI, we find that the theory fails to justify the remote descendants of the GI developers. Further the migration by the developers to other States and simultaneous claiming of GI in distinct areas are justified.<sup>13</sup> Here again we see that the limitations can be overcome if we consider the collective nature of the property recognized by Locke and focus on the group rather than the individuals who constitute the group.

### **2.3 Roscoe Pound's Postulate**

Roscoe Pound's second postulate states that we must assume that men might control for beneficial purposes what has been discovered by them and appropriate for their own use which has created by their own labor or acquired according to the existing social or economic order.<sup>14</sup> This seems to be in line with the Lockean justification for property. Extending this theory to GI we see that the original developers who have put in their labour must get the right.

**Limitations:** The first thing to note is that Roscoe Pound's theory does not make express references to collective ownership or management of property rather his main concern was the society and social interests. Further the rights associated here again are with individuals and not regions. Single right being given to all people seems not to be contemplated under the postulates. Since the rights associated are with individuals and not regions if the individuals move the rights must move with them. Focus of the theory is on human contribution and not on natural factors. Here one sees that the postulate of Roscoe Pound seems to be a weak one as the context and orientation of the theory is in a totally different direction.

### **2.4 Marxian theory**

In Marxian theory we find two situations where there is a reference to common/collective ownership. One is that of 'Primitive Communism' stage where both Engels and Marx

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<sup>12</sup> Jonathan Bennett, *Second Treatise of Government by John Locke*, 2017 edn., p.13, 14 available at <http://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf>, (viewed on 30/04/2019).

<sup>13</sup> Kal Raustiala and Stephen R. Munzer, "The Global Struggle over Geographic Indications", *The European Journal of International Law*, Vol.18, no.2, 2007, p.356.

<sup>14</sup> Linus J. McManaman, "Social Engineering: The Legal Philosophy of Roscoe Pound", *St. John's Law Review*, Vol. 33, 2013, pp.1, 22.

believed that it was nearly universal at the beginning of history and people lived in village communities based on common ownership of land.<sup>15</sup>

Another is the stage of 'Socialism' where private property gets abolished. It does not however mean that there is no property as such but class characteristics of it is abolished. Here collective ownership by the proletariat class subsists and so there is transformation from class to collective ownership. In this society regulates the general production and there is council democracy where the workers govern themselves. The rationale here is prevention of exploitation, estrangement of labour and progress of proletariat class.<sup>16</sup>

In the *Grundrisse*, Marx describes the Asiatic mode of production<sup>17</sup> as one of the forms of collective ownership of land that is formed from the decomposition of tribal communism on the same plane with the collective ownership practices in Rome or among Germans. Marx further notes that among all these forms of collective ownership the Asiatic mode of production is the one that has survived the longest implying that it has existed till the beginning of modern capitalism.<sup>18</sup>

Here we find that Marx talks of instances of collective ownership and self-management and such a system seems to be more justified due to lesser exploitation, better incentive and resultant progress of rural community. But when we extend this theory to GI we have to be very cautious

and must ask ourselves the following question; Within a GI group is there exploitation taking place and is there accumulation of wealth as contemplated by Marx? If the answer is yes, then GI also gets into the exploitation concept of Marx and will be unjustifiable. Further Marx recognizes common property in the context of non-exploitation and if exploitation in any form takes place, it is unjustified. Furthermore, as to how GI is working in the market context? If there is any form of exploitation then Marx will not support GI.

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<sup>15</sup> D. Ross Gandy, *Marx & History- From Primitive Society to the Communist Future*, University of Texas Press, United States of America, 1979, p.8, available at <https://books.google.co.in/books?id=tJDQDAAAQBAJ&pg=PA8&lpg=PA8&dq=Primitive+Communism%E2%80%99stage+where+both+Marx+and+Engels+believed+that+it+was+nearly+universal+at+the+dawn+of+history+and+people+lived+in+village+communities+based+on+common+ownership+of+land&source=bl&ots=FuZ2zpgM7J&sig=ACfU3U0ckgPA4RPiSD0mrFgmzyonphIJ1w&hl=en&sa=X&ved=2ahUKEwjsx72m0oHiAhUIXisKHARiBVwQ6AEwA3oEACAKQAQ#v=onepage&q=Primitive%20Communism%E2%80%99stage%20where%20both%20Marx%20and%20Engels%20believed%20that%20it%20was%20nearly%20universal%20at%20the%20dawn%20of%20history%20and%20people%20lived%20in%20village%20communities%20based%20on%20common%20ownership%20of%20land&f=false>, (viewed on 01.04.2019).

<sup>16</sup> Anthony Giddens, *The Class Structure of the Advanced Societies*, 1<sup>st</sup> edn., Harper & Row Publishers, New York, 1975, p. 54-60.

<sup>17</sup> The Asiatic Mode of Production is a concept of Karl Marx where he refers to Asiatic societies which consisted of despotic ruling class in central cities and undifferentiated villages with common ownership.

<sup>18</sup> Ernest Mandel, *The Formation of the Economic Thought of Karl Marx 1843 to Capital*, 1<sup>st</sup> edn., Monthly Review Press, New York, 1971, pp.127, 128.

### 2.5 Raz theory of Rights

The proponent of this theory is Joseph Raz. His theory considers interest as the basis of a legal right. He gives the definition of a right as 'A has right if and only if A can have rights and other things being the same aspect of A's well-being is satisfactory reason for placing some other person to be under a duty'. There are two classes of rights recognized out of which one is group rights. Raz asserts that groups like individuals possess rights based on interest of group and such interests merit only to the extent they serve individual rights. The ultimate justification of group rights is based on the service to individual interests which ultimately results in advancing the interests of the group.<sup>19</sup>

He recognizes various criteria for the existence of collective rights. They are;

1. An aspect of the interest of individuals justifies some other person being subjected to a duty.
2. The relevant interests are that of individuals as members of the group in a public good. And the right is a right to that public good, for it serves their interests as members of the group.
3. The interest of no single member of the group is sufficient enough to justify holding another person to be subject to a duty.<sup>20</sup>

He explains that the first condition is to be fulfilled for the collective right to be in consistence with humanism. The remaining two conditions set the demarcation between collective rights, such as self-determination and individual rights.<sup>21</sup> As for the right holding capacity of the groups, Raz does not spell it out clearly in *The Morality of Freedom*. He merely states that: 'Whether certain groups, such as families or nations, are artificial or natural persons is important for determining the conditions under which they may have rights.'<sup>22</sup>

Raz goes further to determine the characteristics of groups that enjoy collective rights, relevant for the case of self-determination. They are; firstly, such groups possess a pervasive and encompassing common culture that spreads out to various aspects of life like language, customs etc. Secondly, the individuals who grew up in such a culture are marked by its character. Thirdly, the membership in the group is by mutual recognition. Fourthly, membership in the group is critical for one's self identification. Fifthly, the membership of the group is a matter of belonging, not one of achievements. Finally, their

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<sup>19</sup> Miodrag A. Jovanovic, *Collective Rights - A Legal Theory*, 1<sup>st</sup> edn., Cambridge University Press, Cambridge 2012, pp. 77, 78.

<sup>20</sup> Ernest Mandel, *The Formation of the Economic Thought of Karl Marx 1843 to Capital*, 1<sup>st</sup> edn., Monthly Review Press, New York, 1971, pp.80, 81.

<sup>21</sup> Ibid.

<sup>22</sup> Ernest Mandel, *The Formation of the Economic Thought of Karl Marx 1843 to Capital*, 1<sup>st</sup> edn., Monthly Review Press, New York, 1971, pp.80, 81.

mutual recognition is secured by possession of general characteristics.<sup>23</sup>

Extending the above arguments to GI we see that collective ownership and management of property is recognized and justified by Raz. But the question remains as to how many of the criteria laid down by Raz are met in case of GI. Does GI really serve the interest of the producers or third-party intermediaries? Is the present-day purpose of GI a matter of belongingness or one of pure commercial interests?

### **2.6 Collective human right**

This concept was proposed by Yoram Dinstein. He states that there is a need to distinguish between individual as well as collective human rights. Collective human rights are enjoyable communally, for instance by a minority group. The groups which enjoy such right are not corporates and are exercised jointly rather than severely.<sup>24</sup>

He uses the term “Peoplehood” and states that such groups possess both objective as well as subjective elements. The objective element being that it has to be an ethnic group linked by common history. The objective element being that the people have not only an ethnic link but also a present state of mind. It follows that the persons must delineate the purview of its common existence and must decide the criterion for belonging to the group. Presently the international law only recognizes ethnic, religious and linguistic minorities but the author is of the view there is scope for further expansion.<sup>25</sup>

Thought the above theory is directly concerned with minority groups and their individual rights. We could probably justify the collective rights possessed by the GI holders which enables them to manage and administer the GI collectively based on human rights arguments. If collective human rights are recognizable it could extend to any groups having common culture and identity which we find in case of GI groups.

### **2.7. Moral Right of the Author and the Community**

The main proponents of this theory are Hegel and Immanuel Kant. Hegel and Kant emphasize on the projection of personality into work. Hegelian theory talks of personality as the first determination of the absolute and infinite will. So, a person has a natural existence partly within himself and partly of such a kind that he is related to it to an external world. A person has the right of putting his will into anything and everything and making it his. This is called the absolute right of appropriation which a man has over all

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<sup>23</sup> Id. at 82, 83.

<sup>24</sup> Yoram Dinstein, “Collective Human Rights of Peoples and Minorities”, *The International and Comparative Law Quarterly*, Vol.25, No.1, 1976, pp.102-120, pp.102, 103, available at <http://www.jstor.org/stable/758496> (viewed on 01.04.2019).

<sup>25</sup> Ernest Mandel, *The Formation of the Economic Thought of Karl Marx 1843 to Capital*, 1<sup>st</sup> edn., Monthly Review Press, New York, 1971, pp.104, 111 and 112.

‘things.’<sup>26</sup>

So when we extend this rationale to GI holders, they can be considered as a group of persons extended over time and it plays a role in the creation and continued use of GI.<sup>27</sup> Hegel talks only of an individual’s acquisition of property whereas Kant refers to collective will so let us now turn to Kant. Kant states that human beings are inherently free and there is only one inherent right that is the right of external freedom which means to have the freedom to be able to pursue one’s own end in one’s own way. According to Kant the right to own property is a necessary condition of the right to pursue one’s end.<sup>28</sup> Further in view of his notion of allowable external freedom he states the concept of Universal Justice and lays down the following principle: Every action is just or right that in itself or in its maxim is such that the freedom of the will of each person can exist together with the freedom of every other person in accordance with a universal law. In his distinction between private and public law, he states that “Public law” is based on the general legislative will of the society.<sup>29</sup>

Thus, it is through one’s “will” that property is acquired and for achieving rightful/intelligible possession each person must be obliged to respect each other’s property and it is through the “Collective will” that the State obliges citizens. So Kant recognizes collective will and hence collective property.

**Limitations:** Hegalian theory talks only of individual personality so the concept of a group personality bound up in a particular product is weaker than individual personality concept. If moral right’s argument is accepted then the protection given would be wider than under current GI regime since the holders would be able to prevent copying of the techniques it would result in wider protection. Further the theory being individualistic in nature any GI holder could move to another location and still claim the GI right. As to Kant, he does not make any direct reference to collective property.

## **2.8 Cultural Rationale**

The main proponent of the Cultural rationale is the EU. The cultural rationale states that beyond the private interest and public welfare effects of legal protection GI are essential for protecting local tradition, cultural diversity and national culture. The term “culture” brings within its scope three main aspects, that is, the Culture of production, consumption and identity. By Culture of Production we refer to the protection of the traditional means

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<sup>26</sup> “Hegel’s Philosophy of Right: First Part- Abstract Right”, available at <https://www.marxists.org/reference/archive/hegel/works/pr/property.htm>, (viewed on 01.04.2019).

<sup>27</sup> Kal Raustiala and Stephen R. Munzer, “The Global Struggle over Geographic Indications”, *The European Journal of International Law*, Vol.18, no.2, 2007, p.358.

<sup>28</sup> Wayne F. Buck, “Kant’s Justification of Private Property”, In *New Essays on Kant*, Ed. Den Ouden, 227-244, p. 228, 234; [http://www.academia.edu/249637/Kants\\_Justification\\_of\\_Private\\_Property](http://www.academia.edu/249637/Kants_Justification_of_Private_Property), (viewed on 19.03.2019).

<sup>29</sup> Bruce Aune, *Kant’s Theory of Morals*, 1<sup>st</sup> edn., Princeton University Press, New Jersey, 1979, p. 134.

of production. A painting or literary manuscript can come under this category.<sup>30</sup>

By Culture of Consumption we mean the patterns of consumption and the culture associated with it. For example, the consumption pattern of wine by people of France. By Culture of Identity we refer to the cultural value that is associated with a relevant group's identity. A national flag is an example of this, though not in a trade context. Many argue that this Cultural rationale serves to compensate the justificatory deficiency for GI and serves as an alternative quasi- intellectual property theoretical basis.<sup>31</sup>

**Limitations:** In case of the Culture of production the main difficulty is to encompass the notion of "terroir". A significant aspect of GI is terroir and it talks only of the natural features and does not take into account the production methods or techniques. Further many GI's are based on standard methods of production which requires compliance with minimum standards. These always need not be reflective of the traditional production techniques but may also be due to compliance with export standards.<sup>32</sup>

As to Culture of Consumption we see that competitive exposures to cheaper and non-local products may change the consumption pattern of the locals. Further ever-changing taste and consumption patterns can also affect the local culture of consumption. GI is said to protect the national food icons that construct identity. But instances are not rare when this results in disputes between countries for claim for exclusive usage of the GI.<sup>33</sup>

In spite of the above limitations we find that the Cultural argument is a strong argument as far as GI is concerned, unlike other IP and so requires serious consideration.

## **2.9 Rural development**

Many rural development strategies are based on differentiation of the goods, demanded by a fraction of the consumers owing to their quality or typicality. When these goods are associated with the area in which they are produced they give comparative advantage which can be used as a force for stimulating economic activities in the rural/underprivileged area. GI acts as more than identification of a product with a place they are a means for industrial and social groups with rights to distinguish their product and protect their product. Small producers are able to enhance their reputation and

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<sup>30</sup> Tomer Broude, "Taking Trade and Culture Seriously: Geographical Indications and Cultural Protection in WTO Law", *Journal of International Law*, 26 J. Int'l L. 623, 631 (2005), available at <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1220&context=jil> (viewed on 20.02.2019).

<sup>31</sup> Id. at 631.

<sup>32</sup> Tomer Broude, "Taking Trade and Culture Seriously: Geographical Indications and Cultural Protection in WTO Law", *Journal of International Law*, 26 J. Int'l L. 623, 651, 654 (2005), available at <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1220&context=jil> (viewed on 20.02.2019).

<sup>33</sup> id. at 656-657

compete more effectively against the corporate giants.<sup>34</sup>

The connection between a product and a region provides opportunities for brand development, niche marketing and extracting reputable value from indications. There are possibilities for employment generation in rural areas.<sup>35</sup>

**Limitations:** Some argue that GI's contributions to rural development have been overestimated. They state that even under a collective income maximizing strategy, differentiation by itself may not yield profitable. For it the individual productivity and product differentiation must be high enough. Further, quality labels are a selfish way of development as the rise in farmer's income may not result in any rural development. The profit reaped is only confined to those farmers who can afford to sell the products adhering to the prescribed quality and standard.<sup>36</sup>

Other questions raised in this connection are as to whether the actual holders of the GI receive any benefit in the end or is it the third-party intermediaries who have no relation to the product in issue is the ultimate benefactor? Success of the rural development rational further depends on a

variety of factors like the nature of product, the existing marketing channel, structure of supply chain etc.

### **3. Conclusion**

From above we see that there are no specific theories on GI and probably the reason attributable to it is that no single justification can effectively rationalize GI. GI seems to be justifiable only if we base it on multiple rationales. Many of the theories seen above have merely extended the general IP rationale to GI and thus have a weak basis in support of GI whereas there are other theories which strongly support GI.

Amongst the philosophical justifications the Roscoe Pound's postulate, Marxian theory, Moral rights of the author and the community seems to be weak justifications. Locke's theory, firstness principle, Raz theory of rights, Collective human rights, Cultural and Rural development argument seems to be stronger arguments. Amongst these Locke's theory, Raz theory of interest and Cultural arguments directly encompass the major elements of GI.

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<sup>34</sup> Carina Folkesson, *Geographical Indications and Rural Development in the EU*, p.15; <https://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1334511&fileId=1647280> (viewed on 11.03.2019).

<sup>35</sup> id at 16

<sup>36</sup> id at 17

Since my initial question was to identify the rationales for recognition of GI all the above stated rationales are related and are applicable to GI in one way or the other. The core aspect of recognition of an IP is to balance the interest of both the holders of it on the one side and the society on the other. If the 'balancing of interests' is taken as the basis then GI is better justified than all other IP's due to its social dimensions enlisted and the economic benefit guaranteed to its holders. All the above stated theories rationalize GI on existing philosophies. Thus, we understand that GI is a concept which is based on multiple social factors hence must further the goals discussed in the theories above. These justifications further should be used to identify the basic philosophical reasoning behind GI and must reflect in the GI policy in India and in its implementation.

## **Criminalization of Politics and Politicization of Criminals: A Need for Decriminalization**

**Dr. Jasdeep Kaur\***

### ***Abstract***

*Criminalization of politics has become all pervasive phenomenon. It can be visualized in two different senses. In the first sense, it means direct entry and interference of criminals to parliament and state legislatures. In the second sense, it includes interference of criminals by financing any candidate, providing anti-social man power, booth capturing, contract killing of the rival candidates etc. It continues to be a very big concern with an increase in number of MP's and MLA's with criminal record. The last ten general elections show that even after the deployment of armed forces, para military forces, framing of different codes of conduct, taking special security measure etc., the law and order situation have failed miserably for checking criminalization of politics. The Law Commission of India and several other committees have already recommended different means to overcome the present situation of criminalization of politics. The Supreme Court of India has from time to time given the guidelines for uprooting the phenomenon of criminalization of politics. However, it is of no avail as the government lacks political will in letter and spirit to implement various guidelines and recommendations. The need of the hour is to enlighten the people of India not to vote to such politicians and parties who are involving crime in politics.*

**Keywords:** *Criminalization of Politics, State Legislature, Parliament, Guidelines, Recommendations*

### **1. Introduction**

Criminalization of politics has become an all-pervasive phenomenon. It can be visualized into two different senses. In a narrow sense, it refers to the direct entry and interference of criminals into state legislatures and parliament of India, while on wider sense it refers to interference of criminals into politics either directly or indirectly like financing any candidate, providing anti-social manpower, booth capturing, contract killing of rival candidates, providing muscle power services, as well as campaigning or canvassing for

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\* Assistant Professor, University School of Law, Rayat Bahra University, Mohali

any candidate contesting elections.<sup>1</sup> The use of muscle power and compelling tactics are not totally new to Indian electorate. This had been a fact of political life. Even in the early fifties and sixties some feeble allegations were made about the use of outlaws by the politicians to further their electoral prospects.<sup>2</sup> However, the intensity and frequency of such allegations have increased in recent times.<sup>3</sup>

At one time politicians hired criminals to help them win elections by booth capturing. Today, those same criminals have begun entering parliament and the state legislature.<sup>4</sup> Instead of self-interested politicians employing criminal elements for political ends like organizing vote banks, intimidating opponents or voters, illegally financing campaigns etc., the alleged criminals are now found to be running for political office themselves.<sup>5</sup> The persons known to have criminal past becoming legislators and ministers has not only become very common but is being openly defended by the party leaders.<sup>6</sup> Moreover, the criminals escape in the pretext that they are not convicted by law. They are only accused in few cases and the decision is pending before a court of law. The conviction rate is very low in terms of political leaders. Even if they are convicted by lower courts, they appeal before the higher courts and it goes on for years together. This issue is deliberately overlooked by the majority of political parties.<sup>7</sup> Common people are also threatened to support the leader by different violent means. Often, they are asked to exercise their preference under the threat of violence.

Despite the best intentions of the drafters of the Constitution and the Members of Parliament at the onset of the Indian Republic, the fear of a nexus between crime and politics was widely expressed from the first general election itself in 1952.<sup>8</sup> In the last Lok Sabha elections in February-March, the question of criminalization of politics came to the fore once again. The pleas of the Election Commission as also the president to the political parties not to field candidates with criminal background fell on deaf ears. Conveniently, all major parties fielded criminals as their candidates on the specious plea

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<sup>1</sup> Deepom Baruah, "Criminalization of Politics in India: A Study of Linkage between Politicians and Criminals", Unpublished Thesis, Department of Law, Gauhati University, Assam, India, p. 2 (2014), Available at <http://hdl.handle.net/10603/116198>, Viewed on 23<sup>rd</sup> April, 2019.

<sup>2</sup> Balmiki Prasad Singh, "The Challenge of Good Governance in India: Need for Innovation Approaches", Available at [www.workplace.unpan.org/sites/Internet/Documents/Challenges%20for%20Good%20Governance%20in%20India.pdf](http://www.workplace.unpan.org/sites/Internet/Documents/Challenges%20for%20Good%20Governance%20in%20India.pdf), Viewed on 20<sup>th</sup> April, 2019.

<sup>3</sup> Suvendu Kumar Baral, "Polluting Politics: A Bird Eye View of Criminalisation of Politics India", *Advance Research Journal of Multidisciplinary Discoveries*, Vol. 8, Issue 6, pp. 40-43, p.42 (December 2016).

<sup>4</sup> Bimal Prasad Singh, "Electoral Reforms in India: Issues and Challenges", *International Journal of Humanities and Social Sciences Invention*, Vol. 2, Issue 3, pp. 1-5, p. 2 (March 2013).

<sup>5</sup> Malte Pehl, "From Law Breakers to Law Makers: The Sub national Dimension of Political Malfeasance and Criminalization of Indian Electoral Politics", *ASIEN*, Vol. 137, pp. 13-35, p.16 (October 2015).

<sup>6</sup> B.P.C. Bose and M.V.S. Koteswara Rao, "Criminalisation of Politics: Need for Fundamental Reform", *The Indian Journal of Political Science*, Vol. 66, No. 4, pp. 733-753, p. 733 (October- December 2005).

<sup>7</sup> *Supra* note 3, p. 41.

<sup>8</sup> PC Rajagopalachari in Kishor Gandhi, *India's Date with Destiny: Ranbir Singh Chowdhary Felicitation Volume*, 1st Ed., p. 133 (Allied Publishers, 2006).

that the other competing parties had put up criminals and a person with a clean background could not have been elected.<sup>9</sup> Thus entry of criminals and musclemen into state legislative assemblies and national parliament in sizeable numbers poses a more insidious threat to India's democratic governance.<sup>10</sup> Moreover, under the Indian legal system there is lack of automatic machinery to prosecute these kinds of criminals turned politician. When a person having criminal record or criminal case pending against him becomes a minister, the sanction has to be obtained from the Prime Minister, Chief Minister or some minister under whose authority the person would be working after being elected. The unwillingness on the part of the authorities or causing delay to shield such person increase further the chances of person having criminal record to enter in to politics and escape from criminal liability.<sup>11</sup>

## **2. Extent of Criminalization in Elections in India**

During the election period, newspapers are usually full of information about the number of criminals in the field sponsored by every party.<sup>12</sup> In August 1997, nearly 40 members of parliament present were involved in criminal cases pending against them, whereas nearly 700 members of the legislative assemblies, out of the 4072 members, were involved in criminal cases and trials were pending against them.<sup>13</sup> The share of candidates with criminal backgrounds has grown steadily from 8.88 percent in the 2004 general elections to 14.8 percent in 2009 and 17 percent in 2014. Of the 1158 candidates in the 2009 Lok Sabha elections with criminal charges filed against them, 608 (52.5 percent of tainted candidates and 7.4 percent of all surveyed candidates) reported being tainted with serious charges or convictions (murder, fraud, assault, extortion, and the like) in their affidavits.<sup>14</sup> The data on candidates and elected representative's criminal and financial record shows that the chances of winning increase considerably for candidates with more wealth. Unfortunately, it also shows that those with serious criminal cases pending against them also have a higher chance of winning. The average wealth of over 62,800 candidates analyzed is Rs.1.37 crores, which goes up to Rs. 2.03 crores for third place candidates, Rs.2.47 crores for runners up, Rs.3.8 crores for winners, Rs.4.27 crores for winners with

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<sup>9</sup> Madhav Godbole, "Criminalisation of Politics: Empowerment of Voter", *Economic and Political Weekly*, Vol. 33, Issue 17, pp. 949-950, p. 949 (25<sup>th</sup> April 1998).

