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## FOUNDER'S MESSAGE

It gives me immense pleasure to present the July, 2019 issue of 'CPJ Law Journal' which is published annually. CPJ Law Journal has successfully completed its 9<sup>th</sup> Anniversary serving the Law Fraternity. Our Journal continues to thrive as a storehouse of contributors to the broad area of law.



This Journal has aimed to accomplish lots of milestones in terms of defining and redefining paradigms to achieve excellence in the area of legal research. We rely on honesty, integrity, strength and mettle of our contributors to place the 'CPJ Law Journal' amongst the very best. The Editorial Board is dynamic and at the same time offers a platform to the contributors to address the evolution of new areas as well as to develop interest in law. We endeavour to attract and publish high quality research papers which are aimed essentially and substantially towards bridging the gaps between the legal loop holes of the society. I take pride in congratulating all contributors of this issue and give heartiest thanks to the whole editorial board.

In the course of running the CPJ Law Journal, the editors eventually learn the art and skill of editing, as well as sundry managerial skills. The rest of the students who contribute to the CPJ Law Journal grasp the techniques of legal research and its articulation in the most convincing manner. The CPJ Law Journal has every hope and potential to succeed in its twin objectives that may usher an era of much needed legal research in law schools.

With Regards,

**Shri Subhash Chand Jain**

Founder & Chairman

Chanderprabhu Jain College of Higher Studies & School of Law

## FROM THE DESK OF PATRON

*“Change is the Law of Life,”*

*- President John F. Kennedy*

The CPJ Law Journal has been initiated to fulfill the mandate of promoting research, awareness and writing amongst law fraternity. It accepts contributions on all areas of law, and even social sciences issues bearing a legal angle. The initiative of the Chanderprabhu Jain College of Higher Studies & School of Law in regularly publishing CPJ Law Journal containing insightful research papers is an appreciable attempt by the Editorial Team in spreading legal awareness and knowledge. Change is the law of nature. Nothing remains static and therefore we should always strive for the best and adapt ourselves to the changing times, technology and the needs of the changing society.



Quality legal research and standard publications constitute one of the important mandates of a leading law school like Chanderprabhu Jain College of Higher Studies & School of Law and I am confident that readers will find the present issue of the CPJ Law Journal interesting and thought provoking CPJCHS & SOL solicits valuable suggestions from all our learned contributors and readers for making the journal more useful, relevant and dynamic.

**Dr. Abhishek Jain**

General Secretary

Chanderprabhu Jain College of Higher Studies & School of Law

## FROM THE DESK OF EDITOR-IN-CHIEF

Dear Readers,

The basic aim of CPJ Law Journal is to create a new and enhanced forum for exchange of ideas relating to all aspects of legal studies and assure to keep you updated with recent developments and reforms in the legal world.



The Journal has created a landmark path in the academic field and opens up the doors for the lawyers, professors, students etc. all over the country to contribute the articles, research papers, cases studies etc. I believe that learning is a never-ending process and one continues to discover oneself in this journey. It requires an impetus and environment to thrive and flourish in. Keeping this aim in mind, the journal seeks to facilitate this learning environment. It is a concerted effort to give academic researcher a platform to present their ideas in front of an erudite community. The CPJ Law Journal is a peer reviewed journal which is published annually. The primary aim of this journal is to provide close insights into the various contemporary and current issues of law to the readers and also aims at facilitating services for wholesome development of law students, professionals and all others in this field. Many exciting years for the journal have passed. This journal welcomes your suggestions whole-heartedly, and thus, invites you to give your valuable feedback. We also invite you to submit your original research papers.

This Law Journal has created a quality of research among the academicians, lawyers and the students. Their research article has already made the impact in their academic carrier. But then also the journal has striven to be taking the research a very seriously and attracting the attention and selecting the good research papers for its issues. Though the Editorial board has taken utmost care to rectify the previous shortcomings, it hopes you find this issue informative and interesting. Moreover, as stated earlier we would appreciate your feedback.

With warm regards

**Sh. Yugank Chaturvedi**  
Editor-in-Chief

## EDITORIAL NOTE

Dear Readers,

It gives us immense pleasure to present the current issue to the legal fraternity. Our Basic aim behind introducing this journal was to create a new forum for exchange of ideas on all aspects of legal studies and we assure to keep you updated with recent developments in the legal world.



The CPJ Law Journal is a peer reviewed journal which is published annually. The journal publishes scholarly articles and commentaries on various aspects of law contributed by jurists, practitioners, law professors and students. The primary aim of this journal is to provide close insights into the various contemporary and current issues of law to the readers. Contributing to this journal provides an opportunity to authors to take an in-depth study for in specific areas of the law and enhances their skills in legal research writings and analysis. Talking about this Journal, it is great to be part of such a great initiative which provides all possible services to legal fraternity. Some notable developments might have been recognized by most of our readers but others probably have passed unnoticed to the majority. Therefore, this CPJ Law Journal is not only a retrospective on the previous year but also a good opportunity to summarize recent developments.

Also being from law background we feel that it is our prime duty to contribute for development of the society and we have taken many initiatives in this regard also by organizing various events of social relevance. I hope you find this issue of CPJ Law Journal informative and interesting. The success of this enterprise depends upon your response. We would appreciate your feedback.

With warm regards

**Dr. K.B. Asthana**

Editor

## MESSAGE FROM ADVISORY BOARD

Dear Readers,

I am glad that the Chanderprabhu Jain College of Higher Studies & School of Law (Affiliated to Guru Gobind Singh Indraprastha University, Delhi) is bringing out the IX volume of the CPJ Law Journal 2019 with academic eagerness, contributory enthusiasm and missionary passion. The CPJ Law School is now gaining much attention in legal education circles and is attracting students in good numbers to make their career in law and allied services and professions. It is an institution of hope in Delhi for many to have a better future in this capital town of the largest democracy in the world with association of many reputed legal luminaries. Offering B.A.LL.B(H) and BBA LL.B(H) courses it gives, along with studying prescribed courses, ample opportunities to students for legal research and creative writing without which legal education cannot be expected to attain its goals for a country like India. The CPJ Law Journal Team deserves very high appreciation for its incessant efforts to keep the journal available at its scheduled times. I cherish my association with the Journal since its inception and wish it all success and endurance.



**Prof. (Dr.) M. Afzal Wani**

Professor of Law and Former Member,  
Law Commission of India and Ex-Dean,  
University School of Law and Legal Studies,  
GGs Indraprastha University, Dwarka, Delhi-110078

## MESSAGE FROM PROF. AMAR PAL SINGH

I believe that research in general and legal research in particular is about integrating theoretical with the practical in new and innovative ways and finding new ways of looking at human problems/solutions. Legal research in any way is known as the process of identifying and retrieving information necessary to support legal decision-making process in its quest for finding solutions to societal problems. In its broadest sense, legal research includes each step of a course of action that begins with an analysis of the facts of a problem and concludes with the application and communication of the results of the investigation.



As part of GGS IP University fraternity, CPJ School of Law has taken major steps in providing a unique platform by organizing Loi-Fiesta ‘a National Law Festival’ where every legal professional, law students, scholars and advocates for that matter get an opportunity to show case their outlook which may vary on various spheres of law. With the commencement of new technological advancement in the Indian legal system, research work has become an essential part of reforming the legal system and making it suitable for the changing needs of the society.

I take this opportunity to congratulate the Editorial Board and College Management for coming up with a quality journal on law and legal education. I also wish them good luck in all their academic endeavours.

**Prof. (Dr.) Amar Pal Singh**

Professor (Law), USLLS

GGSSIP University, Dwarka, New Delhi

## MESSAGE FROM Sh. R. S. GOSWAMI

**Many congratulations and warm wishes!**

The motto which will be applicable here is for reader's satisfaction. I believe in the concern of paying respect to the Bar and Bench. I am advocating the thought of maintaining the decorum and inculcating the feeling of professional ethics. I never involved politics in inculcating this feeling and prospering the growth of the legal profession. The Bar Council of India and Delhi also promotes the research by conducting, organising and initiating Seminar, Conference, Moot Courts and such type of sundry activities.



R. S. Goswami and Associates has amassed an enormous amount of Goodwill and knowledge capital that has been consistently developed throughout years that has been built in the passing of every year, every month and every single day.

Finally, I would like to congratulate to CPJ CHS & School of Law, Management and Editorial Board for having me in the Advisory Board of CPJ Law Journal. I am sure that this issue will change the dimension of legal research.

With warm regards

**R.S. Goswami**

Senior Advocate

Chairman Enrolment Committee

Bar Council of Delhi

## MESSAGE FROM Sh. MURARI TIWARI

I am glad to part of this progressive journal which entirely focuses on legal research and covers all issues and concepts which affects the society in legal terms. The function of journal is to provide a different out look to various legal issues that are prevalent in the contemporary society and also to extract exact solution for the same.



The professionals and the law students who contribute their metal to the journal also gain experience in legal research and drafting which has become a demanding area for the highly complex legal system. The Indian legal system is one of the most developing and progressive system in the entire world and whole country believes in the legal system and their reforms and thus functions accordingly.

In my entire carrier as a lawyer journals and research works have played a very important role in developing a critical view for the issue which was prevalent in the society and how the social outlook has been changed because of legal reforms.

I gratify CPJ School of Law for giving me an opportunity to be a part of law journal advisory board.

### **Murari Tiwari**

Senior Advocate

Ex- Honorary Secretary

Bar Council of Delhi

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# CAN CONFIDENCE OF PUBLIC OVER BANKS BE RETAINED ON NPA?

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Dr. K. B. Asthana\* Dr. Karan Singh Yadav\*\*

## Abstract

*Rising NPAs has become a major concern for the banking Industry to manage which in turn also affects the other sectors as well as our whole economy. The main objective of the present research paper is to analyse the performance of Public sector banks with the help of past 5 years (2013-2017) Gross NPA data collected from RBI Website and their probable impact on the general public which keeps the public sector banks at first in their preference list of investment avenues. In view of their declining market share, Reserve Bank of India Deputy Governor NS Vishwanathan said urban co-operative banks (UCBs) need to regain and retain the confidence of their depositors. This may be reduced by Implementation of IT system in banks, according to Vishwanathan, makes it obligatory on the part of banks to have a robust IT risk management architecture. Banks also need to have skilled staff on their rolls rather than depend completely on outsourcing the risk management. This paper also focuses on the major causes behind the NPA and measurements undertaken to curb this issue.*

**Keywords: Gross Non-Performing Assets, Investment Avenues, Public Sector Banks.**

## Introduction

Banking Industry in any country plays an important role in its growth and development as it facilitates in mobilization of money from the people who are abundant to those who are in need of money as to capitalizing the opportunities and thereby contributes to optimum utilization of the country's scarce resources. As long as the banking industry is able to perform this function in an efficient and effective manner, it drives the country's growth in parallel. But the problem arises when such a pertinent growth driver of a country fails in terms of evaluating its assets (i.e. Investments or Advances) which further leads to failure of other sectors also and results into vicious spill over effects at national level. Banking sector NPAs are nothing but the investments (i.e. Advances) of the banks which have been exposed either to partial recovery or to complete failure

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\*\* Principal, Seth Rajnarain Gupta Mahila Vidhi Mahavidhyalay, Bhitara (Behror), Alwar, Rajasthan email: dryadavkaran@gmail.com.

in paying back on borrower's part. As per the RBI recent report, the Gross NPAs of the public sector banks stand at about 9,00,000cr. In a recent scam of PNB to the tune of 11,400cr also shows inefficiencies of the bank to keep a close watch on its clients (i.e. Borrowers). In view of their declining market share, Reserve Bank of India Deputy Governor NS Vishwanathan said urban co-operative banks (UCBs) need to regain and retain the confidence of their depositors. The deputy governor has also emphasised that "While one may be tempted to attribute the decline in market share of UCBs to the emergence of other competing alternatives within and outside the banking sector, there is no gainsaying the fact that UCBs need to regain and retain the confidence of their depositors,"<sup>1</sup>

### **Non-performing Assets and their Classification**

In line with the international practices and as per the recommendations made by the Committee on the Financial System (Chairman Shri M. Narasimham), the Reserve Bank of India has introduced, in a phased manner, asset classification and provisioning for the advances portfolio of the banks so as to move towards greater consistency and transparency in the published accounts.

#### **Non-Performing Assets**

An asset, including a leased asset, becomes non-performing when it ceases to generate income for the bank. A 'non-performing asset' (NPA) was defined as a credit facility in respect of which the interest and/ or instalment of principal has remained 'past due' for a specified period of time. The specified period was reduced in a phased manner as under:<sup>2</sup>

| Year ending March 31 | Specified period |
|----------------------|------------------|
| 1993                 | four quarters    |
| 1994                 | three quarters   |
| 1995 onwards         | two quarters     |

An amount due under any credit facility is treated as "past due" when it has not been paid within 30 days from the due date. Due to the improvements in the payment and settlement systems, recovery climate, upgradation of technology in the banking system, etc., it was decided to dispense with 'past due' concept, with effect from March 31, 2001. Accordingly, as from that date, a Non-performing Asset (NPA) shall be an advance where.

1 Money and Banking, UCBs must retain depositors' confidence: RBI Deputy Governor, Mumbai | Updated on August 25, 2018 Published on August 24, 2018 data retrieved on 15.06.2019.

2 Master Circular- Prudential Norms on Income recognition, Asset Classification and Provisioning pertaining to the Advances Portfolio, DBOD No. BP. BC/ 20 /21.04.048 /2001-2002, August 30, 2001.

- i. interest and/or instalment of principal remain overdue for a period of more than 180 days in respect of a Term Loan,
- ii. the account remains 'out of order' for a period of more than 180 days, in respect of an Overdraft/Cash Credit (OD/CC),
- iii. the bill remains overdue for a period of more than 180 days in the case of bills purchased and discounted,
- iv. interest and/or instalment of principal remains overdue for two harvest seasons but for a period not exceeding two half years in the case of an advance granted for agricultural purposes, and
- v. any amount to be received remains overdue for a period of more than 180 days in respect of other accounts.

With a view to moving towards international best practices and to ensure greater transparency,<sup>3</sup> it has been decided to adopt the '90 days' overdue' norms for identification of NPAs, from the year ending March 31, 2004. Accordingly, with effect from March 31, 2004, a non-performing asset (NPA) shall be a loan or an advance where;<sup>4</sup>

- i. interest and/ or instalment of principal remains overdue for a period of more than 90 days in respect of a term loan,
- ii. the account remains 'out of order' for a period of more than 90 days, in respect of an Overdraft/Cash Credit (OD/CC),
- iii. the bill remains overdue for a period of more than 90 days in the case of bills purchased and discounted,
- iv. interest and/or instalment of principal remains overdue for two harvest seasons but for a period not exceeding two half years in the case of an advance granted for agricultural purposes, and
- v. any amount to be received remains overdue for a period of more than 90 days in respect of other accounts.

### **Assets Classification**

Banks are required to classify its assets further into the following four categories based on the period for which the asset has remained non-performing and the realis ability of the dues:

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3 Master Circular- Prudential Norms on Income recognition, Asset Classification and Provisioning pertaining to the Advances Portfolio, DBOD No. BP. BC/ 20 /21.04.048 /2001-2002, August 30, 2001.

4 Monetary and Credit Policy Measures 2001-2002, DBOD. No. BP. BC.116 /21.04.048/2000-2001 dated 2nd may, 2001.

- a. Standard Assets
- b. Doubtful Assets
- c. Loss Assets
- d. Sub-standard Assets

### **Standard Assets**

A Standard Asset is one which does not pose any problem in terms of recovery and carry only normal business risk. Banks receive the interest amount as well as principle amount of loan either on due date or within 90 days from the due date.

### **Sub-standard Assets**

With effect from March 31, 2005, a sub-standard asset would be one, which has remained NPA for a period less than or equal to 12 months. Such an asset will have well defined credit weaknesses that jeopardise the liquidation of the debt and are characterised by the distinct possibility that the banks will sustain some loss, if deficiencies are not corrected.

### **Doubtful Assets**

With effect from March 31, 2005, an asset would be classified as doubtful if it has remained in the sub-standard category for a period of 12 months. A loan classified as doubtful has all the weaknesses inherent in assets that were classified as sub-standard, with the added characteristic that the weaknesses make collection or liquidation in full, – on the basis of currently known facts, conditions and values – highly questionable and improbable.

### **Loss Assets**

A loss asset is one where loss has been identified by the bank or internal or external auditors or the RBI inspection but the amount has not been written off wholly. In other words, such an asset is considered uncollectible and of such little value that its continuance as a bankable asset is not warranted although there may be some salvage or recovery value.

### **Objectives of Study**

- To analyze the trend of Gross Non-Performing Assets of Public sector Banks for a period of past 5 years (2013-2017).
- To trace out the major causes behind NPA.
- To understand the implication of NPA on the general public faith.

## Literature Review

B. Selvarajan & Dr. G. Vadivalagan (2013), “A Study on Management of Non-Performing Assets in Priority Sector reference to Indian Bank and Public Sector Banks<sup>5</sup>” attempted to analyze the performance of public sector banks lending and emphasized that the public sector banks were not comfortable in regards to NPA management and suggested to focus on the timely action of the banks as to defaulted borrowers.

Monika and Sonia (2014), “Empirical Study on Non-Performing Assets of Banks<sup>6</sup>” tried to study the comparison of total Advances, Net Profit, Gross NPA and Net NPA of PNB and concluded that the Gross NPA & Net NPA of PNB were increasing every year and also positive relation was found out between NPA and Profits due to wrong selection of the clients by banks.

Mayur and Ankita (2015), “A Study on Non-Performing Assets Management with reference to Public sector Banks, Private sector Banks and Foreign Banks in India<sup>7</sup>” analyzed the NPA related ratios of public Sector, Private Sector and Foreign banks in India for 2009-2013 and found out that the ratio of GNPA to Gross Advances were reflected a downward trend for both private sector and foreign banks and an upward trend for public sector bank during the said period.

Miyan, Mohammad, (2017),” A Comparative Statistical Approach towards NPA of PSU and Private Sector Banks in India<sup>8</sup>” attempted to study the performances of public sector Banks and Private sector banks and he found out the rising trend of NPAs in both public as well as private sector. Also, the NPAs of the public sector Banks were greater than that of the private sector and thereby depicted the greater inefficiencies of public sector banks.<sup>9</sup>

Payel and Pradip (2017), “Analysis of Non-Performing Assets in Public sector Banks of India “attempted to analyze the GNPA and NNPA of the public sector banks and also tried to find the impact of GNPA on NP of the selected public sector banks and concluded that the overall NNPA of the banks were deteriorating and also substantiated the negative correlation

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5 Data retrieved from [https://globaljournals.org/GJMbr\\_Volume13/10-A-Study-on-Management-of-Non.pdf](https://globaljournals.org/GJMbr_Volume13/10-A-Study-on-Management-of-Non.pdf).

6 Visited web site <http://www.ijarcsms.com/> on 15.06

7 Data retrieved from <http://www.jms.nonolympictimes.org/Articles/JMS-March-2015-Vol-5-No-1-Art-4.pdf>. on 10 May, 2018 at 1500 hrs.

8 Data retrieved from [www.ijarcs.info](http://www.ijarcs.info).

9 <http://zeenews.india.com/tags/bank-npa.html> visited on May 11, 2018.

between GNPA and NP.<sup>10</sup>

### **Trends of Non-Performing Asset (NPA) in Public Sector Banks in India During 1993 to 2012**

By lending of various loans to individuals, corporate, Small scale industries and etc. the financial institutions have credit risk associated with these product and services with the payment of interest and principal amount. These loans are asset for the banks, Non-payment of interest and principal are affecting adversely to the business activity of banks, and these negate the effectiveness of overall process of banks. Besides this these non-payments or non-recovery of loans will reduce the amount of profit and it is also required to maintain fund by the way capital and creation of reserves and provisions. The Non-performing assets, also called non-performing loans, are loans, on which repayments or interest payments are not being made on time. In this paper an attempt is made to analyse trends of Non-Performing Asset in public sector bank in India from 1992-1993 to 2011-2012, and concluded that the banks should to careful to lending loans to customers.<sup>11</sup>

### **Causes of NPA**

- Default by the borrowers with reference to principal and interest payment.
- Mismanagement on the part of Banks in regards to knowingly sanctioning of loans to the bad borrowers by indulging in unethical practices like Bribery etc. as also happened in a recent scam of PNB.
- The unfavorable economic conditions of a country also contribute to its GNPA's of the Banking sector.
- Improper or insufficient evaluation of the project or purpose for which the loan is being sanctioned also turns out to be a part of NPAs of the Bank.<sup>12</sup>
- Diversion of loaned funds by the borrowers for the purpose or project other than the one for which the loan was approved also leads to NPAs at some point or the other.
- Absence of regular follow-ups for the defaulted amount at initial stages leads to creating the casual behavior of the borrowers for

10 Data retrieved from <http://www.iaeme.com/IJM/index.asp> 15.06.2019.

11 Mishra, Akshay Kumar, CLEAR International Journal of Research in Commerce & Management. Nov2013, Vol. 4 Issue 11, p111-114. 4p.

12 <https://dbie.rbi.org.in/DBIE/dbie.rbi?site=publications#14> visited on May 8, 2018.

meeting their obligation against interest payment and the principal payment which further incentivizes the borrower to make rest part of the loan as Non-Performing loan for the Bank.<sup>13</sup>

## Research Methodology

The present study has been conducted on the basis of 5 years consolidated GNPAs data of public sector Banks and Private Sector banks starting from 2013 to 2017. This study is purely based on the secondary data collected from RBI website and other related Articles and Journals. Also 2013 has been taken as the Base year for converting the figures in percentage.

## Analysis of Study

### GNPAs Status of Public Sector banks

**Table 1**

*(Amount in Billion)*

| Year                | Gross Advances | Gross Advances (%) | Gross NPAs | Gross NPA (%) | Gross NPA as percentage of Gross Advances |
|---------------------|----------------|--------------------|------------|---------------|---|
| Public Sector Banks |                |                    |            |               |   |
| 2017                | 51,422.24      | 126.78             | 6,410.56   | 411.20        | 12.47                                     |
| 2016                | 50,821.56      | 125.30             | 5,020.68   | 322.04        | 9.88                                      |
| 2015                | 48,452.69      | 119.46             | 2,627.45   | 168.53        | 5.42                                      |
| 2014                | 45,904.58      | 113.18             | 2,167.39   | 139.02        | 4.72                                      |
| 2013                | 40,559.00      | 100.00             | 1,559.00   | 100.00        | 3.84                                      |

*Source: www.rbi.org.in visited on 09-05-2018*

### GNPAs Status of Private Sector banks

**Table 2**

*(Amount in Billion)*

| Year                | Gross Advances | Gross Advances (%) | Gross NPAs | Gross NPA (%) | Gross NPA as percentage of Gross Advances (%) |
|---------------------|----------------|--------------------|------------|---------------|---|
| Public Sector Banks |                |                    |            |               |   |
| 2017                | 21,048.80      | 201.12             | 738.42     | 369.21        | 3.51  |
| 2016                | 17,916.81      | 171.19             | 483.8      | 241.9         | 2.70  |
| 2015                | 14,373.39      | 137.33             | 315.76     | 157.88        | 2.20  |
| 2014                | 12,117.31      | 115.78             | 227.44     | 113.72        | 1.88  |
| 2013                | 10,466.00      | 100.00             | 200        | 100           | 1.91  |

*Source: www.rbi.org.in visited on 10-05-2018*

13 <https://dbie.rbi.org.in/DBIE/dbie.rbi?site=publications#14> visited on May 8, 2018.

## Conclusions

The Reserve Bank of India (RBI) has asked urban cooperative banks, which have been facing a steady decline in their market share for over a decade now, to improve their management and governance practices so that customers repose their trust in them and the banks can remain relevant.<sup>14</sup> Further in the Ireland we could see the same situation Just a few weeks ago of August 28, 2017 eyebrows were raised in central bank circles when an archivist at the Bank of England rediscovered a long-kept secret. The British government's attempt in November 1914 to borrow money to fight the first World War was not the dazzling success then officially reported. In fact, the bond issue was a flop: Few investors were attracted by the interest rate on offer and instead the Bank of England stepped in to save the day by printing money. Ireland is of course not alone in its experience of abuses: Indeed, the run-up to the crisis provided much more egregious examples of abuse and misbehaviour by financial institutions in some other countries.<sup>15</sup>

- GNPA Ratio as per the Table-1 shows that the GNPA of the Public Sector Banks had been continuously increasing over the period for which the GNPA data has been analyzed.
- Gross NPA Ratio for year 2017 has come out as 12.47% which implies that for every Rs.100 advanced by the bank, roughly Rs.12.50 are forming a part of NPA.
- The year 2016 was very bad in terms of an increase in GNPA's during the year in comparison to the preceding year 2015. In 2016, the GNPA's have almost been doubled (i.e. 91.09%). However, the corresponding increase in Gross advances in 2016 was as low as 4.89%. This year made a huge contribution in GNPA's corpus.
- After analyzing the public sector banks performance during the period, If we take a look at Table-2 which is depicting the GNPA ratios' trend of the private sector banks for 2013-2017, In spite of following an increasing trend of GNPA ratio of the private sector banks year on year, the private sector banks had been able to keep their GNPA's lower than that of the public sector banks. Additionally, there had not been such a huge hike in GNPA's of the private sector banks as happened with

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14 Improve governance practices to regain public confidence: RBI tells UCBs, RBI has taken several measures to restore public confidence in urban cooperative banks (UCBs), Press Trust of India, Mumbai Last Updated at August 24, 2018 22:21 IST last visited on 16.06.2019.

15 Patrick Honohan (Peterson Institute for International Economics), *Irish Times* August 28, 2017 last visited on 17.06.2019.

Public sector banks in 2016. The GNPA Ratio and the rate of increase in GNPA's of the Public sector banks both are higher than those of the private sector banks.

- Implementation of IT system in banks, according to Vishwanathan, makes it obligatory on the part of banks to have a robust IT risk management architecture. Banks also need to have skilled staff on their rolls rather than depend completely on outsourcing the risk management.

### Suggestions

- A thorough evaluation and consideration of every minor factor related to the project (i.e. the purpose for which the loan is being applied) and the Borrower is required by the bank in order to reduce such a huge level of NPA.<sup>16</sup>
- There should be a centralized committee that could keep a close eye on the banks' advances being granted and which should also have the responsibility of random reviewing of loans passed by the banks at fixed interval and that too in a regular manner.<sup>17</sup> This would pose a fear for the senior officials of the public sector banks and would stop them from indulging in unethical practices, it would also help point out any material miss by the bank while sanctioning of loan.<sup>18</sup>
- Proper post-sanctioning follow-ups and keeping a close tab at the point of very first default by the borrower either in paying principle amount or interest payment, will also help banks escape from probable defaults.<sup>19</sup>
- A meeting should also be conducted at regular intervals with a main agenda of reiterating the importance of each and every ethical step that the Senior bank officials take and the repercussions of the unethical practices that they follow.<sup>20</sup>
- **Formation of Umbrella Organization**

It would be evident that many of the major issues confronting the sector emanate from lack of resources, low scales of operations and increasing compliance requirements which get accentuated in

16 Website [https://www.rbi.org.in/scripts/BS\\_ViewMasCirculardetails.aspx?Id=449&Mode=0](https://www.rbi.org.in/scripts/BS_ViewMasCirculardetails.aspx?Id=449&Mode=0) visited on May 10, 2019.

17 <https://www.ndtv.com/business/bad-loan-npas-woes-indias-stressed-bank-loans-tick-up-to-rs-9-5-lakh-crore-in-december-says-rbi-1831862> visited on May 14, 2019.

18 <https://www.moneycontrol.com/news/tags/npa.html> visited on May 11, 2019.

19 Basant, Rakesh (2000), Corporate Responses to Economic Reforms", Economic and Political Weekly, 4th March, pp 813-22.

20 <http://shodhganga.inflibnet.ac.in/handle/10603/70262> visited on May 11, 2019.

a competitive environment. Apart from consolidation, forming an umbrella organization for the UCBs will help address some of the concerns. This idea was mooted in the year 2006 by the working group set up by Reserve Bank on augmentation of capital of UCBs. It was endorsed subsequently by several committees. The basic idea behind the umbrella organization is to create an institution to provide liquidity support to UCBs in times of need and sharing of resources, particularly the IT resources and managerial support. Such a system is prevalent in several countries where cooperative banking has done well. However, there was no consensus among stakeholders on the structure and functions of the umbrella organisation. In the year 2016, NAFCUB (National Federation of Urban Co-operative Banks & Credit Societies) set up a committee to examine the issues and give its recommendations. Reserve Bank has formally received the Report of the Committee.<sup>21</sup>

### **Limitations of the Study**

This study is purely based on the secondary data collected from the websites, Journals and Articles. The conclusions have been derived on the basis of analysis of only the 5 years GNPA's data and that too only of the Public and Private sector banks.

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21 Shri N S Vishwanathan, Deputy Governor at SahakarSetu – An event organised by Gujarat Urban Co-operative Banks Federation on August 4, 2018 at Gandhinagar. Source [https://rbi.org.in/Scripts/BS\\_SpeechesView.aspx?Id=1062](https://rbi.org.in/Scripts/BS_SpeechesView.aspx?Id=1062) last visited on 16.06.2019.

# GENDER SENSITIZATION: AN ANALYSIS OF THE ROLE OF EDUCATIONAL INSTITUTIONS

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Dr. Reena Bishnoi\*

## Abstract

*Gender sensitization is a movement through which the people with traditional thinking, should be able to assure equal participation of women and men in decision-making; to facilitate equally; to equally access & control on the resources; to acquire alike benefits of development; to get equal opportunities in employment ; economic, political, cultural & social sector and also can get equivalent regard in all other aspects of their life and livelihood so that both genders can enjoy their human rights without any constraint. With the help of education, gender sensitization in educational institutes can create awareness among the children, parents and other members of the community about their roles in future as the men and women in the society. This is the power of education that can make a great social change in the society at large. Each educational institutes should take initiative to understand the gender-related issues and to sensitize its' concerns staffs, teachers, students and society for the women equality. There should be some relevant contents on gender equality in textbooks, a teacher should promote the respect to the girls and women in the classroom environment and Government should also introduce new programs and also make ensure the proper implementation of policies that ensuring the gender equality. This paper is based on Secondary data.*

**Keywords: Gender Sensitization, Equality, Power of Education, Educational Institutions.**

## Introduction

Gender sensitization is the process of changing the stereotype mind set of men and women who strongly believes that men and women are unequal. Gender sensitization tends to change the perception that men and women have of each other. It creates a mind set in men that no longer sees in women the stereotypical image. The impression that women are a weak and unequal entity no more clouds the minds of common man. Women also tend to develop the perception that they are no subordinate to men and they have an equally important role to play in decision making at household, community and organization level. Gender sensitization is a movement through which the people with stereotype & traditional

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thinking, should be able to assure equal participation of women and men in decision-making; to facilitate equally; to equally access & control on the resources; to acquire alike benefits of development; to get equal opportunities in employment ; economic, political, cultural & social sector and also can get equivalent regard in all other aspects of their life and livelihood so that both genders can enjoy their human rights without any restriction.

### **Meaning of Gender and Gender Sensitization**

Gender is used to describe those characteristics of men and women which are socially determined, in contrast to those which are biologically determined. The word 'gender' was used by Ann Oakley and others in the 1970s to emphasis that everything women and men do, and everything expected of them, with the exception of their sexually distinct functions can change, and does change, over time and according to changing and varied social, economical, political, and cultural factors.

Gender sensitization refers to the modification of behavior by raising awareness of gender equality concerns. Gender sensitization theories claim that modification of the behavior of teachers and parents towards children can have a causal effect on gender equality. Gender sensitizing "is about changing behavior and instilling empathy into the views that we hold about our own and the other gender. It helps people in "examining their personal attitudes and beliefs and questioning the 'realities' they thought they know."

### **Meaning of Gender Equality**

Gender equality refers to equal opportunities and outcomes for women and men. This involves the removal of discrimination and structural inequalities in access to resources, opportunities and services, and the promotion of equal rights Equality does not mean that women should be the same as men. Promoting equality recognizes that men and women have different roles and needs, and takes these into account in development planning and programme.

### **Why Gender Considers as Women's Empowerment?**

Although 'gender and development' includes both women and men, however, in most cases focus is given to only women. It is because of imbalance and unequal status of women in most of the societies where women do not have the same opportunities and personal freedom as men do. Therefore, there is a need to focus women compared to men.

## Need of Gender Sensitization in India

India is a country with the vast diversity existing in terms of its customs, traditions, rituals, social values family beliefs and individual perception, the need for a more systematic, well planned and more professional approach is desired to inculcate this sensitivity and primarily highlight the contribution of both the genders in creation and development of a well-balanced society The main problem of Indian society is lack of women recognition and appreciation for women's involvement in multifarious activities. The men, who, are reluctant to acknowledge women's contribution, come forward under the influence for sensitization to recognize their contribution The gender sensitization process develops understanding that women do possess wisdom and therefore they must be involved in decision making process. They have concerns and therefore should be treated with dignity and equal chance in sharing of social and economic benefits. The Constitution of India provides for equality of status and opportunity to all the citizens without any discrimination. These provisions are related to gender equality: -

**Article 14**-Equality before law and equal protection of laws.

**Article 15**-Prohibition of discrimination on the grounds of race, sex etc.

**Article 16**-Equality of opportunity in the matters of public employment.

The following Directive principles in the constitution also specifically relate to gender equality-

**Article 39(a):** - That the citizens, men women equally have the right to an adequate means of livelihood.

**Article 39(d):** -That there is equal pay for equal work for both men and women.

Gender equality is necessary not only because of constitutional provision but also to set free the energy and capabilities of women.

## Role of Educational Institutions

Education is a major force that will help prompt change but this will occur only when teachers and learners assists in adopting classroom initiatives that effect new images based on a positive gender equity ideology. Gender equality as a strategy has great potential to create desired change because it has the capacity to address both the practical and strategic needs of

boys and girls, nations and the world at large. Teachers are strategically positioned to act as agents of change in order to achieve gender equality especially through their teaching.

With the help of education, gender sensitization in educational institutes can create awareness among the children, parents and other members of the community about their roles in future as the men and women in the society. Moreover, this is the power of education that can make a great social change in the society at large. Presently, gender and women studies have become the main subject of study at the higher level of education.

Gender sensitization aims to make students, parents and teachers aware about this field. It helps people in “examining their personal attitudes and belief. For the purpose of achieving equity, it is being stressed that there should be gender sensitization of people. As gender sensitization is a process of behavioral change by instilling empathy into the views that people hold about their own and other sex.

The specific process of socialization which teaches children their gender role is called gendering or gender role socialization. In this process, education and educational institutions play an important role. We can say that educational institutions are the places where the socializing process is resistant. The social knowledge relating to gender is constructed by schools through textbooks, pedagogy skills, assessment and the academic environment. Gender issues are prevailing in society in all areas of life. To minimize these gender issues we need to start changing the mindset of the younger generations of society as they are those who can bring about further change in society with their innovative ideas, thoughts and practices. To do this we need good educated teachers, who have a sound knowledge regarding gender issues. Educational institutions play a very important role in this regard. Gender sensitization through education can be an effective and primary tool to bring change in the thought process of students. The main focus should be on breaking the stereotypes and mind set related to gender prevalent in the society. Gender issues are prevailing in society in all areas of life. To minimize these gender issues, we need to start changing the mindset of the younger generations of society as they are those who can bring about further change in society with their innovative ideas, thoughts and practices. In the educational institutions Teachers can serve as a role models for the students. Teachers need not only gender sensitive curricula and textbooks but also gender equality education

## Conclusion and Suggestions

Gender Sensitization is one basic requirement for the normal development of an individual. Without being sensitive to the needs of a particular gender, an individual may refrain from understanding the opposite gender and in some acute cases even him or herself. The need for this sensitivity has been felt and realised through times immemorial and in almost all kinds of human existence, across the globe. These are some suggestions to the educational institutions regarding gender sensitization-

- The workshops, seminars, debates and gender sensitization cell should be established so that more students become active participants
- As the students studying in colleges are more aware and educated, they as pioneer of this campaign would become the foundation of society.
- Curriculum related to gender sensitization needs to be added.
- Awareness drive should be started by educational institutions in society especially in rural areas
- Government should introduce more welfare schemes for females to make them self-independent.
- Each educational institutes and school should take initiative to understand the gender-related issues and to sensitize its' concerns staffs, teachers, students and society for the women equality.
- There should be some relevant contents on gender equality in textbooks,
- A teacher should promote the respect to the girls and women in the classroom environment and outside from the schools.
- Government should also introduce new programs and also make ensure the proper implementation of policies and strategies that ensuring the gender equality.