<sup>10</sup> Jitendra Mishra, "Decriminalising Indian Politics: A Comment on Sanjay Dutt v. State of Maharashtra", *Journal of Indian Law Institute*, Vol. 51, No. 4, pp. 523-530, p. 523 (October- December 2009).

<sup>11</sup> B.G. Verghese, "Criminals in Politics: Keep Them Out of Public Life", *The Tribune*, Chandigarh, 29<sup>th</sup> September 2005, Available at [https://www.tribuneindia.com/2005/specials/tribune\\_125/main7.htm](https://www.tribuneindia.com/2005/specials/tribune_125/main7.htm), Viewed on 23<sup>rd</sup> April, 2019.

<sup>12</sup> K. Eswara Reddy, "Electoral Reforms in India: Issues and Recent Reforms", *International Journal of Humanitarian and Social Science Invention*, Vol. 3, Issue 8, pp. 26-29, p. 27 (August 2014).

<sup>13</sup> B. Venkatesh Kumar, "Critical Issues in Electoral Reforms", *The Indian Journal of Political Science*, Vol. 63, No. 1, pp. 73-88, p. 78 (March 2002).

<sup>14</sup> *Supra* note 5, p. 23.

a criminal record, and Rs.4.38 crores for winners with serious criminal cases.<sup>15</sup>

In 1996, Sahabuddin was named as a Minister of State for the Home Ministry in the H.D. Deve Gowda government. He was sentenced to life sentence for kidnapping with intent to murder and as many as 34 cases of serious crime are pending against him.<sup>16</sup> Mukhtar Ansari won the Mau seat in the Uttar Pradesh Elections, 2007 as Independent candidate while lodged initially at Ghazipur jail. Arun Gawli is one of the most notorious criminals turned politicians who was based in Mumbai. With his operations Centre at Dagdi Chawl in Byculla he enjoyed the position of MLA. Although was not convicted of any crimes, yet spent almost ten years in prison. Shibu Soren was another politician who was the chief minister of Jharkhand and was found guilty of murder of his secretary. Raja Bhaiya was a SP leader who had a royal ancestry. However, he was declared as a criminal under POTA (Prevention of Terrorist Activities) Act. Adiq Ahmat was a member of Lok Sabha from the Phulpur Lok Sabha Constituency in Uttar Pradesh. He faced trial in 35 criminal cases including several cases of murder. However, in general elections 2009, he was allowed to contest since he is yet to be convicted in any case.

As per the statistics collected by the Association of Democratic Rights and National Election Watch resourced from records of Election Commission of India, the horrible position of criminals in the present day political system (2009-2014) is depicted below.

- (I) The total numbers of M.P.s and M.L.A.s from different political parties is 4,807, out of which 1,460(30%) and 688(14%) are involved in serious offences. They are believed to be hardened criminals facing charges of murder, rape and armed robbery.<sup>17</sup>
- (II) Out of total 543 M.P.s of Lok Sabha 162(30%) have criminal records and 75 (14%) are involved in serious crime. Out of total 4032 numbers of M.L.A.s in the country 1258(31%) have criminal records since the time of their nomination for election and 15% are involved in serious criminal cases.
- (III) Out of the 58 (except affidavit of one has not accessed) candidates for 2014 Rajya Sabha Election in February (for 16 states) whose self-sworn information in their affidavits have been analyzed, 14 candidates (24%) have declared criminal cases against them. Out of the 14 candidates who have declared criminal cases, 2 have declared serious criminal cases. These

<sup>15</sup> Trilochan Sastry, "Civil Society, Indian Elections and Democracy Today", Working Paper No. 465 (July 2014), Available at [https://adrindia.org/sites/default/files/Civil\\_society\\_Indian\\_Elections\\_and\\_Democracy\\_Today\\_Prof\\_Sastry.pdf](https://adrindia.org/sites/default/files/Civil_society_Indian_Elections_and_Democracy_Today_Prof_Sastry.pdf), Viewed on 10<sup>th</sup> April, 2019.

<sup>16</sup> Lakha Ram Chaudhary, "Criminalisation of Politics and Administration (India)", *International Journal of Research in Social Sciences*, Vol. 7, Issue 5, pp. 349-362, p. 352 (May 2017).

<sup>17</sup> Zahoor Ahmed Dar, "An Assessment of the Impact of Criminalization of Politics on Democratic Process of India", *Indian Journal of Applied Research*, Vol. 5, Issue 3, pp. 495-497, p. 497 (March 2015).

include charges of murder, kidnapping and crime against women. Shiv Sena candidate, Dhoot Rajkumar Nandlal from Maharashtra had declared charges of murder, kidnapping and crime against woman.<sup>18</sup>

### 3. Laws Dealing with Criminalization

There are various statutes which contain provisions dealing with criminalization of politics, like The Representation of the People Act, 1951, The Prevention of Corruption Act, 1988, The Indian Penal Code, 1860,<sup>19</sup> The Central Vigilance Commission Act, 2003, The Right to Information Act, 2005. The Representation of the People Act, 1951 contains provisions for the actual conduct of elections to the House of Parliament and the House of the Legislature of each State, the qualifications and disqualifications for members of those Houses, the corrupt practices and other offences at or in connection with such elections and the decisions of doubts and disputes arising out of or in connection with such elections.<sup>20</sup> For regulating the use of financial resources during the election process, it contains provisions relating to election expenses.<sup>21</sup> Failure to lodge election expenses is a disqualification under this Act.<sup>22</sup> If any candidate or his agent has made use of any of the corrupt practice, then his election can be set aside.<sup>23</sup> Moreover, such persons are disqualified from contesting elections.<sup>24</sup> To prohibit the entry of criminals into politics, the accused convicted for certain offences are disqualified from contesting elections.<sup>25</sup>

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<sup>18</sup> Dharendra Kumar Jena, "Judiciary: A Check to Criminalization in Indian Politics", *International Journal of Social Science and Humanities Research*, Vol. 2, Issue 4, pp. 325-332, p. 327 (October- December 2014).

<sup>19</sup> For Details See Chapter IX A of IPC which deals with offences relating to elections.

<sup>20</sup> Part VI, Chapter I - Chapter V, The Representation of the People Act, 1951.

<sup>21</sup> Part V, Chapter VIII, Section 76 - 78, *The Representation of the People Act*, 1951.

<sup>22</sup> *The Representation of the People Act*, 1951, Section 10A.

<sup>23</sup> *Id.*, Section 100.

<sup>24</sup> *Supra* note 21, Section 8A.

<sup>25</sup> *Supra* note 21 Section 8 **Disqualification on conviction for certain offences** (1) A person convicted of an offence punishable under— (a) section 153A (offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony) or section 171E (offence of bribery) or section 171F (offence of undue influence or personation at an election) or sub-section (1) or sub-section (2) of section 376 or section 376A or section 376B or section 376C or section 376D (offences relating to rape) or section 498A (offence of cruelty towards a woman by husband or relative of a husband) or sub-section (2) or sub-section (3) of section 505 (offence of making statement creating or promoting enmity, hatred or ill-will between classes or offence relating to such statement in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies) of the Indian Penal Code (45 of 1860); or (b) the Protection of Civil Rights Act, 1955 (22 of 1955) which provides for punishment for the preaching and practice of "untouchability", and for the enforcement of any disability arising therefrom; or (c) section 11 (offence of importing or exporting prohibited goods) of the Customs Act, 1962 (52 of 1962); or (d) sections 10 to 12 (offence of being a member of an association declared unlawful, offence relating to dealing with funds of an unlawful association or offence relating to contravention of an order made in respect of a notified place) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967); or (e) the Foreign Exchange (Regulation) Act, 1973 (46 of 1973); or (f) the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985); or (g) section 3 (offence of committing terrorist acts) or section 4 (offence of committing disruptive activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or (h) section 7 (offence of contravention of the provisions of sections 3 to 6) of the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988); or (i) section 125 (offence of promoting enmity between classes in connection

#### 4. Efforts for Curbing Criminalization of Politics in India

There have been a number of attempts from time to time for giving recommendations regarding curbing criminalization of politics in the form of formulations of different committees and commissions.

##### 4.1 Vohra Committee Report

The Vohra Committee Report was submitted by the former Indian Union Home Secretary, N.N. Vohra, in October 1993.<sup>26</sup> It studied the problem of criminalization of politics and of the nexus among criminals, politicians and bureaucrats in India. The report contained several observations made by official agencies on the criminal network which was virtually running a parallel government.<sup>27</sup> It also discussed criminal gangs who enjoyed the patronage of politicians of all parties and the protection of government functionaries. It revealed that political leaders had become the lenders of gangs. As a result, in 1997, the Supreme Court recommended the appointment of a high-level committee to ensure in-depth investigation into the findings of the N. N. Vohra Committee and to secure prosecution of those involved.

##### 4.2 The National Commission to Review the Working of Constitution

The National Commission to Review the Working of Constitution recommended that the Representation of the People Act, 1951 be amended.<sup>28</sup> It should provide that any person who is charged with any offence which is punishable with imprisonment for a maximum

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with the election) or section 135 (offence of removal of ballot papers from polling stations) or section 135A (offence of booth capturing) of clause (a) of sub-section (2) of section 136 (offence of fraudulently defacing or fraudulently destroying any nomination paper) of this Act; 1 [or] 1 [(j) section 6 (offence of conversion of a place of worship) of the Places of Worship (Special Provisions) Act, 1991;] 2 [or] 3 [(k) section 2 (offence of insulting the Indian National Flag or the Constitution of India) or section 3 (offence of preventing singing of National Anthem) of the Prevention of Insults to National Honour Act, 1971 (69 of 1971),] 4 [; or] 4 [(l) the Commission of Sati (Prevention) Act, 1987 (3 of 1988); or (m) the Prevention of Corruption Act, 1988 (49 of 1988); or (n) the Prevention of Terrorism Act, 2002 (15 of 2002),] 5 [shall be disqualified, where the convicted person is sentenced to— (i) only fine, for a period of six years from the date of such conviction; (ii) imprisonment, from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.] (2) A person convicted for the contravention of— (a) any law providing for the prevention of hoarding or profiteering; or (b) any law relating to the adulteration of food or drugs; or (c) any provisions of the Dowry Prohibition Act, 1961 (28 of 1961);<sup>6</sup> \* \* \* \* \* (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-section (1) or sub-section (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.] 7 [(4)] Notwithstanding anything 8 [in sub-section (1), sub-section (2) or sub-section (3)] a disqualification under either subsection shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

<sup>26</sup> Available at [https://adrindia.org/sites/default/files/VOHRA%20COMMITTEE%20REPORT\\_0.pdf](https://adrindia.org/sites/default/files/VOHRA%20COMMITTEE%20REPORT_0.pdf), Viewed on 11<sup>th</sup> April, 2019.

<sup>27</sup> Id., at para 10.1, p. 9.

<sup>28</sup> Report of the National Commission to Review the Working of the Constitution (31<sup>st</sup> March, 2002), Available at [www.legalaffairs.gov.in/ncrwc-report](http://www.legalaffairs.gov.in/ncrwc-report), Viewed on 10<sup>th</sup> February, 2019.

term of five years or more, should be disqualified for being chosen as, or for being, a member of parliament or legislature of a state on the expiry of a period of one year from the date of framing of the charges against him by the court in that offence.<sup>29</sup> Further it is recommended that he shall continue to remain so disqualified till the conclusion of the trial for that offence. It was also suggested by the Commission that the aforesaid provision must also be equally applicable to sitting members. In case a person is convicted of any offence by a court of law and sentenced to imprisonment for six months or more the bar should apply during the period under which the convicted person is undergoing the sentence and for a further period of six years after the completion of the period of the sentence. Further, it recommended that persons convicted of heinous crimes such as murder, sexual assault, smuggling, dacoity should be permanently barred from contesting for any political office.<sup>30</sup> It further provides that no political party should sponsor or provide ticket to a candidate for contesting elections if he was convicted by any court for any criminal offence or if the courts have framed criminal charges against him. The law should specifically provide that if any party violates this provision, the candidate involved should be liable to be disqualified and the party deregistered and derecognized forthwith.<sup>31</sup>

#### ***4.3 Second Administrative Reforms Commission***

The Second Administrative Reforms Commission (ARC) was constituted in 2005 as a Commission of Inquiry, under the Chairmanship of Shri Veerappan Moily for preparing a detailed blueprint for revamping the public administrative system.<sup>32</sup> The Commission recommended that Section 8 of the Representation of the People Act, 1951 needs to be amended to disqualify all persons facing charges related to grave and heinous offences and corruption, with the modification suggested by the election commission.<sup>33</sup>

#### ***4.4 Election Commission of India***

The Election Commission suggested a series of steps including the filing of declarations by political parties along with the candidates and their criminal records if applicable.<sup>34</sup> The Commission also recommended that there must be de recognition or deregistration of political parties who files convicted candidates with imprisonment for five years or

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<sup>29</sup> Id., para 4.12.2.

<sup>30</sup> Supra note 27, para 4.12.3.

<sup>31</sup> Supra note 27, para 4.34.

<sup>32</sup> Available at <https://darp.gov.in/about-arc>, Viewed on 5<sup>th</sup> February, 2019.

<sup>33</sup> Second Administrative Reforms Commission, "Ethics in Governance", Fourth Report, pp. 1-140, p. 15, para 2.1.3.3.2 (January 2007), Available at <https://darp.gov.in/sites/default/files/ethics4.pdf>, Viewed on 23<sup>rd</sup> April, 2019.

<sup>34</sup> Available at <http://www.satyamevjayate.in/Criminalization-Of-Politics/EPISODE-5Article.aspx?uid=E5-PTY-A4>, Viewed on 23<sup>rd</sup> February, 2019.

more after giving due opportunity of being heard. The Commission felt that the nomination form should also contain a column seeking information if the candidate had ever been jailed and its duration, criminal cases pending against the persons, and, if the person had been charge-sheeted for any offence.<sup>35</sup> In the event of any person providing false information or suppression of any information, the election should not only be set aside but cancelled. Further that person should be punished with imprisonment up to 5 years or fine or both.

On the 28th of August 1997, the Election Commission passed a significant order, which prohibited convicted persons from contesting elections regardless of whether an appeal was pending in a higher court. It directed the States, Union Territories and Chief Electoral Officers that disqualification of candidates under Section 8 of the Representation of the People Act would commence from the date of conviction, irrespective of whether the person was out on bail or not. The Election Commission asked the returning officers to get affidavits from candidates which should mention that whether they were convicted by a court of law. Further it should also contain details in a prescribed form including date of conviction, the nature of the offence, the punishment imposed and the period of imprisonment. The Commission also recommended sweeping changes in the election laws to the government and suggested that a person sentenced for more than six months should be debarred from contesting in elections for a period of six years and above.<sup>36</sup>

The Election Commission proposed that Section 8 of the Act, 1951 should be amended to disqualify candidates accused of an offence punishable with imprisonment of 5 years or more if the charges are framed against such person by the Court. The Commission has also taken in to the situation of filing wrong accusation against persons and suggested that only cases filed prior to six months before an election would lead to disqualification of a candidate. In addition, the Commission proposed that Candidates found guilty by a Commission of Enquiry should stand disqualified.<sup>37</sup>

#### **4.5 Law Commission of India Report**

The Law Commission of India, suggested that Section 8 of the Act, 1951, be continued in its current form without any amendments.<sup>38</sup> However, with regard to the offences for which disqualification operates, the Commission proposed that a new section (Section 8B) be inserted to deal with electoral offences and offences having a bearing upon the conduct of elections under sections 153A and 505 of the Indian Penal Code, 1860 and along with serious offences punishable with death penalty or life imprisonment. Under the proposed Section, framing of charges must be a ground of disqualification, but this

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<sup>35</sup> Available at <https://eci.gov.in/files/file/9236-proposed-election-reforms/> Viewed on 22<sup>nd</sup> January, 2019.

<sup>36</sup> *The Indian Express* (29<sup>th</sup> August 1997).

<sup>37</sup> Election Commission of India Report on Proposed Electoral Reforms (2004).

<sup>38</sup> *Law Commission of India*, Report No. 244, "Electoral Reforms", pp. 1-269, p. 53 (March 2015).

disqualification shall last only for a period of five years or till the acquittal of the person of those charges, whichever event happens earlier.<sup>39</sup> It also recommended the inclusion of transitory provision of disqualification of such a person with a criminal record.<sup>40</sup>

#### **4.6 Verma Committee Report on Amendments to Criminal Law**

The Committee proposed insertion of Schedule I to the Representation of the People Act, 1951 enumerating offences under IPC under the category of heinous offences. It also recommended that Section 8(1) of the Act should be amended to cover the offences listed in the proposed Schedule 1. Further it should provide that a person in respect of whose acts or omissions a court of competent jurisdiction has taken cognizance under Section 190(1)(a), (b) or (c) of the Cr.PC. or who has been convicted by a court of competent jurisdiction with respect to the offences specified in the proposed expanded list of offences under Section 8(1) shall be disqualified from the date of taking cognizance or

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<sup>39</sup> **“8B. Disqualification on framing of charge for certain offences.** - (1) A person against whom a charge has been framed by a competent court for an offence punishable by at least five years imprisonment shall be disqualified from the date of framing the charge for a period of six years, or till the date of quashing of charge or acquittal, whichever is earlier.

(2) Notwithstanding anything contained in this Act, nothing in sub-section (1) shall apply to a person:

(i) Who holds office as a Member of Parliament, State Legislative Assembly or Legislative Council at the date of enactment of this provision, or

(ii) Against whom a charge has been framed for an offence punishable by at least five years imprisonment;

(a) Less than one year before the date of scrutiny of nominations for an election under Section 36, in relation to that election;

(b) At a time when such person holds office as a Member of Parliament, State Legislative Assembly or Legislative Council, and has been elected to such office after the enactment of these provisions;

(3) For Members of Parliament, State Legislative Assembly or Legislative Council covered by clause (ii) of sub-section (2), they shall be disqualified at the expiry of one year from the date of framing of charge or date of election, whichever is later, unless they have been acquitted in the said period or the relevant charge against them has been quashed.

**OR**

(3) For Members of Parliament, State Legislative Assembly or Legislative Council covered by clause (ii) of sub-section (2), their right to vote in the House as a member, remuneration and other perquisites attaching to their office, shall be suspended at the expiry of one year from the date of framing of charge or date of election, whichever is later, unless they have been acquitted in the said period or the relevant charge against them has been quashed.

(4) Any disqualification/ suspension under sub-section (3) shall operate till the dissolution of the House, or for Members of the Rajya Sabha or State Legislative Council, up to the end of their present term as Member.

[Clause 3 is to be read with the direction to be issued by the Supreme Court to all courts that trial of Members of Parliament, State Legislative Assembly or Legislative Council against whom charges have been framed for an offence punishable by at least five years imprisonment shall be expedited and heard on a day-to-day basis with a view to completing the trial in one year from the date of framing of charge or date of election whichever is later.

<sup>40</sup> **“8C. Transitory provision** A person against whom a charge has been framed by a competent court for an offence punishable by at least five years, before the enactment of this provision irrespective of when the charge was framed, shall, unless exempted under sub-section (2) of Section 8B, be disqualified for a period of six years from the date of enactment of this provision or till the date of quashing of charge or acquittal, whichever is earlier.”

conviction, as the case may be.<sup>41</sup> The Commission further recommended that such a person should be disqualified if the court has taken cognizance or is convicted of an offence. Further the disqualification in case of conviction shall continue for a further period of six years from the date of release upon conviction and in case of acquittal, the disqualification shall operate from the date of taking cognizance till the date of acquittal.<sup>42</sup>

## 5. Judicial Attitude Regarding Criminalization of Politics in India

There have been a number of judgments suggesting the need for curbing criminalization of politics in India. From time and again, the Court has given different guidelines to be followed by Election Commission and political parties before and during elections.

In the case of *Dinesh Trivedi, M.P v. Union of India*,<sup>43</sup> Supreme Court took in to account N. N. Vohra Committee report and its implementation, which addressed the problem of the growing nexus among politicians, bureaucrats and criminals and its effect on the civil society. The court held that an independent body should be formulated to look into the matter and it should also be given the necessary powers to investigate into these matters and if feasible establish special courts to take cognizance of such matters with the consent of Union government.<sup>44</sup>

In *Vineet Narain v. Union of India*<sup>45</sup> the case concerns the historic Hawala scandal in India, which uncovered possible bribery payments to several high-ranking Indian politicians and bureaucrats from a funding source linked to suspected terrorists. The Supreme Court used the power of continuing *mandamus* to direct large-scale institutional reform in the vigilance and investigation apparatus in the country. It directed the Government of India to grant statutory status to the Central Vigilance Commission (CVC). The Court also laid down the conditions necessary for the independent functioning of the CBI and specified a selection process for the Director, Enforcement Directorate (ED).<sup>46</sup> The Court also called for the creation of an independent prosecuting agency and a high-powered nodal agency to coordinate action in cases where a politico-bureaucrat-criminal nexus became apparent. These steps thus mandated a complete overhaul of the investigation and prosecution of criminal cases involving holders of public office. The Court Addressed the problem of delays in obtaining sanctions for

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<sup>41</sup> J.S. Verma, Leila Seth and Gopal Subramaniam, *Report of Committee on Amendments to Criminal Law*, pp. 1-644, p. 375 (23<sup>rd</sup> January, 2013) [https://www.prsindia.org/uploads/media/Justice% 20verma% 20committ ee/js%20verma%20com mitte%20report.pdf](https://www.prsindia.org/uploads/media/Justice%20verma%20committee%20verma%20committee%20report.pdf), Viewed on 11<sup>th</sup> February, 2019.

<sup>42</sup> Available at <https://www.prsindia.org/report-summaries/justice-verma-committee-report-summary>, Viewed on 23<sup>rd</sup> April, 2019.

<sup>43</sup> (1997) 4 SCC 306.

<sup>44</sup> Jitender Loura, "Election Reforms in India vis-a-vis Criminalization of Politics and Right to Reject- A Review", *International Journal of Management and Social Sciences Research*, Vol. 3, No. 3, pp. 35-40, p.36 (March 2014).

<sup>45</sup> (1998) 1 SCC 226.

<sup>46</sup> Available at <https://indiankanoon.org/doc/1203995/>, Viewed on 12<sup>th</sup> March, 2019.

prosecuting public servants in corruption cases and set down a time limit of three months for grant of such sanction.<sup>47</sup>

In *Union of India v. Association for Democratic Reforms*<sup>48</sup> the Supreme Court directed the Election Commission to call for certain information on affidavit of each candidate contesting for Parliamentary or State elections. The Court directed that such information should disclose on mandatory basis that whether the candidate is convicted/acquitted/discharged of any criminal offence in the past. If so, it should also disclose about the quantum of punishment and should specify whether it is prior to six months of filing of nomination or the candidate is accused of any pending case, of any offence punishable with imprisonment for two years or more, and whether in such a case charge is framed or cognizance is taken by a court or not.

In *People's Union for Civil Liberties v. Union of India*,<sup>49</sup> Supreme Court held that the criminal antecedents of the candidates including their assets and liabilities should be available to the voters so that they can make a wise decision regarding the candidate. The Court struck down Section 33B of the Representation of People (Third Amendment) Act, 2002 which sought to limit the ambit of operation of the earlier Supreme Court order in the *ADR* case. Specifically, the amendment provided that only the information that was required to be disclosed under the Amendment Act have to be furnished by candidates and that information is not required in pursuance of any other order or direction. It implied that the assets and liabilities, educational qualifications and the cases in which he is acquitted or discharged of criminal offences were not required to be disclosed. The Court strike down the provision and held that it nullified the previous order of the Court and infringed the right of electors to know which is a constituent of the fundamental right to free speech and expression and also hindered free and fair elections which is part of the basic structure of the Constitution. It is pursuant to these two orders that criminal antecedents of all candidates in elections are a matter of public record, allowing voters to make an informed choice. At the same time, the Supreme Court has also sought to foster greater accountability for those holding elected office.

In *K. Prabhakaran v. P. Jayarajan*,<sup>50</sup> The Court observed that persons with criminal background pollute the process of election as they have no inhibition in indulging in criminality to gain success in an election. There is a need of disqualifying such persons in pursuance of Section 8 (3) of the Representation of the People Act.

In *Lily Thomas v. Union of India*<sup>51</sup> the Court held that Section 8(4) of the Representation

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<sup>47</sup> Available at <https://www.escri-net.org/caselaw/2015/vineet-narain-others-vs-union-india-another-1-scc-226>, Viewed on 22<sup>nd</sup> March, 2019.

<sup>48</sup> (2002) 5 SCC 294.

<sup>49</sup> (2003) 2 SCC 549.

<sup>50</sup> AIR 2005 SC 688.

<sup>51</sup> (2013) 7 SCC 653.

of the People Act as unconstitutional which allows MPs and MLAs who are convicted while serving as members to continue in office till an appeal against such conviction is disposed of against them. The Court gave two justifications firstly that the parliament does not have the competence to provide different grounds for disqualification of applicants for membership and sitting members, secondly, deferring of the date from which disqualification commences is unconstitutional in light of Articles 101(3) and 190(3) of our Constitution, which mandate that the seat of a member will become vacant automatically on disqualification.

In *Public Interest Foundation & Ors. V. Union of India and Anr*<sup>52</sup> The Court observed that the time has come that the parliament must make law to ensure that persons facing serious criminal cases do not enter into the political stream. It is one thing to take cover under the presumption of innocence of the accused but it is equally imperative that persons who enter public life and participate in law making should be above any kind of serious criminal allegations.<sup>53</sup> The court recommended that (i) each contesting candidate is required to fill up the form as provided by the Election Commission and the form must contain all the particulars as required therein. (ii) It shall state, in bold letters, with regard to the criminal cases pending against the candidate. (iii) If a candidate is contesting an election on the ticket of a particular party, he/she is required to inform the party about the criminal cases pending against him/her. (iv) The concerned political party shall be obligated to put up on its website the aforesaid information pertaining to candidates having criminal antecedents. (v) The candidate as well as the concerned political party shall issue a declaration in the widely circulated newspapers in the locality about the antecedents of the candidate and also give wide publicity in the electronic media.<sup>54</sup>

## 6. Suggestions and Recommendations

1. There is a need of strong political will of the political parties. The political parties and the politicians should not recruit any people who have charges of criminal activities. All Political parties instead of blaming each other should evolve a code of ethics among themselves by consensus and should not give ticket to such criminal elements.
2. The candidate should not be allowed to contest election if charges are framed against such person by the court.
3. Vigilant public opinion is also required to put pressure on government
4. People have to be sensitized about the malaise of the electoral process. Only then, free and fair poll can be conducted, which will lead to strengthening

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<sup>52</sup> 2018 SCC OnLine SC 1617.

<sup>53</sup> Id., para 118, p. 99.

<sup>54</sup> Supra note 43, para 116, p. 97 & 98.

of democracy in India.

5. Youngster along with civil societies and voluntary groups can spread awareness on mass level so that people can choose educated, sincere, dedicated, transparent and deserving candidates as their political representatives.
6. The Courts should dispose of the cases against politicians quickly so that a person with criminal charges cannot contest election.
7. There is need for setting up special courts for trying the cases of criminalization of politics. Keeping in view the ever-deteriorating standards of politics, it would be more desirable to try all cases of politicians by special courts. It will help maintain sanctity and purity of elections.
8. There is a need to check unaccounted money spent in elections which is the root cause of the criminalization of politics in India.
9. The persons accused of serious crimes and against whom sufficient evidence is available should be debarred from contesting elections till the case is disproved against them or till they are not acquitted by the courts.
10. The convicted persons should be debarred from contesting elections throughout their life.
11. Special list must be released by election commission with details of candidates with criminal charges and entire detail about their crime. This list must be pasted in every polling booth along with candidate list.
12. The political parties should declare all the relevant details of the candidates apart from the candidate himself which should also disclose his criminal antecedents.

## India's Insolvency and Bankruptcy Code: Driving the Engine of Creative Destruction and Reorganization

Sumit Sonkar\*

### *Abstract*

*To curb the meteoric increase in the non-performing assets of public sector banks, due to the willful default by unscrupulous promoters and corporate entities for repaying the debt of creditors, paving the way for the passage of The Insolvency and Bankruptcy Code, 2015. The legacies of the colonial era and century old existing insolvency and bankruptcy framework and institutional structure were unable to effectively recover the debt which was not only enormously costing lenders and taxpayers' hard earned money but also jeopardizing overall economic growth and development of the country. Therefore, this Code seeks to create a single, comprehensive and consolidated law to address the insolvency and bankruptcy in a limited timeframe which at present is regulated and administered by an assortment of multiple laws having overlapping jurisdiction, significantly delaying the winding up of an entity. Generally, insolvency and bankruptcy policy has been seen in the context of redeployment of capital productivity and arresting the depreciation and deterioration of asset value but the other dimension of this policy is that it also stimulates entrepreneurship and innovation, as this framework facilitates new ventures to experiment with ideas and in case of its failure, it allows start-ups to easily wind up the venture instead of being bogged down with its failure that affects the risk-taking abilities of entities and partnerships, dividing the country from creative and innovative products and services. In this context, this legislative comment has attempted to critically analyze, discuss and explore the finer points of The Insolvency and Bankruptcy Code, 2015.*

**Keywords:** Bankruptcy, Corporate, Economy, Insolvency, Parliament, Reorganization, Resolution etc.

### **1. Introduction**

Once Frank Borman remarked that 'capitalism without bankruptcy is like Christianity without hell' implies the possibility of burgeoning trade and commerce undertakings falling sick either due to its own omissions and commissions or macroeconomic externalities and downturns. Therefore, swift and effective bankruptcy resolution system, which consistently and coherently caters the needs of different stakeholders, who are

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\* PhD Candidate of Laws, The Chinese University of Hong Kong, Hong Kong

impacted due to their inability to honor debts in today's high-velocity business environment is immensely desirable to manage and control default risks and corporate failure. To mitigate the effects of failing undertakings, bankruptcy law is needed to grapple with the mounting bad debt crisis so that piling debts should not ruin the economy and banking system of a country's failure of corporate or commercial entities not only significantly affects shareholders and creditors interests but also shapes broader economic aspects such as income generation and overall economic growth. Generally, bankruptcy is a legal status imposed by courts upon companies or individuals who are unable to meet their debt obligations. Therefore, an optimal bankruptcy regime is required to ensure that viable firms are resuscitated and unrealizable are efficiently liquidated in order to achieve maximum asset allocation outcome.

The Parliament of India passed the Insolvency and Bankruptcy Code<sup>1</sup>, 2016 (*hereinafter* Code), pitted as the most significant reform, which may become a panacea for the non-performing debt crisis ailing the Indian creditors, especially, public banks, given the rotten state of agonizing affair with which creditors are battling bad debt recovery due to the outmoded and outdated bankruptcy system in India. According to an estimate provided by the central bank of India, stressed assets which include gross bad loans, advances and written off accounts rose to 14.5 cents of the banking sector loans at the end of December 2015 and that in terms of figures is around whopping Rs. 10 trillion!<sup>2</sup>The passage of the Code Will certainly provide a desirable framework to ensure resolution of debt recovery from a defaulted corporate borrower which in the present scenario, is a nightmare for any creditor due to the multiplicity of around eleven laws and RBI policies that are governing the insolvency process, with different creditors forced to pursue their claims through various channels.

Though in India, earliest rudiments of insolvency legislation can be traced to the Government of India Act, 1800 and was first articulated in the three Presidency-towns of Calcutta, Bombay and Madras<sup>3</sup> but the recent explosive expansion of trade and commerce has shifted the policymakers focus more towards economic policies such as fiscal measures, monetary interventions and welfare programs to aid businesses from equally important legal processes that play critical roles in enforcing and implementing these policies, which in its absence render even good and meticulous policies

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<sup>1</sup> "Parliament passes the Insolvency and Bankruptcy Code", *Press Information Bureau* (May 11, 2016), available at <http://www.pib.nic.in/newsite/PrintRelease.aspx?relid=145286> (viewed on May 23, 2018)

<sup>2</sup> "Debt and Redemption; Bankruptcy Bill Decoded", *The New Indian Express*, May 15, 2016, available at <http://www.newindianexpress.com/business/news/Debt-and-Redemption-Bankruptcy-Bill-decoded/2016/05/15/article3432913.ece> (viewed on May 24, 2018)

<sup>3</sup> "Emerging Insolvency Framework In India: Issues & Options", *Indian Institute of Corporate Affairs*, available at [http://www.iica.in/images/confdetailpaper/Country\\_Report\\_on\\_Corporate\\_Insolvency\\_laws.pdf](http://www.iica.in/images/confdetailpaper/Country_Report_on_Corporate_Insolvency_laws.pdf) (last visited on May 26, 2018)

ineffective.<sup>4</sup>India's archaic insolvency procedures are regulated by scattered laws and competing agencies with overlapping or unclear jurisdictions, which results in leaving debt recovery cases languishing for decades. Moreover, assortments of eleven laws which are governing insolvency are prolonging litigation for decades with insufficient reliefs, eroding the value of assets sharply, consequently putting the entire banking and financial system at grave risks. According to the World Bank's assessment, winding up a sick company in India Typically takes around four and a half years with an average of 25.7 debt recovery, being the worst recovery rates among emerging markets.<sup>5</sup> This is in contrast with OECD countries, where creditors can recover 72.3 cent within 1.7 years on average, which places India on 136th rank out of 189 countries in resolving insolvency.<sup>6</sup>Therefore, the aim of the recently passed Insolvency and Bankruptcy Code, 2016 is to focus on reconstructing the country's byzantine insolvency process and procedures through the speedy closure of insolvent entities or its restructuring which is on the brink to collapse.

## 2. Single Comprehensive Legislation

One of the main objectives of the Code is to consolidate, streamline and amend bankruptcy laws with an institutional framework that enables the country to match pace with the global standard and address the modern economic realities while removing dead statutory woods which remain unchanged for nearly over an entire century!<sup>7</sup>It's indicative enough that there were no dearth of laws including Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and mechanism like Corporate Debt Restructuring(CDR)to address muddle of insolvency of corporate entities but unfortunately, some of these laws such as Sick Industrial Companies Act have not contrived efficiently, owing to its ineffective enforcement and conflicting rules. Therefore, to obliterate inadequate, ineffective and undue delays in insolvency resolution which are dwindling the maximization of assets value, the Code repealed the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920, in addition, it substantially amended laws such as Indian Partnership Act, 1932, Central Excise Act, 1944, Income-Tax Act, 1961, Customs Act, 1962, Recovery of Debts Due to Banks And Financial Institutions Act, 1993, the Finance Act, 1994, Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Sick Industrial Companies (Special Provisions) Repeal Act, 2003, Payment and Settlement Systems Act, 2007, Limited Liability Partnership Act, 2008, Companies Act, 2013.

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<sup>4</sup>"Bankruptcy Law Reform Needed", *The Hindu*, March 5, 2015, available at <http://www.thehindu.com/opinion/editorial/bankruptcy-law-reform-needed/article6955949.ece> (viewed on May 26, 2018)

<sup>5</sup> Supra note 1

<sup>6</sup> Supra note 5

<sup>7</sup> Supra note 1

### 3. Initiation of Insolvency

Apart from a financial creditor and the corporate debtor itself, for the first time, an operational creditor also has been allowed to initiate corporate insolvency resolution process on the trigger of default.<sup>8</sup>

### 4. Time Bound Resolution

It's ubiquitous that bankruptcy code should be a modicum of justice and fairness, but it's also essential that these fundamental principles to be applied swiftly in order to fulfill the objectives of the bankruptcy policy to uphold underlying asset values and its expeditious deployment for greater availability of credits or funds for business. Furthermore, the efficiency of bankruptcy law lies not only in time bound settlement of insolvency, but also in ensuring timely debt repayment and on this count, new bankruptcy code is noteworthy as it strives for insolvency resolution of corporate and individuals in a time-bound manner. It prescribes the time limit at every stage in order to ensure that the whole insolvency proceeding is completed within 180 days.<sup>9</sup> Nevertheless, one-time extension of 90 days can also be granted in certain force majeure circumstances, if the majority of the creditors' i.e. 75 cent agrees.<sup>10</sup> The Code also provides for fast-track corporate insolvency resolution process option which shall complete its process within a period of ninety days.<sup>11</sup> However, if required, the duration can be extended beyond ninety days, but only for forty-five days not beyond. When this provision comes into operation and implemented in *toto*, India will join the league of world's fastest moving bankruptcy regime.

### 5. Moratorium

In contrast with CDR, NCLT imposes moratorium until completion of the resolution process, or liquidation process, which prohibits any pending legal action or proceeding in respect of any debt and the creditors shall not initiate any legal action or legal proceedings in respect of any debt during the moratorium period.<sup>12</sup> Thus, Code safeguards insolvency resolution from any misadventure, causing unnecessary endless litigation delays.

### 6. Powerful Creditors Committee

The composition of all-powerful credit committees, full of only financial creditor<sup>13</sup>, which can take a call from appointing resolution professional to the revival or liquidation of the firm can shift the balance of power more towards creditors than debtors and other

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<sup>8</sup> Section 6, The Insolvency and Bankruptcy Code, 2015

<sup>9</sup> Section 12(1), The Insolvency and Bankruptcy Code, 2015

<sup>10</sup> Section 12(2), The Insolvency and Bankruptcy Code, 2015

<sup>11</sup> Section 56(1), The Insolvency and Bankruptcy Code, 2015

<sup>12</sup> Section 101(1), The Insolvency and Bankruptcy Code, 2015

<sup>13</sup> Section 21(1), The Insolvency and Bankruptcy Code, 2015

stakeholders. Though The legislator's intention that other stakeholders might strategically oppose implementing reorganization plans or liquidation is understandable, but also casts some doubt over fairness in decision making which at the current moment is non-inclusive.

## **7. Resolution Professional**

At the time of the initiation of bankruptcy process, creditors committee will suspend the powers of the board of directors and the insolvency resolution professional – a class of professionals who are specialized in dealing with insolvency or bankruptcy matters to assist sick companies, will be appointed to assume control of the corporate debtor's management, so that the repayment of debt can be handled professionally, effectively and efficiently.<sup>14</sup> In other words, the Code empowers the creditors to control and possesses the assets and appoints resolution professionals to deal with the day to day affairs of the entity, rather than debtor itself. This model is different from Chapter 11 of the US Bankruptcy Code, which empowers the courts and creditors to appoint trustees to investigate and oversee the affairs of the debtors while management retains its control during the bankruptcy process. The appointment of insolvency resolution professional can be seen from the perspective of minimizing coordination problems which may arise due to existing management of the entity, who can also put restrictions or prolong reorganization or liquidation plans and proceedings.<sup>15</sup>

## **8. Barring Civil Court Jurisdiction**

To arrest undue delays happening in the insolvency resolution process, the civil court has been barred to entertain or exercise its jurisdiction upon any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction.<sup>16</sup> Thus, this mechanism minimizes opportunities for excessive appeals and litigation by debtors. In relation to the insolvency resolution and liquidation of corporate persons, including corporate debtors, the National Company Law Tribunal shall be the adjudicating authority<sup>17</sup> while in insolvency matters of individuals and partnership firms, specialized agency like Debt Recovery Tribunal shall have jurisdiction.<sup>18</sup>

## **9. Information Utilities**

To efficiently realize the insolvency outcome, it's exceedingly desirable that bankruptcy

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<sup>14</sup> Section 22(2), The Insolvency and Bankruptcy Code, 2015

<sup>15</sup> D. Smith and P. Strömberg, "Maximizing the value of distressed assets: Bankruptcy law and the efficient reorganization of firms", (2003), available at [http://www1.worldbank.org/finance/assets/images/Smith-Stromberg\\_Maximizing.pdf](http://www1.worldbank.org/finance/assets/images/Smith-Stromberg_Maximizing.pdf) (viewed on May 27, 2018)

<sup>16</sup> Section 63, The Insolvency and Bankruptcy Code, 2015

<sup>17</sup> Section 60(1), The Insolvency and Bankruptcy Code, 2015

<sup>18</sup> Section 179(1), The Insolvency and Bankruptcy Code, 2015

policy should contain a mechanism through which bargaining parties can identify and verify entity's actual assets belong to the bankruptcy estate, outstanding claims and other liabilities.<sup>19</sup> One way of doing this is to do an audit of the entity to get its real asset values, but this is a costly and time-consuming affair. Therefore, to reduce information deficit among parties, the present code incorporated information utilities which will collect, collate, validate and disseminate all the relevant information related to an entity on a real-time basis not only to facilitate insolvency process but also for singling out the defaulters from abusing the system.<sup>20</sup> Generally, insolvency proceedings require a great deal of information processing and its assessment which consumes a good amount of resources, therefore, this unique inbuilt transparency mechanism also reduces the overall costs of the insolvency process by providing information database about an entity to the parties in the shortest possible time.

### **10. Third Parties Interests**

In terms of payment settlement, wages and unpaid dues of workmen and employees has been prioritized over amounts due to the Central Government, the State Government, and secured creditors in the case of liquidation of assets of a firm.<sup>21</sup> Thus, the Code takes some extra care in protecting workmen and employees, going beyond its explicitly stated goal.

### **11. Disqualification**

For a person declared bankrupt, the Code will disqualify him/her from being appointed or acting as a trustee or representative in respect of any trust, estate, or settlement; being appointed or acting as a public servant and being elected or sitting or voting as a member of any local authority.<sup>22</sup> Thereby, ensuring that anyone who is adjudged bankrupt cannot hold any public office.

### **12. Establishing Insolvency and Bankruptcy Board of India**

Effective financial institution plays a decisive role in enhancing the sustainability of the economy, which can deal with specialized matters of issues plaguing the economy of a country. In order to ensure effective implementation of insolvency professionals, insolvency professional agencies, information, utilities and transparency in its governance, the Code has established Insolvency and Bankruptcy Board of India to operationalize Code compliance through specifying mechanism, guidelines, and regulations.<sup>23</sup>

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<sup>19</sup> Supra note 15 at 10; Also see: Section 210(1), The Insolvency and Bankruptcy Code, 2015

<sup>20</sup> Supra Note 1

<sup>21</sup> Section 178(1), The Insolvency and Bankruptcy Code, 2015

<sup>22</sup> Section 140(1), The Insolvency and Bankruptcy Code, 2015

<sup>23</sup> Section 196(1), The Insolvency and Bankruptcy Code, 2015

### **13. Cross-Border Insolvency**

In the ever increasing and flourishing international corporate transactions and businesses, the main challenge before creditors was how to deal with the defaulters whose assets are lying beyond India's jurisdiction. To address this, Code has included an enabling provision for administering cross-border insolvency which states that Central Government can enter into bilateral agreements with any country outside India for enforcing provisions of the Code and notify applicability of the same from time to time.<sup>24</sup> The effectiveness of this provision is in doubt because bilateral negotiations generally are a time consuming process and given that one of the objectives of bankruptcy is to avoid destruction of asset value, its viability is questionable.

### **14. Punishment and Penalties**

Judy Feuer Zimet in her article claimed that punishment that successfully deters future wrongdoing requires an amount sufficient to impact a defendant's financial condition.<sup>25</sup> The new Code seems to incorporate this proposition by providing severe punishment and penalties for concealment of property, transactions defrauding creditors, misconduct in the course of corporate insolvency resolution process, falsification of books of corporate debtor, willful and material omissions from statements relating to the affairs of corporate debtor, false representations to creditors, contravention of moratorium or the resolution plan which range from one year to five years and a fine of up to rupees one crore for directors and officers besides their personal liability to compensate in cases of false information furnished in the application and for non-disclosure of dispute or repayment of debt by operational creditor.<sup>26</sup> Many of these punishments and penalties are also applicable to creditors as well as insolvency resolution professionals.

### **15. Conclusion**

With the introduction of a single comprehensive insolvency and bankruptcy code, which greatly emphasized on swiftness, India has ushered into modernizing its economic efficiency, which was earlier entangled into the conflicting and contradictory insolvency laws. The self-contained insolvency resolution policy framework certainly makes efforts towards creating a sound climate that fosters productivity, investment and economic growth through resolving bad debt crisis especially, through timely insolvency resolution process and its effective recovery.

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<sup>24</sup> Supra note 1

<sup>25</sup> J. Zimet, "Bad eggs and oil slicks: a defendant's wealth is an important factor in properly assessing punitive damages", 5 *Int. J. of Private Law* (2012), available at <http://www.inderscience.com/info/inarticle.php?artid=43898> (viewed on June 1, 2018)

<sup>26</sup> See Section 184; Section 185; Section 186; Section 187, The Insolvency and Bankruptcy Code, 2015

## Free and Fair Election – Judicial Approach

Dr. Naresh Waghmare\*

### *Abstract*

*Democracy is a foundation of Indian Constitution. To maintain democracy, the role of election commission is of importance. Under Indian Constitution, election Commission is an Independent authority, which has responsibility to conduct free and fair election. Secrecy of ballot is a basic supplement to free and fair election. Secrecy of ballot, albeit absolutely a fundamental job in ensuring free and fair election, was cherished in the law to protect the larger public interest, that is, purity of election for ensuring free and fair election. Ensuring the character of the voter and offering secrecy is likewise a necessary part of free and fair elections.*

*The Supreme Court has held, again and again, that the activities or directions to conduct of elections in a free and fair way will be left in the hands of the Election Commission and the Courts ought not, as a rule, intervene in an order endorsed by the Election Commission except if it is brought to the notice of the Courts that the Election Commission has exercised the power that was not conferred on it or acted arbitrarily.*

**Keywords:** *Democracy, Constitution, Free & Fair Manner, Election Commission, Arbitrary*

### **1. Introduction**

The power of the Election Commission in the context of Art. 324 of the Constitution has been interpreted by the Supreme Court in several judgments and one thing is very clear that the powers of the Election Commission under Art. 324 of the Constitution are plenary in character. The same is clear from the expression of such wide import used such as 'superintendence', 'control' and also from the word 'vest' occurring in Art. 324 of the Constitution. The aforesaid words, specially the word 'control' and the word 'vest', denote that the power of the Commission is very wide, deep and pervasive. The said power has been conferred for achieving a salutary purpose, namely, the ensuring of a free and fair election which can only sustain the democratic fabric of the country. The said power has been so widely conferred also for the purpose of ensuring the independence of the Election Commission in the matter of free and fair election.<sup>1</sup>

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\* Associate Prof., Dept. of Law, Savitribai Phule Pune University, Pune – 7

<sup>1</sup> *Rameshwar Oraon v. State*, AIR 1995 Pat 173, Para 10

## **2. Power to Issue Directions**

The Commission is empowered in its own right under Art. 324 of the Constitution and furthermore as per Rules 5 and 10 of the Rules to build up general guidelines in the most extensive fundamental terms and furthermore in explicit cases so as to quickly encourage a free and fair election. Hence, it is authentic for the Commission to have general arrangements likewise with a view to or in the light of involvement with inquiries relating to symbols. That would also certainly need it to regulate its own procedure in dealing with disputes concerning choice of symbols when raised before it. Also, now and then it would unavoidably prompt the adjudication of disputes in regards to the acknowledgment of opponent parts or claims of a specific symbol. The Order of Symbols is hence a summary of directions as general arrangements for managing different sorts of circumstances identified with the elections with specific reference to symbols. The power to make these directions, whether it is a legislative activity or not, flows from Art.324 as well as from Rules 5 and 10. It, therefore, follows that the Commission has the power to issue the Symbols Order.<sup>2</sup>

## **3. Power to Transfer Police Officers During Election**

Once it is provided that the Police Officers of a State for a period when the election process is on are subject to the control, superintendence and discipline of the Election Commission, the inevitable corollaries of such power is that Election Commission can direct the posting of such Police Officer for the purpose of ensuring a free and fair holding of election.<sup>3</sup> It is incumbent upon the State Government to act in accordance with the direction given by the Election Commission of India in as much as it is also the obligation of the State Government to hold a free and fair election.