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# TRADITIONAL MEDICINAL KNOWLEDGE VIS- À-VIS THE PATENT LAW IN INDIA

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Dr. Navneet Thanvi\*

## Abstract

*Despite the fact that the medical and scientific fraternity around the world has very strong opposition to traditional medicines, these medicines are getting their due recognition as a rationale, effective and cost-effective system of medicine worldwide. The provisions of Intellectual Property Rights under TRIPS governed by WTO have attracted many stakeholders to reap commercial benefits with the traditional medicinal knowledge in India. Medicinal plants and other related plant products are instant targets of patent claims since they have acquired an important place in the international drug and cosmetic industry. Due to the absence of proper policies, issues of bio-piracy and bio-prospecting have been on the rise. There is an urgent need for a developing country like India to formulate its own traditional knowledge policies and a patenting system that extends exclusive rights to indigenous communities for their traditional knowledge on medicine so that they can take benefits from it. The focus should be to provide the actual holders of traditional knowledge with the full authority to control their knowledge systems without adversely affecting the larger interests to society for access to this knowledge. This paper explores the feasibility of devising a new form of intellectual property protection that would be able to recognize the value of traditional knowledge. This paper discusses the current scope of Intellectual Property Rights system with a particular emphasis on the Patent Law in India. This paper also suggests some measures for effective protection and conservation of traditional knowledge.*

**Keywords: Patent Law, Traditional Medicine, Traditional Medicinal Knowledge, Intellectual Property Rights, Biopiracy.**

## Introduction

Traditional medicinal knowledge may be generally defined as a subset of traditional knowledge. It consists of the medicinal and curative properties of plants in indigenous culture which includes genetic resources. Traditional knowledge is often defined by its general characteristics: creation through a long period of time which has been passed down from generation to generation; new knowledge is integrated to the existing, as knowledge is

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improved; improvement and creation of knowledge is a group effort; and ownership of indigenous knowledge varies between indigenous peoples.<sup>1</sup>

Traditional medicine has been an important part of human health care since ages in many developing countries as well as developed countries thereby contributing to the increase in their commercial value. Although, the use of these medicines has been known to mankind for centuries, the demand for such medicines has grown dramatically in the recent years. Traditional medicine usually involves biological resources and the knowledge of local and indigenous people and/or healers regarding their medicinal use; thus, it is interlinked with biodiversity conservation and indigenous people's rights over their knowledge and resources.<sup>2</sup>

In developing countries, the issues of traditional knowledge have assumed a critical dimension in the area of intellectual property rights.<sup>3</sup> The phrase "traditional knowledge" implies the development and transmission of the knowledge from generation to generation within a system, held by local individuals, families, lineages or indigenous communities.<sup>4</sup> From time immemorial, these local individuals or communities have a storehouse of knowledge about their geographical flora and fauna. However, the local individuals and communities do not have the means to safeguard their traditional knowledge in the increasing global process of extraction, exploitation and commercialization of the biodiversity of the Third World.<sup>5</sup> It is a stark reality that globalization is threatening the biodiversity, bio-information and creativity of indigenous approaches into proprietary knowledge for the commercial profit of a few.<sup>6</sup>

### **Traditional Medicine: What is?**

Traditional medicine describes a group of health care practices and products with a long history of use.<sup>7</sup> It frequently refers to medical knowledge developed by indigenous cultures that incorporates plant,

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1 Dr. Gerard Bodeker, "Traditional Medical Knowledge, Intellectual Property Rights & Benefit Sharing" 11 *Cardozo J. Int'l & Comp. L.* 785 (2003).

2 Karin Timmermans, "Intellectual Property Rights and Traditional Medicine: Policy Dilemmas at The Interface" 57 *Social Science & Medicine* 745 (2003).

3 Sonia Jain, "Traditional Medicine and Intellectual Property Rights – An Indian Perspective" available at <http://www.legalservicesindia.com/article/article/traditional-medicine-and-intellectual-property-rights-an-indian-perspective-400-1.html> (Visited on February 12, 2019).

4 *ibid.*

5 *ibid.*

6 *ibid.*

7 Ryan Abbott, "Documenting Traditional Medical Knowledge" World Intellectual Property Organization (March, 2014) available at <http://ssrn.com/abstract=2406649> (Visited on February 12, 2019).

animal and mineral-based medicines, spiritual therapies and manual techniques designed to treat illness or maintain wellbeing.<sup>8</sup> The World Health Organization defines traditional medicine as “the sum total of the knowledge, skills and practices based on the theories, beliefs and experiences indigenous to different cultures, whether explicable or not, used in the maintenance of health, as well as in the prevention, diagnosis, improvement or treatment of physical and mental illness.”<sup>9</sup>

Traditional medicine practices, particularly whole medical systems such as traditional Chinese medicine, share many of the same core values.<sup>10</sup> These practices tend to be characterized by a holistic and highly individualized approach to treatment, an emphasis on maximizing the body’s inherent healing ability, involving patients as active participants in their own care, addressing physical, mental, and spiritual attributes of a disease, and placing a strong emphasis on prevention and wellness.<sup>11</sup> Traditional medicines have the benefit of substantial prior clinical use as well as stronger cultural associations which provide evidence of safety and efficacy and result in traditional medicine being more readily accepted by some populations.<sup>12</sup> World Health Organization as acknowledged that “traditional, complementary, or alternative medicine has many positive features, and that traditional medicine and its practitioners play an important role in treating chronic illnesses, and improving the quality of life of those suffering from minor illness or from certain incurable diseases.”<sup>13</sup> Traditional medicine is not only a vital source of health care, but also an important source of income for many communities.<sup>14</sup> Traditional medicine may even form an integral part of a community’s identity.<sup>15</sup>

Knowledge is not termed “traditional” on the basis of its antiquity. It is that form of knowledge which has a traditional link with a certain community: a knowledge which is developed, sustained and has been passed on

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8 World Health Organization, “Fact Sheet No. 134: Traditional Medicine,” (May 2003), available at <http://www.who.int/mediacentre/factsheets/2003/fs134/en/> (Visited on February 12, 2019).

9 World Health Organization, “Traditional Medicine: Definitions”, WHO/EDM/TRM/2000.1, 2000, available at <http://www.who.int/medicines/areas/traditional/definitions/en> (Visited on February 12, 2019).

10 Iris R. Bell et al., “Integrative Medicine and Systemic Outcomes Research”, 162 *Archives Internal Med.* 133-140, (2002).

11 *Supra* note 7.

12 Directive 2004/24/EC, 2004 O.J. (L 136) 85, amending, as regards traditional herbal medicinal products, Directive 2001/83/EC. *available at* <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:136:0085:0090:EN:PDF>.

13 Fifty Sixth World Health Assembly, Agenda item 14.10, Traditional Medicine, WHA56.3, May 28, 2003 at 1, *available at* [http://whqlibdoc.who.int/wha/2003/WHA56\\_31.pdf](http://whqlibdoc.who.int/wha/2003/WHA56_31.pdf).

14 *Supra* note 7.

15 *ibid.*

within a traditional community, and between generations, sometimes even through specific customary systems of knowledge transmission. A community might see traditional knowledge as a part of their cultural or spiritual identity. So it is the relationship with the community that makes it “traditional”.

### **Defining Intellectual Property Rights**

Intellectual property rights convey legal ownership over certain intangible assets, such as artistic works, commercial designs, and pharmaceutical technologies.<sup>16</sup> The most common types of intellectual property include patents, trademarks, copyrights, geographical indications, protection for plant varieties and trade secrets. Intellectual property rights generally provide the creators of original works economic incentives to develop and share ideas through a form of temporary monopoly. Intellectual property rights are granted nationally and most countries provide for their protection. Minimum standards for domestic laws are established by a complex framework of international treaties and agreements, including by the Agreement on Trade-Related Aspects of Intellectual Property Rights.<sup>17</sup>

### **Traditional Medicinal Knowledge and IPR: The Nexus**

The nexus between the intellectual property rights and the traditional medicinal knowledge has become unavoidable both for its creators and for the world intellectual community at large. The need for preservation, protection and promotion of traditional medicinal knowledge has become inevitable for self-sustenance, economic prosperity of knowledge holders and competitive business advantage.<sup>18</sup> The exponential growth of traditional knowledge has galvanized new forms of intellectual property right protection, especially for traditional medicine.<sup>19</sup> The traditional healthcare problems, complexities linked to intellectual property rights in traditional knowledge, and community knowledge are posing a gargantuan challenge to sustainable development, intellectual and cultural vitality.<sup>20</sup>

One of the most important types of intellectual property rights is patent

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16 *ibid.*

17 Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm).

18 Anand Chaudhary & Neetu Singh, “Intellectual property rights and patents in perspective of Ayurveda” 33 *AYU* 20 (2012).

19 *ibid.*

20 D.B. Shukla, “Synergy of intellectual property and traditional knowledge: Holy Grail for protection and sustainable future, synergy of intellectual property and traditional knowledge” 1 *Open Conf Proc J* 151-6 (2010).

protection. UN defines patent as a legally enforceable right granted by a country's government to its inventor. A patent grant vests the inventor a set of exclusive rights for a limited period of time which prevents others from commercially exploiting the patented invention without proper authorization. Patents allow the holders to prevent a third party from making, using, selling, offering for sale or otherwise commercially exploiting a patented invention. For a product to be patentable, it should be a novel invention and should be industrially applicable. Patent law is centred on the concept of novelty and non-obviousness of the invention. The imitators and all independent devisors are prevented from using the invention for the duration of patent.<sup>21</sup>

### **Traditional Knowledge and Intellectual Property Rights: International Efforts**

The issue of traditional knowledge has been addressed in several international organizations. Issues related to traditional knowledge and intellectual property have been dealt with by United Nations Environment Programme (UNEP) / Convention on Biological Diversity (CBD), World Intellectual Property Organization (WIPO), United Nations Conference on Trade and Development (UNCTAD) and World Trade Organization (WTO). WIPO and UNEP undertook joint case studies on the role of intellectual property rights in sharing of benefits from the use of traditional knowledge and associated biological resources.<sup>22</sup>

In the international scenario, the main challenges have taken place against the backdrop of two international legal frameworks viz. the Convention on Biological Diversity (CBD) and the Trade-Related Aspects of Intellectual Property Systems (TRIPS). The only major international convention that assigns ownership of biodiversity to indigenous communities and individuals is the CBD. The Articles of the CBD clearly outline how the member states should treat their indigenous communities and to develop relations among each other.

CBD declares that State parties are required to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for conservation and sustainable use of biological diversity and promote the wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the

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21 Batish N. Sharma, "Product patent versus process patent in pharmaceutical industry", 4 *J Pharm Res* 133-5 (2010).

22 WIPO Statement to the CTE and TRIPS Council, WT/CTE/W/182 (2001).

benefits arising from the utilisation of such knowledge, innovations and practices.<sup>23</sup> It further declares that the contract parties should encourage and develop models of co-operation for the development and use of technologies, including traditional and indigenous technologies.<sup>24</sup>

Unfortunately, the CBD competes for prominence in the international arena with the more powerful TRIPS.<sup>25</sup> TRIPS which is now a key international agreement which promotes and regulates the harmonisation of intellectual property around the globe cover only intellectual property which include patents, geographical indications, undisclosed information (trade secrets), and trademarks. TRIPS make no reference to the protection of traditional knowledge. It does not acknowledge or distinguish between indigenous, community-based knowledge and that of industry.<sup>26</sup> TRIPS do not require adoption of UPOV standards, but rather make provision for the protection of plant varieties either by patents, by an effective sui generis system or by any combination thereof.<sup>27</sup>

### **Traditional Medicinal Knowledge under Existing Patent Law in India**

India has had legislations related to intellectual property since the second half of the 19th century. The Indian Systems of Medicines (ayurveda, homeopathy, unani etc.) were the predominant health care systems in most parts of the country and, in some areas, the only available systems. In spite of such popularity and widespread use, no effort was made to evolve a policy or law for protecting the intellectual property quotient of the system.

There is currently no patent protection for traditional medicinal methods and pharmaceutical companies commonly utilize the knowledge in the development of new patentable medicines. Western patent system appropriately excludes traditional knowledge from patent protection. Additionally, intellectual property rights are not reconcilable with the traditional beliefs of indigenous people.<sup>28</sup>

The Patent Act, 1970 granted patents on chemical processes but did not

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23 Art. 8 (j) of the United Nations Convention on Biological Diversity (1993).

24 Art. 18 (4) of the United Nations Convention on Biological Diversity (1993).

25 Graham Dutfield, "Trade-Related Aspects of Traditional Knowledge" 33 *Case Western Reserve J. Int'l L.* 239 (2001).

26 *ibid.*

27 Art. 27 (3)(b) of The Trade-Related Aspects of Intellectual Property Systems (2002).

28 Paul Kuruk, "Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual Rights and Communal Rights in Africa", 48 *American L. Rev.* 769 (1999).

permit patents on drugs which allowed the Indian drug companies to reverse engineer molecules to produce generic versions of patented drugs. As a part of making the law compatible with the obligations under the Agreement on Trade Related Aspects of Intellectual Property Rights, three amendments were carried out in the Act in the years 1999, 2002 and 2005.

The Patent Amendment Act, 2002 provided that “an invention which, in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components is not an invention within the meaning of the Act.”<sup>29</sup> Since traditional medicinal knowledge form part of traditional knowledge or formulation in the field of Indian system of medicines, such as the medicinal properties of turmeric, which is recorded in ancient Ayurvedic texts and thus, is a traditional knowledge.

The Act also provides the following criterion as a ground for opposition, both before grant and after grant, namely, “that the invention so far as claimed in any claim of the complete specification is anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere.”<sup>30</sup> This provision extends the scope of protection for traditional medicinal knowledge by including within its purview the oral knowledge also, although most of the knowledge in the field of Indian system of medicine is documented and is available in the classical texts which is also a ground for revocation of a patent.<sup>31</sup> Thus, it can be said that the Patents Act prevents misappropriation of traditional medicinal knowledge.

The Act does not stand in the way of patenting of new inventions in the field of Indian system of medicine since it does not distinguish between technologies when it comes to defining invention, which could be a new product or process involving an inventive step and capable of industrial application.

The Patent Amendment Act, 2005 puts the Indian Patent Act in full conformity with the intellectual property system in all respects and replaced an ordinance promulgated in December 2004 to meet the WTO obligations. Patent Act defines invention as a new product or process involving an inventive step and capable of industrial applications.<sup>32</sup> Inventive step may be defined as a feature of an invention that involves

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29 Sec. 3 (p) of the Patents Act, 1970.

30 Sec. 25 (1)(k) and 2(k) of the Patents Act, 1970.

31 Sec. 64 (1) of the Patents Act, 1970.

32 Sec. 2(j) of The Patent Amendment Act, 2005.

technical advance as compared to existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in art. Thus, an invention, in order to be patentable, should:

- i. Involve an inventive step capable of industrial application;
- ii. Involve technical advances as compared to the existing knowledge or having economic significance or both; and
- iii. Be not obvious to a person skilled in art.

The Patents Act, 1970 has been amended under the new Act which prescribes a class of discovery which cannot be the subject matter of a patent in the following terms:

Mere discovery of a new form of known substance 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 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.<sup>33</sup>

A patentee is provided with an opportunity to prosper by grant of a patent. Thus, a large number of people from diverse backgrounds are attracted towards patents and try to create wealth through traditional medicine by claiming numerous patents on subject matters which are actually in the domain of traditional knowledge. Since the market for traditional medicine has boomed all over the world, organizations as well as individuals are trying harder to get some patents related to traditional medicines in order to exploit multi-million benefits from them. With the upsurge in acceptance of traditional medicine among global public, there is unprecedented abundances in applications to grant patent on many aspects of traditional medicines which vary from process to product categories.<sup>34</sup>

The amendments to the Patents Act in 2005 extended product patents to pharmaceuticals and food items. Therefore, new formulations and process in Ayurveda, Siddha and Unani could be patented, if they meet the criteria for patentability. In fact, even earlier, new process patent for Jeevani, an Ayurvedic drug developed by the Tropical Botanical Garden and Research Institute, Thiruvananthapuram, which became a celebrated case in the area

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<sup>33</sup> Sec. 3(d) of The Patent Amendment Act, 2005.

<sup>34</sup> Supra note 18.

of benefit sharing in traditional knowledge.<sup>35</sup> There are many patents for various Ayurvedic, Siddha and Unani formulations.

### **Some instances of Biopiracy**

The issue of intellectual property right protection for India's traditional medicine became a priority concern when instances came up of such knowledge getting patented in other countries. The Patents (Amendment) Act 2005 introduces product patents for medicines for the first time in 35 years. The Amendment omits section 5 of the 1970 Act. This removes the stricture against patenting medicines. In the case of Traditional Medicine, section 3(d) still applies. Traditional Medicine will continue to be difficult to patent in India. The Amendment lists what are not inventions: the mere discovery of a new form of a known substance 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 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.

The principal Act of 1970 has a similar provision, but it does not specifically consider an invention to be a new use of a known substance that results in enhancement of the 'known efficacy.' While case law will have to be developed, this appears to be favorable to patenting some Traditional Medicine. However, given that the US has a huge pharmaceutical market, there have been instances where Indian Traditional Medicine has been patented in America. Some of such instances are:

### **Turmeric (*Curcuma longa* Linn.)**

The rhizomes of turmeric are used as a spice for flavouring Indian cooking. As a medicine, it has been traditionally used for centuries to heal wounds and rashes. In 1995, two expatriate Indians at the University of Mississippi Medical Centre (Suman K. Das and Harihar P. Cohly) were granted a US patent<sup>36</sup> on use of turmeric in wound healing. The Council of Scientific & Industrial Research (CSIR), India, New Delhi filed a re-examination case with the US PTO challenging the patent on the grounds of existing of prior art. CSIR argued that turmeric has been used for thousands of years for healing wounds and rashes and therefore its medicinal use was not a novel invention. Their claim was supported by documentary evidence of traditional knowledge, including ancient Sanskrit text and a paper

35 Sachin Chaturvedi, "Kani Case", A Report for GenBenefit, *available at* [www.uclan.ac.uk/genbenefit](http://www.uclan.ac.uk/genbenefit) (Visited on February 13, 2019).

36 US Patent No. 5, 401,504.

published in 1953 in the Journal of the Indian Medical Association. Despite an appeal by the patent holders, the US PTO upheld the CSIR objections and cancelled the patent. The turmeric case was a landmark judgment case as it was for the first time that a patent based on the traditional knowledge of a developing country was successfully challenged. The US Patent Office revoked this patent in 1997, after ascertaining that there was no novelty; the findings by innovators having been known in India for centuries.

### **Neem (*Azadirachta indica* A. Juss.)**

Neem extracts can be used against hundreds of pests and fungal diseases that attack food crops; the oil extracted from its seeds can be used to cure cold and flu; and mixed in soap, it provides relief from malaria, skin diseases and even meningitis. In 1994, European Patent Office (EPO) granted a patent<sup>37</sup> to the US Corporation W.R. Grace Company and US Department of Agriculture for a method for controlling fungi on plants by the aid of hydrophobic extracted Neem oil. In 1995, a group of international NGOs and representatives of Indian farmers filed legal opposition against the patent. They submitted evidence that the fungicidal effect of extracts of Neem seeds had been known and used for centuries in Indian agriculture to protect crops, and therefore, was unpatentable. In 1999, the EPO determined that according to the evidence all features of the present claim were disclosed to the public prior to the patent application and the patent was not considered to involve an inventive step. The patent granted on was Neem was revoked by the EPO in May 2000. EPO, in March 2006, rejected the challenge made in 2001 by the USDA and the chemicals multinational, W. R. Grace to the EPO's previous decision to cancel their patent on the fungicidal properties of the seeds extracted from the neem tree.

### **Some other instances**

The plant *Phyllanthus amarus* Schum. et Thonn. (Jaramla) is used for Ayurvedic treatment for jaundice, a US patent has been taken for use against Hepatitis B. The plant *Piper nigrum* Linn. is used for Ayurvedic treatment for vitiligo (a skin pigmentation disorder). A patent has been taken in UK for the application of a molecule from *Piper nigrum* Linn. for use in treatment of vitiligo.

The patenting of certain properties of turmeric and neem and other such cases prompted the government to examine defensive measures that could be adopted to prevent the wrong patenting of Indian traditional

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37 EPO patent No.436257.

medicinal knowledge. The principal reason for such existing knowledge getting patented in the developed countries was the absence of database on such knowledge with the patent offices concerned for conducting prior art search. No patent can be granted on an invention, which has been published anywhere in the world and is already in use, as per the norms of the Paris Convention on Industrial Property (1883) and the Agreement on Trade Related Aspects of Intellectual Property (TRIPS Agreement) (1994). Patent Examiners find out this through search of certain databases and other documents available with the Patent Offices. Unfortunately, Indian traditional medicine knowledge was not available in such searchable databases. Therefore, the government decided to create such a database, which resulted in the Traditional Knowledge Digital Library (TKDL).<sup>38</sup>

India has established a defensive anti-appropriation strategy to counter bio-piracy in the form of TKDL. This approach is an aggressive attempt to make previously inaccessible but codified Indian traditional medicinal knowledge available in digital form, so that patent examiners will have the handy as evidence of prior art with a view to scuttling subsequent frivolous or bio-piracy patents.<sup>39</sup>

### **Challenges of the Patent Law to Traditional Medicinal Knowledge**

Traditional knowledge would be broad enough to embrace traditional knowledge of plants and animals in medical treatment and as food. But can patent law actually provide promising solutions? According to Graham Dutfield<sup>40</sup> the main objections are as follows:

- (i) TK is collectively-held and generated while patent law treats inventiveness as an achievement of individuals; this is because patents require that an individual inventor be identifiable. Yet while traditional knowledge is merely part of the public domain, a new and non-obvious modification to this knowledge achieved by an individual or identifiable group can be the subject of a patentable invention. This suggests that the collective nature of traditional knowledge production and ownership need not be a bar to the acquisition of a patent. It certainly has not been for corporations.

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38 TKDL contains information on the traditional knowledge, particularly knowledge relating to the traditional medicine in India in a digital database comparable to a patent database. The formulations and other prescriptions in the authoritative texts of Ayurveda, Siddha, Unani etc. were translated into modern languages. These were then converted into the format of the specifications in a patent application and digitized in an easily searchable format.

39 Supra note 28.

40 Graham Dutfield, *Intellectual Property Rights Trade and Biodiversity* (Routledge, 2002).

- (ii) Patent applicants must supply evidence of a single act of discovery. Patent specifications must nonetheless provide evidence of an inventive step or an act that would not be obvious to one skilled in the art. Applying the same criteria to TK would exclude much of it from patentability. This is not only because it is difficult to identify a specific act of creation in the area of traditional knowledge, but also because such acts may have taken place in the distant past. Many anthropologists have demonstrated that traditional knowledge in many societies is evolutionary, dynamic and adaptive.
- (iii) Patent specifications must be written in a technical way that examiners can understand. It would be extremely difficult for indigenous group to describe their knowledge to a patent attorney in a way that would enable the latter to complete a patent specification on their behalf. While a useful characteristic of a plant or animal may be well-known to such an individual or group, the inability to describe the phenomenon in the language of chemistry or molecular biology would make it almost impossible to apply for a patent even if the fees could be afforded, which is unlikely. This is a situation that a company can take advantage of. Patent rules in most countries require a company to do more than describe the mode of action or the active compound to acquire a patent. Minimally, it would probably need to come up with a synthetic version of the compound or a purified extract. But in the absence of a contract or specific regulation, the company would have no requirement to compensate the communities concerned.
- (iv) Applying for patents and enforcing them once they have been awarded is prohibitively expensive. The costs of preparing and prosecuting a patent application, and of periodically renewing the patent after it has been granted, are well beyond the financial means of most communities.

Nevertheless, most traditional peoples and communities seem to be fundamentally opposed to patents. There are various reasons why traditional peoples and communities are sceptical that patent law can be utilised to further their interests. The main practical difficulty that deters them from filing patents is the expense of doing so. Legally enforcing the patent against infringers is likely to be even more expensive. Moreover, patents with overly broad claims encompassing non-original products or processes are sometimes mistakenly awarded.

Supporters of patents argue that 'traditional knowledge' cannot be registered under patents. While patent law generally supports such a defence, 'the state of the art' is to some extent subjective, especially from

a cross-cultural perspective. While patent law has been contoured in ways that tend to be highly supportive of corporate interests, the demands of traditional peoples and communities are rarely if ever taken into account when patent regulations are reformed. It can be argued that a democratic IP system should take into account a wider set of interests including those of TK holders.<sup>41</sup>

## Conclusion

The system of intellectual property rights, by principle, exists to encourage innovations and discourage embezzlement of knowledge. TRIPS agreement has established that knowledge is goods which can be traded. If so, there is no logic in distinguishing and discriminating between the 'knowledge eligible for intellectual property protection in the formal system' and 'traditional knowledge in the informal system'. There is no justification for the totally different treatment, existing under the TRIPS IPR regime, for innovations using modern technology and traditional knowledge. Both should be given same legal status and recognition.

At the global level, traditional knowledge is still a relatively novel concern in international law. At present there is no binding and effective international law that safeguards and protects traditional knowledge and rights of the TK holders. Moreover, the TRIPS agreement does not mention traditional knowledge and there is no special treatment even by way of *sui generis* protection for traditional knowledge under TRIPS. For this, traditional knowledge must be recognized by the global community as a scientific knowledge system developed, nurtured and preserved by the indigenous, local and rural people, traditional healers, artisan communities etc., which is inseparably linked with their economic life, social culture and very existence. Biopiracy must be condemned and forsaken by the international community as illegal and unethical appropriation of bioresources owned by the indigenous and local communities which would perturb the continuous improvement, evolution and development of TK and which in turn would lead to the complete erosion of traditional knowledge systems existing in different parts of the globe. Hence, as submitted by India at WIPO,<sup>42</sup> there is a need to provide appropriate legal and institutional means for recognizing the rights of tribal communities on their TK based on biological resources at the international level.

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41 *ibid.*

42 Protection of Biodiversity and Traditional Knowledge – The Indian Experience, submission by India at Committee on Trade and Environment Council for Trade-Related Aspects of Intellectual Property Rights, WT/CTE/W/156, IP/C/W/198, 14 July 2000, p. 2.

# TRANSPARENCY AND ACCOUNTABILITY IN GOVERNANCE: A WAY FORWARD TO “NEW INDIA”

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Dr. J. P. Arya\*

## Abstract

*We all can agree, at least, on the desirability of social awareness about the vital aspects of accountability and transparency in public life. The Important legislation “R.T.I. Act”, made in 2005, draws attention on the eminence of our parliamentarians. People of India appreciate the idea of continuing need for careful, critical scholarship that builds on our law makers. The better we understand ourselves, including curb our darker greedy impulses, the more able we are to become responsible citizens and treat one another with dignity. In fact, the self-analysis exercise builds us strong, sincere and confident in our day to day dealings. Above all, transparency and accountability are important steps in fighting corrupt practices in organizations and government departments and also help smoothening future journey of progress to make socio-political development and economic growth of a country. The fulfillment of Prime Minister Narendra Modi’s vision of “New India” depends on the fact that government policies should try to keep Indian citizenry informed, patriotic, dedicated, skillful, honest, true, straightforward, healthy and safe in every situation. The Right to Information Act makes it statutory for the democratic system to disclose all unclassified information when and where required by citizen. The main aim of this research paper is to stress the need to focus on responsibility for transparency and accountability by the government and institutions in democratic system so that the desired goal of national progress may be attained successfully. It also suggests civil society to step up sincerely in the national interest and keep the vigil and pressure on institutions to remain accountable and transparent, enabling them to build a beautiful fabric of trust between people and institutions.*

**Keywords: Social Awareness, Accountability, Transparency, Institutions, Democratic System, Right to Information.**

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## Introduction

Importance of the term good governance encompasses state institutions and their operations and includes private sector and civil society organizations. Great ancient economist and political sage Kautilya in his treatise “Arthashastra” propounded the qualities of good governance by the ruling king as follows: In the happiness of his people lies his happiness, in public welfare is his self-welfare. Only the things whatever please himself that shall not be considered dear by him. Good governance is significant in public institutions to conduct and manage public affairs and resources to guarantee human rights in free of abuse and corruption, and with due regard for the rule of law. Good governance is thus, a function of installation of positive virtues of administration and elimination of vices of dysfunctional activities. It makes the government work effective, credible and legitimate in administrative system and citizen-friendly, value oriented, caring and people-sharing.

Transparency and accountability have a positive impact on a level of trust in government. Once on any count government lost the public’s faith, it takes longer time to restore trust in government. There is a reason to emphasize trust in government. It has been shown that trust affects the accomplishment of organizational goals, job satisfaction, and motivation<sup>1</sup> Because trust is sometimes viewed to have a close relationship with national growth or economic prosperity, it is considered social capital which enables members of society to confide in each other and form new groups and gatherings<sup>2</sup> Also, more and more researchers have proven that trust in government improves the level of public policy acceptance and reduces administrative costs, while encouraging compliance with laws and regulations.<sup>3</sup> Thus, it can be said that in modern India increasing trust in government is becoming an important goal in order for central and state governments to implement their policy measures effectively and so to realize good governance.

Speaking in the public rallies Prime Minister Narendra Modi stated that he

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- 1 Dwivedi, R. S.: Management by Trust: A Conceptual Model. *Group & Organization Studies*, 1983, 8(4): 375-376.
  - 2 Fukuyama, F.: *Trust: The Social Virtues and the Criterion of Prosperity*, The Free Press, New York, 1995.
  - 3 Ayres, Ian, and Braithwaite, John: (i) *Responsive Regulation*. Oxford: Oxford University Press, 1992; Levi, Magarete *Of Rule and Revenue*. Berkeley: University of California Press, 1998, (ii) *Consent, Dissent, and Patriotism*. New York: Cambridge University Press, 1997; Tyler, Tom R. *Trust and Democratic Government*. In *Trust and Governance* edited by Valerie Braithwaite and Margaret Levi, New York Russell Sage Foundation 1998, pp. 269-294 and *Why People Obey the Law*. New Haven, CT: Yale University Press, 1990.

believed that government has no business to do business. The focus should be on minimum government but maximum governance. For decades, we have had extraordinarily large governments. Though it tried to satisfy the needs and expectations of the people, yet ironically the quality of governance had been average. Earlier, there had been more attention paid to the size of the government than to its quality. Thus, it was voiced by media that Prime Minister Modi’s model of a small yet efficient and effective government stood out. He believed that the role of a Government in businesses should be limited to that of a facilitator.

Prime Minister Narendra Modi, in his Mann Ki Baat address of 31st December, 2017, addressed a wide range of issues and conveyed New Year greetings to the nation. He also spoke about organising Mock Parliaments in every district of India. He said, “New India needs to find ways, make plans regarding how we could accomplish our goals by 2022 and how we could build an India that our freedom fighters dreamt of.”

India follows republic, democratic and secular form of governance, and the values that are enshrined in the constitution. The term “governance” means a political unit for the functioning of policy-making for both the political and administrative units of Government. Good governance is based on the conviction that man has the ethical and rational ability, as well as the absolute right, to govern himself with motive and just. It should reflect transparency at all levels of functioning of the government. The concept of good governance is also associated with capable and real administration in democratic set up. In practical terms, inter alia there are four particular features of good government:<sup>4</sup>

First feature is the empowerment and capacity of government to frame and implement policies and to discharge functions.

Second, the form of political will, effectiveness and efficiency to ensure processes and institutions produce results that meet needs while making the best use of resources for sustainable development.

Third, the process by which authority is exercised in the management of country’s economic and social resources for development.

Fourth, institutions and policymakers try to serve all stakeholders with transparency and responsiveness. Transparency is built on the free flow of

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4 Adapted from, Source: UNDP (1997) Governance for Sustainable Human Development, United Nations Development Programme.

information. Processes, institutions and information are directly accessible to those concerned with them, and enough information is provided to understand and monitor them.

The main quality of the good leaders and the public is to have a broad and long-term perspective on good governance and human development, along with a sense of what is needed for such development. There is also an understanding of the historical, cultural and social complexities in which that perspective is grounded.<sup>5</sup>

### **Meaning of Transparency**

Transparency means knowing the reasons, facts, logics and basis of the decision taken by the administration. Transparency in public administration in legal terms means that a citizen of a nation has a right (legal or fundamental) to have access to the information about government's actions. Denial of such information to the public by the public authorities without appropriate reasons would be offence under the law. Though Supreme Court of India gave a constitutional status for the right to know, yet under the guise of Official Secrets Act 1923 and section 123 of Indian Evidence Act 1872 the executive can withhold the records from production in the court of law on security point of view. Such laws were framed by the British with the sole purpose of protecting the interest of the then executives mostly the loyalist of the British administration and to keep them out of the purview of the scrutiny of court and have become outdated. Certain provisions of these laws corrupt officials and protect them from the public exposure.

Transparency or right to know or right to get information emanates from the fundamental rights; Right to speech and expression guaranteed under Article 19(i) (a) of the Indian Constitution. Denial of information means a restriction on Right to Speech and expression.

In a democratic system right to know the affairs of public authorities is as necessary as the right of adult franchise. Without the one, another is not sufficient. Democratic government stands on two pillars namely; transparency and accountability as it is the fundamental goal of a democratic government to put peoples' will into action and be answerable to people for the same. Unfortunately, 'Secrecy is a rule and Transparency is an exception', while the demand of time is transparency everywhere and secrecy be limited to the cases pertaining only to National Security. It

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5 Ibid.

seems strange to know that the word ‘secret’ or ‘Official secrets’ is defined nowhere in the Official Secrets Act 1923. As such under the purview of Official Secrets Act, any kind of document can be termed as secret. The Section 5 of the Official Secrets Act 1923 makes almost everything a secret, it is worded in such a way that nothing is left form its ambit.

In brief, it can be said that Transparency is the basis of good governance and the first step in fighting corruption. It provides a universal rationale for the provision of good records management systems, archives, and financial regulatory and monitoring systems. In order to hold officials responsible and accountable the principle of transparency keeps vigil and discloses the wrong decisions and actions of those dishonest and corrupt persons in government and organization. They must be open to public scrutiny. Transparency means that the public has a right to access government information and records of the public authorities.

Public knowledge about what government officials do is essential in a representative democracy. Without such knowledge, citizens cannot make informed choices about who they want to represent them or hold public officials accountable.

Political theorists have traced arguments about publicity and democracy back to ancient Greece and Rome. Those arguments subsequently flowered in the middle of the 19<sup>th</sup> century. For example, writing about British parliamentary democracy, the famous philosopher Jeremy Bentham<sup>6</sup> urged that legislative deliberation be carried out in public. Public deliberation, in his view, would be an important factor in “constraining the members of the assembly to perform their duty” and in securing “the confidence of the people.”

Moreover, Bentham noted that “suspicion always attaches to mystery.”

Even so, Bentham did not think the public had an unqualified “right to know.” As he put it, “It is not proper to make the law of publicity absolute.” Bentham acknowledged that publicity “ought to be suspended” when informing the public would “favor the projects of an enemy.”<sup>7</sup>

### **Accountability Defined**

Being accountable simply means being responsible for decisions made,

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6 Is full transparency good for democracy: Please see: <http://theconversation.com/is-full-transparency-good-for-democracy-91441>.

7 Ibid.

actions taken, and assignments completed. One of the most influential minds of the American Revolution, Thomas Paine, wrote that “a body of men holding themselves accountable to nobody ought not to be trusted by anybody. Political accountability refers to the responsibility or obligation of government officials to act in the best interests of society or face consequences. Public officials should be held responsible for their actions. Legal accountability concerns the mechanisms by which public officials can be held liable for actions that go against established rules and principles.

In governance, accountability has expanded beyond the basic definition of “being called to account for one’s actions.”<sup>8</sup> It is frequently described as an account-giving relationship between individuals, e.g. “A is accountable to B when A is obliged to inform B about A’s (past or future) actions and decisions, to justify them, and to suffer punishment in the case of eventual misconduct”<sup>9</sup> Accountability cannot exist without proper accounting practices; in other words, an absence of accounting means an absence of accountability.

Accountability is an element of a RACI (Responsible, Accountable, Consulted, and Informed). The responsibility assignment matrix developed in relation to RACI which is an acronym derived from these four key responsibilities, is able to indicate who is ultimately answerable for the correct and thorough completion of the deliverable work or task, and the one who delegates the work to those responsible.

In leadership roles accountability is the acknowledgment and assumption of responsibility for actions, products, decisions, and policies including the administration, governance, and implementation within the scope of the role or employment position and encompassing the obligation to report, explain and be answerable for resulting consequences.