## **4. Residuary Power of Election Commission**

The jurisdiction of the Election Commission is sufficiently expansive to incorporate every one of the forces important to direct the elections without issues and the word 'elections' is utilized in a wide sense to incorporate the whole constituent procedure, which comprises of several stages and embraces many steps. The limitation on plenary character of power is the point at which the Parliament or the state lawmaking body has issued a substantial relative law or in connection to the elections, the Commission must act as per these arrangements. If the law is quiet, Article 324 is a reservoir of power to act for the avowed purpose of having free and fair election.<sup>4</sup> The Constitution has managed leaving space for the activity of residuary power by the Commission as a creature of the Constitution in the endless circumstances that may emerge every now and then a large

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<sup>2</sup> *Krishna Mohan Sharma v. Jai Bhadra Sing*, AIR 2001 All 175, Para 28

<sup>3</sup> *Supra* note 1, Para 20

<sup>4</sup> *Union of India v. Association for Democratic Reforms*, AIR 2002 SC 2112, Para 56

democracy, since nobody could predict or envision any possibility by enacted laws or by principles.

### **5. Discretionary Powers and Precautionary Measures**

What precautionary measures are required to be taken for ensuring free and fair election, are matters which should be left to discretion of the Election Commission, and its subjective satisfaction, in that, it would alone to be the best Judge to decide upon such precautionary measures giving due regard to prevailing situation.<sup>5</sup> Such precautionary measures if are taken by Election Commission by means of issuance of directions to State Governments, in exercise of wide powers vested in it under Art. 324(1) of the Constitution, such directions cannot be made justifiable in courts except where the precautionary measures are ex facie tainted with mala fides or found to have been made in utter violation of the constitutional or statutory provisions or norms of natural justice.

### **6. Limitations on Power of Election Commission**

The Constitution accommodates a free and fair election and presents the full obligations of the superintendence, direction and control of the conduct of elections in the Election Commission. This obligation may cover powers, duties and functions of many sorts, administrative or something else, contingent upon the conditions.

No less than two impediments are built up on their entire character in the activity thereof. Initially, when the Parliament or any State has issued legitimate laws identifying with or regarding elections, the Commission will act as per not disregarding those arrangements, however when that law is quiet, Article 324 is a reservoir of power to act inside the expressed reason, not separate from driving a free and fair election with the endeavor. Besides, the Commission will be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice in so far as conformance to such canons can reasonably and realistically be required of it as fair play-in-action in a most important area of the constitutional order, viz., elections.<sup>6</sup>

### **7. Secrecy of Ballot: A Very Root of Free and Fair Election**

Secrecy of ballot is undoubtedly a crucial accessory of free and fair election. The election by ballot is to be held when demanded, as to statutorily assure the voter that his identity will not be disclosed accordingly that the voter may vote without fear or favor and is also free from apprehensions. This rule subseries a very vital principle that a voter ought to be totally open to exercise his franchise untrammelled by any restraint.<sup>7</sup> The provision of holding election by ballot is made in the rules to aid voters to vote free from any

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<sup>5</sup> *M/s/ Dasappa and Brothers, Bangalore v. Election Commission, New Delhi*, AIR 1992 Kar 230, Para 10

<sup>6</sup> *A.C.Jose v. Sivan Pillai*, AIR 1984 SC 921, Para 18

<sup>7</sup> *Maruti Bandu Patil v. Village Panchayat, Sidhanerli*, AIR 1981 Bom 378, Para 8

inhibition, fear or apprehension of being subjected to some sort of misfortune. Thus, the provision goes to the very root of the matter, namely, of holding free and fair election.

### ***7.1 Principle of Secrecy of Ballot***

Section 94 of the Representation of People Act, 1950 provides that except in a case of voting by open ballot, no witness or other person shall be required to state for whom he has voted. The basic reason for the arrangement is to guarantee a voter that he won't be constrained, straightforwardly or in a roundabout way, by any expert to uncover who casted a ballot, so he can cast a ballot without dread or in support and be free from all dread of his disclosure without wanting to from his own lips. The Section allows a voter benefit to ensure him both in court when he is known as a witness and outside the court when asked how he casted a ballot. This precisely is the principle of "secrecy of ballot".<sup>8</sup> The "secrecy of ballot" has dependably been the sign of the idea of free and fair election, extremely basic in democratic principles adopted by our polity. Definitely, it is an imperative supplement to free and fair election.

### ***7.2 Principle of Secrecy Is Based on Public Policy***

The secrecy of a ballot must be kept up in light of the arrangements of law contained in Section 94 of the Representation of People Act. Secrecy of ballot has dependably been viewed as a holy and imperative represent a free and fair election, this principle of secrecy is based on public policy went for guaranteeing that the voter can cast a ballot without dread or support and is free from all dread of his disclosure against his will.<sup>9</sup>

### ***7.3 Secrecy of Ballot – A Privilege of Voter***

On the off chance that secrecy of ballot is utilized as opposed to ensuring free and fair elections, to invalidate the public purpose for which it was proclaimed, to keep a slip-up from becoming exposed and to secure a misrepresentation in the election process or even to protect a wrongdoing, e.g. forgery of ballot papers, this rule of secrecy of ballot must respect the more extensive rule of free and fair elections. Secrecy of ballot, albeit unquestionably a fundamental job in ensuring free and fair elections, was revered in the law to guard the larger public interest, that is, purity of election to ensure free and fair election.

The rule of secrecy of ballot can't be kept aside or secluded and contrasted and the establishment of free and fair elections, i.e. purity of election. They can exist together, yet when one is accustomed to decimating the other, the previous must respect the rule of purity of election in larger public interest. In fact, secrecy of ballot, a privilege of the voter, is not inviolable and may be waived by him as a responsible citizen of this country

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<sup>8</sup> *Smt. Rekha Rana v. Jaipal Sharma*, AIR 2009 SC 2946, Para 9

<sup>9</sup> *Sanjay Kumar v. Ashok Kumar*, 2014 AIR SCW 1223, Para 11; *ArikalaNarasa Reddy v. Venkata Ram Reddy Reddygari*, AIR 2014 SC 1290, Para 11

to ensure free and fair elections and to unravel foul play.<sup>10</sup>

### **8. Right of Election - An Essence Of The Constitution**

Democracy is government by the people. It is a persistent participative operation, not a disastrous, periodic exercise. The little man, in his group, who denotes his vote at the poll completes a social control of his Parliament in addition to the political choice of this power.

In spite of the fact that the blossom of participatory government once in a while flourishes, the negligible accreditation of the popular Government is appeal to the people after each term to recharge confidence. So we have adult franchise and general elections as constitutional compulsions. It needs little argument to hold that the heart of the Parliamentary system is free and fair election periodically held, based on adult franchise, although social and economic democracy may demand much more."<sup>11</sup>

### **9. Protection of Elector's Identity And Affording Secrecy**

Democracy is all about choice. This choice can best be communicated by allowing voters the chance to convey what needs be without reservation and forcing least limitations on their capacity to do such choices. By giving NOTA button in the EVMs, it accelerates the effective political participation in the present state of democratic system and the voters in fact will be empowered. By putting into training this right to make a negative choice when the electioneering is going all out, it will advance the virtue of the discretionary procedure and will likewise accomplish one of its targets, in particular wide participation of people.

Free and fair election is a basic structure of the Constitution and essentially incorporates inside its degree the privilege of a voter to make his choice without dread of retaliation, pressure or compulsion. In this way, the assurance of the voter's character and secrecy is an indispensable piece of free and fair elections, and an arbitrary distinction between the voter who casted a ballot and the person who does not cast a ballot is an infringement of Article 14. Accordingly, it is important keep privileged insights amid the two classifications of individuals.<sup>12</sup>

### **10. Electoral Rolls – It's Importance**

The premise of a free and fair election is the voters' list prepared by the 1950 Law and the 1960 Rules. In the event that this isn't done, the discretionary records will have no holiness and the subsequent election won't rouse trust in the general population.<sup>13</sup>

### **11. Election Prior To Time Notified – Not Valid**

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<sup>10</sup> *S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra*, AIR 1980 SC 1362, Para 23

<sup>11</sup> *Mohinder Singh Gill v. Chief Election Commissioner*, AIR 1978 SC 851, Para 23

<sup>12</sup> *Krishnamoorthy v. Sivakumar*, AIR 2015 SC 1921, Para 29

<sup>13</sup> *Lakshmi CharanSen v. A.K.M. Hassan Uzaman*, AIR 1985 SC 1233, Para 32

Where the polls were opened at 8 a.m. instead of 11 a.m. as declared in the notification, and as a result the petitioner or his election agent could not be present at the time of the commencement of the election, the election would be invalid.<sup>14</sup> In order that ballot boxes may not be tampered with and in order that the officers who are charged with the duty of carrying out the election are beyond reproach as to their impartiality, the rules require that the candidates or their polling agents should be entitled to be present when this procedure is followed. Not only that, but they are entitled to be satisfied that the ballot box at the commencement of the election is empty and it is properly sealed and signatures of the Presiding Officer as well as the polling agents are affixed on the seals which are pasted on the ballot box

### **12. Need of Making of Election Laws and Rules**

A free and fair election based on universal adult franchise is the premise of administrative strategies in regards to the store of functions and the distribution of legislative, executive and judicative in the all-out framework, went for holding free election are the subtleties. Initial, a constituent component can be put into activity, there must be a lot of laws and guidelines that build up arrangements with respect to all issues identifying with the decisions or in connection to them, and it must be chosen how these laws and standards are to be made.<sup>15</sup>

### **13. Four Pre-Requisites for Elections to Be Free**

No doubt, a free and fair election should be one in which 'dirty tricks' or manipulations should not have their way. W.J.M. Mackenzie (1958) postulated four pre-requisites for elections to be free : (I) The nation must have an independent judiciary, without political impact or control, which can decipher the constituent laws reasonably and fair-mindedly, (ii) there must be a honest, skillful and non-party administration to coordinate the elections; (iii) there must be a developed system of political parties, in light of the fact that generally the voter may not be clear about which strategies the competitor safeguards, or which potential government would support him chose; (iv) there must be a general acknowledgment, both by politicians and by the general public, of those that could be ambiguously depicted as the "rules of the game". Candidates must play genuine; they ought not endeavor to sidestep legitimate confinements on their constituent exercises, for example, gift or distortion, either in the letter or in the soul of the law, nor should they won't concede rout if the election decision conflicts with. Equally, the voters who supported defeated candidates must accept the decision of the majority".<sup>16</sup>

### **14. Free and Fair Election – Scope and Limitation**

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<sup>14</sup> *Madhavrao Talyasaheb Ghatge v. Collector, District Kolhapur*, AIR 1965 Bom 217, Para 10

<sup>15</sup> *Mukesh Ram Chandani v. State*, AIR 1996 All 219, Para 5

<sup>16</sup> *K.C.Mathew v. Election Commissioner of India*, AIR 1982 Ker 265, Para 37

The Constitution has entrusted the task of framing the law relating to election to Parliament and, subject to the law made by Parliament, to state assemblies. A critical part of the law that plays in the field of free and fair election, in other words, constituencies and allotment of seats to such constituencies is put beyond the cognizance of the court. When it is found that the Constitution has embraced the assignment of drafting enactment regarding the matter in the Parliament and in the state assemblies, it isn't able for a court to demonstrate its legitimacy based on some obscure standards of free and fair election.<sup>17</sup>

### **15. Efficiency and Efficacy of The Functioning of Democracy**

By evolution of democracy in free society, right to govern oneself through one's representative is inherent. Democracy is one of the processes of governance through one's representatives. Democracy is the basic structure of the Constitution, which forestalls the manipulative politics of the democracy, respecting the right of the individuals, minorities, against authority though it is elected. It is peaceful Governance without waging war. Democracy has inherent limitations - be it moral, legal or on ground realities in its constitution, functioning, providing a concrete shape, methodology and mechanism to elect representatives considering the utility, viability, size, the preference for party system, ought to be represented by individual different processes can be provided. It cannot be capsuled in a fixed mould. Power is a vibrant democracy functioning within the constitutional parameters, which confers power on the Parliament and the State Legislatures to legislate to meet the exigencies arising in its functioning. All rights and their efficacy are dependent upon the efficiency and efficacy of the functioning of democracy and process of electing the representatives. Despite the democracy being the basic postulate of our Constitution, it only envisages the radical elections based on adult franchise providing a free and fair election, i.e. right to freely vote and contest to be the representative.<sup>18</sup>

### **16. Conclusion**

Free and reasonable race is the condition sine qua non of democracy. Democracy is a piece of the essential structure of the Constitution and periodical, free and fair election in the substratum of democracy. On the off chance that there are no free and fair periodic election, it is the finish of democracy. Democracy hypothesizes that there ought to be periodical elections, so individuals can re-choose previous representative or, in the event that they wish, change delegates and choose different delegates for them. Democracy likewise necessitates that elections should be free and fair, with the goal that voters can almost certainly vote in favor of their preferred candidates. Without a doubt, democracy can just chip away at the premise of the way that the elections are free and fair and not

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<sup>17</sup> *Smt. Indira Nehru Gandhi v. Raj Narain*, AIR1975 SC 2299, Para 351

<sup>18</sup> *R. Srihari v. Union of India*, AIR 2000 A.P. 185, Para 9

rigged and manipulated, which are compelling devices for deciding prominent will in actuality and structure and are not only determined ceremonies to produce a figment resistance for the feeling of the majority. Free and fair elections require that the candidates and their agents should not resort to unfair means or malpractices as may impinge upon the process of free and fair elections.<sup>19</sup>

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<sup>19</sup> Supra note 17, Para 198

## Transgender and Human Rights- In the Light of National Legal Service Authority Case with Indian Legal Context

M. Muthukumar\*

### Abstract

*This article addresses the various issues involved in Transgender rights in India. Transgender individuals in India are broadly called Hijra and Aravanie in different parts of the country. Transgender people in India face a variety of issues. They face discrimination in nearly every aspect of their lives. A primary reason behind the exclusion perceived to the lack of recognition of the gender status of transgender people. So many human rights violations happen in India against the transgender. So, far, these communities perceive that they have been excluded from effectively participating in social and cultural life; economy; politics and decision making- processes. Transgender people experience high level of discrimination in employment, housing, health care, education, legal systems and even in their families. Under International legal regime India was signatory in various conventions. The Supreme Court of India recognized Transgender is a third gender in National Legal Service Authority case. And also gave the various guidelines to improve the livelihood of social cultural conditions of transgender. But still now some states are not following the guidelines given by the judiciary. So, this research paper critically evaluating the rights of the Transgender People in the light of National Legal Services Authority case with Indian legal context.*

**Keywords:** *Transgender rights, Issues, Discrimination, International Legal Regime, Judiciary*

### 1. Introduction

Discrimination is a major concern of transgender people. <sup>1</sup>Right to life and to live in the family and society is first and essential right. If any practice infringes this right, it will prevent future generation to exist. Whatever it may be - feticide, infanticide or the elimination of abnormal sex children, it violates the right to life. Here right to life means

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\* B.Com., M.L., (UGC-NET), Assistant Professor of Law, Saveetha School of Law, Saveetha Institute of Medical and Technical Sciences, Chennai.

<sup>1</sup> Hastings Wyman, *Transgender and Bisexual issues in public administration and policy*, 126 (Wallace Swan, 2004)

the right of transsexuals to live in family and society. This right can also be correlated with the right to life and the personal liberty as enumerated under Article 21 of the Constitution.<sup>2</sup> Every child of any sex and gender or with any physically abnormal sexual appearance has a right to live comfortably and with dignity in the family. This can be justified socially, ethically, morally and legally. Almighty God cannot do any wrong. So, ethically, any child of abnormal sexual appearance is not the wrong committed by God Almighty. The child should be accepted as such by the family and the society.

The primary cultural definition of hijras, however is that they begin life as men, albeit incomplete men.<sup>3</sup> The most obvious expression of hijras as women is in their dress.<sup>4</sup> Wearing female attire and their characteristic clapping of hands is an essential and defining characteristic. According to UNDP<sup>5</sup> hijra is an umbrella term for all sexual minorities. It states that “hijra cultures are India’s answer to support systems for sexual minorities. Long before the West gave birth to gay lib, India’s homosexuals, bisexuals, transvestites, transsexuals and kothis found refuge under this umbrella.”<sup>6</sup> The socio-economic problems like no property ownership, low economic status or monthly income, poor housing, lower education level, high physical, sexual and verbal abuse, no ownership of voter card; ration card, poor physical health status, less family support, hostile attitude of community etc. and unsatisfactory psychological health are common problems in transgender people.<sup>7</sup>

The People’s Union for Civil Liberties, Karnataka,<sup>8</sup> published a monograph on the Human Rights Violations against the Transgender Community mapping “the structural violence, the use of force by state and civil society actors and agencies, and of the images of emancipator struggles” of the transgender community.<sup>9</sup> The report shed light on the mainstream society’s deep rooted fear of sexual and gender non-conformity, which manifests itself in the refusal of basic citizenship rights to these communities.<sup>10</sup> The report also documented the brutal stories of abuse and sexual violence which negates the claim of equal citizenship and protection for all. It has classified the societal violence against Transgender on the basis of sites where the violence occurs as well as the context of the

<sup>2</sup> Constitution of India, Article 21 which provides that, “No person shall be deprived of his life or personal liberty except according to procedure established by law.”

<sup>3</sup> SERENA NANDA, NEITHER MAN NOR WOMAN: THE HIJRAS OF INDIA, 45(2<sup>nd</sup> Ed.1999).

<sup>4</sup> Id.

<sup>5</sup> United Nations Development Programme (UNDP), 2010. *Hijras /Transgender Women in India: HIV, Human Rights and Social Exclusion*, <http://www.undp.org/content/> (Feb., 25, 2017).

<sup>6</sup> Id.

<sup>7</sup> Aijaz Ahmad Bund, *Other Sex: A study on Problems of Transgender women of District Srinagar*, 17 (2) IOSR Journal of Humanities and Social Science 78, 82(2013).

<sup>8</sup> People’s Union for Civil Liberties, Karnataka (PUCL-K), *Human Rights Violations against the Transgender Community: a Study of Kothi and Hijra Sex Workers in Bangalore*. Bangalore: PUCL-K, 2003.

<sup>9</sup> Id.

<sup>10</sup> Narrain S, “Gender Issues in a twilight world” *Frontline* 18, 22 (24.11.2013)

violence under the following ways Harassment by the police in public places, Harassment at home, Harassment at police stations, and Rape in jails.<sup>11</sup>

## 2. Transgender Rights and International Legal Perspective

For a vulnerable minority, and an unpopular one, domestic and International law has proven to be an indispensable tool, sometimes the only tool, for Transgender to claim a right in the world.<sup>12</sup> In 2006, in response to well documented patterns of abuse and refusal of human rights in Transgender, a distinguished group of international human rights experts were met in Yogyakarta, Indonesia to outline a set of International principles relating to sexual orientation and gender identity. The Yogyakarta principles were developed at a meeting of the International Commission of Jurists, the International Service for Human Rights and human rights experts from around the world in 2006. The Document contains 29 principles adopted by the experts, along with recommendations to governments, regional and intergovernmental institutions, civil society and United Nations itself. It emphasized on that all human beings are born free and equal and dignity in rights, and that everyone is entitled to the enjoyment of human rights without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>13</sup> Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity.<sup>14</sup> A person of diverse sexual orientation and gender identity are integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.<sup>15</sup> Further it stating that no one shall be arbitrarily deprived of life, including by reference to considerations of sexual orientations or gender identity.<sup>16</sup> So the state parties to take necessary steps for protecting the life of the transgender people.

## 3. Judiciary initiative towards National Legal Services Authority Case

First time in Indian Legal History the Judiciary Recognized the Transgender identity of the case of National Services Authority case.<sup>17</sup> The initiative made by the judiciary it is appreciated by the whole community in India. In the meantime, the decision made by the judiciary raising the various issues towards the Indian Legislature. This is the case is the milestone of the Transgender Rights in India. In a landmark judgment, the Supreme Court

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<sup>11</sup> AnithaChettiar, *Problems faced by Hijras(male to female Transgender) in Mumbai with reference to their health and Harassment by the Police*, 5(9) International Journal of Social Science and Humanity 43, 47(2015).

<sup>12</sup> Graeme Reid, *International Law and the uncertainty of Rights for LGBT people*, <https://www.hrw.org/news/2014/09/06/international-law-and-uncertainty-rights-lgbt-people>(Apr., 5, 2019)

<sup>13</sup> Preamble of Yogyakarta Principles

<sup>14</sup> Yogyakarta, Principle 2, further it is stating that, *everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected.*

<sup>15</sup> Yogyakarta, Principle 3.

<sup>16</sup> Yogyakarta, Principle 4.

<sup>17</sup> National Legal Services Authority (NALSA) v. Union of India, AIR 2014 SC 1863

created the “third gender” status for hijras or transgender. Earlier, they were forced to write male or female against their gender. The Supreme Court asked the Centre to treat transgender as socially and economically backward. The apex court said that transgender will be allowed admission in educational institutions and given employment on the basis that they belonged to the third gender category. The Supreme Court said absence of law recognizing hijras as third gender could not be continued as a ground to discriminate them in availing equal opportunities in education and employment. This is for the first time that the third gender has got a formal recognition.<sup>18</sup>

The Apex Court also said that the Centre will devise social welfare schemes for third gender community and run a public awareness campaign to erase social stigma. The Supreme Court said the states must construct special public toilets and departments to look into their special medical issues. The Supreme Court also added that if a person surgically changes his/her sex, then he or she is entitled to her changed sex and cannot be discriminated. The apex court expressed concern over transgender being harassed and discriminated in the society and passed a slew of directions for their social welfare.

### **3. Transgender Rights in India**

Respect for Human Rights and rule of law is one of the most important indicators of good Governance.<sup>19</sup> The expression ‘human rights’ covers within its ambit- the states of the Individual and groups, the conduct and function of the state, International protection for vulnerable and marginalized segments of society.<sup>20</sup> The law does not establish human rights, as they are inherent entitlements which accrue to every person by virtue of his or her birth into humanity.<sup>21</sup> They belong to all persons irrespective of any distinction based on sex, race, caste, religion and the like.<sup>22</sup> In India the Transgender are faced many problems i.e., exclusion from family and societies, No protection from violence, restriction in education, exclusion from economy, Exclusion from livelihood and employment opportunities.

#### **3.1 Section 377 of the IPC**

History says transgender were respected earlier in the society but situation has changed and they now face discrimination and harassment. Fundamental rights were denied to them. Even section 377 of IPC is being misused by police and other authorities against them and their social and economic condition is far from satisfactory. Section 377 of IPC pertains only to eunuchs and no other sections of society like gay, lesbian and bisexuals

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<sup>18</sup> Dhinesh Babu C, “*Creating Awareness about fundamental Rights among Transgender: Need of the Hour*” 1(1), International Contemporary Research Journal in Management and Social Science 55, 59(2014).

<sup>19</sup> Ravindra Kumar Singh, *Role Of The Supreme Court Of India In Upholding Rule Of Law*, In Rule Of Law And Human Rights In India, 129 (Lokendra Malik, Ed., 2012).

<sup>20</sup> Id.

<sup>21</sup> Murthy Y S R, *Human Rights Handbook*, 1 (1<sup>st</sup> ed. 2007)

<sup>22</sup> Id.

who are also considered under the umbrella term transgender'.<sup>23</sup>The Delhi High Court held section 377 of IPC Unconstitutional in so far as it criminalizes consensual sexual acts in private between adults who have attained 18 years of age being violative of Article 21, 14 and 15 of the Constitution.<sup>24</sup>In India the Transgender rights are refused and forgotten by the various institutions. Even after the High Court judgment the rights of the Transgender is not protected by the Government. It is the pathetic situation on the side of the Government. In *Naz foundation case*, the Supreme Court observed,

*“In the Indian Constitution the right to live with dignity the right of privacy both is recognized as dimensions of Article 21. Section 377IPC denies a person’s dignity and criminalizes his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. As it stands, Section 377 IPC denies a gay person a right to full personhood which is implicit in notion of life under Article 21 of the Constitution.”*<sup>25</sup>

### **3.2 Right to live as a person**

It is also clear that law alone cannot change the society. It is the inhabitants living in the society themselves who can contribute to change in the society. So the Government Census Data it should be cover the Transgender population and their demographic indicators. The Government will be identified by the population of Transgender people and implement the various schemes for the transgender people to fulfill the basic needs. The core value of the fundamental rights is to make a life is fruitful. It is remarkably the Supreme Court observed “Life becomes meaningful only when an individual enjoys the social, cultural and intellectual life”.<sup>26</sup> Whatever the rights given by the Constitution under fundamental rights, it should be applicable to transgender. So the transgender have the right to live as a person in the society.

### **3.3 Right to Good Treatment**

An important characteristic of human rights is the respect for the dignity and worth of each individual.<sup>27</sup>The Rule of Law is supreme and everyone is treated equal by the Government in the eyes of Law.<sup>28</sup>The Right to Equality before law and equal protection of law is guaranteed under Article 14 of the Indian Constitution. The right to choose one’s gender identity is an essential part to lead a life with dignity which again falls under the ambit of Article 21. In the *National Legal Service Authority case* the Supreme Court

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<sup>23</sup> *Suresh Kumar Koushal and another v. Naz Foundation and others*, (2014) 1 SCC 1

<sup>24</sup> Pandey J N, *Constitutional Law Of India*, 305(51<sup>st</sup> Ed. 2014)

<sup>25</sup> Id

<sup>26</sup> *Samatha v. State of A.P.* AIR 1997 SC 3297

<sup>27</sup> Dhinesh Babu, *Supra* note 18, at, 2.

<sup>28</sup> Id

observed that,

*“Transgender persons face huge discrimination in access to public spaces like restaurants, cinemas, shops, malls, etc., Further access to public toilets is also a serious problem they face quite often. Since there are no separate toilet facilities for Transgender persons, they have to use male toilets where they are prone to sexual assault and harassment.”*<sup>29</sup>

In *Naz Foundation’s Case*,<sup>30</sup> the Hon’ble High Court of Delhi has specifically mentioned how the sexual minority community is treated in the society and by district and police administration. At the international level, most of the attention to transsexual and inter-sexual human rights has focused on violations dealing with administration of justice, issues such as torture and ill treatment and arbitrary detention. Every state has a obligation provide passport, ration card, voters identity card, pan card, bank accounts, debit and credit card facilities, make a will and inherit property needs to be available to all regardless of change in gender/sex identities to Transgender peoples.

### **3.4 Gender Identity and Equality**

Right to choose one’s gender identity is integral to the right to lead a life with dignity, which is undoubtedly guaranteed by the Article 21 of the Indian Constitution. Subject to law, the Transgender persons may be afforded the right of choice to determine whether to opt for male, female or transgender Classification. The European Court of Human Rights also recognized the human rights of Post-operative transsexuals.<sup>31</sup>In the *National Legal Services Authority case* the Supreme Court Observed,

*“Gender identity refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve the freely chosen, modification of bodily appearance or functions by medical or surgical or other means and other expression of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual’s self-identification as a man, woman, transgender or other identified category.”*<sup>32</sup>

All the laws should be applicable to the transgender like other people. They should be treated equally, courteously and without any intolerance. The right to equality is major fundamental rights under Indian Constitution.<sup>33</sup>The discrimination on grounds of religion,

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<sup>29</sup> Murthy, *Supra* note 20

<sup>30</sup> *Naz Foundation v. Government of NCT Delhi and others*, 2010 Cr. LJ 94 Delhi

<sup>31</sup> Christine Goodwin v. The United Kingdom (application no 28957/95), July 11, 2002 <http://www.hrcr.org/safrica/privacy/Christine.html>( April 3, 2019)

<sup>32</sup> *Id.*

<sup>33</sup> Constitution of India, Article 14 which says that, “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

race, caste, sex or place of birth, it is prohibited under Indian Constitution.<sup>34</sup> Further under this article recognized the Transgender social rights.<sup>35</sup> In India various places the Transgender people access is restricted. In the *National Legal Services Authority case* the Supreme Court observed that,

*“Equality includes the full and equal enjoyment of all rights and freedom. Right to equality is the basic feature of the Indian Constitution. Article 14 of the Constitution also ensures equal protection of laws by bringing in necessary social and economic changes, so that everyone including TGs may enjoys equal protection of laws nobody is denied such protection. Transgender entitled legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizens of this country.”*<sup>36</sup>

### 3.5 Education

Education in India is a fundamental right. Any democratic society even a developed society cannot imagine to sustain without a quality education system. Few countries of the world have ensured education without discrimination on basis of sex or gender. Sexual minorities should enjoy this right, and accordingly, develop their mental faculty. In India, as the trans-sexuality is considered a curse, transsexuals even cannot think or dream of education, resulting in their backwardness. The very sexual behavior prevents them from getting an education in educational institutions. No doubt, there is no bar in law for education of transsexuals, but in practice education for transsexuals is a dream. Recently, India has ensured compulsory education for all the children. One Among the Fundamental Rights of the Indian Constitution recognized the Right to education.<sup>37</sup> Apart from this Article under Directive Principles of State Policy the Central and State Government have obligation to provide education to the people.<sup>38</sup> So, transsexuals should also get education under the mandatory state mechanism. The mechanism may contain the provisions for punishment of parents and school administration, if education of transsexuals is neglected or refused. Educational Institutions need to identify students with Transgender orientation and make space for acceptance and discourage any kinds of abuse. Formulate penalties for those causing abuse. The Government should introduce reservations in educational

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<sup>34</sup>INDIA CONST.art. 15

<sup>35</sup>INDIA CONST.art. 15 cl.2, which is recognizes that, No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

<sup>36</sup>*Supra* note 17, at, Para 54.

<sup>37</sup> Constitution of India, Article 21-A, Provides that, “The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law determine.”

<sup>38</sup> Constitution of India, Article 46recognizes that, “The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation”.

intuitions and Government jobs for such people.

### **3.5 Social Security**

Social Security is essential thing for living as a human being. This social security is recognized as a basic social Right in various International Human Rights Documents. Shelter homes should be made accessible for such transgender women who are facing violence. The Government makes recommendation to the law ministry to recognize the rights of the Transgender to marry, adopt and be protected by other laws as just for women. All the Government and non-Government institutions applications to whichever purposes, it should be having three options for gender, namely Man/Woman/Transgender. The Government will Initiating adequate pension amount for Transgender, who are above 60 years. Right to shelter is a fundamental right under Article 21 of the Indian Constitution.<sup>39</sup>In India the many Transgender people were living in under the poverty line. The Indian Government shall provide adequate house facilities to the Transgender people. Under the Directive principles of State Policy, the State will take steps to improve the raise of the level of nutrition and the standard of living.<sup>40</sup>In America there are 47 states, there is provision in the law for the issuance of a new birth certificate that reflects a new gender identity. However, the states have different requirements. In most states' Transgender applicants for a new birth certificate must undergone some degree of sex related surgery before being eligible. But in India in this regard there are no guidelines for changing the gender identity.<sup>41</sup>

### **3.6 Employment**

Unemployment is the major problem among the Transgender.<sup>42</sup>Every transsexual should be permitted to do dignified work. We should learn a lot from the small countries like Thailand, Indonesia and Malaysia recognizing the right to work of transsexuals. In Yogyakarta principles which were adopted by 25 countries representatives of United Nations from all geographical reasons, it is specifically mentioned that every citizen has a right to take part in the conduct of public affairs including right to stand for elected office, to participate in the formulation of policies effecting their welfare, and to have equal access to all levels of public service and implementation in public functions without discrimination on the basis of sexual orientation or gender identity. Indian Constitution also recognized the Right to Equality.<sup>43</sup> Further the Government should provide equal

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<sup>39</sup> *Chameli Singh v. State of Uttar Pradesh*, (1996) 2 SCC 549

<sup>40</sup> Constitution of India, Article 47 provides that, *The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.*

<sup>41</sup> HASTING WAYMAN, *Supra* note 1, at, 132

<sup>42</sup> Mohammed Rafeek, *Transgender and Human Rights- Current situation and potential options of Development in India*, 1(2)The Rights 3, 4(2015).

<sup>43</sup> INDIA CONST.art. 14

opportunity for all citizens in the Public employment.<sup>44</sup> The right to serve the people as an administrator, police officer or member of the judiciary is denied to the persons born with abnormal sexual identity. Every state member of the world community should realize it that they are depriving a particular class of society of their valuable human rights. Before ensuring the right to public office, social recognition, educational avenues and economic liberty should set the precedent. In India the right to contest election has been recognized and provided to all persons without discrimination on the basis of sexual orientation or gender identity. But, contesting of Election to the Transgender it is not recognized. The Civil and political rights of the Transgender people are violated by the Government. It is to be noted that the various schemes implemented by the Government to common for all people. But that schemes benefits and all not were getting by the Transgender People. In this regard, the Central and State Government have obligation to provide the public assistance to the people.<sup>45</sup> Recently a welcome move by LIC has started recruiting Transgender as their agents.<sup>46</sup>

### **3.7 Right to Privacy**

The term 'Privacy' as a component right of human dignity is a judicially invented constitutional right.<sup>47</sup> The right of privacy thus has been held to protect a private space in which man may become and remain himself. The ability to do so is exercised in accordance with the individual autonomy. The right to privacy means the right to be let alone, is an interest that man should be able to assert directly and not derivatively from his efforts to protect other interests. Right to be let alone should be seen simply as a negative right to occupy a private space free from government intrusion, but also as a right to get on with your life, your personality and make fundamental decisions about your intimate relations without penalization. Transsexuals and intersex people have not received any attention with respect to right to privacy. Mostly government bodies like police violate this right, when they arrest the transgender. Article 12 of the Universal Declaration of Human Rights (1948) refers to privacy and it states that "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence or to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks." International Covenant on Civil and Political Rights refers to privacy and states that, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, or to unlawful attacks

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<sup>44</sup> INDIA CONST.art. 16

<sup>45</sup> Constitution of India, Article 41 recognizes that, *The State shall, within the limits of its economic capacity and development, make effective proviso for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.*

<sup>46</sup> Mohammed Rafeek, *Supra* note 42, at, 4

<sup>47</sup> Upendra Baxi, *Protection Of Dignity Of Individual Under The Constitution Of India*, 50 (Lokendra Malik ed., 2012)

on his honor and reputation.”<sup>48</sup> The above two International Conventions the India is one among the member country. India has the obligation to protect the privacy of the Transgender people. In fact, the National Legal Services Authority case decided by the Supreme Court taking into consideration of the International Conventions.

#### **4. Responsibility of Indian Government**

It is to be noted that Supreme Court recognize the rights of Transgender community in April 2014 and gave Central Government six months to implement its directions. Further it also stated that reservation of transgender community as socially and economically backward classes have to be determined in consultation with National Commission for Backward Class. In fact, the Centre has sent notices to the State Governments to implement the following directions. (i) A grant of Rs. 1000 per month to the parents of Transgender children (ii) it has directed to set a class seventh to tenth Scholarship (iii) to implement a monthly scheme for Transgender persons, and (iv) a Scholarship for promotion of higher studies among transgender children. With respective of above direction of the Central Government, Tamil Nadu and Karnataka have set up a monthly pension scheme. States like Maharashtra, West Bengal, Odisha and Tamil Nadu have set up a Transgender Welfare Board while Bihar and West Bengal have made provisions for reservations in Government employment.<sup>49</sup> In *National Legal Services Authority case*, the Supreme Court commanded, the Government hospital should have been providing separate toilet facilities to the Transgender people. But most of the states it has not been followed.<sup>50</sup> All the State Government should respect the Supreme Court directions and implement the same.

#### **5. Conclusion**

In *National Legal Services Authority case*, the Supreme Court has given various directions to the Central and State Governments. The Government takes necessary steps to implement the guidelines of Supreme Court. Preamble to the constitution mandates justice, social, economic, and political equality of status. The Government should formulate such programs which will ensure the social, economic and political rehabilitation of transgender. Thus, the first and the foremost right transgender are deserving of is the Right to Equality under Article 14. Article 15 speaks about the prohibition of discrimination on the ground of religion, caste, sex or place of birth. Article 21, ensures right to privacy and personal dignity to all the citizens. Especially in India, the lack of welfare Schemes for Transgender. So, the Government should be established a Transgender Welfare Board. The very recent statistics says that the violence against

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<sup>48</sup> International Covenant on Civil and Political Rights, art. 17

<sup>49</sup> Priya Mathur, *Citizenship Rights and Transgender Community: Evaluating the Impact of section 377 and NALSA Judgment*, 1(2) *ITMU Law Review*, 132 (2015)

<sup>50</sup> *Id.* at 133

Transgender increased. The Government will take the initiative the necessary amendments in the criminal laws.

As all human beings have the right to live with dignity at all times, regardless of their legal, social or political status. Creating awareness about fundamental rights among transgender is very important aspect. NGOs should take Transgender welfare as one of their objectives and look into their problems and solutions. Educational institutions must organize seminars and conferences to create awareness about Transgender community in the young minds. Media plays a vital role in spreading things; particularly electronic media like television, internet and cinema should avoid negative portraying of transgender. In fact, the National Legal Service Authority case came before the Supreme Court, in India there is no existing legislations with special reference to Transgender. It is to be noted that the guidelines are judicial creativity and promoting transgender rights in the society. Further the Supreme Court stressed the need of the Transgender legislation in India. Still the Transgender they are fighting for life, Education, Employment, housing etc. Since India is a signatory in various International human rights conventions, it should take necessary steps for promoting transgender rights in India.

## Use of Orphan Works In Derivative Works: Towards A Model Framework

Anushtha Saxena\*  
Abhinav K Mishra\*\*

### *Abstract*

*Orphan Works, as the name suggests, are those works whose author cannot be identified or found for some reasons. These works are copyrightable work but only without the trace of author or author is unknown. US Library of Congress defines 'Orphan works' as "copyrighted works whose owners are difficult or even impossible to locate." Digital world too has created an anomaly in tracing the real author of work for a number of reasons. Be it informal, collaborative, or amorphous or be it works wrote anonymously. In order to use an orphan work a prospective user must invest considerable resources to locate the owner. This may always be not a feasible and appropriate option however remains a necessary step. Therefore, the work creates a lose-lose situation for society. This note explores different issues and legal options at different jurisdictions and at the end proposes model framework.*

**Keywords:** *Orphan Works, Copyright, US, India, Digital Copyright*

### **1. Introduction**

The term orphan works is commonly used in two senses i.e. in a general sense meaning works concerning which the author cannot be identified or located, or in a more limited sense meaning works protected by copyright concerning which the owner of such copyright cannot be identified or located.

This is not only related to authors copyright but also in case of sound recording, performer or performers whose performance is recorded but now he is lost and cannot be traced. Orphan works are those works which are protected by copyright but their owners cannot be found and located. Orphan works as the name suggests are the works whose author is not known as well as cannot be traced.<sup>1</sup> It means origin cannot be traced and information

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\* BALLB. (Amity), LLM (NLSIU, Bangalore) (UGC-NET), Assistant Professor of Law, PSIT, Kanpur. anushtha@nls.ac.in

\*\* Fellow, Institute of Intellectual Property, Tokyo. abhinav@mylawman.co.in

<sup>1</sup> Examples of such orphaned works could be old photos or documents, which have been stored in library collections for years, or perhaps recently discovered. See, Yael Lifshitz-Goldberg, "Orphan Works" WIPO

is missing. It is difficult to find and locate the owner of the copyrighted work. Examples of orphan works can be photographs, documents, diary, music, film, web pages, blogs etc. which are found but the owner cannot be located or are dead, disappeared.<sup>2</sup> Thus if any person desires to make use of other person copyrighted work he cannot use it for commercial or non- commercial uses until it comes under the exceptions of Copyright law of different jurisdictions otherwise he will be liable for infringement of copyright work. If the work is not copyrighted then there is no need to take the permission of the required authorities.<sup>3</sup>

The person like authors, artists, writers who wants to use the work of a person who cannot be found spends a lot of time searching him. A lot of money is also invested and time is spent by him to make a search of the copyrighted person. The fear of future litigation often leads to orphan works being unutilised and no one explores them for the societal benefit as well as commercial benefit. Another example can be of an historian who wishes to use a classical work of a person but in spite of diligent and reasonable search that person is untraceable then obviously the person desiring to use that work will refrain. In this way the people and society will never come across a piece of work which is beneficial to the society as a whole. Orphan materials are found in library, musical, dramatic, artistic works, computer programs, broadcasts, data bases etc. Materials of these categories may be unpublished for example in the case of manuscript, artistic works, in public or private collections.

It has been realised by the Nations that the problem of orphan works is not small and it has to be seen that this issue comes to an end or if not ends then at least there can be measures to resolve the problem of orphan works and their uses in derivative works. For example producing a remixing music, translating a novel from Hindi to English etc. Derivative works are vested in the copyright owner but they can also be delegated by him to a licensee, assignee. But if the original does not belong to the person then it is infringement of copyright.

SAA Representative to WIPO Statement on Archival Issues Involved in “Orphan” Copyrighted Works Standing Committee on Copyright and Related Rights by William J. Maher delivered in Geneva Switzerland May 1, 2014 remarked that the issue of orphan works in legal scenario is much more for the archivists because they focus on unique works and documents.<sup>4</sup>

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Seminar 2010, available at [http://www.wipo.int/edocs/mdocs/sme/en/wipo\\_smes\\_ge\\_10/wipo\\_smes\\_ge\\_10\\_ref\\_theme11\\_02.pdf](http://www.wipo.int/edocs/mdocs/sme/en/wipo_smes_ge_10/wipo_smes_ge_10_ref_theme11_02.pdf)

<sup>2</sup> Id.

<sup>3</sup>US Copyright Register’s Report on Orphan works, January 2006, available at US Copyright Office website available at <http://www.copyright.gov/orphan>.

<sup>4</sup> SAA Representative to WIPO Statement on Archival Issues Involved in “Orphan” Copyrighted Works Standing Committee on Copyright and Related Rights by William J. Maher, *as delivered, Geneva Switzerland*, May 1, 2014

“For instance, just recently, an anonymous donor gave us a small album identified as nothing more than 'Aunt Martha's missionary work in India.' It contains over 150 pre-1920s photographs of rural India showing village and agricultural life, all from the parochial perspective of a white, protestant American, thus providing candid insights into two societies. South Asian specialists who have seen the album have noted the material's rarity, but because of the circumstances of the donation, we have no place names or dates. Crowd-sourcing by digitizing and placing the material on the internet would likely yield the contextual information to make this item a valuable cultural resource. Clearly these are orphan works, but a simple reading of copyright without exceptions would say we cannot do that. Common sense, indeed the archival mandate, on the other hand, would say absolutely yes.”<sup>5</sup>

To see the complexities involved an example can be cited. A person wishes to use the work in his country of origin he should establish two facts-

1. *Whether there is copyright in the work*
2. *If it is protected then who is the owner of the work.*

To establish whether copyright is there in the work it is important to know the identity of the owner because the Berne Convention relates to the nationality of the author. Where the author is not a Convention national, it will be protected if first or simultaneously published in a Convention country.

## **2. Comparative Study Of Different Jurisdictions In Model Framework**

The countries reviewed are Hungary, Canada, UK, USA and INDIA. The owner of orphan works cannot be found therefore the user has to search the owner who has copyright in the respective work. Search in different Jurisdictions means different search. Some nations permit what is called reasonable search whereas in some nations has to be a diligent search etc. Every Jurisdiction covered here involves different search and procedures followed in their nation. There is no one uniform method in doing diligent search. In Canada reasonable efforts are to be done, in USA reasonable search is required and different models are there in different Jurisdictions which are discussed later on.

### **2.1 USA**

USA was concerned over the issues of orphan works and therefore in 2005 the Copyright Office issued a notice and inquiry. They also amended the Copyright Act and added an amendment by which protection was extended to 70 years from fifty years. While U.S. copyright law does not contain an all provisions relating to orphan works, it does contain a few provisions that permit certain users to make uses of certain classes of orphan works, and that deminimise the risk of using a work of someone else called orphan work. There

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<sup>5</sup> Id at pg no.2

are thus already some “orphan works provisions” in U.S. Copyright law. These are implicit in section 108(h), section 115(b), section 504(c)(2), and the termination provisions (sections 203, 304(c), and 304(d)).<sup>99</sup> these existing laws provide models that may be useful in the development of orphan works provision.<sup>6</sup>

In 2006 there was a report in USA report on orphan works a report of the register of the copyrights 2006 that more legislation should be made with respect to orphan works and obligated diligent search criteria to be essential. After this report January 2006 two bills were legislated that is Orphan works Bill 2008 and Shawn Bentley Orphan works Bills 2008<sup>7</sup>. Both these bills were never made an Act. The problem of orphan works was raised in the case of Author’s guild et al vs. Google.

In USA there is a clause of limited liability in the Copyright Act. This clause means that the remedies which are available to the owner of orphan works who in future comes forward are limited. The relief of monetary compensation is limited. If the user proves that he has made reasonably diligent search then the owner will get limited monetary compensation. Liability clause also imposes restrictions on the relief of injunction. If the user has used the work for derivative purposes the copyright owner is not entitled to full

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<sup>6</sup> Other provisions in the Copyright Act can permit use of orphan works. For example, statutory licenses other than section 115 (such as the licenses available under sections 112, 114, and 118) can use of an orphan work. See 37 C.F.R. §§ 253.9, 260.7, 261.8, 262.8 (2005). Similarly, any of the exceptions to copyright – for example those found in section 110 – could permit use of an orphan work. The provisions discussed in this Section of the Report are those that bear the closest resemblance to an exceptions to copyright – for example those found in section 110 – could permit use of an orphan work. The provisions discussed in this Section of the Report are those that bear the closest resemblance to an orphan works provision, and those that are the most instructive for the drafting of an omnibus orphan works provision.

<sup>7</sup> Shawn Bentley, Orphan Works Bill 2008, Subsection (b) (2) (A)“(ii) DILIGENT EFFORT.—For purposes of clause

(i) a diligent effort—

(I) requires, at a minimum—

(aa) a search of the records of the Copyright Office that are available to the public through the Internet and relevant to identifying and locating copyright owners, provided there is sufficient identifying information on which to construct a search;

(bb) a search of reasonably available sources of copyright authorship and ownership information and, where appropriate, licensor information;

(cc) use of appropriate technology tools, printed publications, and where reasonable, internal or external expert assistance; and

(dd) use of appropriate databases, including databases that are available to the public through the Internet; and

(II) shall include any actions that are reasonable and appropriate under the facts relevant to the search including actions based on facts known at the start of the search and facts uncovered during the search, and including a review, as appropriate, of Copyright Office records not available to the public through the Internet that are reasonably likely to be useful in identifying and locating the copyright owner.