Accountability is important for successful leadership. When leaders take personal accountability, they are willing to answer for the outcomes of their decisions, their choices, their behaviours, and their actions in all situations in which they are involved. Accountable leaders do not blame others when

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8 Mulgan, Richard: ‘Accountability’: An Ever-Expanding Concept?’. *Public Administration*, 2000, 78 (3): 555–573 doi:10.1111/1467-9299.00218. and Sinclair, Amanda: “The Chameleon of Accountability: Forms and Discourses”. *Accounting, Organizations and Society*, 2000, 20 (2/3): 219–237. doi:10.1016/0361-3682(93)E0003-Y.

9 Schedler, Andreas: “Conceptualizing Accountability”. In Andreas Schedler; Larry Diamond; Marc F. Plattner. *The Self-Restraining State: Power and Accountability in New Democracies*. London: Lynne Rienner Publishers, 1999 pp. 13–28. ISBN 978-1-55587-773-6.

things go topsy-turvy (i.e. to become in a confused or disorganized state). An accountable and functional leader should take responsibility for the results of his actions.

According to Business Dictionary accountability is defined as the obligation of an individual or organization to account for its activities, accept responsibility for them, and to disclose the results in a transparent manner. It also includes the responsibility for money or other entrusted property.

The term public accountability is important because it provides a democratic means to: monitor and control government conduct, prevent the development of concentrations of power, and enhance the learning capacity and effectiveness of public administration. In a democracy, the principle of accountability holds that government officials — whether elected or appointed by those who have been elected — are responsible to the citizenry for their decisions and actions. Government Transparency is openness, accountability, and honesty. In a free society, transparency is government’s obligation to share information with citizens. It is at the heart of how citizens hold their public officials accountable.

The great economist, Dr. Salvador Lopez,<sup>10</sup> Assistant Professor at the University of West Georgia emphasized the fact that there are three pillars of a well-functioning accountability ecosystem: budget transparency, public transportation, and the effectiveness of oversight institutions. Government corruption is a problem that leads to inefficiency and it results into unequal allocation of resources and income. Transparency and accountability seem to be widely accepted as crucial to reduce corruption in administration.

### **RTI Act, 2005- A Practical Law to Get Information**

The chief objective of the Right to Information Act, 2005 is to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto. Thus, the main aims of the Act can be delineated as under: -

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10 Salvador Lopez’s Research Paper titled “Does Transparency Promote Less Corruption? Evidence From Around The World”, available at following website: <https://www.westga.edu/~bquest/2017/transparency.2017.pdf>.

- a. To set out practical regime of right to information.
- b. To secure access to information under the control of public authorities.
- c. To promote transparency and accountability in the working of every public authority.
- d. To constitute the Central Information Commission and State Information Commissions.
- e. To contain corruption and to hold government and its instrumentalities accountable to the governed.
- f. To preserve the confidentiality of sensitive information disclosure of which is not in larger public interest.

The provisions of RTI Act are very significant to uphold the democratic ideals of our country with an informed citizenry and to enhance transparency of information in India. It is a powerful Act to contain corruption, encourage people's participation in decision making process, and enhance efficiencies for socio economic development of the country. Certainly, the Act has been playing a pivotal role in ensuring greater probity, openness, and transparency in the functioning of public authorities.

The promulgation of Right to Information Act (2005) set the stage for the transparency in the functioning of the government and its various agencies. Under this Act, access to information from a public agency has become a statutory right of every citizen. In its enactment, it had been argued that the system of government in India is so opaque that ordinary citizens do not have much information about how decisions are made and how public resources are utilized.

In effect, RTI Act is a vehicle for greater transparency about the manner of functioning of public agencies. There have been some "major gains" in disclosure of information, as reported in media and research from time to time. According to section 2 (j), "right to information" includes the right to:

- Inspection of work, documents, records;
- Taking notes extracts or certified copies of documents or records;
- Taking certified samples of materials
- Obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device.

The Chief Information Commission (CIC) was established in 2005 and came into operation in 2006. Information Commissions sit at the crossroads between the rights of the public and the duties of officials. As such, it is essential that their judgments are consistent, well justified and can stand up to scrutiny - by the courts, the public and officials.

Section 24(1) of RTI Act (2005) gives Information Commissions a role in determining when information should be released by intelligence or security agencies exempted under Section 24(1) where it is claimed that the information sought “is in respect of allegations of violations of human rights. Section 19(5) of the Act specifically places the burden of proving that withholding information was justified onto the official who denied the request. In practice, this means that an applicant only needs to interact with the Commission after the official withholding the information has first been questioned, because the burden is on the official to show the Commission that they were not wrong.

Transparency is indispensable for making the system of public service delivery fruitful and effective. It enables information in the hands of the citizens in a way that they may be able to claim their entitlements. However, mere knowledge of what entitlements are, and who is responsible for fulfilling them, is not adequate. What is important is to ensure that public services are sufficiently and effectively delivered to the “intended” beneficiaries. There is a risk also that the opening up government becomes only a superficial process. Access to information laws should not become merely “paper” laws and they are required to be appropriately implemented. These laws should not be undermined by other laws. The right mechanisms to ensure implementation of transparency laws are just as imperative as the laws themselves.

### **Highlights of Decisions in Some Leading RTI Cases**

In a leading case,<sup>11</sup> *Chief Information Commr. & Anr v. State of Manipur & Anr*, Hon’ble Supreme Court adopted strict construction of Sections 18 and 19 and upheld the view that the Central or State Information Commission while entertaining a complaint under Section 18 of the RTI Act has no jurisdiction to pass an order providing for access to the information. The only order that can be passed by the Commission under Section 18 is an order of penalty provided under Section 20 of the RTI Act, 2005. Some excerpts of the Judgment are:

Application filed u/s 6 for obtaining information from SIO relating to

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11 Supreme Court of India: Judgment dated 12 December, 2011 in CIVIL APPEAL NOS.10787-10788 OF 2011.

magisterial enquiries. On non-response complaint u/s 19(8) filed before CIO. Its decision was challenged in writ. HC held u/s 18; Commissioner has no power to direct SIO to furnish information. On appeal SC held, out of two procedures, between Sec.18 & 19, one u/s 19 is more beneficial to person who has been denied access to info. Appellants directed to file appeals u/s 19.

It may be that sometime in statute words are used by way of abundant caution. The same is not the position in this case. Here a completely different procedure has been enacted under section 19. If the interpretation advanced by the respondent is accepted in that case section 19 will become unworkable and especially section 19(8) will be rendered a surplusage. Such an interpretation is totally opposed to the fundamental canons of construction.

It is well-known that the legislature does not waste words or say anything in vain or for no purpose. Thus, a construction which leads to redundancy of a portion of the statute cannot be accepted in the absence of compelling reasons. In the instant case there is no compelling reason to accept the construction put forward by the respondents.

Apart from that the procedure under section 19, when compared to section 18, has several safeguards for protecting the interest of the person who has been refused the information he has sought. Section 19(5), in this connection, may be referred to. Section 19(5) puts the onus to justify the denial of request on the part of information officer.

Therefore, it is for the officer to justify the denial. There is no such safeguard in section 18. Apart from that the procedure under section 19 is a time bound one but no limit is prescribed under section 18. So out of the two procedure, between section 18 and section 19, the one under section 19 is more beneficial to a person who has been denied access to information.

There is another aspect also. The procedure under section 19 is an appellate procedure. A right of appeal is always a creature of statute. A right of appeal is a right of entering a superior forum for invoking its aid and interposition to correct errors of the inferior forum. It is a very valuable right.

Therefore, when the statute confers such a right of appeal that must be exercised by a person who is aggrieved by reason of refusal to be furnished with the information; in that view of the matter this Court does

not find any error in the impugned judgment of the Division Bench. In the penultimate paragraph the Division Bench has directed the Information Commissioner, to dispose of the complaints of the respondent No. 2 in accordance with law as expeditiously as possible.

Bombay HC in *Surup Singh Naik v. Maharashtra*,<sup>12</sup> said what cannot be denied to Parliament should not be denied to citizen [Proviso to S 8(1) or RTI Act]. In this case disease related information of a convicted minister was held not personal.

Dealing with the true question what is the true import of proviso (Sec. 8(1)(j) which sets out that the information which cannot be denied to Parliament or a State Legislature shall not be denied to any person. The Hon’ble Supreme Court observes, “As the preamble notes, the Act is to provide for setting out a practical regime of right to information for citizens, to secure access to information under the control of public authorities as also to promote transparency and accountability in the working of every public authority. These objects of the legislature are to make our society more open and public authorities more accountable. Normally, therefore, all such information must be made readily available to a citizen subject to right of privacy and that information having no relationship to any public authority or entity. In the instant case the respondent No. 2 while granting the application of respondent No. 5, has given as reasons larger public interest and as that the information could not be with-held from Parliament or State Legislature.”

The reasons for the information sought by the respondent No. 5 need not be gone into, as the Act itself under Section 6(2) does not require the applicant to give any reasons for requesting the information. The contention on behalf of the petitioners, therefore, that information given may be misused really in our opinion would not arise considering the object behind Section 6(2) of the Act. The provisions of the Right to Information Act, will override the provisions of the Regulations framed under the Indian Medical Council Act to the extent they are inconsistent. The exercise of power under the Act in respect of private information is subject only to Section 8(1) (j) and the proviso. Considering the public element and interest involved the Hon’ble Court directed the respondent No. 2 to dispose of the matter on remand within 30 days.

In another leading case where a Public Information Officer (PIO) failed to provide a proper reply about the action taken on a grievance-related RTI

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12 AIR 2007 Bom 121, 2007 (109) Bom L R 844, 2007 (4) MhLj 573.

application, the High Court of Kerala ruled that the PIO is duty bound to disclose whether any action has been taken on the grievance of the citizen, instead of dismissing it as being out of jurisdiction of his Minister.<sup>13</sup>

The RTI Act (2005) ensures to eradicate any kind of corruption in Public Authority by providing mandatory obligation to the Public Authority to ensure to disseminate the information sought by the Indian citizen within a certain time period with nominal fee. Moreover, Section 4(1) (b) imposes Public authority to maintain and provide access all the information specified in the Section 4(b) by applying suo moto action.

### **New India – Vision 2022**

Governance is the exercise of economic, political and administrative authority to manage a country's affairs at all levels. The concept of Governance is broader than Government. The notion of Governance focuses on institutions and processes. Transparency in governance is vital to way forward of sustainable development of a country. It will help realize the Prime Minister Narendra Modi's dream of: "New India", "Sanklap Se Siddhi", (achievement through resolve): "Badlao Ki Aur".

Good Governance has major features such as:

- 1. Rule of law:** That individuals, persons and government shall submit to, obey and be regulated by law, and not arbitrary action by an individual or a group of individuals.
- 2. Transparency and free flow of information:** India is on the path of progress and economic development. Free flow information enhances transparency. It helps in curbing corrupt practice, nepotism and selfish interests in every sphere of life.
- 3. Participation:** Participation by people in governance consists of state-sanctioned institutional processes that allow citizens to exercise voice and vote, which results in the implementation of public policies that produce some sort of changes in citizens' lives.<sup>14</sup> Government officials should also be responsive to this kind of engagement. In practice, participatory governance can supplement the roles of citizens as voters or as watchdogs through more direct

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13 Mannatil Kumar vs The Central Information Commissioner & Ors., W.P. (C) No. 2261 of 2014, jjt dated 23/10/2014 [Single Bench- SB].

14 Wampler, B., & McNulty, S. L.: Does participatory governance matter? Exploring the nature and impact of participatory reforms. Washington, DC: Woodrow Wilson International Center for Scholars, 2011.

forms of involvement.

4. **Equity and inclusiveness:** Equity means justice and fair play. It is the quality of being fair and impartial and inclusiveness is growth-oriented approach help reducing poverty and inequality. Here groups gain greater access to education, employment and business opportunities.
5. **Effectiveness and efficiency:** It essential for the government to maintain effectiveness and efficiency continuously. Similarly, being efficient is important to both officers and the employees working in the government and institutions. Efficiency indicates using fewer inputs but producing more outputs.
6. **Accountability:** It is the individual or organization to account for its activities, accept responsibility for them, and to disclose the results in a transparent manner. It also includes the responsibility for money or other entrusted property.
7. **Control of Corruption:** Control of corruption measures the degree to which corruption is perceived to exist in the government institutions, business enterprises, public officials and politicians. Many developing countries have weaknesses in good governance which, in turn, gives rise to corruption.
8. **Balances between growth and distribution:** Balances between growth and distribution resulting into increased opportunities benefit the entire population, including the poor. The best way to help the most vulnerable is to promote such balances.
9. **Present and future resource use:** Typically, resources are materials, energy, services, staff, knowledge, or other assets that are transformed to produce benefit and, in the process, may be consumed or made unavailable.

## e-GOVERNANCE & m-GOVERNANCE

Michiel Backus<sup>15</sup> defines e-government as “the application of electronic means in the interaction between government and citizens and government and businesses, as well as in internal government operations to simplify and improve democratic, government and business aspects of governance.”

The concept of e-governance and m-governance has consistently evolved

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15 Michiel Backus: E-governance and Developing Countries: Introduction and Examples, International Institute for Communication and Development (IICD), 2001.

in Indian scenario and it is very much required for transparency and accountability on the part of government and at the same time it is also a tool to increase the participation of people in policy making by empowering them with the right information at right time. The penetration of internet, telecommunication services in India has increased in the last decade and this gives a ray of hope to the citizens of India to fight with the long persisting problems of poverty, corruption, regional disparity and unemployment. But at the same time, due to slow pace of project completion, red-tape and resistance from the side of government employees and citizens too has not given the desired result. However, National e-Governance Plan (NeGP), an important initiative of the Government of India to make all government services available to the citizens of India via electronic media is presently on fast track mode. There are many advantages of e-governance and impact public management through, for example, improved access to services, decreased operational costs, enhanced knowledge management, and strengthened coordination of government agencies. E- governance uses electronic medium to support and motivate good governance.

Public officials and citizens can interact online or via other information technology systems, with the goal of streamlining the processes that connect government organisations to their citizens (G2C), to business (G2B); and, it also has potentially beneficial government-to-government(G2G) implications.

According to the e-governance model introduced by the United Nations (UN) and the American Society for Public Administration (ASPA), the evolution of e-governance progresses through four stages: emerging, enhanced, transactional, and connected. The overall aims of e-government applications are to increase the efficiency and effectiveness of public processes, provide improved services, pave the way for economic development, enhance the business environment, and involve citizens in decision-making and governance.

Against this backdrop, e-government can prove to be a useful tool to observe the work processes of public officials. Competition is higher when there are other service providers in the market, external to established channels. People can then switch between service providers and the chances of corruption, fraud, and bribery decrease accordingly.

### **Transparency Brings Peace**

The least corrupt countries have high levels of e-governance, while the most corrupt countries name appear on Transparency International's list

of Perception of Corruption. The benefits of e-government go far beyond bringing transparency and peace. Implementation of e-government will affect public officials in three major ways. It will take away their discretionary powers and restrict them to act in the best interest of their users. It will give users several alternative means of accessing public services and hence reduce the monopolistic nature of public office. Finally, e-governance means that public officials won't have the power to use governmental resources for their personal benefit as processes will be integrated and public officials held accountable for their actions.

### **e-Bhoomi Portal (Haryana)**

The Haryana Government has launched eBhoomi Portal Haryana also known as eLand portal to ensure the transparency in land deals in the State. The benefits of e-Bhoomi Portal are:

(a)The citizens can sell their land through this online portal. (b) The portal provides a hassle-free agreement with the government. (c)The citizens can sell their lands at reasonable costs. (d) By selling lands through this portal, the citizens can make the government hassle free. (e) The portal gives the landowners an opportunity to join the decision-making process, and the location sites for development projects and ensure hassle-free and purchase by the department. The e-portal launched by the Chief Minister of Haryana makes sure transparency in the land deals.

### **Achievement Through Resolve**

Prime Minister Narendra Modi called upon the people of India and said, “Let us join this mass movement towards Surajya realize the hopes and aspirations of the people and take India to greater Heights.” The Pledge is to build a New India by 2022; an India that is devoid of corruption, is clean, has no poverty, is free of terrorism, has no distinction on the basis of caste and religion. Let us do our best endeavors to create a New India that is strong, prosperous and all-encompassing; an India that will make our freedom fighters proud.

### **Conclusion and Suggestions**

It is a matter of great satisfaction that RTI Act has been one of the friendliest legislations ever.

Thousands of people have benefitted from it. It has gone a long way in bringing about a transparency and accountability among the public

authorities and preventing corruption. But on the flipside, there have been numerous instances where the power given to the people has been misused for frivolous gains and satisfying mala-fide intentions. The fate of any law depends upon the awareness and participation of the people responsible for its implementation. Hence, to make this Act a master key to good governance and to derive maximum benefit out of it, it is the duty of CPIO to be more vigilant and conscious while dealing with the applications filed under the RTI Act. The Public Authorities should ensure that all their endeavors are driven by a promise to deliver: 'Innovation' – newer products & services consistently, 'Reliability' - in the actions & governance and 'Care' – shown uniformly in all their dealings.

The following suggestions are enlisted for improvement in dealing with R.T.I. matters:

- More efforts can be made in further improving the technical infrastructure through easier and better access to VC facilities, digitization and centralization of records pertaining to each case, linking of files relating to same information seeker to address duplicity of case files, etc.
- Improvement in Staff Skill set through periodic workshops and training sessions on RTI Act, 2005 in General and specific skill set in particular
- Facilitating ease of access to information. The CPIO should show empathy and help the information seeker to write application and to suggest the easy way for payment of application fees.
- Sensitization regarding Rights available to the citizens as per the RTI Act, 2005 through Free Legal aid/awareness camps, Nukkad Natak etc.
- Awareness about the objective of the RTI Act and the nature of information that can be sought: It has been experienced on several occasions that information seekers approach the Commission for redressal of their personal grievances or in furtherance of their personal difference.
- Greater Awareness and understanding of Public and Public Authorities.
- Capacity Building Programme for CPIOs should be conducted periodically.

- Due Diligence while Appointing CPIOs/ FAAs: Each Public Authority should exercise due care and caution while appointing CPIOs/ FAAs to ensure that highly motivated and committed officers are appointed for such positions.
- Sensitization regarding provisions of RTI Act, 2005 and nature of information that can be disclosed to citizens and the information that is exempt from disclosure.
- Greater Awareness and understanding of “Larger Public Interest”. Basically, Public interest includes “disclosure of information that leads towards greater transparency and accountability” in the working of a public authority.
- Periodic Audits of type of information repeatedly asked by information seekers: Once analyzed information can be proactively disclosed on the website in accordance with the provisions of Section 4 of the RTI Act, 2005

In a democratic country like India, the role of judiciary cannot be undermined. The Judiciary which acts as the guardian of the Fundamental Rights and watchdog of the constitutional provisions exercises its power of judicial review to keep a check on exercise of powers by the Legislatures and Executive. The Judiciary by way of its orders and judgments promotes social justice and its role and significance in the RTI mechanism is immense considering that the judgments pronounced by Higher Courts act as guiding principle for all concerned and help in developing the RTI jurisprudence which is still at its nascent stage.

The act per se provides sufficient safeguards vide section 8-10 to exempt providing of certain information. The CIC, honorable High Courts and the honorable Supreme Court of India through various pronouncements have also directed the Public Authorities to provide the information to the appellant in the larger public interest. RTI Act 2005 was enacted to play a critical role in systematic corrections rather than limiting its success to individual cases. In fact, RTI Act is a step towards ensuring a stronger and vibrant democratic process in India. The effective implementation of which however rests on proper compliance of the statutory provisions and preventing promotion of selfish motives.

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# ACID ATTACK IN INDIA: THE LAW AND LEGAL STRATEGIES TO COMBAT VIOLENCE AGAINST WOMEN

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Praveen Malik\*

## Abstract

*Acid Attack has emerged as the 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 attack.*

**Keywords: Acid Attack, Violence, Dowry, Indian Legal System, Judiciary.**

## 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

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

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, 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 vitriol age, 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 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 motor cycles or on public roads, as it provides the easiest medium of escape even in broad day light. 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 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.

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2 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.”

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

4 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.

## 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 vitriol age is defined as the act of throwing acid onto the body of a person “with the intention of injuring or 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,

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

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

7 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 tabmodulid=94&article id=805020&module id=405 and Portal Id=0>).

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.

### **Consequences of Acid Attack**

Acid attack victim faces long-term consequences, after the attack, their life style changes completely in one day, even their loved one's also start ignoring the acid attack victims. Due to their horrific physical appearances, the society also looks at the acid attack victims as an alien. Acid attack victims itself 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 affect the victim woman both physically and psychologically.

### **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 deepness 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.

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8 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.

## **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.

## **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 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.

## **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

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9 *Ibid.*

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

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 recognised 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 offence 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 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

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

12 Section 324 of the Indian Penal Code, 1860.

13 Section 326 of the Indian Penal Code, 1860.

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.

### **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 constitute 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 penalises 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 incident. 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.

### **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, in spite of Supreme Court's strict guidelines on the issue. Acid victims also feel reluctant to report acid attacks because they fear the harassment and the ridicule from the police officers. Officers may frame acid violence investigations in terms of a women'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 also not paid to the victims. In *Ravinder Singh v. State of Haryana*,<sup>16</sup> acid was

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14 Supra note 6.

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

16 *Ravinder Singh v. State of Haryana* SC 856 AIR (1975).

poured on a woman by her husband for refusing to give her divorce. The husband was involved in 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 v. 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 disfigurement of the face of both the wife as well as that of the other person and loss of vision of 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 time has 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 atleast 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. He 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

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17 CriLJ 1403 (2002).

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 need to work efficiently hand in hand, otherwise the pains and sufferings of the victims will be everlasting.

## **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.”

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# SHOULD DEATH PENALTY BE AWARDED IN THE CASES OF RAPE OF MINORS?

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Mr. Kush Kalra\*

## Abstract

*Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances. It is now settled law that where maximum punishment that could be awarded under a provision is death penalty, the Courts are required to independently consider facts of each case and determine a sentence which is the most appropriate and proportional to the culpability of the accused.*

*It is not sufficient for the Court to decide the quantum of sentence only with reference to one of the classes under any one of the head of circumstances while completely ignoring classes under the other. That is to say, what is required to be considered is not just the circumstances by placing them in separate compartments, but their cumulative effect. The Court ought to be sufficiently cautious and adherent of the same so as to better administer the criminal justice system and provide an effective and meaningful reasoning by the Court as contemplated Under Section 354 (3) of the Code while sentencing.*

*The Crime Test, Criminal Test and the “Rarest of the Rare Test” are certain tests evolved by Supreme Court. The Tests basically examine whether the society abhors such crimes and whether such crimes shock the conscience of the society and attract intense and extreme indignation of the community. The cases exhibiting premeditation and meticulous execution of the plan to murder by levelling a calculated attack on the victim to annihilate him, have been held to be fit cases for imposing death penalty.*

*Where innocent minor children, unarmed persons, helpless women and old and infirm persons have been killed in a brutal manner by persons in dominating position, and where after ghastly murder displaying depraved mentality, the accused have shown no remorse, death penalty has been imposed. Where it is established that the accused is a hardened criminal and has committed murder in a diabolic manner and where it is felt that reformation and rehabilitation of such a person is impossible and if let*

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*free, he would be a menace to the society, Supreme Court has not hesitated to confirm death sentence.*

**Keywords: Death Penalty, Rape, Rarest of rare case, crime, murder etc.**

## **Introduction**

Unfortunately, a woman, in our country, belongs to a class or group of society who are in a disadvantaged position on account of several social barriers and impediments and have, therefore, been the victim of tyranny at the hands of men with whom they, fortunately, under the Constitution enjoy equal status. Women also have the right to life and liberty; they also have the right to be respected and treated as equal citizens. Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life. Women, in them, have many personalities combined. They are Mother, Daughter, Sister and Wife and not play things for center spreads in various magazines, periodicals or newspapers nor can they be exploited for obscene purposes. They must have the liberty, the freedom and, of course, independence to live the roles assigned to them by Nature so that the society may flourish as they alone have the talents and capacity to shape the destiny and character of men anywhere and in every part of the world. Rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crises. It is only by her sheer will power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21.<sup>1</sup>

If the purpose of laws is to achieve some semblance of justice, we have to bear in mind that it must fulfil two purposes. One, people should have faith in the law which has been enacted. And two, the law should generate fear in the hearts of potential criminals and violators.

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1 Article 21 in The Constitution of India, 1949.

21. Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 15(3)<sup>2</sup> of the Constitution of India confers upon the State powers to make special provision for women and children. Article 39<sup>3</sup> *inter alia*<sup>4</sup> provides that the State shall, in particular, direct its policy towards securing that the tender age of children is not abused and their childhood is protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.

The United Nations Convention on the Rights of Children,<sup>5</sup> rectified<sup>6</sup> by India on 11<sup>th</sup> December 1992, requires the State Parties to undertake all appropriate national, bilateral and multilateral measures to prevent the

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- 2 Article 15 in The Constitution of India 1949.
15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.
1. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
  2. 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 palaces 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.
  3. Nothing in this article shall prevent the State from making any special provision for women and children.
  4. Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.
- 3 Article 39 in The Constitution of India 1949.
39. Certain principles of policy to be followed by the State: The State shall, in particular, direct its policy towards securing.
- a. that the citizens, men and women equally, have the right to an adequate means to livelihood.
  - b. that the ownership and control of the material resources of the community are so distributed as best to subserve the common good.
  - c. that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.
  - d. that there is equal pay for equal work for both men and women.
  - e. that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.
  - f. that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.
- 4 Meaning of *inter alia*: Among other things.
- 5 The United Nations Convention on the Rights of the Child (commonly abbreviated as the CRC or UNCRC) is a human rights treaty which sets out the civil, political, economic, social, health and cultural rights of children. The Convention defines a child as any human being under the age of eighteen, unless the age of majority is attained earlier under national legislation.
- 6 Meaning of *rectify*:
- a. To set right; correct.
  - b. To correct by calculation or adjustment.

inducement or coercion of child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices etc.

### **Who is a Child in India?**

The age of responsibility has been fixed at different levels in different statutes, even in our country. While under Section 82<sup>7</sup> of the Indian Penal Code, 1860 (in short the IPC), nothing is construed as an offence, which is, done by a child under 7 years of age; under Section 83<sup>8</sup> of the IPC, nothing is an offence which is done by a child above 7 years of age and under 12, who has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct on that occasion.

However, under Section 2(k)<sup>9</sup> of the Juvenile Justice (Care & Protection of Children Act, 2000) (in short the JJC Act), the age of a juvenility is 18 years or below. Section 2(l) of the Juvenile Justice (Care & Protection of Children) Act, 2000 provides that juvenile in conflict with law means a juvenile who is alleged to have committed an offence and has not completed the 18th year of age as on the date of commission of such offence.

While generally treating eighteen to be the age till which a person could be treated to be a child, it also indicates that the same was variable where national laws recognize the age of majority earlier. In this regard, one of the other considerations which weighed with the legislation in fixing the age of understanding at eighteen years is on account of the scientific data that indicates that the brain continues to develop and the growth of a child continues till he reaches at least the age of eighteen years and that it is at that point of time that he can be held fully responsible for his actions. Along with physical growth, mental growth is equally important, in assessing the maturity of a person below the age of eighteen years.

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7 Section 82 in The Indian Penal Code .  
Act of a child under seven years of age. —Nothing is an offence which is done by a child under seven years of age.

8 Section 83 in The Indian Penal Code.  
83. Act of a child above seven and under twelve of immature understanding.  
Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

9 Section 2(k) in The Juvenile Justice (Care and Protection of Children) Act, 2000  
(k) “juvenile” or “child” means a person who has not completed eighteenth year of age.

## **The Protection of Children from Sexual Offences (POCSO) Act, 2012**

The POCSO Act, 2012<sup>10</sup> is a gender-neutral legislation. It defines a child as any individual below 18 years and provides protection to all children from sexual abuse. Definition of child sexual abuse is comprehensive and encompasses the following: (i) penetrative sexual assault, (ii) aggravated penetrative sexual assault, (iii) sexual assault, (iv) aggravated sexual assault, (v) sexual harassment, (vi) using child for pornographic purpose, and (vii) trafficking of children for sexual purposes. The above offences are treated as “aggravated”, when the abused child is mentally ill or when the abuse is committed by a person in a position of trust or authority vis-à-vis the child. The Act prescribes stringent punishment graded as per the gravity of the offence, with a maximum term of rigorous imprisonment for life, and fine.

The POCSO Act further makes provisions for avoiding re-victimization, child friendly atmosphere through all stages of the judicial process and gives paramount importance to the principle of “best interest of the child”. It incorporates child friendly mechanisms for reporting, recording of evidence, investigation and speedy trial of offences, trial in-camera and without revealing the identity of the child through designated Special Courts. It also provides for the Special Court to determine the amount of compensation to be paid to a child who has been sexually abused, so that this money can then be used for the child’s medical treatment and rehabilitation.<sup>11</sup>

## **Offence of Rape under IPC, 1860**

The offence of rape occurs in Chapter XVI of IPC. It is an offence affecting the human body. In that chapter, there is a separate heading for ‘Sexual offence’, which encompasses Sections 375, 376, 376A, 376B, 376C, and 376D. ‘Rape’ is defined under Section 375. Sections 375 and 376 have been substantially changed by Criminal Law (Amendment) Act, 1983, and several new sections were introduced by the new Act, i.e. 376A, 376B, 376C and 376D. The fact that sweeping changes were introduced reflects the legislative intent to curb with iron hand, the offence of rape which affects the dignity of a woman. The offence of rape in its simplest term sentence is ‘the ravishment of a woman, without her consent, by force,

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10 The Protection of Children from Sexual Offences Act, 2012. [accessed on April 26, 2018]. Available from: <http://wcd.nic.in/childact/childprotection31072012.pdf>.

11 POCSO Act – Providing Child-Friendly Judicial Process. Press information Bureau, Government of India. [accessed on April 26, 2018]. Available from: <http://pib.nic.in/newsite/efeatures.aspx?relid=86150>.

fear or fraud', or as 'the carnal knowledge of a woman by force against her will'. 'Rape' or 'Raptus' is when a man hath carnal knowledge of a woman by force and against her will; or as expressed more fully, 'rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will'. The essential words in an indictment for rape are rapuit and carnaliter cognovit; but carnaliter cognovit, nor any other circumlocution without the word rapuit, are not sufficient in a legal sense to express rape. In the crime of rape, 'carnal knowledge' means the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation. In 'Encyclopedia of Crime and Justice' (Volume 4, page 1356) it is stated "...even slight penetration is sufficient and emission is unnecessary". In Halsbury's Statutes of England and Wales (Fourth Edition) Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation with violence of the private person of a woman-an-outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order. The physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame.

### **What amounts to Rape/Sexual Intercourse?**

It has been a consistent view of Supreme Court that even a slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial. It is appropriate in this context to reproduce the opinion expressed by Modi in Medical Jurisprudence and Toxicology (Twenty Second Edition) at page 495 which reads thus:

Thus, to constitute the offence of rape, it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case, the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is to the effect whether there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.

## **National Crime Records Bureau (NCRB)<sup>12</sup> 2011 report specifically deals with the statistics of rape victims which is as follows**

### **Rape Victims**

There were 24,270 victims of Rape out of 24,206 reported Rape cases in the country. 10.6% (2,582) of the total victims of Rape were girls under 14 years of age, while 19,0% (4,646 victims) were teenaged girls (14-18 years). 54,7% (13,264 victims) were women in the age-group 18-30 years. However, 15,0% (3,637 victims) were in the age group of 30-50 years while 0.6% (141 victims) was over 50 years of age.

Offenders were known to the victims in as many as in 22,549 (94.2%) cases. Parents/close family members were involved in 1.2% (267 out of 22,549 cases) of these cases, neighbours were involved in 34.7% cases (7,835 out of 22,549 cases) and relatives were involved in 6.9% (1,560 out of 22,549 cases) cases.

A total of 7,112 cases of child rape were reported in the country during 2011 as compared to 5,484 in 2010 accounting for an increase of 29.7% during the year 2011. Madhya Pradesh has reported the highest number of cases (1,262) followed by Uttar Pradesh (1088) and Maharashtra (818). These three States altogether accounted for 44.5% of the total child rape cases reported in the country.

The Department of Women and Child Development conducted a study and prepared a Draft of the Offences against Children Bill, 2005 which was further discussed with the National Commission for Protection of Child Rights (NCPCR).<sup>13</sup>

Parliament later passed the Act titled “The Protection of Children from Sexual Offences Act 2012. (Act 32 of 2012) which received the assent of the President on 19th June. 2012. The Act provides for reporting of sexual

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12 The National Crime Records Bureau, abbreviated to NCRB, is an Indian government agency responsible for collecting and analysing crime data as defined by the Indian Penal Code (IPC). NCRB is headquartered in New Delhi and is part of the Ministry of Home Affairs(MHA), Government of India.

13 The National Commission for Protection of Child Rights (NCPCR) is an Indian governmental commission, established by an Act of Parliament, the Commission for Protection of Child Rights Act in December 2005, thus is a statutory body. The commission works under the aegis of Min. of Women and Child development, GoI. The Commission began operation a year later in March 2007. The Commission considers that its Mandate is “to ensure that all Laws, Policies, Programmes, and Administrative Mechanisms are in consonance with the Child Rights perspective as enshrined in the Constitution of India and the UN Convention on the Rights of the Child.”

offences and the punishment for failure to report or record punishment for filing false complaint and/or false information, The Act also provides for a Justice Delivery System for child victims and few other provisions to safeguard the interest of children.

Chapter V of the Act deals with the Procedure of reporting of cases. Section 19(1)<sup>14</sup> deals with the manner in which the case has to be reported to the Special Juvenile Police Unit or local police. Section 20 deals with the obligation of media, studio and photographic facilities to report cases and the same reads as follows:

*20. Any personnel of the media or hotel or lodge or hospital or club or studio or photographic facilities, by whatever name called, irrespective of the number of persons employed therein, shall, on coming across any material or object which is sexually exploitative of the child (including pornographic, sexually-related or making obscene representation of a child or children) through the use of any medium, shall provide such information to the Special Juvenile Police Unit, or to the local police, as the case may be.*

<sup>14</sup> Chapter V: Procedure for Reporting of Casts.

19. Reporting of offences. -

1. "Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to, -
  - a. the Special Juvenile Police Unit, or
  - b. the local police.
2. Every report given under sub-section (1) shall be-
  - a. ascribed an entry number and recorded in writing.
  - b. be read over to the informant.
  - c. shall be entered in a book to be kept by the Police Unit.
3. Where the report under sub-section (1) is given by a child, the same shall be recorded under sub-section (2) in a simple language so that the child understands contents being recorded.
4. In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.
5. Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection (including admitting the child into shelter home or to the nearest hospital) within twenty-four hours of the report, as may be prescribed.
6. The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.
7. No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1).

**Section 21 prescribes punishment for failure to report or record a case, which reads as follows**

21. (1) Any person, who fails to report the commission of an offence under Sub-section (1) of Section 19 or Section 20 or who fails to record such offence under Sub-section (2) of Section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

(2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under Sub-section (1) of Section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.

In large numbers of cases, children are abused by persons known to them or who have influence over them. Criminal Courts in this country are galore with cases where children are abused by adults addicted to alcohol, drugs, depression, marital discord etc. Preventive aspects have seldom been given importance or taken care of. Penal laws focus more on situations after commission of offences like violence, abuse, exploitation of the children. Witnesses of many such heinous crimes often keep mum taking shelter on factors like social stigma, community pressure, and difficulties of navigating the criminal justice system, total dependency on perpetrator emotionally and economically and so on. Some adult members of family including parents choose not to report such crimes to the police on the plea that it was for the sake of protecting the child from social stigma and it would also do more harm to the victim. Further, they also take shelter pointing out that in such situations some of the close family members having known such incidents would not extend medical help to the child to keep the same confidential and so on, least bothered about the emotional, psychological and physical harm done to the child. Sexual abuse can be in any form like sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted or encouraging, inducing or forcing the child to be used for the sexual gratification of another person, using a child or deliberately exposing a child to sexual activities or pornography or procuring or allowing a child to be procured for commercial exploitation and so on.

Since best interest of the child is paramount and not the interest of perpetrator of the crime. Our approach must be child centric. Complaints received from any quarter, of course, have to be kept confidential without casting any stigma on the child and the family members. But, if the

tormentor is the family member himself, he shall not go scot free. Proper and sufficient safeguards also have to be given to the persons who come forward to report such incidents to the police or to the Juvenile Justice Board.<sup>15</sup>

President of India on 3rd February, 2013 promulgated an ordinance titled “The Criminal Law (Amendment) Ordinance, 2013, further to amend the Code of Criminal Procedure, 1973, Indian Evidence Act, 1872 and the Indian Penal Code, 1860. By the ordinance Sections 375, 376, 376-A, 376-B, 376-C and 376-D of the Code have been substituted by new Sections. The word “rape” has been replaced by the word “sexual assault”. Section 375 has also clarified that lack of physical resistance is immaterial for constituting an offence. A new Section 376-A has been added which reads as follows:

*376A. Whoever, commits an offence punishable under Sub-section (1) or Sub-section (2) of Section 376 and in the course of such commission inflicts an injury which causes the death of the person or causes the person to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean the remainder of that person’s natural life, or with death.*

*Therefore a person, who commits an offence punishable under Sub-section (1) and Sub-section (2) of Section 376 and causes death shall be punishable with rigorous imprisonment for a term which shall not be less than twelve years but which may extend to imprisonment for life, which shall mean the remainder of that periods natural life or with death.*

## **Crime and Punishment**

The criminal law in general adheres to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability

<sup>15</sup> The Juvenile Justice Board or JJB is the authority that deals with Children in Conflict with Law (a child offender).

of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.

Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilized societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Crimes of violence upon women need to be severely dealt with. The socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing Courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. Courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years, married women and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court. There is no extenuating or mitigating circumstances available on the record which may justify imposition of any sentence less than the prescribed minimum. To show mercy in the case of such a heinous crime would be a travesty of justice and the plea for leniency is wholly misplaced.

### **Criminal Law Amendment Act of 2013**

The Criminal Law Amendment Act of 2013,<sup>16</sup> that came into force did not accept all the recommendations of the Justice Verma Committee.

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16 Available at <http://bit.ly/1GxoUuT>.

However, major changes in substantive and procedural law were made with respect to rape cases.

The amendments made in the Indian Penal Code 1860, Code of Criminal Procedure 1973 and Indian Evidence Act, 1872 relating to rape cases were as follows:

### **Indian Penal Code, 1860 (IPC)**

1. The amendment inserted a new provision under section 166 A for punishing public servants who refuse to record a FIR in cases of specified crimes against women including rape.
2. The amendment also inserted a new proviso under section 166 B punishing those in charge of a public or private hospital for refusal to provide free medical treatment for victims of rape.
3. The age of consent was raised from 16 to 18 years.
4. The amendment also included a section 376E for repeated offenders and laid down stricter punishment for persons convicted under this section. Death penalty was also introduced in this section as the punishment along with life imprisonment without parole.

### **Code of Criminal Procedure, 1973 (CrPC)**

1. Section 164(5A) was inserted by the Criminal Law Amendment Act 2013, which makes it mandatory for recording of statement of the victim/survivor by the Judicial Magistrate, as soon as the commission of the offence is brought to the notice of the police.
2. Section 375C, inserted by the Criminal (Amendment) Act 2013, makes it mandatory for all public and private hospitals to immediately provide free first aid or medical treatment to victims of acid attack and rape, and to immediately inform the police of such incident.

### **Indian Evidence Act, 1872 (IEA)**

1. A new section 53 A was inserted by the Criminal Law Amendment Act 2013 which deals with 'evidence of character or previous sexual experience'. As per this section, in a prosecution for an offence of rape, where the question of consent is in issue, evidence of the character of the victim or of such person's previous sexual

experience with any person shall not be relevant on the question of such consent or quality of consent.

2. The existing section 114A was substituted by a new one stating that in a prosecution for rape under clauses (a) to (n) of section 376(2) IPC, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

### Death Penalty when can it be awarded

In the case of *Bachan Singh v. State of Punjab*,<sup>17</sup> while determining the constitutional validity<sup>18</sup> of the death penalty, Supreme Court examined the sentencing procedure embodied in Sub-section (3) of Section 354<sup>19</sup> Code of Criminal Procedure and held as follows:

<sup>17</sup> (1980) 2 SCC 684.

<sup>18</sup> The constitution is the basic law of the land. In other words, all other laws have to be in conformity with the constitution. Any law that is not in conformity with the constitution is invalid. This constitutional invalidity can arise due to broadly, two kinds of reasons - substantive and procedural.

1. **Substantive:** the constitution provides some substantive norms. For instance, the US Constitution's First Amendment provides the right to free speech that can't be taken away by legislations. If a legislation takes away that right in an unacceptable manner (that is, without heeding to the exceptions to free speech carved out by the supreme court), then the legislation is struck down as invalid.
2. **Procedural:** the constitution sometimes can also lay down the manner in which a legislation must come into effect. For instance, in India, a bill (a proposed legislation) must be passed in both Houses of the Parliament before it becomes central law. Any procedural impropriety therein leads to constitutional invalidity of the legislation.

There are countless examples that can be given for both kinds of constitutional invalidity. These two kinds of constitutional invalidity are not watertight compartments - there can, arguably, be overlaps.

<sup>19</sup> **Section 354 in The Code of Criminal Procedure, 1973**

354. Language and contents of judgment.

1. Except as otherwise expressly provided by this Code, every judgment referred to in section 353, -
  - (a) shall be written in the language of the Court.
  - (b) shall contain the point or points for determination, the decision thereon and the reasons for the decision.
  - (c) shall specify the offence (if any) of which, and the section of the Indian Penal Code (45 of 1860) or other law under which, the accused is convicted and the punishment to which he is sentenced.
  - (d) if it be a judgment of acquittal, shall state the offence of which the accused is acquitted and direct that he be set at liberty.

*While considering the question of sentence to be imposed for the offence of murder under Section 302 of the Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence.*

In *Machhi Singh and Ors. v. State of Punjab*,<sup>20</sup> Supreme Court held that case fell in the category of rarest of rare cases calling for capital punishment since the victim of murder was an innocent child who could not have or had not provided even an excuse, much less a provocation for murder or the murder was committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner which arose intense and extreme indignation of the community. The motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof are factors which normally weigh with the court in awarding the death sentence terming it as the rarest of the rare cases.

In *Bachan Singh v. State of Punjab* and *Machhi Singh and Ors. v. State of Punjab*,<sup>21</sup> Supreme Court laid down various principles for awarding sentence:

**Aggravating circumstances: (Crime test)**

1. The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.
2. The offence was committed while the offender was engaged in the commission of another serious offence.
3. The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.
4. The offence of murder was committed for ransom or like offences to receive money or monetary benefits.
5. Hired killings.

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20 (1983) 3 SCC 470.

21 (1983) 3 SCC 470.

6. The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.
7. The offence was committed by a person while in lawful custody.
8. The murder or the offence was committed, to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Code of Criminal Procedure.
9. When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.
10. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.
11. When murder is committed for a motive which evidences total depravity and meanness.
12. When there is a cold-blooded murder without provocation.
13. The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

### **Mitigating Circumstances: (Criminal test)**

1. The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.
2. The age of the accused is a relevant consideration but not a determinative factor by itself.
3. The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.
4. The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.
5. The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and

circumstances of the case, the accused believed that he was morally justified in committing the offence.

6. Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.
7. Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused.

***Below are the cases in which Death penalty has been awarded for rape and murder of minor girls***

1. *Nathu Garam v. State of Uttar Pradesh*<sup>22</sup>

Supreme Court in that case **upheld** the death sentence awarded by the trial Court, confirmed by the High Court, for causing death of a 14-year-old girl by a person aged 28 years after luring her into the house for committing criminal assault. Stress was more on “crime test”.

2. *Dhananjoy Chatterjee v. State of West Bengal*<sup>23</sup>

Supreme Court dealt with a case of rape and murder of a young girl of about 18 years. The Court opined that a real and abiding concern for the dignity of human life is required to be kept in mind by courts while considering the confirmation of the sentence of death but a cold-blooded and pre-planned murder without any provocation, after committing rape on an innocent and defenseless young girl of 18 years exists in a rarest of rare cases which calls for no punishment other than capital punishment.

3. *Laxman Naik v. State of Orissa*<sup>24</sup>

Supreme Court again confirmed the death sentence on an accused for the offence of rape followed by murder of 7-year-old girl by her own uncle. The Court opined that the accused seems to have acted in a beastly manner. After satisfying his lust, he thought that the victim might expose him for the commission of offence on her to her family members and others, the accused with a view to screen the evidence of the crime, put an end to the life of that innocent girl. The Court noticed how diabolically the accused had conceived his plan and brutally

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22 (1979) 3 SCC 366).

23 (1994) 2 SCC 220).

24 (1994) 3 SCC 381).

executed it in such a calculated cold blooded and brutal murder of a very tender age girl after committing rape on her which, according to the Court, undoubtedly falls in the rarest of rare case attracting no punishment other than capital punishment.

4. *Kamta Tiwari v. State of M.P.*<sup>25</sup>

Supreme Court dealt with a case of rape followed by murder of a 7-year-old girl. Evidence disclosed that the accused was close to the family of the father of the deceased and the deceased used to call him “uncle”. Supreme Court noticed the closeness to the accused and the accused encouraged her to go to the grocery shop where the girl was kidnapped by him and was subjected to rape and later strangled to death throwing the dead body in a well. Supreme Court described the murder as gruesome and barbaric and pointed out that a person, who was in a position of a trust, had committed the crime and the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuaded Supreme Court to hold that case as a rarest of rare cases where death sentence was warranted.

5. *Molai and Anr. v. State of M.P.*<sup>26</sup>

A three-Judge Bench of Supreme Court justified death sentence in a case where a 16-year-old girl, preparing for her Tenth Standard Examination was raped and strangled to death. The Court noticed the gruesome manner in which rape was committed and the way in which she was strangled to death and the dead body was immersed in the septic tank.

6. *Bantu v. State of Uttar Pradesh*<sup>27</sup>

Supreme Court confirmed death sentence in a case where a minor girl of 5 years was raped and murdered. Supreme Court, following the principles laid down in *Bachan Singh*, pointed out that when the victim of the murder is an innocent child or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community, it is a vital factor justifying award of capital punishment.

7. *Shivaji @ Dadya Shankar Alhat v. The State of Maharashtra*<sup>28</sup>

This was a case where the accused, a married man having three children, was known to the family of the deceased. The Court noticed

25 (1996) 6 SCC 250.

26 (1999) 9 SCC 581.

27 (2008) 11 SCC 113.

28 (2008) 15 SCC 269.

the horrendous manner in which the girl aged 9 years was done to death after ravishing her. The Court awarded capital punishment. The Court, in this case, took the view that mitigating and aggravating circumstances have to be balanced.

8. *Mohd. Mannan @ Abdul Mannan v. State of Bihar*<sup>29</sup>

This was a case where a minor girl aged 7 years was kidnapped, raped and murdered. Court noticed how the accused had won the trust of that innocent girl and the gruesome manner in which she was subjected to rape and then strangled her to death. The accused was aged 42-43 years. The Court held that he would be a menace to society and would continue to be so and could not be reformed. The Court awarded death sentence.

9. *Rajendra Pralhadrao Wasnik v. State of Maharashtra*<sup>30</sup>

This was a case of rape and murder of a 3 years old child by a married man of 31 years. Court noticed the brutal manner in which the crime was committed and the pain and agony undergone by the minor girl. The Court confirmed the death sentence awarded.

10. *B.A. Umesh v. Registrar General, High Court of Karnataka*,<sup>31</sup> was a case of the rape and murder of a lady, a mother of a 7-year-old child. In the High Court, there was a difference of opinion on the sentence to be awarded - one of the learned judges confirmed the death penalty while the other learned judge was of the view that imprisonment for life should be awarded. The matter was referred to a third learned judge who agreed with the award of a death penalty. Supreme Court confirmed the death penalty since the crime was unprovoked and committed in a depraved and merciless manner; the accused was alleged to have been earlier and subsequently involved in criminal activity; he was a menace to society and incapable of rehabilitation; the accused did not feel any remorse for what he had done.

11. *In Rajendra Pralhadrao Wasnik v. State of Maharashtra*<sup>32</sup>

The accused, a 31-year-old, had raped and murdered a 3 year old child. Supreme Court considered the brutality of the crime and the conduct of the accused prior to, during and after the crime. Prior to the incident, the accused had worked under a false name and had gained the trust and

29 (2011) 5 SCC 317.

30 (2012) 4 SCC 37.

31 (2011) 3 SCC 85.

32 (2012) 4 SCC 37.

confidence of the victim. The accused had, after committing a brutal crime, left the injured victim in the open field without any clothes, thereby exhibiting his unfortunate and abusive conduct.

### Cases in which Death Penalty is Commuted<sup>33</sup>

#### 1. *Kumudi Lal v. State of U.P.*<sup>34</sup>

It was a case where a 14-year girl was raped and killed by strangulation. The Court accepted the brutality of the crime, however commuted death penalty to life imprisonment. The Court noticed that the evidence did not indicate the girl was absolutely unwilling but rather showed that she initially permitted the accused to take some liberties with her but later expressed her unwillingness. Treating the same as a mitigating factor, death sentence was commuted to that of life imprisonment.

#### 2. *Raju v. State of Haryana*<sup>35</sup>

Supreme Court commuted death sentence to life imprisonment in a case where a girl of 11 years was raped and murdered. Court noticed that the accused had no intention to murder her, but on the spur<sup>36</sup> of the moment, without any premeditation,<sup>37</sup> he gave two brick blows which caused the death. Further, it was also found that the accused had no previous criminal record or would be a threat to the society.

#### 3. *Bantu alias Naresh Giri v. State of M.P.*<sup>38</sup>

Supreme Court commuted death sentence to that of life imprisonment in a case where a girl of 6 years was raped and murdered by a boy of less than 22 years. Though, Supreme Court found that the act was heinous and required to be condemned,<sup>39</sup> but it could not be said to be one of the rarest of rare category. The accused did not require to be eliminated from the society.

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33 Meaning of commute:

1. To substitute (one thing for another); exchange.
2. To change (a penalty, debt, or payment) to a less severe one.

34 (1999) 4 SCC 108).

35 (2001) 9 SCC 50).

36 Meaning of spur:

1. A short spike or spiked wheel that attaches to the heel of a rider's boot and is used to urge a horse forward.
2. An incentive.

37 Meaning of premeditation: To form an intent to carry out (an action, such as a crime); intend to carry out.

38 (2001) 9 SCC 615).

39 Meaning of condemn:

1. To express strong disapproval of.
2. To pronounce judgment against; sentence.

4. *State of Maharashtra v. Suresh*<sup>40</sup>

Supreme Court in that case commuted the death sentence to life imprisonment where a girl of 4 years old was raped and murdered. Though Supreme Court felt that the case was perilously<sup>41</sup> near the region of rarest of the rare cases, but refrained from imposing extreme penalty.

5. *Amrit Singh v. State of Punjab*<sup>42</sup>

Supreme Court commuted death sentence to that of life imprisonment in a case, where a 7-8 years old girl was raped and murdered by the accused aged 31 years. The Court noticed the manner in which the deceased was raped, it was brutal, but held it could have been a momentary lapse on the part of the accused, seeing a lonely girl at a secluded place and there was no pre-meditation for commission of the crime.

6. *Rameshbhai Chandubhai Rathod v. The State of Gujarat*<sup>43</sup>

Supreme Court commuted death sentence to life imprisonment of the accused committing rape and murder of a girl of 8 years. It was noticed that the accused at the time of the commission of crime was 27 years and possibility of reformation could not be ruled out.

7. *Surendra Pal Shivbalak v. State of Gujarat*<sup>44</sup>

Supreme Court commuted death sentence to that of life imprisonment in a case where the accused aged 36 years had committed rape and murder of a minor girl. Supreme Court noticed at the time of occurrence, the accused had no previous criminal record and held would not be a menace to the society in future.

8. *Amit v. State of Maharashtra*<sup>45</sup>

Supreme Court commuted death sentence to life imprisonment in a case where the accused aged 28 years had raped and murdered a girl of 11-12 years. Supreme Court noticed that the accused had no previous criminal track record and also there was no evidence that he would be a danger to the society in future.

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40 (2000) 1 SCC 471).

41 Meaning of perilously: Full of or involving peril; dangerous or risky.

42 AIR 2007 SC 132.

43 2011) 2 SCC 764).

44 (2005) 3 SCC 127).

45 (2003) 8 SCC 93).

9. *Sebastian v. State of Kerala*,<sup>46</sup> was a case of a 24-year-old extremely violent pedophile<sup>47</sup> accused of raping a two-year old child and then murdering her. While commuting the death sentence, Supreme Court held that he should remain in jail for the rest of his life
10. In *Ramnaresh v. State of Chhattisgarh*,<sup>48</sup> Supreme Court converted the death sentence of the accused to imprisonment for life though the crime of rape and murder was heinous, since the accused persons were young at the time of commission of the offence (between 21 and 31 years of age); the possibility of the death of the victim being accidental; and the accused not being a social menace with possibility of reforming themselves. It was held, while modifying the sentence that the accused serve a term of imprisonment of 21 years.
11. In *Neel Kumar v. State of Haryana*,<sup>49</sup> Supreme Court modified the death penalty awarded to the accused for the rape and murder of his 4-year-old daughter to one of 30 years imprisonment without remissions.<sup>50</sup>

In *State of Uttar Pradesh v. Sanjay Kumar*,<sup>51</sup> Supreme Court converted the death penalty awarded to the accused for the rape and murder of an 18 year old into one of life imprisonment with a further direction that he would not be granted premature release under the guidelines framed for that purpose, that is, the Jail Manual or even under Section 433-A<sup>52</sup> of the Code of Criminal Procedure.

*Ronny v. State of Maharashtra*,<sup>53</sup> is also among the earliest cases in the recent past where consecutive sentences were awarded. The three accused, aged about 35 years (two of them) and 25/27 years had committed three murders and a gang rape. Supreme Court converted the death sentence of all three to imprisonment for life since it was not possible to identify

46 (2010) 1 SCC 58.

47 Meaning of pedophile: An adult who is sexually attracted to children.

48 (2012) 4 SCC 257.

49 (2012) 5 SCC 766.

50 Meaning of remission: A reduction of the term of a sentence of imprisonment, as for good conduct.

51 (2012) 8 SCC 537.

52 Section 433A in The Code of Criminal Procedure, 1973.

433A. Restriction on powers of remission or Commutation in certain cases. Notwithstanding anything contained in section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.

53 (1998) 3 SCC 625.

whose case would fall in the category of “rarest of rare” cases. However, after awarding a sentence of life imprisonment, Supreme Court directed that they would all undergo punishment for the offence punishable under Section 376(2)(g) of the Indian Penal Code consecutively, after serving the sentences for other offences.

In *Sandesh v. State of Maharashtra*,<sup>54</sup> Supreme Court converted the death penalty awarded to the accused to imprisonment for life, inter alia, for the rape of a pregnant lady, attempted murder and the murder of her mother in law to imprisonment for life with a further direction that all the sentences were to run consecutively.

### **Cases where the death penalty has been converted to imprisonment for life**

In the case of *State of Tamil Nadu v. Suresh*,<sup>55</sup> where the court dealt with the rape and murder of a pregnant housewife. Supreme Court took the view that though the crime was dastardly<sup>56</sup> and the victim was a young pregnant housewife, it would not be appropriate to award the death penalty since the High Court had not upheld the conviction and also due to the passage of time.

In *Nirmal Singh v. State of Haryana*,<sup>57</sup> was a case in which Dharampal had raped P and was convicted<sup>58</sup> for the offence. Pending an appeal, the convict was granted bail. While on bail, Dharampal along with Nirmal Singh murdered five members of P’s family. Death penalty was awarded to Dharampal and Nirmal Singh by the Trial Court and confirmed by the High Court. Supreme Court converted the death sentence in the case of Nirmal Singh to imprisonment for life since he had no criminal antecedents<sup>59</sup>; there was no possibility of his committing criminal acts of violence; he would not continue being a threat to society; and he was not the main perpetrator<sup>60</sup> of the crime.

In *Kumudi Lal v. State of Uttar Pradesh*,<sup>61</sup> was a case of rape and murder of a 14-year-old. Supreme Court was of the view that the applicability of

<sup>54</sup> (2013) 2 SCC 479.

<sup>55</sup> (1998) 2 SCC 372.

<sup>56</sup> Meaning of dastardly: Cowardly and malicious; base.

<sup>57</sup> (1999) 3 SCC 670.

<sup>58</sup> Meaning of convict: To find or prove (someone) guilty of an offense or crime, especially by the verdict of a court.

<sup>59</sup> Meaning of antecedent: An event, circumstance, etc. that happens before another.

<sup>60</sup> Meaning of perpetrator: To be responsible for; commit.

<sup>61</sup> (1999) 4 SCC 108.

the rarest of rare principle did not arise in this case apparently because the crime had no 'exceptional' feature. The Court noted as follows:

The circumstances indicate that probably she (the victim) was not unwilling initially to allow the Appellant to have some liberty with her. The Appellant not being able to resist his urge for sex went ahead in spite of her unwillingness for a sexual intercourse who offered some resistance and started raising shouts at that stage. In order to prevent her from raising shouts the Appellant tied the salwar around her neck which resulted in strangulation and her death. Court, therefore, do not consider this to be a fit case in which the extreme penalty of death deserves to be imposed upon the Appellant.

In *Akhtar v. State of Uttar Pradesh*,<sup>62</sup> was a case of rape and murder of a young girl. The sentence of death awarded to the accused was converted to one of life imprisonment since he took advantage of finding the victim alone in a lonely place and her murder was not premeditated.<sup>63</sup>

In *State of Maharashtra v. Suresh*,<sup>64</sup> death penalty was not awarded to the accused since he had been acquitted by the High Court, even though the case was said to be "perilously near" to falling within the category of rarest of rare cases.

In *Mohd. Chaman v. State (NCT of Delhi)*,<sup>65</sup> the accused, a 30-year-old man, had raped and killed a one-and-a-half-year-old child. Despite concluding that the crime was serious and heinous and that the accused had a dirty and perverted mind, Supreme Court converted the death penalty to one of imprisonment for life since he was not such a dangerous person who would endanger the community and because it was not a case where there was no alternative but to impose the death penalty. It was also held that a humanist approach should be taken in the matter of awarding punishment.

*Raju v. State of Haryana*,<sup>66</sup> was a case in which Supreme Court took into account three factors for converting the death sentence of the accused to imprisonment for life for the rape and murder of an eleven-year-old child. Firstly, the murder was committed without any premeditation (however, there is no mention about the rape being not premeditated); secondly, the

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62 (1999) 6 SCC 60.

63 Meaning of premeditated: To form an intent to carry out (an action, such as a crime); intend to carry out.

64 (2000) 1 SCC 471.

65 (2001) 2 SCC 28.

66 (2001) 9 SCC 50.

absence of any criminal record of the accused; and thirdly, there being nothing to show that the accused could be a grave danger to society. This is what was said:

The evidence on record discloses that the accused was not having an intention to commit the murder of the girl who accompanied him. On the spur of the moment without there being any premeditation, he gave two brick-blows which caused her death. There is nothing on record to indicate that the Appellant was having any criminal record nor can he be said to be a grave danger to the society at large. In these circumstances, it would be difficult to hold that the case of the Appellant would be rarest of rare case justifying imposition of death penalty.

In *Bantu v. State of Madhya Pradesh*,<sup>67</sup> Supreme Court converted the death sentence awarded to the accused to imprisonment for life. The accused was a 22-year-old man who had raped and murdered a 6-year-old child. It was acknowledged that the rape and murder was heinous,<sup>68</sup> but Supreme Court took into account that the accused had no previous criminal record and that he would not be a grave danger to society at large. On this basis, the death penalty was converted to life imprisonment.

In *State of Maharashtra v. Bharat Fakira Dhiwar*,<sup>69</sup> Supreme Court converted the death sentence to imprisonment for life since the accused was acquitted<sup>70</sup> by the High Court and imprisonment for life was not unquestionably foreclosed.

In *Amit v. State of Maharashtra*,<sup>71</sup> the death penalty awarded to the accused for the rape and murder of an eleven year old child was converted to imprisonment for life for the reason that he was a young man of 20 years when the incident occurred; he had no prior record of any heinous crime; and there was no evidence that he would be a danger to society.

*Surendra Pal Shivbalakpal v. State of Gujarat*,<sup>72</sup> was a case in which the death penalty awarded to the accused who had raped a minor child, was converted to life imprisonment considering the fact that he was 36 years old and there was no evidence of the accused being involved in any other case and there was no material to show that he would be a menace to society.

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67 (2001) 9 SCC 615.

68 Meaning of heinous: Wicked; abominable.

69 (2002) 1 SCC 622.

70 Meaning of acquit: To find not guilty of a criminal offense.

71 (2003) 8 SCC 93.

72 (2005) 3 SCC 127.

In *State of Maharashtra v. Mansingh*,<sup>73</sup> the accused was acquitted by the High Court of the offence of rape and murder of the victim. In a brief order, Supreme Court noted this fact as well as the fact that this was a case of circumstantial evidence<sup>74</sup> and, therefore, the death sentence was converted to imprisonment for life to meet the ends of justice.

*Rahul v. State of Maharashtra*,<sup>75</sup> was a case of the rape and murder of a four-and-a-half-year-old child by the accused. The death sentence awarded to him was converted by Supreme Court to one of life imprisonment since the accused was a young man of 24 years when the incident occurred; apparently his behavior in custody was not uncomplimentary; he had no previous criminal record; and would not be a menace to society.

In *Amrit Singh v. State of Punjab*,<sup>76</sup> a 6 or 7-year-old child was raped and murdered by a 31-year-old. Supreme Court took the view that though the rape may be brutal and the offence heinous, “it could have been a momentary lapse” on the part of the accused and was not premeditated. The victim died “as a consequence of and not because of any overt act” by the accused. Consequently, the case did not fall in the category of rarest of rare cases.

*Bishnu Prasad Sinha v. State of Assam*,<sup>77</sup> was a case concerning the rape and murder of a child aged about 7 or 8 years by two accused persons. The death penalty awarded to them was converted to life imprisonment since the conviction was based on circumstantial evidence and Appellant No. 1

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73 (2005) 3 SCC 13.

74 **Circumstantial evidence** is evidence that relies on an inference to connect it to a conclusion of fact—like a fingerprint at the scene of a crime. By contrast, direct evidence supports the truth of an assertion directly—i.e., without need for any additional evidence or inference.

On its own, circumstantial evidence allows for more than one explanation. Different pieces of circumstantial evidence may be required, so that each corroborates the conclusions drawn from the others.

75 (2005) 10 SCC 322.

76 (2006) 12 SCC 79.

77 (2007) 11 SCC 467.

had expressed remorse in his statement under Section 313<sup>78</sup> of the Code of Criminal Procedure and admitted his guilt.

*Santosh Kumar Singh v. State*,<sup>79</sup> was a case in which the sentence of death was converted to life imprisonment by Supreme Court since the accused had been acquitted by the Trial Court and the High Court had reversed the acquittal on circumstantial evidence. The accused was young man of 24 years when the incident occurred; he had got married in the meanwhile and had a daughter; his father had died a year after his conviction; his family faced a dismal future; and there was nothing to suggest that he was not capable of reform.

*Rameshbhai Chandubhai Rathod v. State*,<sup>80</sup> of Gujarat was an unusual case in as much as the two learned Judges hearing the case had differed on the sentence to be awarded. Accordingly, the matter was referred to a larger Bench which noted that the accused was about 28 years of age and had raped and killed a child studying in a school in Class IV. The accused was awarded a sentence of imprisonment for life subject to remissions and commutation at the instance of the Government for good and sufficient reasons.

In *Haresh Mohandas Rajput v. State of Maharashtra*,<sup>81</sup> the Trial Court had awarded life sentence to the accused for the rape and murder of a 10-year-old child but the High Court enhanced it to a sentence of death. Taking into account the view of the Trial Court, Supreme Court converted the death sentence to one of life imprisonment.

**78 Section 313 in The Code of Criminal Procedure, 1973**

313. Power to examine the accused.

1. In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-
  - a may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;
  - b shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case: Provided that in a summons- case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).
2. No oath shall be administered to the accused when he is examined under sub- section (1).
3. The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.
4. The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

79 (2010) 9 SCC 747.

80 (2011) 2 SCC 764.

81 (2011) 12 SCC 56.

In *Amit v. State of Uttar Pradesh*,<sup>82</sup> the death penalty awarded to the accused for the rape and murder of a 3 year old child was converted to imprisonment for life since the accused was a young man of 28 years when he committed the offence; he had no prior history of any heinous offence; there was nothing to suggest that he would repeat such a crime in future; and given a chance, he may reform. Supreme Court sentenced him to life imprisonment subject to remissions or commutation.

**There are several reasons, cumulatively taken, for converting the death penalty to that of imprisonment for life. However, some of the factors that have had an influence in commutation include**

1. The young age of the accused; (2) the possibility of reforming and rehabilitating the accused; (3) the accused had no prior criminal record; (4) the accused was not likely to be a menace or threat or danger to society or the community.
2. A few other reasons need to be mentioned such as the accused having been acquitted by one the Courts; the case was one of circumstantial evidence

### **Conclusion and Recommendations**

Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances. It is now settled law that where maximum punishment that could be awarded under a provision is death penalty, the Courts are required to independently consider facts of each case and determine a sentence which is the most appropriate and proportional to the culpability of the accused. It is not sufficient for the Court to decide the quantum of sentence only with reference to one of the classes under any one of the head of circumstances while completely ignoring classes under the other. That is to say, what is required to be considered is not just the circumstances by placing them in separate compartments, but their cumulative effect. The Court ought to be sufficiently cautious and adherent of the same so as to better administer the criminal justice system and provide an effective and meaningful reasoning by the Court as contemplated Under Section 354

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82 (2012) 4 SCC 107.

(3)<sup>83</sup> of the Code while sentencing.

The Crime Test, Criminal Test and the “Rarest of the Rare Test” are certain tests evolved by Supreme Court. The Tests basically examine whether the society abhors<sup>84</sup> such crimes and whether such crimes shock the conscience of the society and attract intense and extreme indignation of the community. The cases exhibiting premeditation<sup>85</sup> and meticulous<sup>86</sup> execution of the plan to murder by levelling a calculated attack on the victim to annihilate<sup>87</sup> him, have been held to be fit cases for imposing death penalty. Where innocent minor children, unarmed persons, helpless women and old and infirm persons have been killed in a brutal manner by persons in dominating position, and where after ghastly<sup>88</sup> murder displaying depraved mentality, the accused have shown no remorse, death penalty has been imposed. Where it is established that the accused is a hardened criminal and has committed murder in a diabolic<sup>89</sup> manner and

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83 Section 354 in The Code of Criminal Procedure, 1973

354. Language and contents of judgment.

1. Except as otherwise expressly provided by this Code, every judgment referred to in section 353, -
  - (a) shall be written in the language of the Court;
  - (b) shall contain the point or points for determination, the decision thereon and the reasons for the decision;
  - (c) shall specify the offence (if any) of which, and the section of the Indian Penal Code (45 of 1860) or other law under which, the accused is convicted and the punishment to which he is sentenced;
  - (d) if it be a judgment of acquittal, shall state the offence of which the accused is acquitted and direct that he be set at liberty.
2. When the conviction is under the Indian Penal Code (45 of 1860), and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative.
3. When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

84 Meaning of Abhor: To regard with horror or loathing; detest.

85 Meaning of premeditation: To form an intent to carry out (an action, such as a crime); intend to carry out.

86 Meaning of Meticulous: Showing or acting with extreme care and concern for details.

87 Meaning of annihilate:

- a. To destroy completely.
- b. To reduce to nonexistence.

88 Meaning of Ghastly:

1. Causing shock, revulsion, or horror; terrifying.
2. Resembling a ghost; pale or pallid.

89 Meaning of Diabolic:

1. Of, concerning, or characteristic of the devil; satanic.
2. Appropriate to a devil, especially in degree of wickedness or cruelty.

where it is felt that reformation and rehabilitation of such a person is impossible and if let free, he would be a menace to the society, Supreme Court has not hesitated to confirm death sentence.

While awarding the death penalty in cases of rape and murder of female children following tests need to be satisfied

1. The accused is not of young age;
2. The possibility of reforming and rehabilitating the accused is nil (habitual criminal);
3. The accused has criminal record;
4. The accused was likely to be a menace or threat or danger to society or the community.

Section 354(3) of the Criminal Procedure Code (CrPC), 1973, requires a judge to give “special reasons” for awarding death sentences. Capital punishment can be inflicted only in rarest of rare cases and in choosing the sentence, the condition of the convict is also to be taken into account.

The Law Commission of India in its report on death penalty said that after many years of research and debate a view has emerged that there is no evidence to suggest that the death penalty has a deterrent effect over and above its alternative - life imprisonment.

The Justice JS Verma committee, which was formed after the December 2012 Delhi gang rape and murder case, in its report concluded death penalty would be a regressive step in the field of sentencing and reformation. The panel recommended that punishment for aggravated forms of rape may be enhanced to life term as “deterrent” effect of death penalty on serious crimes is actually a myth.

Having regard, however, to the conditions in India, to the variety of social upbringing of its citizens, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, in evaluating a crime and apportioning the most appropriate punishment, one of the most important functions Court performs while making a selection between life imprisonment and death is to maintain a link between contemporary community values and the penal system. Criminal jurisprudence indicates that society’s perceptions of a crime with respect to appropriate penalties are not conclusive.

Concurrently, it also stands that the said standards have always been progressive and acquire meaning as public opinion becomes enlightened by a humane justice. The scope of determining the standards is never precise and rarely static.

The ‘Study on Child Abuse: India 2007’<sup>90</sup>, published by the Ministry of Women and Child Development, shows that 72.1% of child respondents did not report sexual assault of penetrative form to anyone. One of the reasons is that mostly the perpetrator is a ‘known accused’. It is apprehended that the death penalty will increase pressure on the child to not report the crime. The conviction rate reflected in ‘Crime in India: 2016’<sup>91</sup> is low — 28.2% under Sections 4 and 6 of the POCSO Act. Instead of attempting to instil fear in the minds of potential rapists of minors, the state should concentrate on winning the confidence of children through skilled investigation, modern forensic gathering, and establishing structures/appointing human resources under the POCSO Act.

The government needs to address the root cause of the problem by investing in sex-education programmes for children and launching gender empowerment programmes to educate the masses. The court infrastructure needs to be strengthened, police better trained and sensitised to handle and support victims of the crime. This will ensure better investigations which in turn will translate into better conviction rate of the offenders. It is certainty and uniformity of the punishment, which actually deters an offender from committing a crime.

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90 <https://www.childlineindia.org.in/pdf/MWCD-Child-Abuse-Report.pdf>.

91 <http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWPDFs/Crime%20in%20India%20-%202016%20Complete%20PDF%20291117.pdf>.

# DIMENSIONS AND RELEVANCE OF INDIAN FEDERALISM

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Ms. Nisha Singh\*

## Abstract

*Federalism' is one of those good echo words that evoke a positive response toward many Concepts as democracy, progress, constitution, etc. Federalism tries to facilitate the socio, political cooperation between two sets of identities through various structural mechanisms of 'shared rule'. But because of the above reasons, centre- state relations and the state autonomy have become the cardinal issues of the Indian federalism. The union government appointed Sarkaria Commission in 1983 to examine and review the working of the Indian Federalism, but this Commission doesn't make any useful recommendations for structuring the Indian federalism in a proper manner. The Union government also took in a very easy approach some of the recommendations made by this commission. This shows that even though our constitution is said to be a federal, but this overemphasis on the power of the federal government makes incapable of dealing effectively with socioeconomic challenges and strengthening national unity. Hence, it is appropriate to restructure Indian Federalism to make it more effective and promote centre – state relation.*

**Keywords: Democracy, Federalism, Sarkaria Commission, Constitution of India, Socio-Economic Challenges.**

## Introduction

Federation is the existence of dual polity. Federalism is a principle of government which defines the relationship between Central Government at the national level and its constituent units at the regional, state or local levels. The principle of government allocates power and authority between the national and local governmental units in a way that each unit is delegated a sphere of power and authority, that only it can exercise, whereas the others have to be shared.

“Federalism has been part of the public discourse in India for many decades, before and after independence in 1947, but it has gained greater importance since the 1990s when the country’s national polity

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saw the advent of the coalition era.”<sup>1</sup> Prior to the formation of the Constituent Assembly, the Cabinet Mission Plan emphasized on a Central Government with very limited powers to be confined to foreign affairs, defence and Communication. In contrast, the Muslim League and the Indian National Congress did not agree to this. Despite of this, the first report of the Constituent Assembly envisaged a weak centre upon the encouragement of Cripps and Cabinet Mission Plans. It was the passing of India Independence Act and the subsequent partition of India which made the Constituent Assembly to take up a more unitary version of federalism. Mahatma Gandhi also favoured the decentralized structure and preferred a panchayat/village-based federation. On the other hand, the then Prime Minister Jawaharlal Nehru and Dr BR Ambedkar were in favour of a unitary system of governance while the Home Minister Sardar Vallabhai Patel also stood for the idea of federalism. All is well that ends well, and finally a healthy compromised was reached which resulted in a balance of power between the Centre and the State, and India was thus described as ‘Unity of States’ and this unity being indestructible. The structure prescribed for Union as well as State governments with a single citizenship policy rather than dual citizenship.