(iii) CONSIDERATION OF RECOMMENDED PRACTICES.—A qualifying search under this subsection shall ordinarily be based on the applicable statement of Recommended Practices made available by the Copyright Office and additional appropriate best practices of authors, copyright owners, and users to the extent such best practices incorporate the expertise of persons with specialized knowledge with respect to the type of work for which the search is being conducted”. In the Orphan Works Bill 2008 standards of diligent search are entrusted to the Copyright Registry in the form of Best Practice guidelines – Subsection (b) (2) (A).

injunction rather the user will have to pay monetary compensation and also sufficient attribution.<sup>8</sup>

## 2.2 HUNGARY

The Act CXII of 2008 amended the existing law Copyright Law, 1999 of Hungary and introduced a complex regulation of the use of orphan works. The Act was formally adopted on December 28, 2008, and had come into force on February 1, 2009. With respect to the orphan works it entered into force on 1<sup>st</sup> April, 2009.<sup>9</sup> The act inserted Article 57A whereby it provided that if any person who wants to use the work of a person who cannot be found after diligent search some conditions are given which has to be observed by the person who wants to make use of a work whose owner is not traceable. Hungary provides for compulsory licensing system and everything is managed by Hungarian Intellectual Property Office. This office maintains registers and other records of registered copyright works. The license which is granted by this office remains valid for a period of five years. The license application has to be filled up by giving all the valid details like the kind of work, extent of the work etc. The license granted is not transferable and the amount has to be deposited with the office. The amount is determined by the office by determining the nature of the work and its use.

If in future the copyright owner produces himself within five years then he is paid price of the license. If within five years the person does not appear then there is a provision in the Act which provides that the price of the license will be transferred to the Collective society or National Cultural Fund. The Act also provides that if the rightholder appears before the expiry of the license period then the work undertaken by the licensee has to be withdrawn but the undertaken uses can be continued till five years. If the owner is of the opinion that the prescribed remuneration is not as per the work then he can file a suit in the civil court to claim remuneration of his work.

The Hungary law of copyright also gives guidelines as to the lawful use of orphan works. The search has to be in the written form and it has to be diligent search<sup>10</sup> by giving all the

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<sup>8</sup> Orphan Works Act 2008 Section 514( b)(1)(iii): “provided attribution, in a manner that is reasonable under the circumstances, to the owner of the infringed copyright, if such owner was known with a reasonable degree of certainty, based on information obtained in performing the qualifying search.

<sup>9</sup> IIC –The new orphan works regulations of Hungary, International Review of Intellectual Property and Competition Law, Issue 2014/8, p. 940-952.

<sup>10</sup> The diligent search has to be one in which the person has made every effort. Also an advertisement has to be given in the national and regional newspapers. The procedure has to be strictly followed before the license is granted otherwise it will be rejected. Article 8 of the Hungary Copyright law also provides for a register kept for orphan works. The diligent search has to be one in which the person has made every effort. Also an advertisement has to be given in the national and regional newspapers. The procedure has to be strictly followed before the license is granted otherwise it will be rejected. Article 8 of the Hungary Copyright law also provides for a register kept for orphan works. The following details are maintained-

1. Application number
2. Details are given so as to recognise the orphan works.

data collected. Among these sources the legislation mentions (i) voluntary register managed by the Hungarian Intellectual Property Office, (ii) databases of relevant Hungarian collecting societies; (iii) publicly available collections and archives; (iv) information resources of organisations representing producers and/or publishers; (v) other suitable databases.

### **2.3 CANADA**

In Canada orphan works are dealt under section 77<sup>11</sup> of the Canada Copyright Act of 1988. Under section 77<sup>12</sup> the work orphan works is not used rather the term “owner cannot be located” is used. The granting of licenses in copyright works is vested in Copyright Board of Canada. The license which is granted to use orphan works is not valid outside Canada. On the separate point of foreign works, Bouchard and De Beer (2009) state “The Supreme Court of Canada has held that the Board has jurisdiction to approve tariffs covering persons or activities that have a ‘real and substantial connection’ to Canada... Thus, the Board has been of the view that it may issue a licence to use in Canada an orphan work owned by an unlocatable foreign national”.<sup>13</sup>

The Copyright Board of Canada issues licenses for the substantial part only and not for insubstantial portion and it has been seen in the reports that it has refused various applications on this basis. Licences in orphan works in Canada is applicable to performers, broadcasters and sound recordings also apart from music, paintings, graphics, photographs etc. In Canada the work is protected for fifty years till the end of the creators death or there are some works in which copyright protection is not given. If protection is not given then there is no bar to use orphan works in which copyright is not given. Here comes the fair use clause into play. Fair use means use of work for education, research purposes, studies etc. Section 77 of the Canada Copyright Act 1988 there has to be “reasonable efforts” to be made and the Copyright Board should be satisfied that the

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3. The amount of remuneration.

4. Pending legal works relating to orphan works.

<sup>11</sup> Section 77 (1): Where, on application to the Board by a person who wishes to obtain a licence to use

(a) a published work,

(b) a fixation of a performer’s performance,

(c) a published sound recording, or

(d) a fixation of a communication signal in which copyright subsists, the Board is satisfied that the applicant has made reasonable efforts to locate the owner of the copyright and that the owner cannot be located, the Board may issue to the applicant a licence to do an act mentioned in section 3, 15, 18 or 21, as the case may be.

(2) A licence issued under subsection (1) is non-exclusive and is subject to such terms and conditions as the Board may establish.

(3) The owner of a copyright may, not later than five years after the expiration of a licence issued pursuant to subsection (1) in respect of the copyright, collect the royalties fixed in the licence or, in default of their payment, commence an action to recover them in a court of competent jurisdiction.

<sup>12</sup> Copyright Act, R.S.C. 1985, c. C-42, s. 77

<sup>13</sup> J. De Beer, M. Bouchard, Canada’s “Orphan Works” Regime: Unlocatable Copyright Owners and the Copyright Board [2010] Vol. 10(2) *Oxford University Commonwealth Law Journal*, p. 215-256. Also available at Copyright Board of Canada at <http://www.cb-cda.gc.ca/about-apropos/2010-11-19-newstudy.pdf> p. 22.

applicant has made the search in every way and every effort has been made to find out the true owner of the work. The search efforts are made to see that the applicant has done case to case search or not. The Board also sees whether the work is for the commercial use or non-commercial use, nature of the work to be done, the entity-commercial or non-commercial. A payment has to be made by the person using the work known as royalty. If in future the owner of the work appears then the royalty will be given to him by the Collecting society. When the license is given then immediately royalty is deposited with the Collecting society. Royalties can be paid based on or 'contingent' on locating the owner, or can be payable immediately to a collecting society. Section 77(3) provides that the cooperative society keeps this royalty money as a trustee so that if in future the owner presents himself then this royalty money is given him. If the owner does not present himself in five years then the cooperative society can use this money for the beneficial works but if the owner comes after expiry of five years then the collecting society has to give him remuneration. It may also be possible that the owner stops the licensee holder to make use of the work but he cannot be restrained if provided so in the license. But if the owner is found during the stage of application itself then the application is abandoned.

#### **2.4 INDIA**

In India the Indian Copyright Act, 1957 was amended by Copyright (Amendment) Act, 2012. In India the orphan works are dealt in section 31A and 31B. In 2012 various amendments were made to the Copyright Act 1957 and in that line Section 31A (1) of 1957 Act orphan works are those works where the owner of the work cannot be found or the owner is dead and also the works which have not been published in India. Section 17 of the Copyright Act 1957 amended section 31A (1)<sup>14</sup> and give a wide scope to this section by including unpublished work, published work. Before the amendment orphan works were not recognised.

Section 31A(2) also provides that the applicant has to make due diligent search and when the application is given it is made to the Copyright Board along with the copies of evidence that he made advertisements in regional and one English newspaper. A royalty amount is also paid to the Copyright Board according to the work, the purpose also is seen while determining royalty amount. The Copyright Board after holding due inquiry the Copyright Board if it thinks fit then the Registrar of Copyright Board will grant license to the person for publishing unpublished or published work and also royalty fees will be paid.<sup>15</sup>

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<sup>14</sup> Section 31A (1) 1957 Act (as amended) – “Where in the case of an Indian work referred to in sub clause (iii) of clause (I) of Section (2), the author is dead or unknown or cannot be traced, or the owner of the copyright in such work cannot be found, any person may apply to the Copyright Board for a licence to publish such work or a translation thereof in any language”.

<sup>15</sup> The Gazette of India, The Copyright (Amendment) Act 2012 (No. 27 of 2012) (7 June 2012) available at [http://copyright.gov.in/Documents/CRACT\\_AMNDMNT\\_2012.pdf](http://copyright.gov.in/Documents/CRACT_AMNDMNT_2012.pdf).

In India there is no provision as to up to what time the owner if he comes in future will have the right to claim royalty amount. Thus there is no time limit for the owner to claim royalty in future. Also Indian law is silent as to what is done with royalty money which is deposited with the Copyright Board.

## **2.5 UNITED KINGDOM**

In 2013, the U.K. largely adopted these recommendations through amendments to its Copyright, Designs and Patents Act of 1988. The provisions authorize the Secretary of State to grant non-exclusive licenses for the use of orphan works where the prospective user has conducted a diligent search but has failed to locate the copyright owner.<sup>16</sup>

Like the United States, the United Kingdom has considered proposed solutions to the orphan works problem for several years. The issue was a key focus of an independent review of the U.K. intellectual property system launched by Prime Minister David Cameron in November 2010.<sup>17</sup> Section 116 of the Act deals with power to provide for licensing of orphan works.<sup>18</sup>

In UK there was no law on orphan works before 2014. In 2014 amendments were made by following the recommendation of the Enterprise and Regulatory Reform Act. UK follows the new licensing system while granting licenses to orphan work users. In UK Intellectual Property Office grants licence to the user of the orphan works after the user has done diligent search. The application is examined by the Intellectual Property Office after making sufficient inquiry. The Board also inquires that the applicant has made every possible effort to search the owner. The licence is granted for a period of seven years. The

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<sup>16</sup> Enterprise and Regulatory Reform Act 2013, c. 24, 77.

<sup>17</sup> Like the United States, the United Kingdom has considered proposed solutions to the orphan works problem for several years. The issue was a key focus of an independent review of the U.K. intellectual property system launched by Prime Minister David Cameron in November 2010.

<sup>18</sup> **116A-Power to provide for licensing of orphan works**

(1) The Secretary of State may by regulations provide for the grant of licences in respect of works that qualify as orphan works under the regulations.

(2) The regulations may—

(a) specify a person or a description of persons authorised to grant licences, or

(b) provide for a person designated in the regulations to specify a person or a description of persons authorised to grant licences

(3) The regulations must provide that, for a work to qualify as an orphan work, it is a requirement that the owner of copyright in it has not been found after a diligent search made in accordance with the regulations.

(4) The regulations may provide for the granting of licences to do, or authorise the doing of, any act restricted by copyright that would otherwise require the consent of the missing owner.

(5) The regulations must provide for any licence—

(a) to have effect as if granted by the missing owner;

(b) not to give exclusive rights;

(c) not to be granted to a person authorised to grant licences.

(6) The regulations may apply to a work although it is not known whether copyright subsists in it, and references to a missing owner and a right or interest of a missing owner are to be read as including references to a supposed owner and a supposed right or interest.

UK already has one provision that affects a small subset of orphan works. Under section 57 of the Copyright,

Designs and Patents Act 1988, “Copyright in a literary, dramatic, musical or artistic work is not infringed by an act done at a time when, or in pursuance of arrangements made at a time when - (a) it is not possible by reasonable inquiry to ascertain the identity of the author, and (b) it is reasonable to assume - (i) that copyright has expired, or (ii) that the author died 70 years or more before the beginning of the calendar year in which the act is done or the arrangements are made.”

### **3. Limited Liability clause of USA**

In USA the limited liability clause imposes restrictions on the liability of the user. Even if the user has made reasonably diligent search still his liability should not be limited so much in USA. This is because the user has made every reasonable search possible for him and after proper inquiry only he is granted the license to use the work. But this limited liability clause is in a way very limited and also narrows the scope of the work which is copyrighted also. The best legislation on orphan works is the Canadian legislation on orphan works. It provides legal certainty by granting compulsory licensing system. The Indian Copyright law was amended in line with the Canadian legislation on Copyright law of compulsory licensing system. The user deposits royalty to the Copyright Board and in future if the owner comes to claim the copyrighted work then the royalty amount is paid to him.

If the owner comes in future and proves that he has copyright in the work then he should be given full protection as given in the Canadian law because he had used his labour, skills in that work. And now if someone else uses his work the owner should be given full protection as given in the Canadian legislation .Strong protection should be given to him. Compulsory licenses can be granted and also it should be for a limited time period. It is good that orphan works are used for the benefits of the society since the owner cannot be found but at the same time there should be a balance between the use of orphan works and the remedies available to the copyrighted owner who comes forward in the future. Reasonable compensation and attribution is not the only solution to the owners of copyrighted works. There should be more than this.

USA did not adopt the method of Compulsory Licensing system because it adopted a different approach that it is of no use to pay royalty or license fee and it will be insufficient because no copyright owner will come in future to claim funds. In Canada the Copyright Board is nonprofit and independent organisation.

The USA office of Copyright believes that there should not be windfall gains in the owner if in future he comes and he should not get so much benefit when his work has been used

in derivative works by the user. The Board believes in single, fixed sum so that he does not get so much profit from his work.

#### **4. EU Directives On Certain Permitted Uses**

The European Union in 2012 issued directives on certain permitted use of orphan works<sup>19</sup>. These directives were issued and all the member states for a wide use of orphan works but it limits them to few uses. These are libraries, education, research, museums, film and audio heritage institutions. These directives were issued to make the members of European Union to legislate in their national laws and make an exception that to make the above mentioned works available to the public by reproducing and digitising these works on certain terms and conditions.

If the owner is unknown there are restrictions and long procedure to use the work in educational purposes for example in libraries. Thus making orphan works public in certain uses will be of great benefit to society and a number of works which remain unused because the owner cannot be found will be used by making them public in certain uses only. These directives play a major role in these works. Not only libraries are updated for educational and research purposes but also that other uses like archives, cinematographic works, museums will also be playing a vast role by making use of orphan works. Permitted uses are limited to reproduction and digitisation, restoration as well as preservation. However the directives also played a great role in the commercialisation of Europe and also in competitiveness.

The directives issued guidelines that whoever wants to make use of orphan works like museums, libraries etc they have to make a diligent search by using databases and registers. Then if the work is declared to be orphan work then all the member states of the European Union will be able to make use of the orphan works in their nation states. The directives also issued directives relating to one office where all the orphan works will be registered. These directives will help in generating revenues to cover the cost of digitisation by making use of certain permitted orphan works uses.<sup>20</sup> The directives also provide for reasonable compensation to the owner of orphan works who may reappear in future.

But the directives have been critics on the grounds that it permits uses of certain works only as orphan works. There are other works also which can be for the public interests which are not given recognition by the European Directives of 2012. It may allow private bodies also to make use of orphan works by making derivative uses to make new creations

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<sup>19</sup> Directive 2012/28/EU, of the European Parliament and of the Council of 25 October 2012, on Certain Permitted Uses of Orphan Works, 2012 O.J. (L 299) 55, 5, available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF>.

<sup>20</sup> EUROPEAN COMMISSION PRESS RELEASE DATABASE [http://europa.eu/rapid/press-release\\_MEMO-12-743\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-12-743_en.htm?locale=en)

and innovations in the fields of technological and global development. It also seen that the directives played a limited role in European libraries as these libraries have put forward various practical problems and they came forward with a view that it will benefit only small scale and niche projects.<sup>21</sup>

In 2014 USA Copyright Office also give proposals related to Orphan works and its uses and it is seen that the directives of European Union are limited then the proposal of USA Copyright Office. USA proposals applies to any prospective user but the European Union directives are limited to certain works only. The USA proposal applies to all classes of works in which copyright can be granted whereas the EU directives applies to phonograms, photographs etc which are first published in European Union.

## **5. Conclusion And Suggestions**

The person who wants to use his work in his work that is derivative works and the owner is not found after reasonable and actual search the work of the original owner is called Orphan works. In this paper we have seen the frameworks in Different Jurisdictions and it can be said that in different countries there are different options for Orphan works. There are issues relating to the works whose owner cannot be found after reasonable searches. Different countries have different way of search. In some there is to be a reasonable search and in some there has to be diligent search.

In order to make strong legislation on Orphan works there has to be a Uniform and certain legislation. It can be said that the procedure adopted on orphan works by Canadian system which is based on Extensive licensing system is such which can be said to be uniform and provides protection to user as well as the orphan work owner. India has also amended its Copyright Act of 1957 in line of Canada legislation. Country like USA who has limited liability clause should also work on compulsory licenses and should not put the owner at loss when in future he comes forward for the work produced by him. This will not put the owner at disadvantage. Rather the license of the user should be cancelled if the copyrighted work is found in future. Thus countries should have a uniform compulsory licensing system in order to recognise orphan works of their countries as well as of other nations.

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<sup>21</sup> The European Orphan Works Directive - an EIFL Guide <http://www.eifl.net/resources/european-orphan-works-directive-eifl-guide#provisions>

## Considering Terrorism As A Crimes Against Humanity: A Victim Centric Approach

Vishal Sharma\*

### Abstract

*Since the time of Nuremberg and Tokyo trials there are three major recognised international crimes; war crimes, genocide and crimes against humanity. For war crimes four Geneva conventions were adopted in 1949. For Genocide an international convention was signed in 1956. However, work of drafting an international convention on crimes against humanity is still 'in progress at the level of international law commission. In 2019 August, International law commission has come out with all draft articles crimes against humanity. Definition of crimes against humanity has continuously evolved from Nuremberg to International Criminal Court. But international law commission has lost this opportunity to further develop this definition. The commission should have added terrorist activities as a new component in the definition of crimes against humanity. Though the commission has given a logic of practicality behind borrowing its definition from the Rome Statute. Nonetheless an academic scrutiny is called for at this moment to analyse whether terrorism or terrorist activities can satisfy all the threshold requirements for being considered as crimes against humanity. If it is so considered what purpose it will serve. Other than introduction this research paper has three parts. First part deals with the nature and definition of crimes against humanity, second part deals with various jurisprudential aspects of terrorism and its nature. Third part is focused on various similarities and difference among terrorism and crimes against humanity.*

**Kew Words:** Crimes against humanity, The Hague convention, The Rome Statute, terrorism, principle of complementarity, universal jurisdiction.

### 1. Introduction

International Law Commission is drafting a proposed international convention on crimes against humanity. In August 2019 the commission has finished its process of drafting the articles of proposed convention. Now it will be analysed by the sixth committee of United

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\* Assistant Professor at UPES Dehradun. In second week of May 2019 the author has participated in the drafting committee meetings of International Law Commission, in Geneva, as a research associate on Crimes against humanity. The author can be reached at vsharma@ddn.upes.ac.in and vishal.jnu.du@gmail.com.

Nations Organisation.<sup>1</sup> If sixth committee gives a positive review then U.N. General Assembly will adopt it. And after that all ratifying States are supposed to legislate same or nearly similar law on the prevention of crimes against humanity in their respective national legal systems. The convention has covered both substantive and procedural aspects to propose a workable regime for the prevention of crimes against humanity in international and national legal regimes. But for the sake of bringing harmony in the statute of International Criminal Court and various national regimes International Law Commission did not choose to improve the definition of crimes against humanity, any further. However, the Commission has well explained its viewpoint on this issue and it is a practical approach, but an academic evaluation is always desirable whether the current definition of crimes against humanity is complete. Are there any other serious international crimes that qualify as crimes against humanity? The definition of crime against humanity has developed over the time according to the experiences of humanity. It shows there is still a scope of development in the definition of crimes against humanity. Moreover, 'law' in itself is a dynamic concept, which changes to serve the needs of the changing societies. Various academicians and Statesmen have considered, terrorism as a crime against humanity. It is pertinent to discuss whether terrorism qualifies the minimum threshold limit for being considered as a crime against humanity or not? For that is pertinent to understand the meaning and scope of crimes against humanity and terrorism one by one.

## 2. What is crime against humanity?

"Crime against humanity" as a legal concept and international crime has two basic aspects. First, these crimes are so heinous that these are crimes against very spirit of being human; they shock the collective consciousness of entire mankind. Second, due to extreme ugly an inhuman nature of the crimes these crimes, entire human society at global level feels aggrieved and, hence, becomes interested in its punishment.<sup>2</sup> Second, the crime is so heinous that it is an attack not just upon the immediate victims, but also against whole humanity, and hence the entire community of humankind has an interest in its punishment.<sup>3</sup> International Criminal Tribunal of Yugoslavia in *Prosecutor v. Erdemovic* has noted as under in

*"Whilst rules proscribing war crimes address the criminal conduct of a perpetrator towards an immediate protected object, rules proscribing "crimes against humanity" address the perpetrator's conduct not only towards the immediate victim but also towards the whole of humankind ...*

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<sup>1</sup> United Nations Organisation's legal committee with the representation of legal members from all States is known as 'sixth committee'.

<sup>2</sup> (Hannah Arendt characterized the Holocaust as a "new crime, the "crime against humanity" — in the sense of a crime 'against human status,' or against the very nature of mankind." H. Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil, at 268 (Viking Press, 1965).)

<sup>3</sup> First Report of Special Rapporteur on "crimes against humanity".

*Because of their heinousness and magnitude they constitute egregious attacks on human dignity, on the very notion of humaneness. They consequently affect, or should affect, each and every member of mankind, whatever his or her nationality, ethnic group and location.”<sup>4</sup>*

In ancient times only India had the examples like Mahabharata, where humane methods of war were followed. However at the world level we find such example only in the modern history, when a crucial step to reduce the ferociousness of wars was taken at the Hague conventions of 1899 followed by 1907, where in article 47 of regulations provided in annexure, proscribed attack on civilian populations. But these provisions remained just on paper and in both World Wars numerous war crimes and “crimes against humanity” were committed. During World War I, highly dehumanizing atrocities were committed by the Turkish ruling establishment, against its own population who were “Armenian Christian” ethnically. Finally, in historic event of Nuremberg trials and Tokyo trials perpetrators of “crimes against humanity” were prosecuted. This concept developed over the past century through adhoc tribunals of Yugoslavia and Rwanda. International Law Commission also presented a draft statute for making an “international criminal court”.

But since Nuremberg to Rwanda all, the international criminal tribunals were set up as mechanisms for ex-post facto prosecutions. There was great demand that there should be an international criminal court with prospective jurisdiction. Only a prospective court can get more acceptability from the international community. Another demand was for framing a comprehensive definition of the crime, with all the modern standards of international law. Since international consciousness regarding human rights and humanitarian laws, was much developed till 1998, hence the definition was also much comprehensive on these aspects. After long deliberations held in the meetings of plenipotentiaries, known as Rome conferences, an extensive prospective code was adopted. This criminal code is known as the Rome Statute of International Criminal Court. Article 7 (1) of the Rome Statute provides definition of “crimes against humanity” as under:

*“Article 7: crimes against humanity*

*1. For the purpose of this Statute, crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:*

- (a) Murder;*
- (b) Extermination;*
- (c) Enslavement;*
- (d) Deportation or forcible transfer of population;*
- (e) Imprisonment or other severe deprivation of physical liberty in violation*

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<sup>4</sup> *Prosecutor v. Erdemović*, Appeals Chamber, Judgment, ICTY Case No. IT-96-22-A, para. 21 (Oct. 7, 1997).