In India, there are two governments in existence, the Union Government and the State Government. The two governments do not subordinate with each other rather cooperate with each other while working independently. Though the Indian constitution has the traits of being a federal constitution, but in its strict sense, it is not. The presence of features which are necessary for existence of a federation is quite a unique aspect of Indian Constitution but on the other side, there are provisions which give more power to the Union Government vis-à-vis that of State governments. Henceforth, the Indian Constitutional structure is a quasi-federal structure and it was made like this in the 1935 Act. This Act laid down the foundations of federal form of government in India. It provided for the distribution of legislative powers between the Union and the provinces (the structure at that time). These provisions were laid down for promoting harmony and resolving differences between the provinces. The Act further maintained for a sense of cooperative relationships amongst the provinces. Getting into nuances of this Act, Sections 131, 132 and 133 laid down provisions for resolving the water related disputes. Basically, these provisions dealt with the problems relating to inter Province Rivers and river valleys. On the other hand, Section 135 of the 1935 Act laid down provisions for the creation of councils to deal with the coordination between the various provinces of

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1 Surendra Singh and Satish Misra “Federalism in India: Time for a Relook?” [ii] <http://www.halfmantr.com/display-polity/161-indian-federalism>.

the British India. The need for creating a cooperative relation between the provinces was felt even before the independence. The Indian Constitution has incorporated the principles in a detailed form which were actually laid down under the 1935 Act.

### **Conceptual outlines of federalism in India**

No doubt, India has a political and constitutional structure where federal features are evident. There is sharing of power between the Centre and the States but the Constitution provides Central Government with supreme powers and concentrates administrative and financial powers completely in its hands. Seems there was some deficiency which made the constitutional framers to incorporate features which worked against the federal principle. Reiterating some Central Government's powers, it has the power to reorganize the states through parliament; Governors appointed by the Centre can withhold assent to legislation passed by the state; Parliament can override the legislations passed by the states for the reasons of national interest; Governors have a role in the formation of state governments and the Centre is vested with the power to dismiss the state governments under Article 356; residuary powers are vested with the Centre and the major taxation powers lie with the Central authority. Fortunately, the reviewing power of judiciary of Centre-State relation exists as that in federal structure. The bottom-line is that the Indian political system has federal features which are circumscribed with a built-in unitary core.

Former Chief Justice Beg, in *State of Rajasthan v. UOI*, 1977 called the Constitution of India as 'amphibian'. He said that ".... If then our Constitution creates a Central Government which is 'amphibian', in the sense that it can move either on the federal or on the unitary plane, according to the needs of the situation and circumstances of a case..."

Similarly, in *S. R. Bommai v. Union of India*, "pragmatic federalism" was used. Quoting Justice Ahmadi, "...It would thus seem that the Indian Constitution has, in it, not only features of a pragmatic federalism which, while distributing legislative powers and indicating the spheres of governmental powers of State and Central Governments, is overlaid by strong unitary features..."<sup>2</sup> The phrase 'semi-federal' was used for India in *State of Haryana v. State of Punjab*, whereas in *Shamsher Singh v. State of Punjab*, the constitution was called 'more unitary than federal.'

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2 Surendra Singh and SatishMisra "Federalism in India: Time for a Relook?" <http://www.halfmantr.com/display-polity/161-indian-federalism>.

Another case on this issue is that of *State of West Bengal v. Union of India*. This case dealt with the issue of exercise of sovereign powers by the Indian states. The Supreme Court in this case held that the Indian Constitution does not promote a principle of absolute federalism. The court further outlined four characteristics highlighting the fact that the Indian Constitution is not a “traditional federal Constitution”.

*First* being that there is no provision of separate Constitutions for each State as required in a federal state. The Constitution of India is the supreme document, which governs all the states. *Secondly*, the Constitution can be altered only by the Union Parliament; whereas the States have no power to alter it. *Thirdly*, in contradiction to a federal Constitution, the Indian Constitution renders supreme power upon the Courts to invalidate any action which violates the Constitution. *Fourthly*, the distribution of powers facilitates local governance by the states and national policies by the Centre.

The Supreme Court further held that both the legislative and executive power of the States is subject to the respective supreme powers of the Union meaning that Centre is the ultimate authority for any issue. The political sovereignty is unevenly distributed between the Union and the States with greater weight age in favour of the Union. Another reason which militates against the theory of the supremacy of States is that there is no concept of dual citizenship in India. The learned judges finally concluded that the structure of the India as provided by the Constitution is centralized, with the States occupying a secondary position vis-à-vis the Centre.

### **Political and fiscal dimensions of federalism in India**

One central aspect of federalism is that the provinces or units of the federation should each have its own exclusive sources of revenue to meet the needs of performing its own exclusive functions. In the Indian case this became a matter of no consideration at all. Those state representatives at the Constituent Assembly who called for financial autonomy did so out of pride and a desire to assume greater responsibilities than out of a sense of a right as participants in the birth of a federation. The other reason was the need for a social revolution that was uppermost in the minds of the assembly members, which clearly meant that distribution of revenues would have to be based on ‘need’ (with a proportionately larger share going to poorer states) rather than on the capacity to raise taxes. But it was not reflected on after all who will fix the ‘need’??. It was decided that the union government would appoint finance commissions from time

to time that would fix the 'need'. But who would appoint the finance commissions and its members? Obviously, the centre really ultimately would decide states' needs, even though the President may be ritually involved technically and the commissions would be quasi-judicial bodies. So, the power of the union to distribute taxes was overwhelming. The main problem with the Constitution's finance provisions was that while it prescribes how taxes may be levied and collected it did not prescribe how the proceeds should be distributed.<sup>3</sup>

Financial self-sufficiency and autonomy, at least partial, of the constituting units in a federation is arguably one of the main defining characteristics but in the case of the Indian federation this was not to be. Rather a centralized process at the centre and clearly influenced by the political power at the centre would fix first the 'need' and then distribute the revenues according to its best judgment. This naturally raised apprehensions among the states and every state was eager to point out its own need over other states.

A major aspect of federalism in India is centralized planning. There is evidence to suggest that national planning was originally never seen as an aspect of federalism but more as a necessity for the 'social revolution'. The Congress had established a national Planning Committee in 1937 and Nehru had been its chairman. The Congress party during its negotiations under the Cabinet Mission Plan had also made it clear that the central government would be responsible for national planning. Also, Indian big business and financial interests who had published the famous so called 'Bombay Plan' in 1945 were in favour of central planning.

The rise of regional political forces and parties' bit by bit over the years since independence has proved unavoidable so much so that now it could be safely said in this era of coalition politics and governments that the balance of power is firmly in their hands. The question is whether that is good for Indian federalism or not?<sup>4</sup> The local regional leaderships were closer to the people, spoke the same languages as the people, had direct and better awareness of people's problems and after waiting for development and not getting it from the central leadership often came across as refreshing and as a new hope for the people.

For obvious reasons the regional leaderships also became great advocates of regional autonomy and emerged as a countervailing force to the central

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3 Amaresh Bagchi "Fifty Years of Fiscal Federalism in India – An Appraisal.

4 Prakash Karat "Federalism and the political system in India" *State of Rajasthan v Union of India* (1977) 3 SCC 592.

leadership's centralizing tendencies. The abuse of the use of the offices of Governors, the unfair distribution of revenues, the imposition of central forces without consultation on the plea of national security in some states etc. all added up over the years as irritants. As early as 1967 when the centre asked the Administrative Reforms Commission to look into the matter of centre-state administrative relations, the commission had recommended that powers needed to be delegated to the states to the maximum extent possible and expressed the fear that centralised planning had tended towards excessive interference in the freedom of states to design and implement their own policies and programmes. The commissions also made suggestions with respect to the office of the governor and suggested the need to establish an Inter-State Council under Article 263 of the Constitution. The recommendation received no favourable consideration from the government.

### **Criticism and issues of Federalism**

The Government of India Act 1935 aimed to establish India as a Federation of States. It emphasized division of powers, independent and apolitical Governors and Governor-Generals and introduced provincial autonomy for the first time in India. On 26 January 1950, India adopted a new constitution.

### **Unitary Bias of the Constitution**

Article 1 (1) of the constitution says India shall be union of states and its citizens shall have at least two-tier governance. So, the people of a UT have every right to opt for statehood in India. However, the amended (in 1956) Article 3, allows the union government power with prior consent of the President (common head of states and union governments) to (a) form a new state/UT by separating a territory of any state, or by uniting two or more states/UTs or parts of states/UTs, or by uniting any territory to a part of any state/UT. (b) The power to establish new states/UT (which was not previously under India's territory) which was not in existence before.

Control of industries, which was a subject in the concurrent list in the 1935 act, was transferred to the Union List. The Union government in 1952 introduced the repulsive Freight equalisation policy which resulted in the resource drain and backwardness of a number of Indian states. The sufferers of this policy were the states of West Bengal, Bihar (including present-day Jharkhand), Madhya Pradesh (including present-day Chhattisgarh) and Orissa. These states lost their competitive advantage of holding the minerals, as the factories could now be set up anywhere in India. This

was not the case in the pre-independence era, when the major business houses like the Tatas and the Dalmias set up industries in these states, and most of the engineering industry was located in the state of West Bengal. Even after the removal of the policy in the early 1990s, these states could not catch up with the more industrialized states. In 1996, the Commerce & Industry minister of West Bengal complained that “the removal of the freight equalisation and licensing policies cannot compensate for the ill that has already been done”.

The Political Economy Issues- Goal is devolving central funds to the states under specific identified schemes (like NREGA, etc.) whose implementation by the states is subject to the satisfaction of the Goal which is highly controversial and against Article 282. The controversy arises from the fact that the grants for centrally sponsored schemes and central plan schemes are under complete control and discretion of the ruling party. The ruling party does not use it to help the states in need or where poor people are concentrated, but to pursue its own partisan and political goals. This distributive tendency of the ruling party is known as pork barrel politics. The nomenclature of schemes is specifically designed to convey that the central government is the source of these progressive policies. This is done to prevent leakage of benefit to state governments.

### **Challenges to Indian Federalism**

The decision to divide Andhra Pradesh raises important questions about federalism and the nation’s future. This is the first time in India that a state is sought to be divided without the consent of the State legislature, and without a negotiated settlement among stakeholders and regions, and in the face of public opposition.<sup>5</sup>

All major federal democracies have in their Constitutions the provision that a state cannot be divided or merged with another state without its prior consent. This is the essence of federalism. Article 3- India’s Constitution-makers gave much thought to the issue of formation of new states and reorganisation of states. The Drafting Committee and the Constituent Assembly were aware of the circumstances prevailing at that time. India witnessed Partition, accompanied by violence, bloodshed, and forced mass migration. In addition, there were several kinds of States — Parts A, B and C — and there was need to reorganise all states and integrate the 552 princely states. If the consent of every State or Unit was a precondition to altering the boundary, reorganisation would have become an excruciatingly

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5 State of West Bengal v. Union of India 1963 AIR 1241 Patrick Hoening “Federalism and identity in India”.

difficult exercise. Consequently, the final text of Article 3 as promulgated provided for the President's recommendation and ascertaining the views of the state concerned both with respect to the proposal to introduce the Bill and with respect to the provisions thereof.

So far, Parliament and governments have acted with restraint and wisdom in dealing with boundary issues and formation of states. They rejected the notion that anything could be done to alter boundaries, provided it is not expressly prohibited by the Constitution. While prior consent of the state legislature is not mandatory, in practice care has been taken to obtain consent, or to act only on the express request of the state. The 1956 reorganisation was based on the fundamental principle of language; there was broad national consensus on the issue.

Articles 3 & 4 in their present form are enabling provisions empowering Parliament to act in an exceptional situation when national interest warrants it, or to settle marginal boundary disputes between states when they are recalcitrant and efforts to reconcile differences and arrive at a settlement fail. The framers of the Constitution did not intend to give Parliament arbitrary powers to redraw boundaries; nor did successive Parliaments and governments act unilaterally or arbitrarily without consent, broad consensus or negotiated settlement.

Even after 1987, in every case of state formation, the consent of the state legislature was obtained. The broader principle of federalism and the willing consent of constituent units and their people has been deemed to be necessary before a state is formed or a territory merged, unless overwhelming national interest demands action by Parliament.<sup>6</sup> The procedure was observed in creating Jharkhand, Uttaranchal and Chhattisgarh in 2000.

It is this spirit that informed the actions of the Union government and Parliament over the past six decades. There were blemishes in the application of Article 356 earlier. But over the past two decades Indian federalism has matured a great deal. The Supreme Court, in *Bommai* (1994), made Article 356 more or less a "dead letter" — as Dr. Ambedkar had hoped. Though the Finance Commission's recommendations are not binding on Parliament and government, those of every Finance Commission in respect of devolution of resources have been accepted and implemented. Since the report of the Tenth Finance Commission, there has been greater transparency in devolution: most of the tax revenues of

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6 <http://www.halfmantr.com/display-polity/161-indian-federalism>.

the Union are being treated as the divisible pool, and a fixed proportion of it is shared with states as decided by the Finance Commission. States are now more in control of their economic future.

The Constitution, the President, Parliament and the political parties will be put to a severe test in this case, and the way they respond to this challenge will shape the future of our Republic, and the future of federalism in India.

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# RIGHT TO DRINKING WATER AND SANITATION: ARE WE DOING ENOUGH?

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## Abstract

*Right to safe drinking water and sanitation are recognised as human rights in various international conventions and resolutions. Yet many people are unable to access to drinking water and are facing deterioration in sound sanitation facilities. An additional challenge is the growing scarcity of water. Even in areas where water is available, it is rendered unfit for human consumption on account of the presence of harmful contaminants. The impurity in the quality of water and its consequent unavailability coupled with the difficulty in securing access is a grave violation of human rights. Likewise, open defecation and lack of awareness about the adverse impact of unhygienic practices on health and environment continue to plague the global sanitation sector. In India, although the right to drinking water and sanitation has not been expressly stated as fundamental right, the Indian Judiciary has over the years interpreted it to be an integral part of the right to life under Article 21 of the Constitution of India. This paper makes an analysis of the existing international and Indian legal and policy framework dealing with the right to drinking water and sanitation. It also attempts to analyse the challenges that hinder the successful realisation of this human right while also putting forward suitable suggestions that may help in its effective implementation.*

**Keywords: Drinking Water, Sanitation, Human Rights, Article 21, Awareness**

## Introduction

Water is inherent to life, since without water there can be no life. All through our early years of childhood, we are time and again informed about the importance of water for life. Then be it human life, plant life or the lives of countless organisms thriving around us, inhabiting different ecosystems. Water has since time immemorial been recognised as a vital, inseparable source of life. In recent years, it has become an indispensable attribute of sustainable development, since it concerns diverse facets of life including health, nutrition, economic and gender equality as well.<sup>1</sup> It

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1 United Nations Organization, International Decade for Action on Water for Sustainable Development 2018-2028, available at <http://www.un.org/en/events/waterdecade/> (Visited February 20, 2019).

will be inadequate to attach worth to water by only ensuring its quantitative presence, since the quality of water is equally important. Human health and wellbeing, food security, preservation of the environment and being able to pursue a decent standard of living are all important components of life; each of which require the presence of water in some form or the other. With the gradual advancement in science and technology, water has begun to be used extensively in urbanisation and industrialisation projects. Hence, water no longer exclusively caters to the needs of simple physical survival; it has transcended to development as well.

Likewise, sanitation is an important aspect of life. It is primarily concerned with ensuring such facilities and services are provided to people for accessing safe, clean and private toilets. It also deals with effective and safe systems of management and elimination of human and animal wastes.<sup>2</sup> This is important since engaging in any kind of unhygienic practices has detrimental repercussions upon the health of people. The situation becomes particularly worrisome for children, who account of tender ages and immune systems, are more susceptible to communicating numerous diseases. This in turn has dire consequences on socio-economic conditions such as low attendance in schools, stunted growth and improper levels of health. Poor standard of sanitation is leads to the spread of infectious diseases such as dysentery, cholera and typhoid.<sup>3</sup> Thus it is evident that securing access to safe drinking water and appropriate sanitation facilities are two equally important pillars of living a life with dignity and enjoying basic human rights. In fact, this right has been recognised as human right at the international level through various international conventions and treaties, recommendations and general comments observed by various monitoring committees established under these conventions and guiding principles as well.

Despite the link that exists between dignity, human rights, drinking water and sanitation, billions of people across the world are unable to effectively realise these rights. The Sustainable Development Goals Report 2018, as prepared by the United Nations Division for Sustainable Development Goals (“SDGs”), reported that in the year 2015, around 29 % (twenty nine per cent) of the world’s population lacked safe drinking water supplies, and about 61 % (sixty one per cent) of the world’s population lacked sanitation facilities.<sup>4</sup> It was also reported that unsafe drinking water

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2 World Health Organization, Health Topics, Sanitation, available at <https://www.who.int/topics/sanitation/en/> (Visited February 20, 2019).

3 *Ibid.*

4 United Nations, The Sustainable Development Goals Report 2018, New York 2018, available at <https://unstats.un.org/sdgs/files/report/2018/TheSustainableDevelopmentGoalsReport2018-EN.pdf> (Visited February 20, 2019).

and unsafe sanitation continue to be responsible for global mortality. Together, these were responsible for 870,000 deaths in the year 2016.<sup>5</sup> These are disturbing figures since it indicates the unfortunate reality of the continued inaccessibility people face while accessing safe drinking water and sanitation facilities. It indeed remains a bitter pill to swallow knowing that despite advancements being made in the fields of science and technology, which may be used to build robust water conservation and sanitation techniques, a large number of people continue to live in deplorable conditions due to persistent challenges in these sectors.

Availability, accessibility, affordability, safety and acceptability are important per-requisites for the enjoyment of the right to safe drinking water and sanitation.<sup>6</sup> Each of these components is closely interlinked. Ensuring availability of water in appropriate quantities but which lacks in quality defeats the purpose of ensuring clean drinking water. Likewise, building safe, clean, private toilets may not help achieve the objective of eliminating open defecation if transgenders and other vulnerable groups continue to face discrimination while accessing the same. In such cases, although facilities are available, their accessibility is hindered due to caste or gender-based prejudices. Observing poor practices such as defecating in the open coupled with low awareness amongst people regarding the adverse consequences that such practices have on the environment and human health all hamper the exercise of this right. In fact, behavioural patterns are largely responsible for unhygienic conditions of sanitation. Hence, it becomes important to ensure that water and sanitation facilities are available in good and potent quantities, and are accessible to one and all.

Thus, two things emerge from the above. First, that the right to drinking water and sanitation is a human right; second that despite its international recognition, various challenges prevent its exercise and effective realisation. Contracting states to numerous conventions are brought under stringent obligations to undertake measures for protecting this right. Nevertheless, in the last few decades, the world has witnessed a staggering fall in the availability of water resources. In the recent past, there has been deterioration in the sanitation system of different parts of the world. These situations render people as helpless victims of the violation of one of their most basic rights. Bringing a human rights approach towards water and sanitation brings the states under the tripartite typology of obligations, i.e.,

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<sup>5</sup> *Ibid.*

<sup>6</sup> World Health Organization, Guidelines on Sanitation and Health, available at <https://apps.who.int/iris/bitstream/handle/10665/274939/9789241514705-eng.pdf?ua=1> (Visited February 20, 2019).

to protect, respect and fulfill the obligations in respect of this human right.

India is home to a very large population; of more than 1 (one) billion people.<sup>7</sup> What often accompanies the problem of having a growing population is the increase in demands raised by the growing number of people. The governments may, in such cases, find it particularly challenging on account of limited resources and financial restraints to keep pace with these demands. India is a party to a large number of international conventions and treaties that recognise the right to drinking water and sanitation as a human right. On account of the vehement, outspoken and uninhibited approach of the Indian judiciary, the right to water and sanitation has come to be interpreted as a part of the right to life under Article 21 of the Indian. Though there exist various laws that address preservation of water from an environmental perspective, it is typically the policy initiatives undertaken by the Government of India that contain detailed provisions on the attainment and provision of good sanitation and drinking water facilities to the people of India. Prior to undertaking an analysis of the status of the right to drinking water and sanitation in India, it remains important to understand in brief the recognition that has been granted to the right to drinking water and sanitation.

### **Right to Drinking Water and Sanitation under the International Framework**

The international attention towards right to drinking water and sanitation gained prominence especially in the period emerging prior to the Millennium Development Goals (“MDGs”).<sup>8</sup> The MDGs as they once stood, contained elaborate provisions on various important facets of human rights. One of the targets therein was to accomplish by 2015 a reduction by half in the total number of people bereft of access to safe drinking water and basic sanitation.<sup>9</sup> With sustainability having emerged as a strong focal point driving international discussions, the world moved towards the Sustainable Development Goals (“SDGs”). SDG 6<sup>10</sup> specifically seeks to

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7 According to the census reports of Indian Census 2011, the population of India is 1,210,854,977 with 623,724,248 males and 586,469,174 females.

8 United Nations, Millennium Development Goals, available at <http://www.un.org/millenniumgoals/> (Visited February 18, 2019).

9 Goal 7: Ensure Environmental Sustainability, Target 7.C: Halve, by 2015, the proportion of the population without sustainable access to safe drinking water and sanitation, Millennium Development Goals, 2015, available at <http://www.un.org/millenniumgoals/environ.shtml> (Visited February 18, 2019).

10 United Nations Development Programme, Sustainable Development Goals, available at <https://www.undp.org/content/undp/en/home/sustainable-development-goals.html> (Visited February 18, 2019).

“ensure availability and sustainable management of water and sanitation for all”. Recognising the importance of how the future seems uncertain with regards to water stressed regions; the SDGs call upon states to foster international co-operation, assistance and capacity building. They also place special emphasis on the increased participation of local communities in improving the conditions and infrastructure.

Premised on non-discrimination, the Universal Declaration of Human Rights, 1948 seeks to secure inherent human dignity and rights. The International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights, 1966 (“ICESCR”) are two other principal human rights documents. None of these expressly recognise water or sanitation as a human right. But to simply interpret the mere absence of a specific provision as its negation or de-recognition as a human right would defeat their very objectives. Hence, flexibility is evident from the language of most international human rights documents.

Nevertheless, there exist various international conventions and documents that expressly recognise the right to water and sanitation as a human right. A brief analysis of some of these key instruments has been made hereinafter.

### **(a) ICESCR<sup>11</sup> and General Comment No. 15**

The right to water and sanitation can be recognised in two aspects; first in terms of its association with adequate standard of living and the second in terms of its association with appropriate standard of health. Article 11 of the ICESCR lays down the right to an adequate standard of living including adequate food, clothing and housing. The inclusive language used in this Article indicates the liberal intention of the drafters to leave no stone unturned for recognising any ancillary aspect that is necessary for enjoying an adequate standard of living, as a human right. Clarifying this position, the Committee on Economic, Social and Cultural Rights (“ESRCommittee”) has, in its General Comment No. 15,<sup>12</sup> recognised right to water as a human right; given that it is a fundamental attribute

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11 UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, available at: <https://www.refworld.org/docid/3ae6b36e0.html> (Visited February 18, 2019).

12 General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant) Committee on Economic, Social and Cultural Rights, on January 20, 2003 (Contained in Document E/C.12/2002/11), available at <https://www.refworld.org/pdfid/4538838d11.pdf> (Visited February 18, 2019).

for enjoying an appropriate standard of living. The right to water has also been said to be an important component as far as securing and enjoying the highest attainable standard of health is concerned, which is provided in Article 12 of the ICESCR. The ESR Committee has recognised the worth of water even in its earlier General Comment No. 12 that had been given while discussing the importance of the right to food. The three important aspects of the right to water, namely, availability, quality and accessibility have also been highlighted in detail.

Likewise, the ESR Committee further elaborates on how it remains important to ensure that farmers, including women farmers should have access to rain harvesting and other technological facilities. In this way, the ESR Committee has called upon the contracting states to the ICESCR to ensure that the right to water is recognised as a human right in their respective domestic jurisdictions and efforts are made for its effective realisation, for one and all, without any form of discrimination. Obligations have also been brought upon contracting states to ensure universal access to sanitation since it is not only necessary for respecting dignity and privacy but is an ethical mechanism for protecting drinking water quality.

**(b) United Nations General Assembly Resolution 64/292 (“Resolution 64/292”)**<sup>13</sup>

This is an important document since the United Nations General Assembly formally recognised the right to water and sanitation as a human right. Focus in the Resolution 64/292 has been cast on building effective co-ordination between contracting states and international organisations for sharing financial resources, exchanging technology and building capacity for providing universal access to safe, potent drinking water and basic sanitation.

**(c) Convention on Elimination of All Forms of Discrimination against Women, 1973 (“CEDAW”)**<sup>14</sup>

The CEDAW is an important international document dealing with the rights of women and calls for contracting states to eliminate any kind of discrimination that they may be subjected to. Discrimination has for long existed against women, right from the time when they did not have

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13 United Nations General Assembly, 64/292. The human right to water and sanitation, Resolution adopted by the General Assembly on July 28, 2010, A/RES/64/292.

14 UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, December 18, 1979, United Nations, Treaty Series, vol. 1249, available at: <https://www.refworld.org/docid/3ae6b3970.html> (Visited February 18, 2019).

the right to vote. Article 14(2) of the CEDAW imposes obligations upon contracting states to undertake necessary measures and effective steps to eliminate any discrimination that women face, especially in the rural areas, to ensure that they are able to derive benefits from rural development-based activities. Amongst many rights, the right of women to adequate living conditions, particularly those in relation to sanitation, electricity and water supply has been highlighted under Article 14(2). Thus, this Article recognises the important role that women play in terms of community and rural development. The Committee on the Elimination of Discrimination against Women has more specifically elaborated upon Article 14 in its General Recommendation No. 24<sup>15</sup> and has called upon the contracting states to ensure all actions are taken to provide adequate living conditions in relation to water and sanitation to all women. This helps in ensuring the wellbeing and health of women. In India, for instance, especially in rural parts, the taboo associated with menstruation and menstrual hygiene is responsible for deterioration in the health of women and young girls. Likewise, the absence of safe, potent toilets results in women and girls waiting until the dark to venture out in the open for defecation. This not only puts their privacy and dignity at stake but has adverse impact upon the right to health.

#### **(d) Convention on the Rights of the Child, 1989 (“CRC”)<sup>16</sup>**

The CRC is a landmark document since it brought a paradigm shift in the international approach towards the children’s rights movement by recognising children as subject holders of rights. Article 24 of the CRC calls upon contracting states to recognise the right of children to the enjoyment of the highest attainable standard of health; and to work towards making this right available to all children by ensuring measures for combating malnutrition and diseases are undertaken, particularly by providing clean drinking water and nutritious foods. Children, as compared to adults, are more vulnerable and easily susceptible to communicating a large number of diseases that may be water borne. For instance, it has been reported that 1 out of every 5 children who die in the world are in India and the death is on account of severe diarrhea. Similarly, poor sanitation facilities in school, especially those with respect to menstrual hygiene may be factors responsible for a large number of drop outs from schools and impacting

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15 Division for the Advancement of Women, UN Committee on the Elimination of Discrimination Against Women (*CEDAW*), *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, 1999, A/54/38/Rev.1, chap. I, available at: <https://www.refworld.org/docid/453882a73.html> (Visited February 18, 2019).

16 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html> (Visited February 18, 2019).

their development. The Committee on the Rights of the Child has also elaborated on this right in its General Comment No. 7, wherein it has acknowledged the link between clean drinking water and the health and development of children.

### **(e) Convention on the Rights of the Persons with Disabilities, 2006 (“CRPD”)<sup>17</sup>**

The CRPD brings to the forefront the discrimination and challenges that persons with disabilities face while exercising various human rights. Importance is given to ensure that persons suffering from disabilities are able to secure access to drinking water and sanitation. Very often, the non-availability of disabled friendly facilities in the form of handles and bars may make it difficult for the person with disability to access water and sanitation. The CRPD puts obligations on ensuring these persons are able to exercise their right to social protection, including clean water services, without any kind of discrimination.

Thus, as stated above, there exists no dearth in the international recognition given to safe drinking water and sanitation. But as has always been the challenge with international law provisions, since they are often perceived to be ‘soft’, several challenges emerge with respect to their implementation.

## **Right to Drinking Water and Sanitation in India: Key Laws and Policies**

While talking about the legal protection with respect to any subject matter in India, one always proceeds from an analysis of the provisions contained in the Constitution of India with respect to the matter concerned.

### **(a) The Constitution of India and the Role of Judiciary**

Being the fundamental law of the land, the Constitution of India has a plethora of provisions in its Part III on “*Fundamental Rights*”. Fundamental rights have, over the years, gone beyond the simple interpretation of express provisions in the text of the Constitution. This is largely on account of the durable insight of the Indian Judiciary in continuously expanding the scope of these rights, by including with their ambit, such other rights that are important for the enjoyment of life. Article 21 emerges as the most

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<sup>17</sup> UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106*, available at: <https://www.refworld.org/docid/45f973632.html> (Visited February 18, 2019).

widely relied upon provision in this regard.<sup>18</sup> In fact, the Supreme Court of India has observed that the right to life includes “*finer graces of human civilization*”.<sup>19</sup> Thus, it has been rightly observed that the Supreme Court has through some of its most powerful and thought-invoking judgments rendered Article 21 of the Indian Constitution as “*a repository of various human rights*”.<sup>20</sup>

Right to water has not been expressly provided under Chapter III of the Constitution. Nevertheless, the Indian Supreme Court filled in this vacuum, with its wisdom and liberal views, by holding it to be a part of the right to life. In the case of *Subhash Kumar v. State of Bihar*,<sup>21</sup> the Supreme Court interpreted that right to life includes the right of enjoyment of pollution free water and air for the full enjoyment of life. A similar pursuit has been followed by various High Courts of the country as well. For instance, in the case of *Gautam Uzir v. Gauhati Municipal Corporation*,<sup>22</sup> the High Court of Assam, while considering a petition dealing with the scarcity and impurity of potable water, observed that it the Gauhati Municipal Corporation is placed under an obligation to supply sufficient drinking water and such water ought to be clean and drinkable. In terms of its more recent jurisprudence, the Hon’ble Bombay High Court had in the year 2014 held that the slum dwellers who occupied illegal huts could not be denied and deprived of the fundamental right to water.<sup>23</sup> Likewise, in the 2014, the Supreme Court of India in its historic verdict, afforded transgenders with the status of third gender.<sup>24</sup> Through this decision, the dignity and privacy of transgender may be protected by provision of facilities such as separate toilets and freedom to choose the washroom they want to access.

## **(b) Environmental Laws**

The Water (Prevention and Control) of Pollution Act, 1974 is an important legislation as far as securing a pollution free environment by providing measures for the prevention and control of water pollution and for restoring as well maintaining the wholesomeness of water. Although it is concerned with ensuring that water from a largely environmental perspective is not polluted, it does not deal with the right of the people to access drinking

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18 Article 21 of the Indian Constitution provides that no person shall be deprived of his life or liberty except according to the procedure established by law.

19 Dr. P. NallaThampyTerah v. Union of India, AIR 1985 SC 1133.

20 P. M. Bakshi, *The Constitution of India* 82, 14thEdn., Universal Law Publishing, (2017).

21 *Subhash Kumar v. State of Bihar*, 1 SCC 598 (1991).

22 Civil Rule (PIL) 12 Of 1998, PIL 9 Of 1999.v.

23 *PaniHaqSaiti&Ors. Vs. Brihan Mumbai Municipal Corporation &Ors.*, PIL No. 10 of 2014.

24 *National Legal Services Authority (NALSA) v. Union of India*, 2014.

water. Likewise, the Environmental Protection Act, 1986 is the umbrella legislation in India that caters to various aspects of environment and lays down strong measures for the prevention of environmental pollution. The 1986 has been enacted specifically in line with India's obligations under the Stockholm Conference on Human Environment that took place at Stockholm in June 1992 and does not deal with the right of the people to secure access to drinking water.

### **(c) Policy initiatives in India**

Policy initiatives have been taken by the Government of India from time to time to deal with different subject matters. These policies also tend to greatly appreciate the divide that exists between urban and rural areas and have very often, compartmentalised the measures to be taken depending upon the needs of the specific groups of people. This is particularly true since people in rural parts may continue to practice age-old harmful practices such as open defecation that in turn not only contaminates the environment but has serious repercussions on life. They may also be faced with unawareness about their rights and the effective mechanisms for their grievance redress. This is where policy initiatives come to be particularly handy. Not only do they determine the specific aims and objectives but also enlist the mechanisms to be followed for their implementation.

- *Total Sanitation Campaign*

In terms of India's policy initiatives with regard to drinking water and sanitation, its genesis can be traced to the Total Sanitation Campaign that was launched in 1999 by the Indian Government. Its primary objective was to provide enhanced sanitation coverage all over India and specifically called for inter alia the elimination of the practice of open defecation in order to reduce degradation in the quality of drinking water. Its objectives also included making people more aware of the need for sanitation, so as to build their capacity to demand access to suitable sanitation facilities, coupled with emphasis for these facilities in schools.<sup>25</sup> Despite making progress, it suffered on account of limited deployment of resources. Resultantly, its base was enlarged when it was re-formulated and presented as the Nirmal Bharat Abhiyan in 2012 under the auspices of the Ministry of Drinking Water and Sanitation.

- *Swachh Bharat Mission/ Swachh Bharat Abhiyan ("Mission")*

The Nirmal Bharat Abhiyan was once again reviewed and refurbished

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25 The Ministry of Rural Development, Government of India, The Mahatma Gandhi National Rural Employment Guarantee Act, 2005.

in 2015 as the Swacch Bharat Mission or what has popularly come to be known as the Swacch Bharat Abhiyan. The Mission was launched on October 02, 2014 to commemorate with the birth anniversary of Mahatma Gandhi. It seeks to achieve universal sanitation coverage. It has been placed under the mandate of the Ministry of Drinking Water and Sanitation and comprises of two sub-missions dealing with urban parts of India and ‘*Gramin*’ (dealing with rural areas). Each sub-mission has specific objectives along with guidelines devised to help achieve a clean India by 2019. Its urban wing aims to inter alia limit open defecation in urban areas, eradicate manual scavenging and promote modern municipal solid waste management. The rural component aims to enhance the quality of life in rural parts and promote cleanliness and hygiene along with elimination of open defecation.

- *National Rural Drinking Water Programme*

This is a centrally sponsored scheme that seeks to provide all people in rural parts of India with safe quality of water for drinking, cooking and various other allied domestic purposes on a sustainable basis.<sup>26</sup> This programme emphasizes upon the drawing up of appropriate infrastructure and building capacities for the effective supply of drinking water in rural India.

- *National Policies on Water and Sanitation*

The National Water Policy of September 1987<sup>27</sup> emphasised upon role of water in development planning. Importance was also placed upon adoption of strategies for the preservation, conservation and utilisation of water resources. It also spoke about the first charge that the drinking requirements of human beings and animals have on available resources of water. In the year 2012, the Government of India adopted the National Water Policy of 2012<sup>28</sup> that acknowledged that securing access to safe water facilities for drinking and other allied purposes continues to be a challenge in several parts of India. It called for increased stakeholder participation and adoption of measures necessary for equipping the country to adapt to climate change hurdles and to build capacity for effective conservation and preservation of water resources.

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26 National Rural Drinking Water Programme, Ministry of Drinking Water and Sanitation, Government of India, available at <https://mdws.gov.in/about-us> (Visited February 18, 2019).

27 Ministry of Water Resources, Government of India, The National Water Policy, September 1987.

28 Ministry of Water Resources, Government of India, The National Water Policy, 2012, available at [http://mowr.gov.in/sites/default/files/NWP2012Eng6495132651\\_1.pdf](http://mowr.gov.in/sites/default/files/NWP2012Eng6495132651_1.pdf) (Visited February 20, 2019).

- *Swajaldhara*

Swajaldharais yet another important initiative of the Government of India that was launched on 25 December 2002. It focuses upon the need of the hour to realise the necessity of carefully building in community-based water supply and drinking programmes from a supply point of view. This programme stresses upon the importance of the provision of water to the rural population through the Piped Water Supply Schemes (PWSS) and Spot Source Water Supply Schemes (SSWSS). This programme specifically calls for enhanced level of community participation by empowering the villagers and small communities to participate in the decision making process pertaining to the drinking water schemes, control of finances and other expenses and such other arrangements to be made.<sup>29</sup> Swajaldhara also recognises that the ownership of drinking water continues to vest and remain in the community/ panchayat itself.

- *National Urban Sanitation Policy*

From a sanitation perspective, the Ministry of Urban Development introduced this Policy for bringing about the sanitation of all Indian towns and cities and focusing on public health and environment with special focus on hygienic and affordable sanitation facilities for the urban poor and women. Thus, as can be seen, the policy initiatives undertaken by the Government of India are elaborate and appropriate, keeping in mind the urban-rural divide that exists and suggesting suitable measures for preservation, conservation and management of water resources and use of sound sanitation.