*of fundamental rules of international law;*

*(f) Torture;*

*(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;*

*(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;"*

*(i) Enforced disappearance of persons;*

*(j) The crime of apartheid;*

*(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>5</sup>*

This definition of “crime against humanity” has slowly evolved from the Nuremberg to the Rome. Initially the concept of “crime against humanity” was attached to the situation of war.<sup>6</sup> Later on, it was thought that only a state power could commit “crimes against humanity”, that too against its own people.<sup>7</sup> Currently it is understood as a “wide spread or systematic attack against any civilian population”.<sup>8</sup> In drafting process of this definition many kinds of interests were involved. The representatives of sovereign States and many international institutions and NGOs prepared Rome Statute, as an international criminal jurisdiction of prospective nature. Activists wanted to make this definition of the “crimes against humanity” as more and more comprehensive to cover maximum types abuses related to human rights and humanitarian laws. On the other hand representatives of various States wanted to add maximum safeguards in this definition, because as a prospective definition this could apply on their own State authorities also. Hence there was a perfect mix of new kinds of culpabilities and new safeguards as compared to the previous definitions. For example chapeau requirements in article 7 (1) have introduced one new condition i.e. “with knowledge of the attack”. It was not there in any of the previous tribunals.

At the same time may new offences were added in this definition. In the category of crimes against women, other than rape in sub clause (g) of article 7 some new sexual offences against women were also added in the definition, in addition to rape, such as; enforced prostitution, forced pregnancy and enforced sterilization. This sub-clause carved out a new niche to consider other sexual offences also as “crimes against humanity”, by adding a phrase at the end i.e. ‘any other form of sexual violence of comparable gravity’.

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<sup>5</sup> The Rome Statute of International Criminal Court.

<sup>6</sup> International Military Tribunal (Nuremberg), 1945.

Available at: [https:// history.state.gov/milestones/1945-1952/nuremberg](https://history.state.gov/milestones/1945-1952/nuremberg).

<sup>7</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, (1994).

<sup>8</sup> Rome Statute of International Criminal Court, (1998).

Other new offences added in this definition were enforced disappearance and crime of apartheid etc. In early 1990s apartheid got defeated in South Africa, and its inclusion in the definition of the Rome Statute shows that till 1998, it had well-grounded in the international law as a presumptive norm, from whom no derogation was possible. Similarly, prevention of enforced disappearance had also got firm acceptability in international law till then.<sup>9</sup>

Article 7 in clauses (2) and (3) provided comprehensive explanations of all contents of “crime against humanity” as used in article 7 (1). This was actually one more method for providing safeguard against expensive judicial interpretations. Article 7 (2) provided further qualification for the requirement of ‘widespread’ and ‘systematic’. Many activist and NGOs were very happy when ‘or’ as a disjunctive word was added between the requirements of ‘widespread’ and ‘systematic’, and made them ‘widespread or systematic’. Any one of the two were required to raise culpability. But article 7 (2) (a) while explaining the meaning of term ‘attack’ provided that attack means multiple commissions of the crimes narrated in article 7 (1), in pursuance of a State of organisational policy. This requirement of ‘policy’, effectively eliminated the disjunctive effect provided by the term ‘or’, which was much hailed by human rights activist in the Rome conference. Because a systematic attack is always a policy driven attack. However, a widespread attack might or might not be policy guided. But this straight away requirement of policy for both kinds of attacks had actually made it almost two sides of the same coin.

Nonetheless, article 7 (2) (a), has introduced a scope of *at par* culpability of State and non-State organisations. Means it was accepted that anti-State groups could also commit the “crimes against humanity”. Both, state and non-state groups could commit “crimes against humanity”.<sup>10</sup> Therefore, any individual attack by individual person cannot be “crime against humanity”. However, if individual had the knowledge that there is a widespread or systematic attack against the civilian population, and he wanted to take the benefit of the circumstances to commit some crimes at personal level, then that individual is also criminally liable, because he has wanted to make his crime as a part of the undergoing widespread or systematic attack. However, this definition of “crimes against humanity” is a victim centric definition.<sup>11</sup> It is least concerned about the nature of the perpetrator organisation. Here focus is on ‘civilian population’.

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<sup>9</sup> Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), I.C.J. Reports 2012, p. 422, at para. 99; Al-Adsani v. United Kingdom, E.Ct.H.R., Judgment, App. No. 35763/97, para. 61 (2001).

<sup>10</sup> Ibid.

<sup>11</sup> Frédéric Mégret, “Victims before the International Criminal Court: A New Model of Criminal Justice?” *VCRD*, 5 Feb. 21, 2017. Available at: <http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd5-rr5/p6.html>.

Above mentioned definition of crimes against humanity quite extensive. It includes torture, forced disappearance and apartheid also. Still, some major crimes like terrorism and human trafficking etc., which are considered as crimes against humanity in common parlance, are not covered under the current definition. If terrorism were also defined with victim centric approach, then the elements of international crime of terrorism and “crime against humanity” overlap each other. In both the crimes innocent people are victims, just because they do not agree with the political or politico-religious ideology of the perpetrators. In order to compare and understand the nature of terrorism and “crime against humanity”, it is pertinent to trace the historical evolution of terrorism. Tracing history of terrorism from victim oriented point of view, and not from perpetrator’s inspirational or motivational aspect, would be quite helpful to highlight that there might be a difference of quantitative degree of terrorism and crimes against humanity, but not of the qualitative criminality.

### **3. Understanding intricacies of terrorism**

Terrorism is a worldwide problem. Almost all the States have faced problem of terrorism in variety of methods. However, there is a worldwide conflict in definitions of terrorism, but all the States agree that terrorism is an international problem, and no State can fight it alone. In essence, terrorism is a political struggle in which civilian population is attacked to get political discounts from the powerful governments. In history, we can find many examples of terrorism, but this crime was defined as ‘terrorism’ as such only in the twentieth century. In order to understand the essence of terrorist activities, a study from historical point of view is very important.

### **4. A brief history of terrorism**

According to contemporary understanding terrorism is an unlawful use of violence and intimidation, especially against civilians, in the pursuit of political aims. However, the term terrorism in historical times appeared in late 18<sup>th</sup> century, and its connotations as per the perpetrators have varied. State as well as anti-State or non-State powers have accused of terrorism at different times. Starting from 18<sup>th</sup> century France, trajectory of terrorism is as under:

#### *4.1 Reign of Terror in France*

In modern history terror as a term refereeing to political violence was first time used to describe the brutal regime of Maximilien Robespierre's Jacobin club in France. It was an era of mass executions by the so-called revolutionaries. Anybody suspected of opposing revolution or the methods used by Jacobians was put to the guillotines.<sup>12</sup> In this thirteen-

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<sup>12</sup> Albert Soboul, “The Sans-culottes; the Popular Movement and Revolutionary Government, 1793–1794”, 24 (Garden City, N.Y.: Anchor Books, 1972).  
Available at: <https://fsu.digital.flvc.org/islandora/object/fsu:182029/datastream/PDF/view>.

month long regime starting from June 1793, several thousands of people were awarded death sentences in France.<sup>13</sup> Contemporary French philosopher Francois-Noel Babeuf used the term *terroriste*, to describe this atrocious regime. From there the words ‘terrorist’ and ‘terrorism’ slowly evolved.<sup>14</sup> Robespierre’s ‘Reign of Terror’ was an example of use of excessive force to retain political dominance by an anti-State group, which succeeded to get hold of the State power.

#### 4.2 *The Irish Fenian*

“Fenian brotherhood” was a violent movement of Irish people, against the British political domination, started in mid-nineteenth century. This violent movement continued even in twentieth century as “Irish brotherhood”, or the “Irish Republican army”. Primarily it was an insurgency and revolt, which aimed at attacking symbols of British power, but occasionally used terrorist acts also and targeted common people. Mainly Roman Catholic people inhabited region of Ireland but even then they derived the initial name of their movement from pre-Christian mythical warriors, called Fenians.<sup>15</sup>

#### 4.3 *Palestinian Terrorism*

In 1917, during World War I Britain through, “Balfour Declaration” declared Palestine as a natural homeland for the Jews.<sup>16</sup> Palestine then a part of Ottoman Empire had a small Jewish minority, which was around one-sixth of total population. From then Palestinian opposition to Jewish immigrants started which led to many serious riots and eventually resulted in making of a separate Jewish State. Rather than ending the conflict, it intensified the Palestinian opposition to Israel. In Arab-Israel war of 1948, attack by Arab countries on Israel proved to be counterproductive. Since then several Palestinian terrorist groups emerged. Among them PLO (Palestinian Liberation Organization), Fatah and Hamas were major players. Their acts of terrorism against Israel continued for several decades, finally PLO, officially renounced violence in 1988.<sup>17</sup> However, Hamas is continuously engaged in rocket attacks on Israel. Terrorist attacks of Hamas and Fatah are targeted against Israeli State as well as innocent Israeli people.<sup>18</sup>

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<sup>13</sup> Id at 24, 30, 31, 52.

<sup>14</sup> Lawrence W. Reed, “Francois-Noel Babeuf: The Marxist Before Marx” *Foundation for Economic Education* June 11, 2019. Available at: <https://fee.org/articles/francois-noel-babeuf-the-marxist-before-marx/>

<sup>15</sup> Michael Burleigh, *Blood And Rage: A Cultural History Of Terrorism* 6 (Harper Collins Ebooks, 1<sup>st</sup> Edn, London, 2010).

<sup>16</sup> Mark Levene, “The Balfour Declaration: A Case of Mistaken Identity” 54-77, *HER* Vol. 107, No. 422 (Jan., 1992).

Available at: <https://www.jstor.org/stable/pdf/575676.pdf>.

<sup>17</sup> Prince James, “PLO, officially renounced violence in 1988” 25 *Stan. J. Int'l L.* 681 (1989).

Available

at: <https://heinonline.org/HOL/Page?handle=hein.journals/stanit25&id=691&collection=journals&index=>

<sup>18</sup> Eli Berman “Hamas, Taliban And The Jewish Underground: An Economist’s View Of Radical Religious Militias” Working Paper, National Bureau Of Economic Research 1050 Massachusetts Avenue Cambridge, (Sep. 2003).

#### 4.4 *Neo Fascist Terrorism in Europe*

After the World War II, Europe has seen an influx of Asian and African immigrants. Against this slowly changing demography of Europe, several small racist groups have emerged. These groups have launched some fierce terrorist attacks especially on foreign merchants and foreigners in Europe.<sup>19</sup>

#### 4.5 *Political Terrorism in South Asia*

In South Asian region, India has seen two major terrorist movements; Punjab terrorism and Kashmir terrorism. Both of these were Pakistan sponsored terrorist movements. It was an example where State of Pakistan was involved in terrorism against India, through non-State terrorist organizations. Both these terrorist movements were against the State as well as religious minorities of the region. Killing of innocent Hindu population in Punjab and Kashmir was a strategy to inflict fear among the minorities and enforce their exodus. Political violence in North-East India and Naxal violence is mainly in the nature of small-scale insurgency, which has used violence against innocent civilian targets also.

#### 4.6 *Tamil Tigers: The deadly terrorists of Sri Lanka*

LTTE (“Liberation Tigers of *Tamil Elam*”) was another major terrorist group of South Asian region, which continued to launch violent attack on innocent Sri Lankan Sinhala population, on deviant Sri Lankan Tamils and as well as on “rival Tamil Liberation groups”.

#### 4.7 *Radical Islamic Terrorism*

Islam has many schools of thought and many interpretations. Out of these, some are radical, such as Wahhabism and Salafism, and call for violence against non-Muslim political regimes. During anti-colonial struggle of Asia and Middle East, radical Islamic groups spread its roots in the form of a Muslim youth organization- Muslim Brotherhood. Which eventually became a breeding ground for radical Islamic terrorist groups.<sup>20</sup> However, “Muslim Brotherhood” *per se* cannot be termed as a terrorist organization, but terrorist organizations like *Al-Qaida* and *Daish* commonly known as “ISIS” (“Islamic State of Iraq and Syria”), have recruited many of their cadres from “Muslim Brotherhood”.<sup>21</sup>

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Available at: <https://www.nber.org/papers/w10004.pdf>

<sup>19</sup> 1988 Cannes and Nice attacks, 1992 Copenhagen bombing, 1999 London nail bombings, Charlottesville car attack, Murder of Jo Cox, Los Angeles Jewish Community Center shooting, 2006 Moscow market bombing, 2011 Norway attacks, Overland Park Jewish Community Center shooting.

<sup>20</sup> Counter Extremism Project, The Muslim Brotherhood’s Ties to ISIS and al-Qaeda (June 2017). Available at: [https://www.counterextremism.com/sites/default/files/Muslim%20Brotherhood%20Ties%20to%20ISIS%20and%20AQ\\_061617.pdf](https://www.counterextremism.com/sites/default/files/Muslim%20Brotherhood%20Ties%20to%20ISIS%20and%20AQ_061617.pdf)

<sup>21</sup> Ibid.

Both “*Al-Qaida*” and “ISIS” use terrorist methods of killing innocent people. Notorious 9/11 attack on “World Trade Towers” in USA (“United States of America”) was the biggest example, when terrorists killed around 3000 innocent civilians.<sup>22</sup> ISIS is even more deadly terrorist organization. It has captured large territories in Iraq where several thousand innocent, civilians have been murdered, thousands of Yazidi women have been mass raped, enslaved, transported and sold in markets like animals.<sup>23</sup> Radical Islamic terrorist organization such as *Boko Haram* are also targeting innocent civilians in Africa.<sup>24</sup> Their aim is to destabilize every non-Islamic government and establish a rule of Islam all over the world.<sup>25</sup> Radical Islamic terrorism is different from the political terrorism. Terrorist groups of Ireland or Sri Lanka were using violence to achieve political motives with in a particular geographical area, and were willing to compromise if they were allowed to get political hold of the geographical territory in question. However, radical Islamic terrorism with politico-religious connotations is not seeking any compromise, it has only two options for every non-Muslim regime i.e. either submit or die.<sup>26</sup> This type of terrorism is certainly a crime against whole humanity.

This is not an exhaustive account of terrorist organizations of the world. Nevertheless, this discussion underlines that almost all the terrorist organizations of the world are involved, in attacks on innocent civilians. They might be attacking symbols of State power also, but ‘systematic attack’ on ‘civilian population’ is invariably part of their strategy. To understand real nature of terrorism, it is necessary that its ideological and jurisprudential roots are analysed.

## **5. A Jurisprudential Scrutiny in the Genesis of Terrorism**

Problem with treating terrorism as crime against humanity is lack of unanimity at world level. Some State like Pakistan are using terrorism as their State policy. They try to justify terrorism as a political struggle. It is important that the roots of terrorism should be analysed from a philosophical and jurisprudential angle. So that various attempts to justify terrorism are academically countered. Since terrorism is a violent political struggle against the State, hence it is pertinent to discuss the origin of terrorism, beginning from the social contract theory itself. Hobbes the first eminent philosopher of social contract theory, while describing his hypothesis of Man’s transition from a forest dwelling free

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<sup>22</sup> Quintan Wiktorowicz and John Kaltner “Killing In The Name Of Islam: Al-Qaeda’s Justification For September 11” *MEPR* Vol. X Summer 2<sup>nd</sup> (2003).

Available at: <https://www.mepc.org/journal/killing-name-islam-al-qaedas-justification-september-11>

<sup>23</sup> Ariel I. Ahram, “Sexual Violence and the Making of ISIS” 57-78 *Survival*, vol. 57 no. 3 (June–July 2015).

<sup>24</sup> Monica Mark, “Boko Haram’s ‘deadliest massacre’: 2,000 feared dead in Nigeria” *The Guardian* Jan. 10, 2015.

Available at: <https://www.theguardian.com/world/2015/jan/09/boko-haram-deadliest-massacre-baga-nigeria>

<sup>25</sup> Roman Loimeier, “Boko Haram: The Development of a Militant Religious Movement in Nigeria” 137-155, *Africa Spectrum* Vol. 47, No. 2/3 (2012)

Available at: [https://www.jstor.org/stable/23350455?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/23350455?seq=1#metadata_info_tab_contents)

<sup>26</sup> John L. Esposito, “Islam and Political Violence” 1067-1081 *Religions*, Vol. 6 Issue 3 (2015).

Man to a political Man under a State system headed by a king, proposed that people have surrendered their all rights to the State in the lieu of protection of their life and property. Hobbes' theory of social contract had no provision either for people's personal liberties or for change of the political superior if he does not perform his duty, assumed under the 'social contract'.<sup>27</sup> John Locke's theory of social contract was one-step ahead of Hobbes' as much as it propounded that people had not surrendered all their rights to the State. Only political rights were surrendered, but people had kept their civil liberties with themselves. According to Locke, the king had a duty to protect civil liberties of the people along with their life and personal properties.<sup>28</sup> Both these theories were incomplete as these were silent with regard to the justification of unpopular political regimes. In medieval Europe, people had become conscious about their rights after the renaissance period. Due to this, there was an unrest among the subjects of various European States against such kings. Kings, who were not taking care of their people, became unpopular. In the year, 1688 AD there was a political coup against the King James II of England, famously know as glorious revolution.<sup>29</sup> Similarly, French revolution was also a result of king's inability and unwillingness to protect people's rights.<sup>30</sup> Kings used to treat the kingdoms as their personal properties rather than considering it a pious duty to protect the people. Some decades before French Revolution, many scholars had propounded the idea of people's rights. Rousseau was one such French scholar, who proposed that people have a right to change the regime, if the king is not able to protect, life, liberty and property of the citizens.<sup>31</sup>

However, holders of political power have always a tendency to retain it to themselves forever. It was same situation in England during the reign of King James II; as well as in France during the regime of Louis XVI; where kings used violence to crush any popular effort challenging their political legitimacy. This shows that political struggle is inherent in the idea of modern State system. Overthrowing an unpopular regime with help of neighbouring States was one of the commonly used methods of regime change in ancient and medieval times.

In the twentieth century, States have become more powerful by the advent of highly efficient weapons, and innumerable economic resources at their disposal. Nevertheless,

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<sup>27</sup> Thomas Hobbes, *Leviathan: Or the Matter, Form and Power of a common-wealth Ecclesiastical and Civil* (Yale University Press, Connecticut, 2010). Available at <https://archive.org/details/hobbessleviathan00hobbuoft>

<sup>28</sup> Daudi Mwita Nyamaka, *Social Contract Theory of John Locke (1632 to 1704) in the Contemporary World* (June 2011) Available at <http://works.bepress.com/cgi/viewcontent.cgi?article=1009&context=dmnyamaka>.

<sup>29</sup> Lois G. Schworer, "Propaganda in the Revolution of 1688-89" 843-874 *AHR* Vol. 82, No. 4 (1977). Available at: <https://www.jstor.org/stable/1865115>

<sup>30</sup> Benjamin Nathans, "Habermas's "Public Sphere" in the Era of the French Revolution" 620-644 *FHS* Vol. 16, No. 3 (Spring, 1990). Available at: <https://www.jstor.org/stable/286491>

<sup>31</sup> Jean Jacques Rousseau, *The Social Contract, Or Principles of Political Right* (Paris April, 1762) Available at <http://www.constitution.org/jjr/socon.htm>.

at the same time democracy as a form of government has been largely accepted all over the world. Regime change of unpopular rulers has become easy. It is right to say that social contract theory propounded by Rousseau was possible only in a democracy; and in modern times by periodic elections, people are changing regimes. Though in many parts of the world kingdoms and autocratic rulers still exist, but in majority States, people have been empowered by democracies. Now people decide the fate of rulers by the power of vote rather than the power of weapons. After the end of World War II, the world has seen a phase of exercising right to self-determination, by the erstwhile colonies of Asia and Africa.<sup>32</sup> By the end of twentieth century, the phase of political formations and reformation of new nation States has been almost over. Ideally, now world should be ruled with peace and stability. Existence or sovereignty of States should not depend on the use of force. Other than external threats, there should not be any internal violent threat to the political authority of the State, as people could change governments periodically with the power of vote.

However, medieval tendencies of capturing political power by force or retaining the political authority with violence are still present. Those who cannot win the hearts of majority voters, they often try to carve out a separate political entity for themselves, by the use of violence.

There are many different terms to denote the use of violence against a State for acquiring political power; such as revolt, coup, insurgency and terrorism. All these terms signify use of violence, from the political subjects against their own State, and not by the adversary States. It is pertinent to analyse the difference between the legal meanings of these terms, according to *Black's Law dictionary*.

1. **Revolt:** Revolt is a term, which can be used against a violent as well as non-violent disobedience and opposition to the established authority of any kind. Revolt might be against any political or non-political authority both.<sup>33</sup>
2. **Coup or Coup d'état:** Coup is a sudden and violent change of political power.<sup>34</sup> In common parlance also, coup is a sudden and violent seizure of power by the use of military force; and this term is used in this aspect only.
3. **Insurgency:** Insurgency is as an act of internal armed hostility against an established government for political reasons.<sup>35</sup>

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<sup>32</sup> Anthony Whelan, "Self-Determination and Decolonisation: Foundations for the Future" *ISIA* 25-51 Vol. 3, No. 4 (1992).

<sup>33</sup> Merriam Webster's Dictionary. Available at: <https://www.merriam-webster.com/dictionary/revolt>

<sup>34</sup> Bryan A. Garner-Black's Law Dictionary 355 (7th Edn., West Group 1999).

<sup>35</sup> Id at 811.

4. **Terrorism:** According to Black's Law dictionary terrorism is use or threat of use of violence to intimidate or cause panic, esp. as a means of affecting political conduct of people or a State.<sup>36</sup>

Terrorism in common parlance is understood to be a politically motivated violence against the innocent citizens of a State, in order to get political concessions, by inflicting a sense of terror among the citizens and decision making officials of the State. It is a kind of extortion, not for money, but for political power. What makes terrorism different from the insurgency is the use of violence against the innocent people. Insurgents use violence against the State machinery, whereas terrorists use violence against the State as well as people of the State.

Insurgency is a militia driven violent movement against the people's government and its symbols. Insurgents use fighting irregular warfare as much as they attack government forces suddenly. They deny response time to the government forces. With less response time, government forces have to bear some causality, but even then, they repel insurgent's attacks. In this process, insurgents also have to bear causalities. However, terrorists target non-combatant innocent citizens, who cannot retaliate. Hence, for a terrorist organization in a terrorist attack, targeted civilian causality can be maximum and easy to achieve, that too with no immediate risk for the terrorists. Generally, terrorists get enough time to run away. In a democratic setups terrorists, inflict a feeling of continuous terror among the people, so that they can compel the government to provide them some political concessions. It is interesting to know that international community is well aware about the threat of terrorism and adopted a number of international instruments related to various types of terrorist activities, but even then due to considerations of international politics it has so far evaded all the efforts to carve out a universal definition of terrorism. It is apposite to analyse some prominent international instruments related to terrorism, which are hereunder.

#### **6. Analysis of types of terrorist activities recognised by international law**

International community has recognised many terrorist activities as international crimes. There are good number of international treaty instruments against those crimes. Study of these treaties and related crimes is important to analyse whether these crimes in common parlance as terrorist activities or not? Whether these crimes fall under any category of crimes listed in the definition of crimes against humanity? Whether victim of such international crimes fall under the term 'any civilian population', as mentioned in the definition of crime against humanity? Whether a series of multiple acts centrally planned or centrally conceived can be termed as a widespread or systematic attack? For this, an analysis of various international instruments covering terrorist activities is necessary.

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<sup>36</sup> Id at 1484.

Some of these treaties as mentioned on the website of United Nations Office of Counter Terrorism are as under:

#### **6.1 Instruments regarding civil aviation<sup>37</sup>**

##### **“1. 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft**

- Authorizes the aircraft commander to impose reasonable measures, including restraint, on any person he or she has reason to believe has committed or is about to commit such an act, where necessary to protect the safety of the aircraft; and
- Requires contracting States to take custody of offenders and to return control of the aircraft to the lawful commander.”<sup>38</sup>

##### **“2. 1970 Convention for the Suppression of Unlawful Seizure of Aircraft**

- Makes it an offence for any person on board an aircraft in flight to "unlawfully, by force or threat thereof, or any other form of intimidation, [to] seize or exercise control of that aircraft" or to attempt to do so;
- Requires parties to the convention to make hijackings punishable by "severe penalties"
- Requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution; and
- Requires parties to assist each other in connection with criminal proceedings brought under the Convention.”<sup>39</sup>

##### **“3. 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation**

- Makes it an offence for any person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of the aircraft; to place an explosive device on an aircraft; to attempt such acts; or to be an accomplice of a person who performs or attempts to perform such acts;
- Requires parties to the Convention to make offences punishable by "severe penalties"; and
- Requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution.”<sup>40</sup>

##### **“4. 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation**

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<sup>37</sup> United Nations Office of Counter Terrorism.

Available at: <http://www.un.org/en/counterterrorism/legalinstruments.shtml>

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

- Criminalizes the act of using civil aircraft as a weapon to cause death, injury or damage;
- Criminalizes the act of using civil aircraft to discharge biological, chemical and nuclear (BCN) weapons or similar substances to cause death, injury or damage, or the act of using such substances to attack civil aircraft;
- Criminalizes the act of unlawful transport of BCN weapons or certain related material;
- A cyber attack on air navigation facilities constitutes an offence;
- A threat to commit an offence may be an offence by itself, if the threat is credible.
- Conspiracy to commit an offence, or its equivalence, is punishable.”<sup>41</sup>

**“7. 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft**

- Supplements the Convention for the Suppression of Unlawful Seizure of Aircraft by expanding its scope to cover different forms of aircraft hijackings, including through modern technological means;
- Incorporates the provisions of Beijing Convention relating to a threat or conspiracy to commit an offence.”<sup>42</sup>

**“1979 International Convention against the Taking of Hostages”<sup>43</sup>**

"Any person who **seizes or detains and threatens to kill, to injure, or to continue to detain another person** in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostage within the meaning of this Convention".<sup>44</sup>

**“Instrument Regarding Terrorist Bombings”**

**“17. 1997 International Convention for the Suppression of Terrorist Bombings**

Creates a regime of universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into, or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place.”<sup>45</sup>

Analysing above-mentioned universal instruments on various aspects of terrorism, it is evident that focus is to counter the use of violence against the non-combatant and civilian

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<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> International Convention Against the Taking of Hostages, G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979), entered into force June 3, 1983.

<sup>44</sup> Ibid.

<sup>45</sup> Supra Note 44.

targets. But still there is no consensus among world powers, on the definition of terrorism. This confusion is mainly due to the stress on motives of perpetrators. However, from victim-oriented approach defining terrorism might become easy. As there is, a consensus that terrorism is politically motivated killing of civilians, an international covenant against terrorism should be drafted from victim-oriented perspective.

However, at the level of United Nations Organization (UNO), there are three important declarations on international terrorism:

1. "Declaration on Measures to eliminate international terrorism, 1994."<sup>46</sup>
2. "Declaration to supplement the 1994 declaration on Measures to eliminate international terrorism, 1996."<sup>47</sup>
3. "The United nations Global Counter- terrorism strategy, 2006."<sup>48</sup>

Other than these three, there are around 20 resolutions of UNSC (United Nations Security Council). These resolutions have been passed from time to time by the UNSC, in order to respond to the contemporary situations related to terrorism. These resolutions are very important to understand the trend of UNSC resolutions with regard to terrorism. Some of these UNSC resolutions are, as thus:

1. "Resolution 1373 (2001) Establishment of Counter terrorism Committee (C.C.) threats to international Peace and security caused by terrorist acts",
2. "Resolution 1377 (2001) —Ministerial declaration on the global effort to combat terrorism",
3. "Resolution 1390 (2002) —the situation in Afghanistan",
4. "Resolution 1452 (2002) — threats to international peace and security caused by terrorist acts",
5. "Resolution 1455 (2003) — threats to international peace and security caused by terrorist acts",
6. "Resolution 1456 (2003) —declaration of the Ministers for Foreign affairs on the issue of combating terrorism",
7. "Resolution 1526 (2004) — threats to international peace and security caused by terrorist acts",
8. "Resolution 1535 (2004) — establishment of the executive directorate Counter-terrorism Cmt. (CTED)",
9. "Resolution 1540 (2004) — Non-proliferation of weapons of mass destruction",
10. "Resolution 1566 (2004) — establishment of a working group to consider measures to be imposed upon individuals, groups or entities other than those designated by the I-Qaida Taliban sanctions Committee",
11. "Resolution 1617 (2005) — threats to international peace and security caused by terrorist acts",
12. "Resolution 1624 (2005) —Prohibition of incitement to Commit terrorist acts",

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<sup>46</sup> Available at: <http://legal.un.org>.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

13. "Resolution 1735 (2006) — threats to international peace and security caused by terrorist acts".

Similarly, there are 16 regional treaty instruments, and most of these are directly refereeing to terrorism. Though, there might not be any unanimity on the definition of the terrorism at the world level, but at regional level States have achieved consensus on the working definition of the terrorism. It shows that at regional level due to similarity in the national interests and national threats States can come on one page, but at international level due to conflict of interests and international politics States could not achieve required consensus to develop a universally accepted definition of terrorism or international terrorism. Some important regional instruments against terrorism are as under.<sup>49</sup>

## 6.2 Regional Instruments Resolving to Curb Terrorism

1. "Organization of American states Convention to Prevent and Punish the acts of terrorism taking the Form of Crimes against Persons and Related extortion that are of International Significance, 1971".
2. "European Convention on the suppression of terrorism, as amended by its Protocol, 1977".
3. "South Asian association for Regional Cooperation (RC) Regional Convention on suppression of terrorism, 1987".
4. "The Arab Convention on the suppression of terrorism, 1998".
5. "Treaty on Cooperation among the states Members of the Commonwealth of independent states in combating terrorism, 1999".
6. "Convention of the organization of the Islamic Conference on combating international terrorism, 1999".
7. "Organization of African Unity (U) Convention on the Prevention and Combating of terrorism, 1999".
8. "Shanghai Convention against terrorism, separatism and extremism, 2001".
9. "Inter- American Convention against terrorism, 2002".
10. "Additional Protocol to the RC Regional Convention on suppression of terrorism, 2004".
11. "Convention of the Cooperation Council for the Arab states of the Gulf on combating terrorism, 2004".
12. "Protocol to the organization of the African Union Convention on the Prevention and Combating of terrorism, 2004".
13. "Additional Protocol on Combating terrorism to the agreement among the Governments of the Black sea economic Cooperation organization Participating states on Cooperation in Combating Crime, in particular in its organized Forms, 2004".
14. "Council of Europe Convention on the Prevention of terrorism, 2005".

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<sup>49</sup> United Nations, International Instruments related to the Prevention and Suppression of International Terrorism, New York 2008.

15. "Council of Europe Convention on Laundering, search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of terrorism, 2005."<sup>50</sup>
16. Association of Southeast Asian nations, Convention on Counter-terrorism, 2007.

It shows that states are clearer on the definition of terrorism when they are dealing with it at the national level or the regional levels<sup>51</sup> For example article 2 of Arab Convention against terrorism defines it as under:

*"Any act or threat of violence, **whatever its motives or purposes**, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize a national resources."*<sup>52</sup>

Similarly, Convention of the Organization of the Islamic Conference on Combating International Terrorism in its article 2 has defined terrorism in following words:

*"Terrorism means any act of violence or threat thereof **notwithstanding its motives** or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperiling their lives, honour, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States."*<sup>53</sup>

The Shanghai Convention on combating terrorism, separatism and extremism, in its article 1 has defined terrorism as under:

"1) "terrorism": a) any deed recognized as a crime in one of the treaties listed in the Annex to the present Convention (hereinafter referred to as Annex), and as it is defined in this treaty; b) any other deed aimed at causing death of any civil person or of any other person not taking active part in hostilities in the situation of an armed conflict, or causing him a serious bodily injury, and causing a considerable material damage to any material object, as well as the organization, the planning of such a deed, assistance in its commitment, incitement to it, when the purpose of such deed due to its character or nature, consists in

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<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> The Arab Convention on the suppression of terrorism, 1998.

<sup>53</sup> Organization of the Islamic Conference (OIC), Convention of the Organisation of the Islamic Conference on Combating International Terrorism, 1 July 1999, Annex to Resolution No: 59/26-P.

intimidation of the population, breaching the public security or forcing state authorities or an international organization to commit any action or refrain from its commitment.”<sup>54</sup>

However, while drafting universal covenant against terrorism states could not agree on the definition of terrorism. Even in international covenant against terrorist bombing the term, terrorism has not been properly defined. Hence, it shows that states are willing to fight terrorism, when it affects them directly, originating from their own domestic jurisdictions, or from the land of neighbouring countries but, at the same time states are willing to reserve the right to support terrorism in other countries. However, in modern world with the increase of human rights, common citizens are no more ‘political inferiors’. In such environment governments are increasingly adopting people centric approaches in various fields of governance. If in the field of combatting terrorism a victim centric approach is adopted then, fight against terrorism will become principally transparent and more effective.

### **7. Victim Centric Approach for Understanding Terrorism**

The common civilian population, who might be or might not be politically active, suffers loss of life and property without any fault of their own. In recent past, the world has seen some big terrorist groups such as Al-Qaida, who killed thousands of people in New York on 9/11.<sup>55</sup> Killing people is not the only crime committed by the terrorists against innocent civilians; there are other crimes also such as mass rapes, sexual slavery and forced marriages etc. Boko Haram, a terrorist organization in Africa kidnapped many school-girls; raped them for several months and then forcefully married them to some of their terrorists.<sup>56</sup> Similarly, ISIS the deadly terrorist group captured vast territories in Iraq and Syria. Where they established a reign of terror. Many innocent non-combatant civilians were killed; women were raped, and pushed into sexual slavery. There were incidents when the captive Yazidi women were sold in the open markets by ISIS terrorists.<sup>57</sup> It is clear from the discussion that terrorism is ‘a use of violence against civilian population, for political motives’.

### **8. State Terrorism**

On the other hand, in many States after losing in democratic elections, the ruling powers had tried to continue illegally, merely with the use of ‘blood and iron’ policy. This kind

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<sup>54</sup> Regional Treaties, Agreements, Declarations and Related, Shanghai Convention on Combating Terrorism, Separatism and Extremism, 15 June 2001, available at: <http://www.refworld.org/docid/49f5d9f92.html> [accessed 3 November 2018]

<sup>55</sup> Quintan Wiktorowicz and John Kaltner “Killing In The Name Of Islam: Al-Qaeda’s Justification For September 11” *MEPR* Vol. X Summer 2<sup>nd</sup> (2003). Available at: <https://www.mepc.org/journal/killing-name-islam-al-qaedas-justification-september-11>

<sup>56</sup> Dionne Searcey, “Kidnapped as Schoolgirls by Boko Haram: Here They Are Now” *The New York Times* Apr.11, 2018. Available at: <https://www.nytimes.com/interactive/2018/04/11/world/africa/nigeria-boko-haram-girls.html>

<sup>57</sup> Ariel I. Ahram, “Sexual Violence and the Making of ISIS” 57-78 *Survival*, vol. 57 no. 3 (June–July 2015).

of unjustified use of State power to crush people's democratic mandate is just a form of State terrorism. In order to retain political power, West Pakistani rulers started mass atrocities on the civilian population in Bangladesh.<sup>58</sup> Similar acts were committed against the civilian population in Germany, during World War II.<sup>59</sup> In Yugoslavia, also violence was used against civilians by the outgoing regimes. In Rwanda too 'government supported militia' attacked innocent civilian population. In international law, the concept of crimes against humanity has developed to refer this kind of State atrocities. International criminal tribunals of Nuremberg and Tokyo prosecuted and convicted many perpetrators for committing crime against humanity.<sup>60 61</sup> Before analysing whether terrorism should be treated as a crimes against humanity or not it is pertinent to discuss various particulars of concept of crime against humanity

### **9. Similarities and Differences in Terrorism and Crimes against Humanity**

The concept of crime against humanity is also a situation where the perpetrators have launched a wide spread and systematic attack against a civilian population. If entire debate of crimes against humanity and terrorism is viewed from the perspective of victimisation of civilian population, then it is clearly noticeable that, terrorism and crime against humanity are overlapping concepts. According to general understanding, a rogue State commits crime against humanity against its own people, or against the civilian population of the overrun territories. Therefore, initially in Nuremberg charter the concept of crime against humanity was connected with the 'situation of war'.<sup>62</sup> In the statute of Yugoslavia tribunal concept of crime against humanity was extended to attack on civilian population even during the non-international conflicts.<sup>63</sup> Further, in the statute of Rwandan tribunal concept of crime against humanity was delinked form the requirement of war or conflict.<sup>64</sup> Just an attack against a civilian population was enough. In the Rome, statute of international criminal court the concept of crime against humanity was further elaborated. A detailed list of crimes was drafted, which included, murder, rape, sexual

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<sup>58</sup> Q. C. Niall Macdermot, "Crimes Against Humanity in Bangladesh" 476-484 *The International Lawyer*, Vol. 7, 2 (Apr. 1973). Available at: <https://www.jstor.org/stable/pdf/40704788.pdf>

<sup>59</sup> Steven T. Katz, "The Holocaust in Historical Context, Volume 1: The Holocaust and Mass Death Before the Modern Age" (New York: Oxford University Press, 1994).

<sup>60</sup> International Military Tribunal (Nuremberg), 1945. available at: <https://history.State.gov/milestones/1945-1952/nuremberg>.

<sup>61</sup> International Military Tribunal for the Far East, 1946. available at: <http://lib.law.virginia.edu/imtfe/tribunal>.

<sup>62</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, (1945).

<sup>63</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, (1994).

<sup>64</sup> Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994. (hereinafter referred to as "The International Tribunal for Rwanda").

slavery or slavery, forced transportation etc.<sup>65</sup> But crime of terrorism was not added in the concept of crime against humanity. Dr. Roberta Arnold, Legal adviser, Swiss Dept. of Defence in Laws of Armed Conflict Section, in her article has analysed the scope of prosecuting terrorism as a crime against humanity. She has reached to a conclusion that all the acts of terrorists can be prosecuted under the offence of crime against humanity, if they qualify the thresh hold of being widespread or systematic.<sup>66</sup>She argues that when acts of terrorism can be prosecuted under the crime against humanity, then there is no need of adding terrorism as a separate offence in the list of crimes within the scope of crimes against humanity.

International criminal court has started prosecution against some notorious heads of governments such as Laurent Gbagbo and Jean Pierre Bemba etc., for committing crimes against humanity against civilian populations of their own States.<sup>67</sup> Nevertheless, there are examples when the insurgents like Germaine Katanga, have committed crimes against humanity, and international criminal court, has prosecuted and convicted them.<sup>68</sup> This fact that insurgents can be prosecuted for crime against humanity has strengthened the proposition of Dr. Roberta Arnold; when insurgents and terrorists can be prosecuted for crime against humanity then there is no need of adding terrorism as a specific offence in the components of crime against humanity.

But this idea leads to a situation where a terrorist group has launched a single attack on the civilian population, but still it cannot be prosecuted under the head of crime against humanity. Or a terrorist organization is periodically launching lone wolf attacks or suicide attacks against civilian infrastructure facilities, such as destruction of bridges, railways stations, bombing of school buildings and parks etc., in order to inflict sense of fear and sorrow among the civilian population. But they cannot be prosecuted for committing crimes against humanity, if there are no killings associated to these acts. Or if, only once terrorists have killed few people by bombing or indiscriminate firing; then they are just destroying the public utility buildings; and citizens are under continuous fear of death in any possible terrorist attack. Then this act of keeping entire population under regular trauma and fear is also a kind of crime against humanity. People feel their lives are vulnerable and they are at the mercy of the terrorists. However, in such a scenario terrorists in the event of arrest or surrender will only be prosecuted for the offences of destroying public property or few murders. The sense of fear, which they wanted to generate among the surviving civilian population, was successfully generated, but still they cannot be guilty of crime against humanity. If unwanted use of excessive power by

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<sup>65</sup>The Rome Statute of the International Criminal Court, 1998. Available at: [http://www.the-icc-cpi.int/EN\\_Menus/the-ICC/Pages/default.aspx](http://www.the-icc-cpi.int/EN_Menus/the-ICC/Pages/default.aspx).

<sup>66</sup> Roberta Arnold, "The Prosecution of Terrorism as a Crime against Humanity" *MPICPLIL* (2004).

<sup>67</sup> The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/13.

<sup>68</sup> The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06.

the armed forces can be regarded as terrorism and hence a war crime, then why the same act of terrorism cannot be an act of crime against humanity, when committed by terrorist in a non-conflict situations.

Crime against humanity when committed by the State power is generally mentioned as an act of State terrorism. In general, various political leaders also refer terrorism as a crime against humanity. It shows that terrorism and crime against humanity are generally referring to the same kind of acts of mass atrocities against the civilian population. Then what purpose will be served by adding the offence of terrorism under the head of crime against humanity. The terrorism, as an idea *per se* is an act, which will definitely lead to physical or mental attack on the people. Adding terrorism in the list of crime under the head of crime against humanity will bring the acts of bombing public or private properties or destroying religious or cultural buildings under the scope of international prosecution. In 2017, international criminal court has sentenced *Al Mahdi* under the head of war crimes for destroying religious buildings of Timbuctoo.<sup>69</sup> It was possible because in the Rome Statute, definition of war crimes has been extended to non-international conflicts also. Nonetheless, if terrorist attacks and their engagement in hostilities with the government of Mali were not of such a level which could be termed as non-international conflict. And Mr. *AL Mahdi* would have destroyed the same thousand year old mausoleums, which are considered as world heritage, by terrorist bombings as a lone wolf attack to kill the soul of inhabitants of Timbuctoo and to inflict a sense of fear among them, then Mr. *Al Mahdi* could not have been convicted by the ICC. As the act would not have qualified as war crimes and it would not have come under the head of crime against humanity, whereas it was an act which generated sense of grievance not only in the people of Timbuctoo or Mali, rather in the whole international community.

Analysing current definition of crime against humanity, it becomes clear that attack against a civilian population, should not be always in the nature of murder. It can be in the nature of “extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender; enforced disappearance of persons; the crime of apartheid”.<sup>70</sup>

If apartheid and torture against a civilian population can be crime against humanity, then why keeping a whole community in a continuous fear of injury or death cannot be a crime

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<sup>69</sup> *The Prosecutor v. Ahmad Al -Faqi Al- Mahdi* ICC-01/12-01/15.

<sup>70</sup> Article 7, The Rome Statute of the International Criminal Court, 1998. Available at: [http://www.the ICC-cpi.int/EN\\_Menus/the ICC/Pages/default.aspx](http://www.the ICC-cpi.int/EN_Menus/the ICC/Pages/default.aspx).

against humanity. Moreover, there are several terrorist tactics, such as destroying public infrastructure, taking hostages or hijacking etc., which cannot be prosecuted under any of the existing counts of crimes against humanity. In such a scenario, it will be useful if terrorism or terrorist activities as a separate offence are added in the components of crime against humanity.

Second opposition to this idea comes from those quarters who consider terrorists as freedom fighters, or who count use of force by the State against insurgents as an act of State terrorism. But this is the most weak argument, because concept of crime against humanity is not concerned with the status of the perpetrator or his motivation. Perpetrators of crime against humanity can be both State or non-State groups or individuals. Focus in the concept of crime against humanity is on the victims. If civilian population or non-combatants are victims then the act can qualify as a crime against humanity. From this angle, terrorism can qualify as crime against humanity because, in the acts of terrorism, targeted lot is always civilian population. Hence, terrorism can qualify as an independent head of crime against humanity.

If international community treats terrorism and terrorist activities as crime against humanity, it will open the doors of principle of complementarity and concept of universal jurisdiction. Then one State would be able to investigate and prosecute fugitive terrorists of any other State. This situation will be diametrically opposite to the present situation when terrorists of one State are getting safe heavens in other States, as they are treated as political asylum seekers.<sup>71</sup> In a situation like Mumbai attacks of 26/11, treating terrorism as crime against humanity will make investigation and prosecution possible. Because in the example of Mumbai attacks Pakistan, due to its policy, is unwilling to investigate and prosecute those terrorists who are perpetrators of this attack. Even after lot of international pressure Pakistan is pursuing a sham investigation in the matter.<sup>72</sup> On the other hand India is unable to investigate and prosecute the perpetrators of Mumbai attack as evidences and terrorists both are present in other criminal jurisdiction. In such a scenario, principle of complementarity will allow international criminal court to investigate and prosecute the perpetrators of Mumbai terrorist attacks. Treating terrorism as a crime against humanity will strengthen international community's fight against terrorism.

So, for possible impact of universal jurisdiction and principle of complementarity on the international terrorism has not been sufficiently discussed in legal academics. But there

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<sup>71</sup> Dorothee, and Niemann, Arne The Europeanisation of German asylum policy and the "Germanisation" of European asylum policy: the case of the "safe third country" concept. In: UNSPECIFIED, Montreal, Canada. (Unpublished) (2007). <http://aei.pitt.edu/8006/1/post-d-08g.pdf>

<sup>72</sup> PTI, "India gives Pakistan 11th dossier on Mumbai attacks" The Times of India, June 18, 2010. Available at: <http://timesofindia.indiatimes.com/india/Indiagives-Pakistan-11th-dossier-on-Mumbai-attacks/articleshow/6064070.cms>.

are certain important questions which should be brainstormed upon while considering terrorism and terrorist activities as crimes against humanity. If terrorism is added as a specific offence in the definition of crime against humanity then whether it will have to qualify the threshold limit of widespread or systematic attacks against the civilian population? Or the concept of crime against humanity will be further modified to accommodate the offence of terrorism? If yes then in such a scenario, what kind of modifications will be required? The concept of crime against humanity has changed a lot to accommodate the dynamic nature of human brutality in last 75 years. Moreover, there is still no universally accepted covenant on crime against humanity. It is in the phase of evolution. Hence, it is pertinent to discuss this idea of terrorism as crime against humanity, from an intense legal and jurisprudential aspect, rather than emotive rhetoric. Terrorism is a serious offence against whole humanity, but still it is used as a label of political accusations. There is a need to chalk out common standpoints of international community on the concept of terrorism and the crime against humanity, and to identify the overlapping areas in both concepts. So, that the terrorism could be treated as a crime against humanity.

## **10. Conclusion**

Crimes against humanity is such a concept which is victim centric. If there is an attack, with knowledge, against any civilian population, pursuant to organisational policy of any State or organisation, then that is considered as a crime against humanity. Whereas terrorism is also an offence which is in the nature of an attack against a civilian population, for getting political discounts from the government of the concerned State. However, terrorism most of the time has been discussed from the angle of perpetrator's motive, and generally it is tried to be confused with other kinds of political movements. Due to this perpetrator centric approach, so far, international community could not draft a universal definition of terrorism. This entire politics of keeping terrorism as a nebulous and ambiguous offence, can be perhaps understood in the backdrop of the fact that terrorism itself is an offence which is committed with political aims. But if terrorism is explained from the victim centric point of view, then all the ambiguities evaporate, because it is clearly in the nature of a systematic attack against the civilian population. Terrorism is always pursuant to organisational policy to instil, a systematic terror in the minds of the innocent civilians. Therefore always with knowledge as well as intention. In twentieth first century the world has witnessed several hundred of terrorist attacks. Now its high time to consider terrorism as a crime against humanity, applying victim centric approach. So, that terrorism is met with a more effective response in the terms of investigation as well as prosecution, applying principles of complementarity and universal jurisdiction.