## **Right to Drinking Water and Sanitation: Challenges**

Water is a social asset and a common resource property to be enjoyed and utilised universally, without any discrimination. In spite of these widely accepted notions, woes regarding the accessibility to clean water and appropriate sanitation facilities continue. This is primarily on account of behavioural patterns and engagement in unhygienic practices, caste or gender-based discrimination, lack of education and awareness and improper allocation of funds. In terms of the growing scarcity in the availability of water, industrialisation projects including hydropower and thermal power plants also contribute to the poor quality of water.

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<sup>29</sup> Government of India, Swajaldhara Yojana, available at <http://phed.bih.nic.in/owndw.htm> (Visited February 18, 2019).

### (a) Privatisation of Water

The origin of privatisation of water can be traced to Latin American countries, most notably Bolivia. Over the last few years the privatisation model has been rendered ineffective to sustain itself and is waning off. This is particularly true of such projects undertaken across Buenos Aires and Tucuman in Argentina, Dar es Salaam in Tanzania, Grenoble in France and Metro Manila in Philippines.<sup>30</sup> Disconnections from water supply have followed due to the inability of local residents to afford high water charges imposed by those in control of water. If indeed water is a common resource which everyone ought to have universal access to, then can there even be a question of earmarking portions of it in the hands of a few? Those who are skeptical about any benefits flowing from the privatisation model use this argument. In fact, the gradual concentration of water resources in the hands of a few will only lead to its commodification and increase the burden of those living in dire socio-economic conditions. Be as it may, the world can also no longer ignore the growing demand for water which is increasing at the rate of about 1% (one per cent).<sup>31</sup> The growing concerns over the scarcity of water as also for its preservation marks the starting point for the argument in favour of its privatisation. It remains very important to be able to bring in harmony between these diverging aspects for the good of the people and for the preservation of water.

India began to witness water privatisation in around the 1990s. The privatisation of the Sheonath River in 1992 was the first such model in India that was set up following an agreement with the Madhya Pradesh Industrial Development Corporation and Radius Water Works. The project covered a 3 KM stretch of the Sheonath River and the arrangement allowed the private entity to supply water to the Borai Belt in the state of Chattisgarh for a period of 22 years. However, the local inhabitants protested claiming that the water was usurped in the name of privatisation and led to scarcity of water. Several other projects have been initiated in the last few years for enhanced participation of the private sector in water projects but whether these lead to any benefits or not remains uncertain.<sup>32</sup> In as early as 2002, several people including tribal people had protested

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30 India Water Portal, available <https://www.indiawaterportal.org/topics/privatisation> (Visited February 18, 2019).

31 United Nations Water, World Water Development Report 2018, available at <http://www.unwater.org/publications/world-water-development-report-2018/> (Visited February 24, 2019).

32 Neeraj Mishra, *Privatisation of Sheonath river upsets local populace*, available at <https://www.indiatoday.in/magazine/indiascope/story/20021223-privatisation-of-sheonath-river-upsets-local-populace-793792-2002-12-23> (Visited February 27, 2019).

and agitated against the unrestrained water use resorted to by the soft drink manufacturer, Coca Cola, at its factory in Planchimada in Kerala. People agitated about how the unregulated use of water through the digging of wells and groundwater by the manufacturer resulted in the depletion of water resources.<sup>33</sup> Although conservation is indeed very important, it remains worthwhile to note the human costs that will be involved if unregulated privatisation of water on conservation grounds continues.

### **(b) Urbanisation and Industrialisation**

Economic development of a country has become synonymous with industrial advancement. Although development is important, it is equally important to ensure that it is sustainable. After all it is not only the present generation but also the future who ought to enjoy the benefits. For long, the disastrous consequences of development projects on the environment have been known. Particular attention needs to be brought to power projects and other industries located on the banks of rivers that end up irreversibly degrading the quality of rivers through disposal of wastes at source. The Ganges River in India, which provides drinking water to millions of people, continues to remain polluted with the presence of sewage, garbage and trashy remains. The River continues to be used as a disposal ground for the wastes that flow from cooking, bathing and burial remains that are performed on its banks. Dangerous and toxic chemicals continue to be poured in the Ganges from various leather tanning industries and other factories that have been established in its surroundings. In the year 2015, US \$3 billion was announced to be utilised for the cleaning up of the Ganges that also has a symbolic presence as a place of worship. Hence, although development remains vital, the costs at which development is sought and attained remain equally vital.<sup>34</sup> The discharge of hazardous wastes from development projects into water resources are an important concern since they decline the quantity of clean drinking water and compel people to resort to unsafe water.

### **(c) Behavioural Patterns**

It is one thing to sign and ratify international conventions. What really matters is how effectively are these international obligations meted out by

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33 The Times of India, *Kerala Villagers up in arms against Coca Cola*, June 21, 2002, available at <https://timesofindia.indiatimes.com/city/thiruvananthapuram/Kerala-villagers-up-in-arms-against-Coca-Cola/articleshow/13664689.cms> (Visited February 24, 2019).

34 Jeremy Berke, *See photos of the devastating pollution in India's holy Ganges River*, Business Insider, Jan. 28, 2018, <https://www.businessinsider.in/See-photos-of-the-devastating-pollution-in-Indias-holy-Ganges-River/articleshow/62684561.cms> (Visited February 24, 2019).

the contracting states in their respective national jurisdictions. Unsafe and unhygienic practices lead to the deposit of various harmful pollutants and contaminants in water as well as in the environment. Lack of awareness amongst people of the importance of conservation of water resources and eliminating unhygienic practices is a major challenge that hinders the effective realisation of this right. This is particularly true of those living in rural areas and not possessing adequate awareness and knowledge about the serious health consequences that poor sanitation and water conservation practices have. Thus, although water may be available in safe quantity, engaging in unhygienic practices ruins its fertility. Similarly, even if toilets are constructed and maintained, their usage may be limited on account of historically held beliefs of defecating outside homes, in the open. Unless and until we are able to manifest a change in our behaviours and convert the attitude of apathy towards an attitude of respect towards water, sanitation and our overall practices, the problem will continue to exist.

#### **(d) Vulnerability and discrimination**

Discrimination is another challenge faced by many people, especially the vulnerable such as women, children, disabled and transgender. This is particularly true in rural parts, where discrimination on grounds of caste, sex and gender continue to exist. Privacy and dignity are two core components of sanitation. Open defecation leads to violation of the right to privacy, especially of women and young children and has grave consequences on their health as well. In terms of transgenders, it has been reported that they are very often faced with violence while accessing public toilets. This results in helplessness amongst these people who are discriminated against and subjected to violence or non-violent attacks on their dignity and privacy. The challenge facing the disabled people is to ensure that water facilities and services and sanitation facilities such as toilets are constructed and built in a disabled friendly. This helps in reducing the helplessness of the disabled people who may very often consider themselves as being burden on the society.

#### **(e) Lack of Political Will**

Issues with respect to priority, increasing levels in demand and budgetary constraints may emerge as obstacles, due to which some states may become reluctant towards incurring the expenses of providing social, cultural and economic rights. Factors such as limited economic resources and other restraints may be the reason why nations often shy away from signing documents such as the ICESCR. This would be particularly true for the

developing and less developed economies. Seeing the growing demand in water, many nations may even perceive that by acknowledging this right as a human right, they will be put under obligations of protecting, respecting and fulfilling all the commitments that are imposed upon them. Nevertheless, states must display enhanced co-operation and their political willingness to make this right available to one and all.

## **Conclusion and Recommendations**

It is rather unfortunate to note that despite the advancement made in fields of science, information and technology, coupled with robust legal and policy-based initiatives, people continue to live without access to drinking water and sanitation. Not being able to secure access to drinking water and sanitation is a systematic, blatant attack on the dignity, privacy and human rights of the people. Thus, while states should take every endeavour to ensure they are able to effectively realise this right for one and all, a similar obligation is put upon the people of the states to undertake all measures as are necessary for securing and making available to themselves drinking water in safe quantities and healthy sanitation practices.

For the states it remains important to display an increased level of political will. This remains specifically true of the legislators, lawmakers, policy framers and administrators to ensure that such laws and policies are implemented from time to time that helps achieve the effective realisation of drinking water and sanitation. Prioritising the needs and wants of people and suitably deliberating upon the disbursement of funds and budget on developing technology and infrastructure for water and waste management remains crucial. Allocation of funds also remains important for effective using of information, communication and technology for reaching out to the vulnerable people and to those living in rural areas. More emphasis on local self regulating bodies such as the Panchayati Raj Institutions should be encouraged and even peoples participation in the decision making process ought to be welcomed. Since drinking water and sanitation are a global problem, members of the world should come together, communicate and co-ordinate more effectively. This will help in the flow of information as well as exchange of ideas, new technology and infrastructure between the nations. This helps in building capacities and building more resilient and stronger societies and in turn a stronger world. Technological flow between countries is crucial. This helps build a more closely tied world.

Creating greater awareness amongst people about the importance of adopting sound sanitation practices is most crucial in the process of

making available clean drinking water and in turn aiding the effective realisation of this right. Reaching out to the people, especially those living in social isolation and in rural areas, and making them aware of the grave dangers of using unhygienic practices in terms of water and sanitation is important. Measures for the abolition of all forms of discrimination or discriminatory practices, be it perpetrated on caste, creed, sex, race or religion needs to be encouraged. This will help in reducing the grievances that vulnerable groups such as women, physically disabled and the transgenders face while exercising these rights. Non-discrimination and equality are important principles of human rights. Having a prejudice free society will help build a more integrated and inclusive society, respecting the human rights of one and all.

Likewise, it remains important to respect the human rights of manual scavengers as well as the sanitation workers to ensure that they are treated with inherent dignity and their basic rights are respected. Providing effective gloves and other equipment, which are necessary for upholding their rights and basic human dignity, should be provided. Discrimination against them should be eliminated on any grounds and they should be treated with respect and appreciation for the work that is being undertaken by them. More expenditure should be incurred on developing technologies that in turn may be used for production of better equipment for scavenging. This in turn will help in gradually eradicating the practice of manual scavenging.

At the end, it simply comes down to the individual will and determination of the person for changing individual thought patterns, mindset and behaviours. Treating the environment more generously, being more cautious with scarce resources such as water and respecting the rights of others, including those of future generations to enjoy all components of the environment, are all small changes that we can start with. Spreading information about the need for reforming our behaviours and beliefs, especially to those who are vulnerable and thus in turn empowering them are vital tools for bringing about improvement in scarce water resources and poor sanitation practices. A combination of all of the abovementioned practices and an enhanced display of individual, political and international will, will go a long way in effectively realising this right for one and all, without any discrimination.

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# RIGHT TO INFORMATION IN INDIA: ISSUES AND CHALLENGES

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Ramesh Kumar\*

## Abstract

*Democracy demands openness and transparency in the functioning of government. It requires people's participation at all levels in the governing process so as to discourage autocratic rule. For a meaningful participative governance, it is important that people know what decisions are being taken by the government for their welfare, what is the process being followed in the government departments, what are the rules and regulations to be followed, processing of documents, status of their applications, and so on. In the maturing of our democracy, right to information is a major step forward to realize the dictum 'Government of the people, by the people and for the people'. This right enables citizens to participate fully in the decision-making process that has a profound effect on their lives thereby ensuring good governance, development schemes and improved quality of life of the citizens. In this paper the author analyses the issues and challenges pertaining to the dissemination of information to the people in India.*

**Keywords: Transparency, Information, Participation, Democracy, Arbitrary**

## Introduction

Prior to the passing of the RTI Act in India, the culture of official secrecy that prevailed in the public institutions resulted in extensive growth of corruption and arbitrary exercise of power by those in power. The Official Secrets Act was first enacted in 1923 by the British Government in India and was retained after independence. The law of official secrets made spying, sharing information, interference with the armed forces in prohibited/restricted areas, etc. as punishable offences. If found guilty, a person could be punished with imprisonment up to 14 years or fine or both. The information could be any reference to a place belonging to or occupied by the government, document, photographs, sketches, maps, plans, models, official codes or passwords.<sup>1</sup>

The imposition of the British dictatorship was the obvious reason for

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1 <https://www.thehindu.com/news/national/all-you-know-to-know-about-the-official-secrets-act/> (Visited on May 5, 2019).

enactment of the Act initially but its continuance in independent India was not a good move. The Act was arbitrary in the sense that it did not define the term 'secret information' or specify as to what information is to be kept secret from the people. The atmosphere of official secrecy continued post-independence. Due to non-accountability of the public authorities and lack of openness in the functioning of government, abuse of power and unscrupulous diversion of the public money became rampant. Under these circumstances, there was a public demand for greater access to the information held by public authorities. Subsequently, the government brought in administrative reforms by enacting the RTI Act, 2005 which empowered Indian citizens to seek information from public authorities, thus making the government and its functionaries more accountable and responsible. The doors of governance which were earlier closed to the common man were opened up so that any citizen of India can come and find out as to what is going on inside the government offices. The Right to information has provided a very powerful source of reliable information to the public in the true democratic sense. But this information procurement is still not without challenges.

### **'Right to Know' Under Constitution of India**

Right to know is also a part of the fundamental right under Article 19(1) (a) which guarantees the freedom of speech and expression.<sup>2</sup> Article 19(1) (a) says that all citizens shall have the right to freedom of speech and expression. 'Freedom of speech and expression' under Article 19(1) (a) has been held to include the right to acquire information and disseminate the same. It includes the right to communicate it through any available media whether print or electronic or audio-visual i.e. advertisement, movie, article or speech etc. The freedom includes the freedom to communicate or circulate one's opinion without interference to as large a population in the country, as well as abroad, as is possible to reach. Communication and receipt of information are the two sides of the same coin and are complementary to each other.<sup>3</sup>

Right to know under Article 19(1) (a) has also been recognised by the judiciary in India in *Romesh Thapper v. State of Madras*.<sup>4</sup> In this case Patanjali Shastri J. observed that freedom of speech and of the press lay at the foundation of all democratic organizations, for without free political

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2 J. N. Pandey, Constitutional law of India 189(Central law agency, Allahabad 53rd edition,2016).

3 Ref. Bishwa Kallyan Dash, "Right to information in cases sub-judice" Vol.XLIII (3) IBR 245(2016).

4 AIR 1950 SC 124.

discussion no public education, so essential for the proper functioning of the process of the popular government, is possible. This right was also recognised by the Supreme Court of India in *State of Uttar Pradesh v. Raj Narain*.<sup>5</sup> The democratic credentials of a state are judged today by the extent of the freedom press enjoys in that state.<sup>6</sup> In *Prabhu Dutt v. Union of India*,<sup>7</sup> the Supreme Court has held that the right to know news and information regarding administration of the government is included in the freedom of press.

### **Important Provisions of the RTI Act**

This Right to information entitles every citizen to have access to information controlled by public authorities. It the right of a citizen under RTI act 2005 to seek information from any public authority which is required to provide the same expeditiously or within thirty days or even in 48 hours in case the information sought concerns the life or liberty of a person.<sup>8</sup> Under the Act, it is obligatory upon public authorities to provide information and maintain records consistent with its operational needs. The object of the Act is to promote openness, transparency and accountability in administration.<sup>9</sup> Salient features of the Act are:

- It covers Central; State and local governments; bodies and institution owned; controlled and financed by the government: NGO's substantially funded by the government; executive, judiciary and legislature.
- Provides for PIOs in each department to receive and process the applications.
- Information is to be provided within 30 days in general or 48 hours where life and liberty is involved.
- No reply within prescribed time –limit is a deemed refusal.
- Reasons for seeking information is not required.

The Act also exempts disclosures in certain cases. Section 8 of the Act mentions a list of ten categories of information which can be denied to the citizens, as there shall be no obligation to give any citizen such information. The exempted information is mainly related to the sovereignty and integrity

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5 AIR 1975 SC 865, 884.

6 M. P. Jain, *Indian Constitutional Law*, 991 (LexisNexis ButterworthsWadhwa, Nagpur, 2009).

7 AIR 1982 SC 6.

8 Section 7(1) of the RTI Act, 2005.

9 J. N. Pandey, *Constitutional law of India* 190 (Central law agency, Allahabad 53rd edition.2016).

of India, the security, strategic, scientific or economic interests of the state, trade secrets or intellectual property, private information and information forbidden by Courts. If the information is related to corruption and human rights violations, the exempted clause does not apply. Notwithstanding any of the exemption listed above, a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

### **Issues and Challenges**

The implementation of the RTI Act suffers from various challenges. Foremost is the lack of awareness among the public especially the women, rural population and SC/STs. Even those who are aware either do not use it or are not aware of procedural formalities for seeking information. There also appears to be a lack of initiative on part of the government to create adequate awareness in this regard.<sup>10</sup> Mostly the legal practitioners or government employees or NGOs make use of this valuable right meant for all public which was not the purpose of this legislation. Also the government departments prefer to downplay the implementation for obvious reasons and to maintain secrecy of their activities which encourages corruption.

Even when the information is sought, the public departments prefer to reject the same on one ground or the other seeking legal help from their legal counsels. The general public is comparatively a weaker party with no legal help. This discourages the general public to seek information and defeats the very purpose of the RTI Act. Even the appeal procedure is not people-friendly. Also, the exemption of 'private information' and 'public interest' clause is not properly defined which result in misuse by the public authorities as a ground for denial. Also, the authorities keep waiting till the last minute of 30 days period and make no sincere attempts to provide information at the earliest.

### **Conclusion**

Right to information Act, 2005 is one of the most significant and revolutionary and progressive legislations in the history of democratic India. The purpose behind the enactment of the Act was to create informed citizens and to promote transparency of information. It recognizes that in a democracy like India, all information held by the government ultimately belongs to the people. The Act seeks to establish that in a democracy,

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<sup>10</sup> <https://rti.gov.in/rticorner/studybywc/key-issue> pdt website visited on May 30,2019.

transparency is the norm and secrecy is an exception in the working of governance institutions. However, the fruits of this noble initiative has not reached the masses especially amongst the poorest of poor. Sincere efforts by those in power to implement the Act at the grass-root level will contribute to a healthy democracy in India.

### **Suggestions for Improvement**

The right to information can be made more meaningful for the common man by ensuring awareness about the Act. This could be achieved through media campaigns and community awareness programmes. The rural population may be exempt from any application fees for seeking information. Instructions should be given speedy disposal of applications where the information sought is denied under the exceptions. In case the information sought pertains to the RTI Officer himself/herself, then there should be a provision for alternate official to handle that application as to meet the requirements of natural justice. The clause ‘private information’ and ‘public interest’ needs to be clearly defined so that these are not misused or used as a shield for corrupt activities in the government departments.

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# TRACING THE PRINCIPLE OF NON-REFOULEMENT IN INDIAN MUNICIPAL LAW

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Mr. Aditya Gupta\*

## Abstract

*A country which refused to sign the 1951 Refugee Convention and has failed to enact any Municipal Statute to shelter and protect the populations fleeing their sovereign borders, has time and again accommodated this citizenry. The Foreigner's Act of 1946, is a stringent deportation-oriented statute which has failed to comply with the dynamic of International Refugee crisis. The principles embodied in Article 21 of the Indian Constitution has time and again been the repository of rights available to the fleeing populations. Despite, the absence of a Municipal Legislation and International guidance and persuasion, India has accommodated and rehabilitated various refugees and granted them lands and protection, this forms the cornerstone of the entire research. The principle of Non-Refoulement has not been accorded legislative sanction, neither has the same been acquiesced as a principle of International responsibility, yet, the same has been provided due credence and importance to ensure that the Indian sovereignty assumes a sympathetic and protective stance whenever deemed necessary. The research attempts to analyse the source of the protective stance taken by the Indian Sovereignty and as to whether or not the Indian Judiciary has filled the aperture which has been left open by the Indian Legislature. The method of incorporation of International Treaties and Customary International Law in the domestic jurisprudence also forms an integral part of the research.*

**Keywords: Refugee Convention, Foreigner's Act of 1946, International Refugee, Article 21, International Treaties, Customary International Law.**

## Introduction

The principle of Non-Refoulement is the central premise to the refugee protection programmes and international obligations. While the principle has been argued to have assumed the status of a Peremptory norm<sup>1</sup> in International Law, by virtue of its incorporation in various bilateral and multilateral treaties,<sup>2</sup> its assimilation in the Indian Legal Framework is

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1 A. Farmer, *Non-Refoulement And Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection*, 23 GEORGETOWN IMMIGRATION LAW JOURNAL 2, (2008).

2 E. Lauterpacht & D. Bethlehem, *The Scope and Content of The Principle of Non-Refoulement: Opinion*, CAMBRIDGE UNIVERSITY PRESS 89, (2009).

limited. India has not ratified the 1951 Convention for the Protection of Refugees and the 1967 Protocol for the Protection of Refugees and has also not enacted any legislation which discusses or enacts the principle as a domestic enactment. In 2015, two bills were presented before the Lok Sabha namely the Protection of Refugees and Asylum Seekers Bill<sup>3</sup> and the Asylum Bill<sup>4</sup> both of which incorporated the principle,<sup>5</sup> but neither of the two bills were enacted as domestic legislations. Also, the affidavit filed by the Government of India before the Supreme Court on 18th September 2017 pertaining to the immigration of Rohingya Muslims, unequivocally announced that the Central Government shall not provide refuge to the immigrants because of security concerns and that the principle of Non-Refoulement does not constitute to be a binding principle on the Indian executive.<sup>6</sup>

The fact that the executive has not ratified two of the most important treaties pertaining to the refugee management systems in the modern international law scenario and that the legislature despite multiple attempts has failed to enact a municipal legislation, coupled with the fact that the executive is of the opinion that it can circumvent its obligation to foster the refugee population, point towards the fact that possibly the principle of non-refoulement does not form to be a part of the Indian Legal Framework.

The present research does not contradict the fact that India's practice in accommodating refugee populations at various instances has not been in consonance with the International norms and standards. The question that the present research indulges in is whether the Indian Legal Framework accommodates the principle of Non-Refoulement as a binding obligation. In absence of clearly defined statutory standards, the refugee populations shall be subjected to inconsistent and arbitrary government policies. The present research identifies three sources of the principle in Indian jurisdiction. Firstly, the Institutional Structures which work towards the betterment of refugee populations. Secondly, Article 21 of the Constitution of India and lastly, Article 51 of the Indian Constitution.

### **Institutional Aid and Protection**

The current institutional structures have nevertheless prevented the

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3 Bill No. 290 of 2015.

4 Bill No. 334 of 2015.

5 Section 3 of the Protection of Refugees and Asylum Seekers Bill, 2015 and Section 8 of the Asylum Bill, 2015.

6 D. Mitra, *Modi Government Affidavit on Rohingya Refugees Reverses India's Long-Held Stand on Non-Refoulement*, THE WIRE (Jul. 15, 2018, 6:45 PM), <https://thewire.in/diplomacy/indias-statement-rohingya-refugees-reversal-long-held-stance-non-refoulement>; , 38 PUCB BULLETIN 1 (2018).

refoulement of some refugees over the years, but such institutions are incapable of providing any guarantee. Also, institutional structures cannot provide the protection which can be afforded by virtue of a legislation or a binding set of obligations. The two major institutions which deal with refugee issues in the country are United Nations High Command for Refugees (UNHRC) and National Human Rights Commission (NHRC).

The UNHRC published the statistics pertaining to refugee populations in India. As of 2016, India hosted 1,97,821 refugees and an additional 9,219 asylum seekers rendering the cumulative figure to 2,07,040. Of these, only 24,594 refugees were assisted by the UNHCR,<sup>7</sup> which amounts for less than 12 percent of the total refugee population. It has been argued that since in various cases the High Courts have stayed the deportation of refugees and allowed them to seek protection under UNHCR,<sup>8</sup> such practice should be taken as a directive of the principle. Although, the fact remains that the courts have not granted to the concerned citizenry benefits under the Principle of Non-Refoulement, but rather a right to apply to UNHCR, and that right is again conditional upon the discretion of the government. In the case of *Ktaer Abbas Habib Al Qutaifi v. Union of India*,<sup>9</sup> N.N. Mathur J. highly deplored the actions of the UNHCR which instead of facilitating an agreement between the concerned state pertaining to the refugee, only provided said refugee with a certificate of according upon him the status of refugee.

Hence, owing to the fact that UNHCR has been able to provide aid to a very limited number of refugees and the fact that the presence of UNHCR in India is not guaranteed by any municipal legislation it cannot be considered to be the repository of the Principle of Non-Refoulement in Indian Legal Framework.

The NHRC has been involved in some very important litigations pertaining to the rights of the refugees in the Indian Context but the existence of the commission simply cannot guarantee substantive rights, it provides recommendations, and spearheads litigation, but in no way provides new rights to citizens.<sup>10</sup> Also, the recommendations of the NHRC are not binding on the government,<sup>11</sup> and also the commission cannot personally

7 Global Trends: Forced Displacement in 2016. (2017). UN High Commissioner for Refugees (UNHCR).

8 *Bogiyiv. Union of India*, Civil Rule No. 981 of 1989; *ND Pancholi v. State of Punjab*, W.P. No. 243/88.

9 1998 Cri LJ 919.

10 V. Shripati, *India's Human Rights Commission: A Shackled Commission?* 18 BOSTON UNIVERSITY INTERNATIONAL JOURNAL, 2 (2000).

11 *D.K. Basu v. State of West Bengal*, (2015) 8 SCC 744.

award compensation to the victims.<sup>12</sup> Hence, the NHRC cannot very well be the genesis of the principle in Indian Legal Framework.

### Constitutional Symbolism

Over the years many authors have espoused the view that the stateless citizenry is protected by the constitutional mechanisms embodied in the various fundamental rights and obligations to honour international obligations.<sup>13</sup> Whereas some other authors have appraised the judicial position in the country and argue that the judicial pronouncements ensure and foster refugee rights.<sup>14</sup>

### Article 21

Article 21 has time and again been argued to be the repository of the principle of non-refoulement in the Indian Legal Framework. Such claims are patently false, no such right has ever been read into the constitutional jurisprudence, nor can such a right be extrapolated.<sup>15</sup>

Initially the understanding of Article 21 was limited to three simple steps. First, there had to be a law justifying interference with the person's life or personal liberty. Second, the law had to be a valid law. A law following the typical process of parliamentary legislation would suffice. Third, the procedure laid down by the law should have been strictly followed. Under this straightforward test, which operated as a check on improper procedure, the state could justify serious infringements on life or personal liberty so long as the three procedural steps were followed in its creation and enforcement.<sup>16</sup> Thus, Article 21 was construed as providing for a mere procedural check on the government.

Although, later with the judgement of *Maneka Gandhi v. UOI*,<sup>17</sup> the principles of Article were commingled with the principles of Article 14 and Article 19. Thus, Article 21 moved from mere 'procedure established by law' towards 'due process', as incorporated within the US Jurisprudence.

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12 R. Singh, *Law, Policy and Practice of Refugee Protection in India: The Benefits and Roadblocks*, 2(1) KIIT STUDENT LAW REVIEW, (2015).

13 M. Purohit & M. Purohit, *An analysis of Non Refoulement in India*, 2(1) JAMIA LAW JOURNAL 173 (2017).

14 S. Bhattacharjee, *India needs a Refugee Law*, 43(9) ECONOMIC AND POLITICAL WEEKLY, 73(2009).

15 B. Acharya, *The Future of Asylum in India: Four Principles to Appraise Recent Legislative Proposals*, 9 NUJS LAW REVIEW, 187(2016).

16 MAHENDRA PAL SINGH, *VN SHUKLA'S CONSTITUTION OF INDIA* (13 ed. Eastern Book Company 2018).

17 1978 AIR 597.

Article 14, within the ambit includes the proposition of ‘equality amongst equals’, thus digressing from the principle of absolute equality. If the executive can reasonably distinguish between classes of refugees, Article 14 cannot be extracted by the disclaimed population to their benefit. The only substantial colour is made available to Article 14 when it is conjointly read with Article 19. The conundrum that the Refugee population suffers from is that the protection afforded under Article 19 is exclusive to the citizens of the country. Thus, no substantive rights can be read into Article 14 and Article 21.

Therefore, in extension to the same, the ‘due process’ clause shall not be applicable to the Principle of Non-Refoulement, any ‘procedure established by law’, can abrogate the Right to Life and Liberty of a non-citizen.

Often heavy reliance has been placed on the case of *NHRC v. State of Arunachal Pradesh*,<sup>18</sup> to hypothesise that Article 21 encompasses the principle of Non Refoulement.<sup>19</sup> The dispute between the Chakma population and a group of hostile locals formed the subject matter of the present case. The Chakma population had been displaced in 1964 from erstwhile East Pakistan (now Bangladesh) and moved to Assam to the current state of Arunachal Pradesh. Although many applied for citizenship, local officials prevented their applications from reaching the federal government; despite living in India for over 30 years. As the relationship between the Chakmas and the local inhabitants of Arunachal Pradesh worsened, ‘quit orders’ were issued by the Arunachal Pradesh Students Union demanding that the Chakma leave or suffer severe harm. Meanwhile, the Union Home Ministry attempted to confer blanket citizenship on the Chakma population. Finally, the NHRC filed a petition in court demanding that Arunachal Pradesh halt the Chakmas’ forced migration and protect them from harm. The Supreme Court held that they cannot be migrated forcefully until the Central Government decides on their citizenship and that, the state government had an obligation to provide security at their present location.

This case does not point to the conclusion that Article 21 is a repository of the principle firstly, because the instructions provided by the Supreme Court do not prohibit the eviction or removal of the Chakma population, it only subjects such action to the Federal Government adjudicating their claim of citizenship. Hence, the mandate so rendered is not against

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18 *NHRC v. State of Arunachal Pradesh*, (1996) 1 SCC 742.

19 S. Agarwal, *Refugee Blues- Victims of Regional Geopolitics*, 8(1) GLC LAW REVIEW 136, (2014).

the eviction of such population but the state's procedural violation of immigration law which would have rendered such eviction a 'deprivation of life and personal liberty'. Secondly, the Court acknowledged the fact that the Chakma population has been living in the country for more than two and a half decades, hence, the court has protected a citizenry which might probably be its citizens by actualisation but because of some procedural irregularity could not be registered as such.

Another case which has time and again been extracted to overestimate the protection conferred by Article 21 is the case of *Ktaer Abbas Habib Al Qutaifi v. Union of India*,<sup>20</sup> adjudicated upon by a single judge bench of the Gujarat High Court. The two petitioners were duly granted the status of a refugee by the UNHCR, who filed a petition to be released from the Joint Interrogation Centre and instead of deporting them to Iraq they be handed over to the UNHCR. The court eventually directed the concerned authorities to consider the petitioner's case from a humanitarian perspective and that the petitioner shall not be deported from India unless such consideration has been made. The judgement does not provide any recourse to the said refugee but simply implores the authorities to take a humanitarian stance and if they opine that the petitioner is to be deported, the 'due process of law' be adhered to. Also, the judgement is powerless against the Supreme Court's confirmation of the Centre's "unrestricted right to expel."<sup>21</sup>

Although, in some cases, very few and far between, regarding specific facts some court have required the government to meet procedural due standards before restrictively regulating refugees. Those cases must be confined to their facts because they are very clearly exceptions; indeed, none of them were even declared reportable and they are no longer than a few unreasoned paragraphs.<sup>22</sup> Therefore, it can very well be argued that Article 21 merely provides for a procedural impediment for the executive to comply to, before deporting the concerned population. It in no way encompasses the Right of Non Refoulement.<sup>23</sup>

## Article 51

The practice of assimilation of treaty obligations in domestic jurisprudence

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20 *Ktaer Abbas Habib Al Qutaifi v. Union of India*, 1998 Cri LJ 919.

21 *Hans Muller v. Supt., Presidency Jail*, AIR 1955 SC 367. Hand Muller was handed down by a five-judge Constitution bench of the Supreme Court.

22 B. Acharya, (2016). The Future of Asylum in India: Four Principles to Appraise Recent Legislative Proposals *NUJS Law Review*, 9, pp.173-228. SUPRA.

23 O. Chaudhary, *Turning Back: An Assessment of Non-Refoulement Under Indian Law*, 39(29) ECONOMIC AND POLITICAL WEEKLY, 3262(2018).

as incorporated by India is very much similar to the approach which has been adopted by the United Kingdom. India follows the dualist approach of International Law,<sup>24</sup> which mandates that treaties are subject to municipal law. Enforcement of any treaty obligations must conform to domestic law of the country. Whenever a conflict arises between a treaty and a municipal law, the latter prevails unless it can be harmoniously interpreted.<sup>25</sup>

Neither does India have a municipal legislation specifically pertaining to refugees or asylum seekers, nor has the principle of Non-Refoulement been espoused by any domestic legislation. The Foreigners Act, 1946 is the current piece of domestic legislation which governs the state practice pertaining to refugees. S. 2(a) defines a 'foreigner' as 'a person who is not a citizen of India. Hence, this definition very well covers any kind of immigrants, refugees and tourists. S. 3(2) of the act provides the executive wide powers to control the entry of foreigners within the country. Under this act the Central Government has been endowed with the power to prohibit, regulate and restrict the entry of foreigners in India. The Act also provides that the Central Government can very well restrict the movement of foreigners in India and confine them to refugee camps.

India has not ratified the Refugee convention of 1951. Hence, it can very well be argued that A. 51 has not been inserted with the intention of abiding to the said obligations incorporated under the convention.

Hence, subject to the dualist approach followed by the Indian Legal Framework, it can very well be argued that since the provisions of Foreigners Act are in direct contravention to the principle of Non-Refoulement, any treaty which imposes the obligation not to refouled refugees, whether in verbatim or in meaning cannot be imposed as a domestic obligation on India.

### **Non-Refoulement as Customary International Law**

The right of Non-Refoulement has been appraised by many authors to have procured the status of Customary International Law.<sup>26</sup> The European Court of Human Rights has held that non-refoulement protects "the fundamental values of democratic societies."<sup>27</sup> Although, the assimilation of Customary International Principles in Indian Legal Framework is not unconditioned.

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24 State of W.B. v. Kesoram Industries Ltd.,(2004) 10 SCC 201.

25 Bhavesh Jayant Lakhani v. State of Maharashtra and Ors., (2009) 9 SCC 551.

26 M. Sternberg, *The Evolving Law of Non-Refoulement And Its Influence on The Convention Refugee Definition*, 24 IN DEFENSE OF THE ALIEN 215, (2001).

27 Saadi v. Italy, (2009) 49 EHRR 30, para. 127; Chahal v. United Kingdom, (1997), 23 EHRR 413, para. 79.

Different Indian Courts at various instances have opined that a Customary International Law shall be deemed to be incorporated in Municipal Law only if they are not contrary to the Municipal Law.<sup>28</sup> In the present context, the principle of Non-Refoulement is in direct contravention to the provisions of the Foreigners Act. Hence, the domestic legislation in India very well ‘occupies the field’ of refoulement principles.

The Supreme Court in the case of *Vishakha v. State of Rajasthan*,<sup>29</sup> opined that “*In the absence of domestic law occupying the field...the contents of the International Conventions and norms are significant for the purpose of interpretation of Article 21.*” Although, the discussion in question dealt with treaty obligations of the state and not the assimilation of custom in International Law. It is a settled principle of law that a court can pass orders on issues before it.<sup>30</sup> Hence, not only does the Foreigners Act ‘occupy the field’ but also the Supreme Court’s judgements often relied upon do not in fact discuss the obligations imposed by virtue of a Customary International Law.

Also, India has many times considered and rejected being party to the refugee convention. Hence, the country would be hesitant in applying a principle whose responsibility it has been evading from 1951.

### Summary of Arguments and Conclusion

- The UNHCR and NHRC cannot be considered as repositories of International Law, subject to the enormous refugee population in the country and the limited operations of UNHCR. The NHRC on the other hand does not enjoy any substantive powers and can merely help the concerned population in litigation for their rights. The Committee is also marred by legislative concerns which have rendered the commission ‘toothless’.
- Article 21 of the constitution provides for a mere procedural impediment upon the executive and does not accord any substantive rights on the persons so claiming under it. Although, the commingling of the principles enshrined in Article 21 with those of Article 14 and Article 19, provide for some substantive rights being available to the claimants. Although, since the benefits

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28 T.N. Tamil and English Schools Association v. State of T.N., (2000) 2 CTC 344; PUCL v. Union of India, AIR 1997 SC 568.

29 Vishakha v. State of Rajasthan, AIR (1997) SC 3011.

30 H. M. SEERVAI, CONSTITUTIONAL LAW OF INDIA (4 ed. Universal Law Publishing Company 2011).

of Article 19 are not available to non-citizens. Whether or not any substantial rights are available to the refugees is debatable.

- The case laws which have often been relied upon to direct that non refoulement, in principle is enshrined within Article 21 of the Constitution do not postulate any such conclusion.
- Any treaty or obligation pertaining to the acceptance of Non-Refoulement entered into by the Indian state shall not be binding by virtue of the provisions of the Foreigners Act.
- Even if the principle of Non-Refoulement achieves the status of Customary International Law, the same shall not be binding on the Indian jurisprudence since, the domestic legislation already ‘occupies the field’.

Rights of the refugee population in the world is a matter of grave concern and India has time and again been a benevolent host to these populations. Although, the fact of the matter is that the central premise of refugee law, the Principle of Non-Refoulement is not a part of the Indian Legal Framework. This renders the refugee population dependent on the benevolence of the state and opens room for arbitrary executive action.

Acceding to the Refugee Convention and the Refugee Protocol and other allied treaties is not a solution of the said problem. The legislature should enact a domestic legislation which deals with the rights of the refugee and other such populations. In the meantime, the Foreigners Act should necessarily be amended to comply with the International norms of the jurisprudence of Refugee Law. With such amendment coming into force the Court can take recourse of International Treaties and Customary International Law to ensure that the refugees are accorded a fair and just treatment in consonance with the International obligations. Thus, ensuring that the Indian state complies with the necessary international commiserating jurisprudence which avers the refugee population being reduced to modern day scavengers.

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# CRIMINALISATION OF POLITICS - LEGAL LACUNA AND REALITY

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Mr. Prattay Lodh\*

## Abstract

*The world's largest democracy within every five years elects a new government for itself, where every citizen will get the opportunity to be a part of this revolution. While some people This paper tries to answer several orthodox as well as unorthodox questions to the topic, more importantly what exactly a man looks when he votes for a candidate in these elections and why is that a common man wants to see a fresh face contesting in elections in an era of two-party dominance. Eventually it is the working-class citizen of the country, in who's hands the fate of the country rests.*

**Keywords: Working-Class, Opportunity, Revolution, Orthodox, Democracy.**

## Introduction

The world's largest democracy is successful not because of the ideals envisioned by great political stalwarts, but because of the people who have upheld these values. It is the people who believe in this system and trust that these ideals are supreme. But in the recent years, it has been seen that due to some factions created in the society, this trust and confidence of people in our government's.

One of the major reasons that the general public is losing confidence in the various functionaries of the government is due to the level of corruption prevalent in our "system". In a country where power cannot remain innocent, the problem of corruption has now been like a wildfire which is beyond control now. Why is that when one hears the "politics", the first thing which comes to their mind is not public service but criminals corrupting numerous functionaries of the government,

This wave of criminalisation of politics has been rooted in the Indian political setup for quite some time. But this trend was most strongly felt in 1993, during the Mumbai serial blasts which in turn was a result of a collaboration of police, custom officials, criminal gangs, politicians and

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their patrons. The Vohra committee report<sup>1</sup> clearly indicates the extent to which the system was corrupted in the city of Mumbai, where political parties not only facilitated the local gangs and petty criminals to risk the lives of millions but also provide orders to police to help them.

The 1193 Mumbai blasts was one such example where the individuals the Vohra committee reported the depreciating value of lives in the country as seen by one of the three main organs of the government itself. Those events were an eye opener for the country, maybe for many more eye washes which were about to come in the future.

One out of many observations of the Apex court by these reports was that when such unruly forces get intertwined with the political setup of the country, it become fairly impossible to get them apart. Where the end result directly affects the working-class heroes of the country.

“Criminalisation of politics was never an unknown phenomenon in the Indian political system, but its presence was seemingly felt in its strongest form during the 1993 Mumbai bomb blasts which was the result of a collaboration of a diffused network of criminal gangs, police and customs officials and their political patrons.”<sup>2</sup>

The criminalisation of politics, where it initially came into the notice of the country, never seized to have stopped there. Jingoism like “Gundaraj” are heard almost every day, now more than often. There are people who live in fear because of the pressure of these elected criminals at the Parliament, where everything becomes jolly good at the time of elections or worse still such goons and hooligans force people to vote by mere force.

So, the question around which the paper revolves is what happens when the people who has the power to safeguard you against several heinous crimes is himself/herself a criminal? And also, what makes these people so powerful that even the strongest organisation, when it tries to, cannot deter them? And is the tag “world’s oldest democracy” is just a farce, when everyone has already submitted to such people?

### **Statement of Problem**

This paper’s primary objective is to study the various aspects in relation

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1 Report available at [https://adrindia.org/sites/default/files/VOHRA%20COMMITTEE%20REPORT\\_0.pdf](https://adrindia.org/sites/default/files/VOHRA%20COMMITTEE%20REPORT_0.pdf).

2 Deepak Mishra, Abu Salem Abdul Qayoom Ansari vs State of Maharashtra & Anr, CRIMINAL APPEAL NO. 990 OF 2006.

to the criminalisation of politics in the country. The researcher has further focussed upon the various aspects of the Parliament functions and what are the issues which are in the relation to the theme. The author has further researched upon the causes of the political parties getting involved in such activities which are far away from the conventional answers which one might expect. Furthermore, the author has researched upon the relevant case which were provided by the honourable courts of this country, focussing upon the need to keep the criminals away from politics. In the end, the author has provided his critical analysis of this system, where the author has provided various remedies to such a situation.

### **Research Questions**

- What is meant by criminalisation of politics?
- What are the instances where democracy has been compromised in this country?
- What are the issues prevalent in the status quo?
- What are the causes which act as a catalyst to promote criminalisation of politics?
- What are the views of various courts in this matter?
- How can the government be more responsive towards the needs of citizens?

### **Issues Prevalent**

As we might already know (or have prejudiced) that Indian political setup is full of criminals, if one had to put a number on it, what would that be?

In a country like ours, the number of politicians who take rounds at police stations are ever increasing. Reports suggest that there are at least 1580 MPs and MLAs who are facing pending criminal charges.<sup>3</sup> In such situation, how does one not expect the law-making functionaries to work efficiently?

The former Chief Election Commissioner while in office has made no bones when talking about the process of election and the inflow of cash which suddenly pops out of nowhere. For instance, while in office, he said that about Rs 10,000 crores of black money was spent in the 2012 UP elections.<sup>4</sup> At Rs.25 crores for each constituency, and in over 4000 Assembly seats in India, this amounts to Rs.100,000 crores.

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3 Report of Association for Democratic Republic, July 2014.

4 Quoted in Business Today, April 24, 2014, "Ceiling on legitimate election expenditure is too low".

In an ideal case scenario, if one considers the Lok Sabha elections with 543 seats this adds up to another Rs.12,500 crores or a total of Rs.125,000 crores. Estimates of the 2014 campaign expenses by the ruling party are between Rs.4000 and Rs.10,000 crores. Local elections including Municipal, District, Block and Panchayat, easily double the figure of over Rs.100,000 crores as there are lakhs of contested seats. However, several Gram Panchayat elections are barely held.

Estimates for all elections put together, vary from a total of Rs.150,000 crores to Rs.250,000 crores. It should be taken note of that the numbers by the former Chief Election Commissioner shows evidently that candidates tend to spend for than the prescribed limit on election expenses several times over. A politician who he spends over Rs. 8 crores over an election is in reality spending 20 times the limit of Rs.40 lakhs per Assembly constituency.

The provision in the Representation of Peoples' Act<sup>5</sup> which empowers the Election Commission to cancel an election for false declaration of electoral expenses is of course prevalent. This raises several questions about the nature of elections and democracy. If this continues, it can be concluded that government's finances are in the control of these criminals, where an honest tax payer would be left to suffer at the end of this.

As said by many officials, there has been a rapid spread and growth of anti-social elements in the society, this in turn has led to the growth of "armed senas", criminal gangs, smuggling gangs, drug mafias, economic lobbies and drug peddlers which in turn, over the years, advanced an widespread network of associates with the bureaucrats at regional levels, media persons, politicians and strategically located individuals in the Non-State sector. Where some of these Organizations also have linkages to international avenues, including the foreign intelligence agencies.

This just proves that how dangerous current problem can get. We as Indians, are living in an era where the Home Ministry<sup>6</sup> is not aware of the emergency<sup>7</sup> being imposed in the State of Jammu and Kashmir, the Finance

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5 Ibid.

6 The Ministry of Home Affairs or Home Ministry is a ministry of the Government of India. As the interior ministry of India, it is mainly responsible for the maintenance of internal security and domestic policy. The Home Ministry is headed by Union Minister of Home Affairs Rajnath Singh.

7 Article 370 of the Constitution of India states that Parliament of India and the Union Government jurisdiction extends over limited matters with respect to State of Jammu and Kashmir, and in all other matters not specifically vested in Federal governments, actions have to be supported by state legislature.

Ministry<sup>8</sup> not being aware of Demonetisation policy and the Defence Ministry<sup>9</sup> being completely unaware of the Rafael deal taking place in the country. In a country, where some of the most reputed independent organisations like the Judiciary, Media and the CBI are turning against each other and there is evident threat to R&AW, the thought of these institutions being further corrupted by criminalisation of politics is nerve chilling.

- States, like Haryana, Bihar and UP these gangs enjoy the benefaction of local level politicians, which offers them ease to cut across party lines and the fortification of governmental officials. The candidates contesting spearhead these armed senas and get themselves elected at local, State and the national Parliament. In conclusion, such elements have assimilated considerable political influence which seriously jeopardizes the smooth functioning of any administration and the safety of life of the common man, causing a sense of despair amongst the people.
- It is no surprise that various economic transactions do get affected by the syndicates controlling the political clout in the country, this mainly occurs due to the dominance of these criminals in the international environment, these affect the economics of the country in several ways which include circulation of black money, havala transactions and operations of a vicious parallel economy causing serious strain to the economic fibre of the country. This primarily happens because there is a certain amount of respectability and fear which these syndicates churn. They exercise enough influence to make the task of prosecuting and investigating agencies extremely difficult; where even the adherents of the legal system have not escaped the encirclement of them.
- Certain elements of the Mafia have shifted to drugs, narcotics and weapon smuggling and established narco-terrorism states, one such examples can be cited in the States of J&K, Gujarat, Maharashtra and Punjab. The cost of contesting elections has thrown the politician into the lap of these elements and led to a grave compromise by officials of the preventive/detective systems. The spread of virus to almost all the areas in the country; the coastal and the border States have been particularly affected.

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8 The Ministry of Finance is an important ministry within the Government of India concerned with the economy of India, serving as the Indian Treasury Department.

9 The Ministry of Defence is charged with coordinating and supervising all agencies and functions of the government relating directly to national security and the Indian armed forces.

- Presently, there is no mechanism which is precisely designated to gather intelligence connect the dots to the linkages developed by Mafias with the politicians present in the government organisation. The various enforcement agencies collect information about the link between the administration and politicians with the Mafia gangs, smugglers and the underworld.

In a country, where terms like ‘Hafta’ are so commonly used, where common people, instead of protesting find it easy to give-in to these goons, it is fairly impossible to count the number of criminals in the country. But the reports submitted towards this cause point out that out of 62,800 candidates who have filed for elections, at least 11,030 (18%) had around 27,027 pending criminal cases against them while 5,253 (8%) candidates had 13,984 serious criminal charges including murder, rape, corruption, extortion, dacoity etc.

These include were 1229 cases of murder, 2632 cases of attempt to murder, and 496 instances of IPC sections on other cases related to murder (culpable homicide, abetment to suicide etc.). An average of 9% of all candidates fielded by political parties had serious criminal cases. Without exception all parties had such candidates, varying from 4% to 17%. If we look at candidates with some criminal case, including so called ‘trivial’ cases, the average shoots up to 18%.

**Relative chances of winning for clean and tainted candidates**

(All State Assembly, Lok Sabha, Rajya Sabha elections from 2004 to September 2013)

| No. who Contested | No. who Won | % of those with clean records who won | % of those with charges framed who won | % of those with serious charges who won |
|-------------------|-------------|---------------------------------------|--|---|
| 62847             | 8882        | 12%                                   | 23%                                    | 23%                                     |

The quantity of winners with unlawful cases is 28.4% though only 18% of candidates had such records. Similarly, 13.5% winners had serious criminal charges compared to 9% of candidates. In every type of criminal case, the percent amongst winners is much more. Civil society and the Election Commission have therefore asked for candidates with serious criminal cases to be barred from contesting elections. The Courts have also been inclined to take this view although they are not empowered to enforce this.<sup>10</sup>

<sup>10</sup> Ibid.

## **Causes of Criminalisation of Politics in India**

After understanding that the criminalisation of politics is a far deep-rooted problem than it seems, it becomes imperative to comprehend the issues which help in contributing the criminalisation of politics in our country. The issue contributing such events should be seen as a black ink for democracy, where the people who are supposed to have a set vision for the country is identified, just not to do that.

### **• Caste and Religion**

In our country, any big institution which goes parallel to caste and religion, seems to go corrupt in no time (at least in this case), the country which is supposed to run by politicians who are supposed to either make laws or govern the country delve themselves into the holiness of religion their respective caste systems.

The between personal and public lives is now completely blurred out, where the politicians try to impose concepts of their religious teacher onto the general public. The fundamental understanding that these are personal laws, which is up to each individual never occurs. Hence, when these people influence support from some of the sections in the society, it entitles them to use means which are juxtaposed from ethics.

### **• Relationship between the Bureaucracy and the Legislature**

The dangerous relationship between the organs of the government has aggravated the problems. Gone are the days where the Executive and Legislature were supposed to be separate. The link between them has led many politicians to think that they can influence the laws at their disposal. This mindset of politicians has scarred the image of politics in the country.

### **• Interference of politics with administration**

This interference of politics in the domain of law making is another effect which emerges out of this cause. The politicians have entered the domain of administration, leaving what they are actually supposed to do. The administrative departments of the government also, does have a tendency of getting muscled out by such politicians.

This intertwining of politicians with the administration has made the civil servants as well as other politicians who are at the look out to gain more money more and more corrupt, eventually leaving the politics of the country of this country at the hands of these criminals.

- **Public opinion**

In a country like India, where the freedom of speech is a Fundamental Right for people,<sup>11</sup> there seems to be a lack of strong public opinion of people against corruption. The issue which has already destroyed so many lives and has the potential to destroy more and more is also a matter, which is almost never spoken about. Only when an individual when have the knowledge that how is this phenomenon affecting his life, they will open their mouth, but by then it becomes too late. The country's silence over certain pertinent issues in the society makes it fairly impossible to spread awareness regarding the catastrophic effects to which it leads to.

- **Nature of the society**

The Indian society as a whole being underdeveloped, poor and illiterate leads to gain these criminals an upper hand in the society. These further upheavals the nature of the shrewd politicians to cater to his greediness. The self-interest seeking politicians cum criminal thence, stops at nothing, and makes sure to get what he wants, no matter at what cost.

### **For the Apex**

The increasing nexus between criminals and politics threatens the survival of any true democracy. In India, the Election Committee's official publication 'Electoral Reforms (Views and Proposals)' highlighted the need to amend the Representation of the Peoples' Act, 1951<sup>12</sup> to debar anti-social and criminal elements making inroads into the electoral and political fields. It said that criminalisation of politics had reached a stage where the law breakers have become law makers.

The views were reiterated by the Law Commission<sup>13</sup> which also recommended amendments of the Representation of Peoples' Act, 1951 by providing that framing of charges for offences punishable with death or life imprisonments, should disqualify a candidate for five years or until acquittal, whichever happens earlier. It also recommended that a candidate seeking to contest election must give details about his criminal history, or

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11 Freedom of Speech guaranteed under Article 19 (1) of the Constitution, 1950.

12 The Representation of People Act, 1951 is an act of Parliament of India to provide for the conduct of elections of the Houses of Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections.

13 Law Commission of India, 179<sup>th</sup> report.

any pending criminal cases, including a copy of the FIR/Complaint and also furnish details of all assets possessed whether by the candidate, spouse or dependent relations. No action was taken on the recommendation by the government because of lack of consensus amongst the political parties.

It is in this environment of inaction of the government, Parliament and the political parties, the matter was first brought before the Delhi High Court through a PIL Writ Petition.<sup>14</sup> Basing itself on the thesis that under Article 19(1)(a) of the Constitution, guaranteeing freedom of speech and expression, the right to information is an integral part of the freedom of speech and expression. Accordingly, the High Court ruled that a candidate while filing his nomination for his nomination for election to Lok Sabha or a State Legislature should give his full information in an affidavit about his past criminal record, financial status etc.

The Central Government appealed to the Supreme Court against the High Court verdict. On appeal, the Supreme Court has more or less reiterated the same judgement that was pronounced before. The Supreme Court has ruled that the Election Commission should call for information of each candidate on affidavit regarding his past criminal record, his financial assets (including those of his spouse or dependents), his liabilities to public sector bodies and educational qualifications<sup>15</sup>

It may be noted that these are not in any disqualifications of the candidate. The idea underlying is that if the electors have the full information about the antecedents of a candidate, they will be in a better position to decide as to whom to give vote.

Subsequent to the decision in the Supreme Court in Association of Democratic Representation of People Act, 1951 was amended the existing provision<sup>16</sup> by inserting Section 33A which requires a candidate to furnish information whether he is accused of any offence punishable with the imprisonment of two years or more in a pending case in which charges have been framed by a court of competent jurisdiction and whether he has been convicted and sentenced to imprisonment for one year or more.

Whereas, failure to file an affidavit or concealing information is punishable under Section 125- A. As far as the declaration of assets is concerned, the Parliament chose to partially implement the decision of the Supreme

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14 Association for Democratic ... vs Union of India (Uoi) And Anr, AIR 2001 Delhi 126, 2000 (57) DRJ 82.

15 Union of India vs Association of Democratic Reforms.

16 The Representation of the People (Third Amendment) Act, 2002 (Act 72 of 2002).

Court by requiring an elected and not a candidate standing for election, to declare his assets.<sup>17</sup>

Where Section 33-B primarily states that a candidate is not required to disclose

- a. the cases in which he is acquitted or discharged of criminal offence(s);
- b. his assets and liability and
- c. his educational qualification. The section was held to be unconstitutional by the courts in the case of *People Union of Civil Liberties v. Union of India*,<sup>18</sup> in the ground that the voter had a fundamental right under Article 19(1)(a) to be aware of the antecedents of his candidate.

### Measures Taken

The Election Commission, is the body responsible to make sure that the election does take place in a free and fair manner. But in the recent years, there have been certain instances where this freedom has been compromised time and again. But still, the Election Commission tries to as much as it can to save democracy.

The Election Commission of India (ECI) has debarred as many as 1921 entrants from contesting the 2014 Lok Sabha elections. These candidates from all over the country had not submitted their election spending results in the earlier election that they had disputed in, whether in the State assembly or Lok Sabha elections. Even after several years, the governance has failed time and again against the Gundaraj which prevails in the system.

But coming back to an important question as to what exactly does an individual want when they cast their votes in these elections. The top 10 priorities for voters was basic essential services (drinking water, education, health, electricity), employment, basic infrastructure (roads, public transport), law and order and women's security, lower food prices/ subsidized Public Distribution System (PDS).<sup>19</sup>

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17 Sec 75 A of the Representation of People Act, 1951.

18 *People Union of Civil Liberties vs Union of India*, Writ Petition (Civil) No.196 of 2001.

19 ADR report, 2014.

| <b>Voter rating of performance on Governance</b> |  |  |                                    |                                    |
|--|--|--|------------------------------------|------------------------------------|
|  | <b>Expectation on 30 governance parameters</b> | <b>Performance on 30 governance parameters</b> | <b>Top 10 priority expectation</b> | <b>Top 10 priority performance</b> |
| Score on 10 point scale                          | 7.53   | 5.74   | 7.74                               | 5.87                               |
| Interpretation                                   | Medium to High                                 | Bad to Average                                 | Medium to High                     | Bad to Average                     |

In a scenario, where the criminalisation of politics is not the top agenda or given high priority, there needs to be an establishment of a link between the two dots in the voter's mind. The issue of misuse of funds for the purpose of election sits in the heart of the matter. Elections as it is, is a high-risk investment for any candidate, this money has to be recovered by the candidate by earning revenues from the public taxes and public remunerations. This in turn will affect the administration in an adverse fashion where primacy of self-interest will always prevail to that of nations.

### **The Way Forward**

It is no doubt that the issue of criminalisation of politics in our country germinates from the society. In a way, the general perception of the public to be indifferent functions as a catalyst for the promotion of a behaviour which is more like this. This clearly reflects upon the type of democracy these people want to develop. The ADR survey clearly report that the people are more focussed upon their day to day necessities rather than building an ideal form of democracy.

To eradicate such issues the public requires a clear vision. A collaborative process where society is based on the principle serving the wants and needs of people first, and in turn spreading awareness may be one alternative. We live in a country where public anger can be quickly mobilized (thank fully in this case) every time there is a crisis (or none at times). Where building of a clear vision seems to be a wide term goal, but this in turn can bring in a lot of positive changes for the people of this country.

In this era, where various businesses and political interests are synergising into one and want to achieve goals to their best interest, a citizen interests are not really being addressed by either, where the latter has a fundamental

duty<sup>20</sup> to do so. However, rule-making is in the hands of politicians and bureaucrats. Hence, in this present scenario, a citizen is only important to cast a vote in the elections term after term.

Hence, a voter needs to focus on identifying the link in voters' minds between the goodness amongst the same politicians at the time when elections are fought, and the bad governance we get as a result. Voters need to recognize the consequences of electing such people which comprises corruption to recover electoral investments, auction of public and natural resources, and a shift in policy and budget allocations towards the interests of those who fund elections. People's interests are of lower priority. This vote education needs to be based on verifiable facts, rather than ideology and opinion. Such a voter awareness campaign is difficult to do, and requires a lot of resources. It will also be long drawn out and needs to be a continuous process over decades.

### **Conclusion**

It is the "solemn responsibility" of all concerned to enforce the law as well as the directions laid down by this court from time to time in order to "infuse the culture of purity in politics and in democracy and foster and nurture an informed citizenry, for ultimately it is the citizenry which decides the fate and course of politics in a nation and thereby ensures that we shall be governed no better than we deserve".

These were the words of the honorable judge presiding at the case where the aforementioned issue was being heard. This statement has only meant to say that it is not only the responsibility of the officials but also a responsibility of us as citizens of the largest democracy in the world to serve this nation. It can be concluded from the aforementioned arguments that politics is a double-edged sword, where powers and responsibilities to fulfil expectations go hand in hand. What needs to be realised that in the status quo, the powers are enjoyed a lot, but the duties are almost never fulfilled, the main reason behind that is the criminalisation of politics, which eventually ruptures the entire political setup. What needs to be seen is how much can our democracy survive, if the issues at hand continue like the way they are at present.

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20 The Constitution lays down certain Directive Principles of State Policy, which though not justiciable, are 'fundamental in governance of the country', and it is the duty of the State to apply these principles in making laws.

# CRIME VICTIMS AND VICTIMOLOGY

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Ms. Priyanka Nair\*

## Abstract

*Victimology is the scientific study of crime victims and the psychological aftermath of the victim's experience. This paper focuses on the theory of victimology from the perspective of various jurists including Mendelsohn, Hans von Hentig and Marvin Wolfgang. Victimology is a division of the broader field of criminology and hence, victimology with reference to criminology is explained. The key concepts of Victimology in general such as the definition of Victim, Crime Victim, Victim genesis, Victim Percipitation, Victim rights etc. are taken into consideration. The paper also envelops the nature and extent of victimization and the way is it perceived throughout the world. The objective of the paper is to analyses the situation of victim compensation and the theory of victimology, the evolution of the theme of victimology and crime victims with respect to International and Indian law. The victim rights in International Law with reference to Declaration of 1985 and United Nations Draft of 2006 is elaborated. Further, the Indian laws in context with the precedents relating to victim compensation are also explained and finally how the laws in India are inadequate and how laws in India are just confined to compensation to the victim are elaborated.*

**Keywords: Victimology, Crime, International Law, United Nations Draft 2006**

## Introduction

*'Why in history has everyone always focused on the guy with the big stick, the hero, the activist, to the neglect of the poor slob who is at the end of the stick, the victim, the passivist – or maybe, the poor slob (in bandages) isn't all that much of a passivist victim – maybe he asked for it?'*

*[Hans von Hentig – The Criminal and his Victim – 1948]*

The surfacing of the study of Victimology started back in 1937 when Benjamin Mendelsohn initiated the study of “the science of the victim”.

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Victimology, the term that has been emerged as a part of criminology, is about the scientific study of the victims of crime and the psychological aftermath of the experience that they encountered. Of late, our law has become more focused on the “offenders” as a whole and what we tend to forget is the condition of the victims after a crime has happened, including the psychological effects on the victims. Victimology studies this and helps us ascertain the conditions of the victims in a society. It also helps us determine the different facets of offenders.

Benjamin Mendelsohn, Hans von Hentig and Marvin Wolfgang are considered as the founders of Victimology. Benjamin Mendelsohn derived the word ‘victimology’ from the Latin word ‘victima’ and Greek word ‘logos’. In Victimology, the main alert area is the state of victims, their relationship with the criminal justice system and the aspects of victimization. Victimology, thus, is the study of the etiology of victimization, its consequences, how the criminal justice system helps out victims and it also interprets the conditions of the victims in the society. Victimology as a field of study began in 1950s with the work of Hentig and Mendelsohn. Interested in understanding crime, they examined the relationship between victims and the offenders. Their early work was especially focused around victim action and weaknesses. These scholars were of the view that victims had a role to play in victimization. In its infancy, work produced by victimologists was scant and overshadowed by the coming out of Criminology. As such, little recognition was given either to the field of Victimology or the scholars who studied crime victims. It was not until 1970s that victimology was formally recognized as a subfield of criminology. One of the important milestones in the history of Victimology<sup>1</sup> was the establishment of the World Society of Victimology in 1979 by criminologist Hans Schneider. It is now a not-for-profit, nongovernmental organization with Special Category consultative status with the Economic and Social Council (ECOSOC) of the United Nations and the Council of Europe.

Victimology as the word suggests is the study of victims. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 defines the expression “victim of crime” as person(s) who, individually or collectively, have suffered harm, including physical and mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

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1 Hoffman, 1992; Kirchhoff 1993, Friday, 1989.

The victim as defined by Section 2 (wa) of Code of Criminal Procedure is as follows:

“Victim” means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression “victim” includes his or her guardian or legal heir.”<sup>2</sup>

Victims could be classified into:

- Primary or Direct Victims
- Secondary or Indirect Victims

Primary Victims are those who had the firsthand experience of crime and secondary are those who are indirectly or in the course of action subsequently affected, such as the victim’s family, etc. Mendelsohn had also categorized victims into six:<sup>3</sup>

- Completely innocent victims
- Victims with minor guilt
- Voluntary Victim
- Victim more guilty than offender
- Victim who is alone guilty
- Imaginary Victim

The classification’s focal point is the ‘behavior’ of victims. Earlier, victims had a good role to play in order to punish the offenders. They were given liberate rights to decide the punishment. Then with the Rule of Law, Modern Justice System made specific changes regarding the same and the law began to focus on the ‘offender’ as a whole. Hence, the offenders became the center point of concentration of law and subsequently, victims somehow were not taken care of. Generally, the whole attention is paid by the crime investigators and the Courts on the criminals. They are concerned with the victim of the crime only for detention of the crime and to substantiate or falsify the prosecution story. Criminology is mainly concerned with the criminals, their social background, the causes of

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2 As per 2008 Amendment of Criminal Procedure Code, 1973.

3 H.J. Schneider, ‘Victimological developments in the world during the past few decades I: A study of comparative victimology’, *International Journal of Offender Therapy and Comparative Criminology* 45(4) 2001, 449-468.

criminality, the methods of punishment and crime prevention etc. Little attention has been made on the victim either as instigator of crime or as deserving protection of administration and society for rehabilitation in an honorable and dignified way. *Payne v. Tennessee*<sup>4</sup> was a United States Supreme Court case (the first case of its kind) which held that testimony in the form of a victim impact statement is admissible during the sentencing phase of a trial.

### **Penal Couple: The Relation Between Criminal and Victim**

Mendelsohn, a Romanian barrister deserves to be noted for identifying first of all the victim-doer relationship which he termed as the “penal couple”. He did his research with bio-psycho-social point of view, studied some cases of rape and some other offences against morality in which he noted that the resistance of the victim may be lessened by the following circumstances-

1. The familiar, authoritative or hierarchical relations existing between the accused and the victim.
2. The volcanic temperament of the victim, which may obscure reasoning faculty.
3. The libertine social surroundings of the victim.
4. The superiority of the social milieu of the accused in relation to that of the victim.

He has stated as to how he started to elaborate the doctrine of victimology while preparing for the trial of Stephen Codreanu in 1945. The accused after divorce continue to live with his wife. He was invited on the first and fifteenth of every month by his wife under the pretext to prepare lessons with their little daughter. He used to eat with the family and was given all the sweetness by the wife at night. After taking all his money, he was turned out from the house the next morning and her lover a young soldier ridiculed him. He, therefore killed his wife and her lover with all premeditation. From the facts we could easily infer that he would have never killed his wife but for that behavior.<sup>5</sup>

Prof. Hans Von Hentig, a psychiatrist, instead of describing ‘Penal Couple’ has termed it as “doer-sufferer”.<sup>6</sup> Professor Henry Ellenberger, German

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4 *Payne v. Tennessee*, 501 US 808 (1991).

5 B. Mendelsohn, ‘The Origin of Victimology’, *Excerpta Criminologica*, Vol. 3 (May-June 1963), pp. 239-241.

6 Hans Von Hentig, ‘The Criminal and His Victim’ 1954.

barrister and criminologist has described it as “Victimogenesis”,<sup>7</sup> Hentig and Ellenberger consider the victim as a subject-matter of criminology. B. Mendelsohn considers it as a separate science. According to Dutch criminologist, Nagel, the study of victim should necessarily be a part of criminology.<sup>8</sup>

Hens Von Hentig’s Work, ‘The Criminal and His Victim’ Published in America in 1948 attracted the attention towards the “victim-doer” relationship in which a criminal by taking advantage of his victim committed the crime. Thus the poverty and ignorance breeds a peculiar kind of fraud, larceny from the sleeping of intoxicated person is easy; the criminals prefer the persons who often suffering loss cannot breathe a word of it; the lingo of the criminal indicates the vulnerability of some kinds of people to become victims, in many burglaries and arson cases, the victims are really perpetrators and winners and more serious being the burglaries staged by the victims themselves who are merchants of jewellery, furs, silks and similar valuables and hold-ups arranged by the banks in default. Victimology is more apparent in murder and in rape or sex assaults but Hentig does not present a clear image of victim in these personal crimes. The female is frequent victim of murder and still more of sexual assault. Certain types of victims are so weak or vulnerable so as to be easily preyed by the criminals e.g., young, females, old, mentally defective and deranged, intoxicated persons, the immigrants, the dull normal persons, members of the minority group. Some of the victims are instigators by their attitudes, personalities and desires.

Taking into account psychological aspects of the doer-victim relationship, he described some victims as real instigators. In some cases, the victim may desire injuries and in some cases even lustfully longed for, in some cases as a price of greater pain, in some cases the detrimental effect may come due to concurrent effort of the victims and in some cases the detriment would not come without instigation or provocation of victims.<sup>9</sup>

### **Victimization and its effects**

The victim is the forgotten man of our criminal justice system. He sets the criminal law in to motion but then goes into oblivion. Crime affects the individual victims and their families. The impact of crime on the victims

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7 Henry Ellenberger, ‘Relations Psychologiques entre le criminel et sa victime’ (Revue internationale de criminology et de police technique, No. 2/1954, Geneva).

8 W.H. Nagel ‘The Notion of Victimology and Criminology’, Excerpta criminologica, Vol. 3 (May-June 1963), pp. 245-246.

9 Henry Ellenberger, p.420.

and their families ranges from serious physical and psychological injuries to mild disturbances. Following are the brief description of the physical, financial and psychological effect on crime victims.

(a) Physical- Victims of crime of violence suffer physical injury ranging from minor to fatal injuries. The physical injury is the worst kind of pain that not only hurts externally but also leaves scars internally. The victim has the right to defend himself. In some cases, the right extends even to the extent of causing death. Section 96 to 102 and 106 of Indian Penal Code provides the right of private defence.

(b) Financial- Victims of financial loss are those who suffer loss financially due to the nature of the offences committed. The offences against property are the offences in which victim sustain the loss of the property. In offences involving violence and offences against human body also victims suffer financial losses. Thus, in a riot, there happens to be enormous looting and destruction of immovable and movable property both. In offences against human body, the victims who become physically handicapped sometimes become incapable of doing employment or self-employment. Besides, they also incur expenses for their medical treatment and high cost of litigation. When the victims suffer fatal injuries, their families have to bear the expense in funeral or burial and follow on social traditions. The dependants of an earning member in the family who loses his life are more vulnerable. The financial stringency and the poverty in such situation bring mental agony and traumatize the entire family.

(c) Psychological- The mental torment and trauma suffered by the effect of crime may be such as no reparation can make it up. The crimes against violence, sometimes, affect victim as to permanent incapacitating them to behave like a responsible person of the society and they out of feeling of revenge become hardened criminals. There are illustrations when not only the immediate affected victims turn into criminals but their future generations also become involved in family-feuds. Similarly, the rape tarnishes the whole personality of a ravished woman and she either has to console herself with the circumstances or may take extreme steps such as suicide or she may become bandit in the revenge. Brutalization of the children results in such act that thousands of them, as the researches show, that “Little victims grow into big terrorists”.<sup>10</sup>

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10 V. N. Rajan, ‘Victimology in India’ (A.P.H.) 1995 P. 175 quoting R.M Fields, ‘A society of the Run-Pub’ (Hamonsworth, England (Penguin)).

## Hypothesis

**Victim Precipitation Theory:** This theory with a negative outlook towards the victim holds the victim's own contribution for his victimization. This theory has been subjected to criticism and often disregarded as a theory of victimology being anti-victim. Wolfgang, has said it is the 'victim facilitation' not the 'victim blaming' that makes the victim because of victim interactions' vulnerable to crime and therefore opposed this theory. According to Schater, the lack of care and vigil among the victims are the factors that contribute substantially to the victimization.

**Three Model Theory:** According to Benjamin and Mendelsohn, there may be three conditions for precipitating the crime, the first one being the victim's presence at the wrong place at a wrong time, secondly the factors and the life style which attract and make the fertile ground for crime and finally, the pre- disposing factors of victimization e.g., poverty, childhood, minority, unemployment, etc.

**Routine Activities Theory:** Cohen and Felson who propounded this theory describe the occurrence of crime on satisfying of three conditions—(i) a suitable target, (ii) a motivated criminal, (iii) No security, parental care or guardianship.

## Right of Victims in International Law

In order to curb the issue of victimization and to reduce crime victims, various organizations all over the world have come up with one or another measure. The promulgated various rights to victims including the right to participate in the legal proceedings to receiving compensation for the injuries and damages, such as the French legal system allows all parties who suffered injury to implead in legal proceedings. The United Nations handbook on justice for Victim has given a comprehensive victim assistance scheme for the rehabilitation of victims of crime. The two of the major Declarations/Drafts prepared by the World Society of Victimology are as follows:

### Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985

The General Assembly adopted in November 1985, 'U.N. Declaration of Basic Principle of Justice for Victims of Crime and Abuse of Power. "The draft was proposed and prepared by the World Society of Victimology. It affirmed the necessity of adopting national and international measures in

order to secure the universal and effective recognition of, and respect for, the rights of victims of crime and of abuse of power. It further called upon the Member States to take necessary steps to give effect to the provision contained in the Declaration and, in order to curtail victimization. After this Declaration, considerable progress has been made by many nations including India in safeguarding the rights of victims.

### United Nations Draft Convention, 2006

A U.N. Convention on Justice and Support for Victims of Crime and Abuse of Power was held on 14<sup>th</sup> November, 2006. A draft was developed by the World Society of Victimology in partnership with the International Victimology Institute. The draft convention is subject to ratification by the States. This was drafted keeping in mind that even after the 1985 declaration, millions of people, including women and children, throughout the world were still suffering harm as a result of crime, abuse of power and terrorism, and that the rights of these victims have not been adequately recognized. The general considerations of the draft included Access to Justice and Fair Treatment (Article 5), Protection of victims, witnesses and experts (Article 6), Medical, Psychological and Social Assistance to victims (Article 8) and Adequate Compensation (Article 11).

### **Victim Rights, Compensation and Victimology in India**

1. Setting the law in motion: The victim or any other person sets the law in motion by filing an F.I.R. under Section 154 of Code of Criminal Procedure or by filing a complaint before the Magistrate under Section 200. The victim has the right to attend the proceedings during bail application, investigation, inquiry, trial and thereafter at the stage of sentencing, parole, etc. By it, the harm to the victim and his interest both are recognized.
2. Right to know where investigation not to be done: Where F.I.R. is lodged, the investigation is started by the police<sup>11</sup> and in case of a report of a non-cognizable offence investigation cannot be started by the police without the order of the Magistrate having power to try such case or commit the case for trial.<sup>12</sup> In case of a cognizable offence where the information is given against any person by name and the case is not of a serious nature, the office in charge of Police Station need not proceed in person or depute a subordinate officer

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11 Section 156 of Cr.P.C.

12 Section 155 of Cr.P.C.

to make an investigation on the spot.<sup>13</sup> If it appears to be officer-in-charge of police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.<sup>14</sup> In both the cases, the officer-in-charge of the police station shall state in his report to the Magistrate the reasons for it and in the latter case, he shall also forthwith notify to the informant, if any, in such manner, as may be prescribed by the State Government, the facts of not investigation of the case.<sup>15</sup> Thus, the informant has been given the right to know that the case shall not be investigated by the police.

3. Hearing of complainant when complaint to the Magistrate: The right has also been given to file a complaint before the Magistrate. A Magistrate taking cognizance of an offence on complaint shall examine the complainant and the witnesses present.
4. Engagement of lawyer by the victim: Under Section 301(2) a private person which includes a victim is entitled to instruct a pleader as prosecutor in any Court. If it is so, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution.
5. Legal aid: Section 12 of The National Legal Service Authority Act, 1987 enshrines the principle of free legal aid. It states that every person who has to file or defend a case shall be entitled to legal services under this Act if that person is a member of Scheduled Caste or Scheduled Tribe, A victim of trafficking, a woman or a child, a mentally ill or otherwise disable person, an industrial workman, a victim of mass disaster, a person in custody of protective home within the meaning of clause (g) of Section 2 of the Immoral Traffic (Prevention) Act, 1956 and individuals in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court.
6. Protection of rape victims: Victims have been given certain statutory and judicial protection and rights. Under Section 154 of Cr.P.C by lodging an F.I.R, the criminal law is set in motion regarding the alleged offence. It is an important document on the basis of which investigation proceeds in a criminal case and it is used to support or

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13 Proviso (a) to Section 157 (1) of Cr.P.C.

14 Proviso (b) to Section 157 (1) of Cr.P.C.

15 Section 157 (2) of Cr.P.C.

contradict evidence of informant.<sup>16</sup> In *State of Himachal Pradesh v. Prem Singh*,<sup>17</sup> the Supreme Court has held that the delay in lodging F.I.R in case of sexual assault cannot be equated with the case involving other offences. There are several matters that weigh the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint and in such cases of sexual assault, the victim's psychological and mental torment should definitely be considered.

### **Indian Judiciary and Victim Compensation**

Indian laws only have meagre ways of awarding compensation to the victims. The provisions involving the compensation to victims of crime are enclosed in sections 357, 357(1), 357 (2), 357 (3), 357A, 358, 359 and 250 of the Code of Criminal Procedure, 1973. Constitution of India also provides for certain safeguards to the victim of crime. Article 14 and 21 of the Constitution supports the argument. Section 5 of Probation of Offenders Act, 1958 states that the court may if thinks fit at the time of release of the offender may order payment of reasonable compensation to victims. The amount ordered to be paid can be recovered as fine. Under Section 5 of the Motor Vehicles Act, 1988 the victims of motor vehicle accident or their legal representatives are entitled to claim compensation from the offender.

The higher judiciary in India was always keen in assuring compensation to the victims of crime. In *Rudul Shaw v. State of Bihar*,<sup>18</sup> the Supreme Court observed that a person is entitled to compensation for the loss or injury caused by the offence and it includes wife, husband, parents and children of the victims. Rudul Shaw's case is a landmark judgment in the jurisprudence of state liability. It is considered particularly significant as it led to the emergence of compensatory jurisprudence for the violation of fundamental rights under the Constitution. It is noteworthy in this context that there is no express provision for awarding compensation in the text of the Indian Constitution, and that this judgment was on the basis of the Court's interpretation of the extent of its remedial powers. This was the first case since the inception of the Supreme Court that awarded monetary compensation to a person for the violation of his fundamental rights guaranteed under the Constitution. The grant of such monetary compensation was in addition, and not to the exclusion, to the right of

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16 Damodar Prasad v. State, AIR 1972 SC 629.

17 State of Himachal Pradesh v. Prem Singh 2009 Cr LJ 789 (SC).

18 Rudul Shaw v. State of Bihar AIR 1983 SC 1086.

the aggrieved person to bring an action for damages in civil law or in tort. Following this case, the Supreme Court awarded compensation in several cases. In the subsequent early cases in which this remedy was considered, the Court held that compensation would be awarded only in 'appropriate cases' which seemed to primarily involve life and liberty rights and were mostly cases relating to illegal detention and unlawful deaths. Nonetheless in later cases, it became clear that the scope had become significantly wider. Since economic and social rights are often considered by the Supreme Court under the ambit of Article 21 of the Constitution (the right to life which is a fundamental right), compensation as a constitutional remedy may be available for violations of these rights. In another case<sup>19</sup> wherein a Member of Legislative Assembly was maliciously and deliberately arrested and detained by the police in order to prevent him from attending the assembly session, the Court observed that the malicious intention of the arrest and detention is not washed away by his being set free later and hence ordered a compensation of Rs. 50,000 to the petitioner for the violation of his legal and constitutional rights. In *State of Andhra Pradesh v. Challa Ramakrishna Reddy*,<sup>20</sup> the Supreme Court while affirming the judgment of the Andhra Pradesh High Court which awarded compensation to the survivor of a bomb attack in police custody which killed the head of the family observed as under- "so far as Fundamental Rights and human rights or human dignity are concerned, the law has marched ahead like a Pegasus but the Government attitude continues to be conservative with regard to compensation to the affected victims and it tries to defend its action or the tortuous action of its officers by raising the plea of immunity for sovereign act or acts of State, which must fail.

## Conclusion

In the Modern Criminal Justice System, mainstream victimology continues to focus solely on the study of crime victims. This emphasis has resulted in an increased awareness and understanding of not only victims of crime, but also has impacted the way crime is measured and also the role that victims play. Also, the society as a whole has a moral responsibility because the crime is a result of certain undesired conditions existing in the society. If the State fails to remove these conditions from the society, it is bound to compensate. Although the laws are still feeble and needs a strapping hold up in order to help the victims to cope up with what has happened to them and thus, implementing more stringent laws with

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19 Bhim Singh v. State of Jammu and Kashmir AIR 1986 SC 494.

20 State of Andhra Pradesh v. Challa Ramakrishna Reddy (2000) 5 SCC 712.

regard to the compensation is the need of the hour. Every crime produces a victim. Crime rate is growing at a rapid pace in India especially in cases of organized crime such as drug trafficking, shooting, money laundering, extortion and murder for leasing, fraud, human trafficking. As per a survey, crime against women is reported in every two minutes in India. The data highlight the urgent need to ensure proper law and order situation in the country and also, proper schemes for victim compensation. Although a silver lining could be seen in the recent changes made to Code of Criminal Procedure, 1973 and also in the judicial response but there need to be enforcement of more stringent laws for compensation as mere forgiveness to the criminal would do no good because forgiveness has nothing to do with absolving a criminal of his crime and compensation to an extent has a role to play with relieving oneself of the burden of being a victim.

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# ELECTIONS: WHO HOLDS THE REINS?

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Isha Khurana\*    Shagun Khurana\*\*

## Abstract

*Elections are considered to be unique milestones in the political development of the country. They have become an integral part of our political system. With mushrooming of various regional and national parties, India has witnessed an unprecedented growth in the realm of competitive electoral practice in the recent times. In the highly charged atmosphere experienced during elections, universal standard of 'free and fair elections' has to be adhered to. As per the mandate of the election commission, the voters are supplied with sufficient knowledge about their prospective legislators. Indian Constitution has accorded the right to vote to citizens of India and has supplemented it with various other rules and regulations to effectuate a well-informed decision by the balloters of the country.*

*Unfortunately, at times, even an intelligent choice acts in an adverse manner. Currently, India is witnessing something similar and a constant rise in unethical and irresponsible behaviour on the part of the elected legislators is being experienced. In a world where globalisation of democratic electoral process is a reality, we need to empower our voters with the 'Right to recall'.*

*Right to recall is basically a power to 'de-elect' the representatives from the legislature through a direct vote, which is initiated with a minimum number of voters. Right to recall is a mean to achieve certain end term objectives and not the end itself. It is quintessentially a 'post-election' measure to constantly monitor the working of the elected representatives. The electorate's right to recall legislators will be instrumental in ensuring the latter's accountability towards the people. The damage caused to the 'democratic institutions' by the errant or non-performing elected representatives should be checked by the democratic process only and hence this right should vest in the citizens. The right to recall can act as wake-up call for the legislators.*

*This research paper would delve in the unexplored area of right to recall and its exercise by electorates at different occasions in India. It would also highlight the debate around the 'excessive democracy' being granted to citizens by this right. A comparative study with the similar right in various jurisdictions will also be conducted.*

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**Keywords: Right to recall, De-elect, Post-election measure, Excessive democracy**

## Introduction

The Preamble to the Constitution of India reads as:

“WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a

SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC...”

The people of India have declared their sovereignty and have proclaimed India as a Democratic nation at the very outset. Democratic principles have been recognized by the judiciary<sup>1</sup> and citizens making India the largest democracy in the World. The modern Indian nation along with the present electoral process<sup>2</sup> came into existence post the adoption of our Constitution.

Democracy has been held to be a part of doctrine of basic structure<sup>3</sup> meaning thereby that democracy is the very fabric of the Indian society. The principle of democratic decision making requires a method of group decision where every member of the group is treated equally. The mandate of the electorate is reflective of the majority will.

Many complex political societies have adopted the democratic principle as a legitimate method of decision making and institutional design in the political sphere. Gradually, in many flourishing economies, democracy has emerged as a pre-emptive normative form of decision making.<sup>4</sup>

India is a constitutional democracy with a parliamentary system of government, and at core of the system lays the commitment to hold regular, free and fair elections. The word Election finds its origin from the Latin word ‘eligere’, which means —to choose, select or pick. In other words it means to elect, or vote, to select or to make a choice. Election is a process through which the citizens of the country demonstrate their collective will.

1 P. N. Bhagwati, “The role of the judiciary in the democratic process: Balancing activism and judicial restraint.” 18(4) *Commonwealth Law Bulletin* 1262 (1992).

2 Part XV of the Constitution of India was adopted on 26th November, 1950.

3 His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr. (1973) 4 SCC 225.

4 As of the end of 2017, 96 out of 167 countries with populations of at least 500,000 (57%) were democracies of some kind. See, Drew DeSilver, despite global concerns about democracy, more than half of countries are democratic, Pew Research Centre, 2017 available at <https://www.pewresearch.org/fact-tank/2019/05/14/more-than-half-of-countries-are-democratic/> (last accessed on January 05, 2019).

These elections are responsible for determining the composition of the government at various Centre, State and Municipal levels. The membership of the two Houses of Parliament, the State and Union Territory Legislative Assemblies, the Presidency and Vice-Presidency are elected through various methods of choosing our own representatives.

### **Our thrust with democracy**

Indians have always more or less committed to a democratic future ever since pre-independence. The experience of colonialism reinforced this desire for democracy. Of course, as was to be expected, there were considerable differences in the understanding of the meaning and functioning of democracy and development in post-independence India. This indicated a vibrant and democratic political ethos in the making.

The aim of the democracy was to challenge social and economic privileges that were entrenched in India. In reality, however, the nation soon forgot the intertwined nature of the democracy agenda<sup>5</sup> and hoped that somehow the fruits of development would seep downwards without any concrete and institutional changes being made in this regard.

The whole concept of democracy came into picture in order to ensure that India acts as a 'Welfare State' which can be achieved by development and economic reforms. The same was the objective when the democratic principles were incorporated in the grundnorm of our country.

#### **(i) Eligible to be Inked Electorates:**

The democratic system in India is based on the principle of Universal Adult Suffrage;<sup>6</sup> meaning thereby that any citizen over the age of 18 can vote in an election. This right to vote is irrespective of caste, creed, religion or gender. This is not an absolute right as it is qualified by soundness of mind and also restricts people convicted of certain criminal offences from exercising their right to vote. Guarantee of right to vote is found in Part XV of the Constitution titled "Elections". The Electoral Law in the country is supplemented by The Representation of People Act, 1950.

The onus of registering electors in India lies on the election commission.<sup>7</sup>

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5 Shri M. Hamid Ansari, Address on 9th National Conference of the Indian Association of Lawyers, 2016 Available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=155870> (last accessed on December 20, 2018).

6 The Constitution of India, 1950, Art. 326.

7 Election Commission of India is a permanent Constitutional Body and was established in accordance with the Constitution on 25th January 1950. See also Election Commission of India, The Setup, available at: <https://eci.gov.in/about/about-eci/the-setup-r1/> (last accessed on December 23, 2018).

It sends officials enumerators, from house to house, to collect data about eligible electors, on the basis of which electoral rolls are prepared for each constituency, polling station wise. Registering of names in the electoral rolls is a mandatory requirement to be allowed to vote. The electoral rolls are revised every year to add names of new eligible electorates and remove the names of people who have passed away or moved out of the constituency on the 1<sup>st</sup> January of that year.<sup>8</sup>

## (ii) Electoral Reforms

### (a) The Need for Reforms:

The electoral process in various assembly elections, across different states, has been initiated which had in turn commenced our journey towards general elections 2019, which have successfully concluded. This electoral process is witnessing participation of a large-scale electorate. What is disheartening to whole process of democracy is that even 69 years post-independence 25.96<sup>9</sup> the citizens of India are illiterate, making meaningful democracy impossible but making it easily possible for politicians to have a vested interest in illiteracy and public ignorance.

Conventional avenues and structures of democratic politics have become progressively more corrupt. The distance between these structures and the democratic aspirations of the people has grown considerably. The reality at the ground level is that people are engaged in democratic struggles for livelihood, water, city space, education to name a few and these struggles are a consequence of the limited success of India's democracy.

Time and again the politicians have used these basic struggles for sustenance as a tool to garner positive electoral votes. The populist policies used by a few of them have distorted the very fabric of democracy.<sup>10</sup> Supreme Court and Election Commission have tried to uphold the sanctity attached to elections and this has led to enactment of various electoral reforms in the country.

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8 M.S. Gill, 'The Electoral System in India' available at [http://eci.nic.in/eci\\_main/eci\\_publications/books/miscell/ESI-III.pdf](http://eci.nic.in/eci_main/eci_publications/books/miscell/ESI-III.pdf) (last accessed on 7th May, 2018).

9 Literacy And Level of Education, 2004 Census Report available at [http://censusindia.gov.in/Census\\_And\\_You/literacy\\_and\\_level\\_of\\_education.aspx](http://censusindia.gov.in/Census_And_You/literacy_and_level_of_education.aspx) (last accessed on 23rd May, 2018).

10 Balmiki Prasad Singh, "The challenge of good governance in India: Need for innovative approaches." *Ash Institute for Democratic Governance and Innovation 2008*, available at: <http://www.innovations.harvard.edu/cache/documents/1034/103461.pdf> (last accessed on January 23, 2019).

## (b) Reforms through the years:

There is no denying that governments in India are voted in and voted out, elections are by and large free and fair, and the media is open and powerful. However, this does not complete the score card of democracy in India. Electoral process in India has also picked up pace with the changing time and has undergone a sea change ever since its conception, post-independence.

The Election Commission is considered to be the guardian of free and fair elections in the country. It was in 1971, Election Commission of India came out with Model code of conduct for the first time.<sup>11</sup> Ever since then, prior to elections, model code of conduct comes into operation. With 61st amendment<sup>12</sup> to the Constitution of India, the age of adult suffrage was reduced from 21 to 18 years. Under the directions of Supreme Court in 2002, Election Commission issued an order under the broad ambit of Article 324 mandating the disclosure of assets, movable and immovable, and qualifications by the candidates filling their papers for nominations. The Commission has fixed legal limits on the amount of money which a candidate can spend during the election campaign. These limits have been revised from time to time.

Further, making use of Information Technology for efficient electoral management and administration, the Electronic Voting Machines (EVM) were introduced which replaced the ballot paper voting. Initially in 1999, in order to check impersonation all the electoral rolls were made electronic and subsequently by 2009, photo electoral rolls for proper verification of voters were introduced across the country.<sup>13</sup>

Supreme Court<sup>14</sup> read the right of not to vote as an integral aspect of right to vote and directed that the EVM machines should contain the option of None of the Above (NOTA). Supreme Court went a step further and also laid down the directive that advertisement for governmental schemes should not have pictures of ministers on it except Prime Minister, President or Chief Justice.<sup>15</sup> Subsequently, the introduction of electoral bonds for giving donation to the political parties and the cap of cash donations per individual are efforts to

11 Electoral Laws Compendium (II) available at [http://eci.nic.in/eci\\_main/ElectoralLaws/compendium/VOL-II\\_24022014%20.pdf](http://eci.nic.in/eci_main/ElectoralLaws/compendium/VOL-II_24022014%20.pdf) (last accessed on 1st June, 2018).

12 61<sup>st</sup> Constitutional Amendment Act, 1988.

13 Sumandeep Kaur, Electoral Reforms in India: Proactive Role of Election Commission available at <https://www.mainstreamweekly.net/article1049.html> (last accessed on 15th May, 2018).

14 *People's Union for Civil Liberties v. Union of India* (2013) 10 SCC 1.

15 *Common Cause v. Union of India* W.P.(C) No. 21 of 2013.

weed out the black money infused in the political campaigning.

Unfortunately, in spite of laudable efforts to weed out the virus of malpractices in the electoral process, the core objective for which we incorporated the democratic system is not being achieved. Efforts have been made to incorporate better methods and systems which utilize the advanced scientific technologies for maintaining the high reputation of the Indian elections there have been instances where elected representatives have themselves been instrumental in faulting the ethos of democracy. Nation is witnessing a constant rise in unethical and irresponsible behavior on the part of the elected legislators. Instances which demonstrate the lackadaisical attitude of legislators have been on a constant rise.

Our legal system has made life too easy for criminals and too difficult for law abiding citizens. A touch here and a push there and India may become ungovernable under the present constitutional set up. The quality of our public life has reached the nadir. Politics has become tattered and tainted with crime. The moral standards of our politicians, policemen and criminals are indistinguishable from one another.<sup>16</sup> In a world where globalisation of democratic electoral process is a reality, we need to empower our voters with the “Right to recall”.

### **(iii) Right to recall**

Right to recall is a process whereby the electorate is empowered to make conscious decision to remove the legislator before the expiry of the fixed tenure. This is basically a power to “de-elect” the representatives from the legislature through a direct vote, which is initiated with a minimum number of voters.<sup>17</sup>

The Right to recall is a mean to achieve certain end term objectives and not the end itself. It is quintessentially a “post-election” measure to constantly monitor the working of the elected representatives.<sup>18</sup> The electorate ‘s right to recall legislators will be instrumental in ensuring the latter’s accountability towards the people. The damage caused to the “democratic institutions” by the errant or non-performing elected representatives should be checked by the democratic process only and hence this right

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16 Nani A. Palkivala, *We the People* (UBS Publishers ‘Distributors Pvt. Ltd., New Delhi, 1999).

17 Rahul Mehta, *Right to Recall – An Indian Perspective*, available at <https://apnabhaarat.wordpress.com/2011/07/01/right-to-recall-an-indian-perspective/comment-page-1> (last accessed on 3rd June, 2018).

18 Sonika Bajpeyee, *Right to Recall Elected Representatives: Whether viable in the Indian Scenario?*, *Indian Law Journal*, available at [http://www.indialawjournal.org/archives/volume6/issue\\_1/article8.html](http://www.indialawjournal.org/archives/volume6/issue_1/article8.html) (last accessed on 5th April, 2018).

should vest in the citizens. The right to recall can act as wake up call for the legislators. It is in this backdrop we advocate “Right to Recall”.

Locke has advocated that the government is a servant to the people, a beneficiary or trustee and adds on that good governance can only be achieved with the legislators being accountable to the citizens. Supreme Court also acknowledged the need to have a corruption free government and ‘de-election’ of delinquent representatives would be one way of achieving that. The *raison d’etre* to introduce right to recall is to ensure “good governance” by eliminating the corrupt, unworthy officials.

Presently, India has not read right to recall as a part of universal democracy but a few states like Madhya Pradesh, Chhattisgarh, Rajasthan have taken a lead in this and have acknowledged the right to recall in local bodies. The first recall election in India was witnessed in year of 2001 in Anuppur Nagar Panchayat, Shahadol, Madhya Pradesh when electorates exercised their right to recall.<sup>19</sup> In 2008, three local body chiefs were de-elected by the people in accordance with the Chhattisgarh Nagar Palika Act, 1961.<sup>20</sup> Recently Mangrol Municipality area of Baran District, Rajasthan witnessed the application of right to recall against the municipality representative.<sup>21</sup>

The recall procedure which has been formulated and penned down in a few state specific legislations and have been followed thereafter raises various interesting issues and concerns. These concerns are profound when one tries to import the right to recall in the general elections both at centre and state level. It also pertinent to analyse whether are we advocating “excessive democracy” in the garb of right to recall or is it a legitimate extension of our right to vote which has been granted to citizens.

### **(i) Is it a move towards direct democracy?**

The representative parliamentary democracy in India gives the power to remove an elected representative to the Parliament alone. On the other hand, the freedom to choose their representatives is given to the people directly. However, the people do not choose their candidates in the literal sense. The choice of candidates is determined by the leaders of political parties, which need not always follow principles of inner party democracy.

19 Voters exercise right to recall, The Hindu available at <http://www.thehindu.com/2001/04/12/stories/14122123.htm> (last accessed on 23rd April, 2018).

20 Vinod Bhanu, Right to Recall Legislatures: The Chhattisgarh Experiment, *Economic & Political Weekly*, 15-16, (4th October 2008).

21 Rajasthan witnesses its first ever right to recall vote, The Hindustan Times available at <http://www.hindustantimes.com/india/rajasthan-witnesses-its-first-ever-right-to-recall-vote/story-kjEvlZ3Lp28IoRMqjoKWN.ht> (last accessed on 23rd May, 2018).

<sup>22</sup>Therefore, people are constrained to vote for a —party politician and not just a —candidate. They are elected not because of their personality, personal achievements or personal policy preferences, but because they are party’s candidates. Thus, the electorate faces a restricted choice.

Right to Recall can be touted as a step towards direct democracy, here the power to recall an elected representative lies directly with the electorates. On a motion passed by the minimum number of the electorates the elected representative can be removed. This will ensure greater accountability and transparency in their words and actions.

Former Lok Sabha speaker, Somnath Chatterjee, in his address at the plenary session on —Right to Recall as a Strategy for Enforcing Greater Accountability of Parliaments to the People at the Commonwealth Parliamentary Conference, 2007, vehemently supported the subject as an integral part of the democratic process.<sup>23</sup> He emphasized that the members of the Parliament have a duty to conform to the accepted behaviour and conduct both inside and outside the walls of the Parliament. They must maintain high standards of morality, dignity, decency and values in the public sphere. Through their votes, the common people place their confidence in their representatives and it is the latter ‘s responsibility henceforth, to deliver their duties with complete dedication and commitment.

However, over the last few years, numerous incidents of shirking from their roles and unethical and unacceptable behaviour of the democratically elected representatives have come to light. For example, the Coalgate scam; the 2G spectrum case; former BCCI Chairman’s involvement in IPL match-fixing; Sexual Harassment allegations; offering rewards on slicing of nose of actresses; passing off comments on the caste that one hails from; major financial scams; allegation physical assault of Chief Secretary of NCT of Delhi to name a few. Such instances are not a recent development in our society, but it is the need of the hour to bring about mechanisms to eliminate such vices. Direct democracy can be explored as an alternative to eradicate them.

## **(ii) Horizontal accountability vs. Vertical accountability**

Horizontal accountability is brought about by regulatory and supervisory

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22 Vinod Bhanu, Recall of Parliamentarians: A Prospective Accountability, *Economic and Political Weekly* available at [http://www.epw.in/system/files/pdf/2007\\_42/52/Recall\\_of\\_Parliamentarians\\_A\\_Prospective\\_Accountability.pdf](http://www.epw.in/system/files/pdf/2007_42/52/Recall_of_Parliamentarians_A_Prospective_Accountability.pdf) (last accessed on 13th April, 2018).

23 Address of the Speaker of Lok Sabha at the Plenary Session on —Right to Recall as a Strategy for Enforcing Greater Accountability of Parliaments to the People at the Commonwealth Parliamentary Conference, 2007, available at <http://speakerloksabha.nic.in/speech/SpeechDetails.asp?SpeechId=239> (last accessed on 3rd May, 2018).

bodies which are composed of officials acting on behalf of the public. On the other hand, vertical accountability is mandated by the public directly through a variety of mechanisms like elections, complaint procedures, legal routes, civil society organizations, etc. Recall is quintessentially a “post-election” measure to ensure vertical accountability, however, there are already in existence various neglected “pre-election” measures which aim to achieve the same purpose. These pre-election measures are comprehensive enough to realise the cherished goal of “good governance”, however, there is a serious problem with the implementation of the same.<sup>24</sup> However, it is typically accepted that effective accountability can be ensured only by a combination of both horizontal and vertical accountability measures.

The current system is seriously flawed because voters have to wait for five years for electoral sanction to remove a person from office even if he shirks accountability. The Right to Recall can be an effective method by which accountability is ensured in a democratic state. Recall elections will send a strong message to delinquent legislators.<sup>25</sup> It is only fair to de-elect such elected representatives who do not fulfill the purpose of them being elected.

### (iii) Potential hurdles

#### (a) Lack of Political alertness?

Right to Recall has been considered unviable for India. It has been a concern that voters might not always have the capacity or information to make informed decisions about the issue at stake, and instead may make ill-informed decisions based on partial knowledge.<sup>26</sup> It has been thus, argued that sound functioning of Right to Recall can be warranted only when the electorate are “politically alert”. This opposition might not have been completely unjustified. Right to Recall involves increased and informed participation of people during and after the election process. The average adult literacy rate in India is 74.04% - much lower than the world average of 86.3%. That there is a positive correlation between “being literate” and

<sup>24</sup> *Supra* note 12.

<sup>25</sup> Anup Sahu, Recall the Lawmakers Who Are Lawbreakers, *Economic and Political Weekly*, available at [http://www.epw.in/system/files/pdf/2011\\_46/17/Recall\\_the\\_Lawmakers\\_Who\\_Are\\_Lawbreakers.pdf](http://www.epw.in/system/files/pdf/2011_46/17/Recall_the_Lawmakers_Who_Are_Lawbreakers.pdf) (last accessed on 10th June, 2018).

<sup>26</sup> An Electoral Processes Team Working Paper, Issues relating to the referendum mechanism, International IDEA *September 2004* available at [http://www.oldsite.idea.int/news/upload/ddemocracy\\_referendums.pdf](http://www.oldsite.idea.int/news/upload/ddemocracy_referendums.pdf) (last accessed on 13th May, 2018).

“being politically alert” is almost incontestable.

(b) Concern of being misused

One of the major arguments against the Right to Recall is the possibility of potential abuses of this power. It can be misused by special interest groups with money power and influence, and genuine politicians may become victims of this power.<sup>27</sup> In states like Madhya Pradesh, Rajasthan and Chattisgarh, people have been exercising their Right to Recall, granted at the Panchayat level by their respective State governments. Between 2000 and 2011, Madhya Pradesh witnessed as many as 27 recall motions out of which 14 of the previously elected representatives were replaced.<sup>28</sup> It is definite that the Right to Recall is in people’s interest but there is scope of its misuse.

One such case surfaced in Patiala, Punjab in 2008. The panchayat in Dewangarh had one place reserved for a male candidate from the Scheduled Castes. Jaswinder Singh, a brick kiln worker was elected Sarpanch that year. The other four panchs boycotted the Panchayat meetings completely during the course of two and half years. The people of the village were also not accepting of an SC Sarpanch — being committed to the members of the affluent Jat-Sikh community. As soon as the mandatory half-term was over, the other four Panchayat members passed a no-confidence motion against Jaswinder Singh and removed him. Many people have opposed Right to Recall stating that it is against the poor and will only serve the influential calling it against the spirit of democracy.

(c) Further Challenges

Being the largest democracy in the world, the election process in India is a grand affair at all levels of the government. The amount of money, time and effort consumed throughout the process of elections is immense. This raises questions about the feasibility of recall elections throughout the nation as the cost of elections is very large. Acknowledging this problem, the Right to Recall can be defended by arguing that over the longer period of time, the number of recall motions are expected to decrease assuming that the recall mechanism is implemented efficiently and is successful in achieving

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<sup>27</sup> *Supra* note 19.

<sup>28</sup> Right to Recall?, Hindustan Times Delhi, *available at* <http://www.hindustantimes.com/delhi/right-to-recall/story-OiDOYf01s3zuHGIYIAesAL.html> (last accessed on 23rd May, 2018).

the desired ends transparency and accountability in the governance of our country to some extent.

The most vital argument against direct democracy is that it can result in excessive democracy. This applies to the Right to Recall as well since this might threaten the independence of the representatives as they will be under the perpetual fear of being recalled. This would lead to undermining the role and importance of the elected representatives. In order to stay in office and avoid getting recalled, the representatives might be coerced to put in place populist policies to keep their electorates happy. Thus, this right would be a hindrance to policy changes necessary for development if such policies are tough and unpopular. This would discourage the representatives from using their own judgement and tying up of representatives to their electorates is inherently detrimental to the larger public interest.<sup>29</sup>

#### **(iv) Role of Media**

The Right to Recall might seem to be a pre-mature move for India to certain people but the rationale and the objectives that it proposes to achieve are justified and important for the smooth functioning of the government. There is a need to address the delinquency and misconduct of the people in power and Right to Recall, being successfully exercised at the local government level in a few states, proves that it might be successful in achieving the same, provided certain important plugins are made in the system. One of the major plugs in required in this system is the Information gap, owing to the literacy rate and to political alertness of the citizens.

This information gap can be tapered by the presence of a sensible, powerful, reliable and responsible media. Media plays a crucial role in keeping the people informed about the functioning of the government and its members.<sup>30</sup> This is important because the general public should not be at the behest of being misguided due to lack of correct and complete information during both, pre-election and post-election periods. A major inadequacy in our country's democratic exercise is that people or groups that get directly affected by any policy or reform measure, do not express their hardships in order to make their voices heard, and even if they want to, there are no proper redressal or compliant mechanism which can be resorted to,

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29 *Supra* note 12.

30 Timothy Besley and Robin Burgess "Political agency, government responsiveness and the role of the media." 45(4) *European Economic Review* 629 (2001).

and challenge the policy step. Media, as rightly called the fourth pillar of democracy,<sup>31</sup> has made significant progress during the last decade, but still has a long way to go in order to achieve the aforementioned qualifications.

Excerpting from a recent interview of Josh Earnest, White House Press Secretary (2014-17), in which he talks about the importance of efficient and responsible journalism. He says: “Our (United States of America) democracy benefits from having a professional, independent Press Corps that covers the White House and holds people in positions of authority accountable for what they are doing and demands transparency. Those are all good things and those are things that we should be looking to invest in and augment, not looking for ways to undermine it. There was never a situation in which the briefing room could not accommodate all of those people who were there to attend a White House briefing, even on the very first day. Reporters are going to think carefully about what they write if they know they have to look me in the eye the next day. And I certainly, and my staff, who work at the White House are going to be careful, to be accurate and to be honest and to be factual if they know they are going to be looking at journalists in the eye the next day. So that’s a good thing and I think continuing to facilitate that kind of interpersonal face to face interaction on a daily basis is a good thing and something that’s worth investing in. White House journalists have a responsibility to show up every day, demand accountability, demand transparency and to never be satisfied with what they ‘re given.”<sup>32</sup>

There is a widening disconnect between public interest and governance,<sup>33</sup> which in turn leads to erosion of our faith in the institutions of democracy. Right to Recall will add new dimension to the concept of transparency and accountability which will restore our faith in the institutions. Media, The Four Estate of Democracy can play a very vital role in ensuring that the public is politically updated. Legislators will always be vigilant about their actions and activities and ensure that they are involved in the working for the benefit of public.

#### **(v) The way forward**

Accountability is a very important tool in ensuring that a democracy functions smoothly, the representatives elected through the democratic

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31 Amartya Kumar Sen “Democracy as a universal value.” 10(3) *Journal of democracy* 3 (1999).

32 Josh Earnest on the Future of The Press/White House Relationship, NowThis Politics, available at [https://www.facebook.com/pg/NowThisPolitics/videos/?ref=page\\_internal](https://www.facebook.com/pg/NowThisPolitics/videos/?ref=page_internal) (last accessed on 23rd May, 2018).

33 Vikram S Mehta, The Financial Express, “Why India needs a fourth political revolution.” (March 5, 2018).

process have power and thus must be held responsible if they indulge in misuse of their power or are non-performing in their responsibilities. India is a developing country plagued with various numerous problems like any other developing nation. Corruption, crime and injustice hinder the potential development of our nation.

It should be our endeavour to establish Government which is limited- limited not in responsibility, but limited by the rule of law, by the discipline of the constitution and limited in its capacity.

Dr. Ram Manohar Lohiya once remarked:

“A lively nation does not wait for five years.”

It is a fact that carrying out a democratic process in India entails a heavy burden on the exchequer but that should not be a reason to acknowledge the next plausible right of ‘de-elect’. Further, as suggested in the Private Members Bill<sup>34</sup> introduced in Lok Sabha by Varun Gandhi for inclusion of the ‘Right to Recall’ among the rights of electorates. It empowers the eligible voters to vote out MP’s and MLA’s after completion of minimum two years of their term, provided 75% of those who voted for them are dissatisfied and think they are unable to deliver their promises. Unfortunately, this Bill was not passed.

There is a need to empower our voters with right to delect and read it as an extension of right to elect. Right to reject that is NOTA (None of the Above) has been recognised<sup>35</sup> but the same has been rendered toothless as there are no consequences if a large number of votes casted for NOTA. We need to ensure that Right to recall when recognized should not be reduced to just another right on paper.

The researchers would like to conclude by saying that reading of Right to Recall as an intrinsic part of the Right to Vote is an attractive idea in theory but we do understand that Right to Recall being advocated by us is not flawless but there is a need to consider “out of box “alternatives<sup>36</sup> as these would encourage us to brainstorm on solutions to the existing problems.

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34 Representation of the People (Amendment) Bill, 2016 available at: <http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/3407.pdf> (last accessed on February 21, 2019).

35 *Peoples Union for Civil Liberties v. Union of India*, 2013 (10) SCC 1 (NOTA Case).

36 Vikram S. Mehta, “The Fourth Political Revolution?”, 5<sup>th</sup> March 2018, Indian Express.

# CORPORATE GOVERNANCE AND SUSTAINABILITY

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## Abstract

*Corporate governance and sustainability of two sides of the same coin which are contrived on three precedents of social development, economic progress and environmental improvements. Corporate governance is a broader term whereas sustainability is restricted only to economic, social and environmental development. Corporate governance plays a crucial role in corporate sustainability performance and hence, ensure the level of business enterprise's success.*

*This paper will provide the quintessence of corporate governance and business sustainability. It will deal with the measurement of corporate governance with regards to: sustainability performance, social equity performance, economic performance and environmental performance etc. It will discuss the relation between corporate governance and sustainability by focussing on the impact corporate governance have on sustainability and contrariwise. It will also highlight how efficient/inefficient (governance and sustainability) leads to permanent success and deeper problems in the business.*

*“Good corporate governance, it's about being proper to prosper.”*

**- Toba Beta**

**Keywords: Corporate Governance, Sustainability, Economic Performance, Social Equity, Environmental Performance, Sustainable Business, Corporate Social Responsibility.**

## Introduction

Corporate governance is the mode in which a company stratagem itself. It refers to the system of regulations, practices and procedures through which a corporate entity is controlled and directed. It encompasses the processes by which company's targets are framed and prosecuted in the context of the regulatory, social and mart environment. It embraces overseeing the policies, practices, actions and decisions of companies, their representatives and affected stakeholders. Governance framework recognizes the dispensation of rights and responsibilities amid divergent participants in the firm and incorporate the regulations and mechanisms for

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making resolutions in corporate matters. Corporate scandals of assorted forms have perpetuated political and general interest in the modulation of corporate governance.<sup>1</sup> The desideratum for corporate governance was felt after the (Sahara and Satyam) scams. The concept of corporate governance was inculcated under the Clause 49 of the Listing Agreement of SEBI and it was later incorporated under the Companies Act, 2013. Its scope revolves around balancing the interests of company's stakeholders (shareholders, financiers, employees, management, suppliers, customers, community and government).<sup>2</sup> When implemented constructively, it can avert corporate frauds, scandals and civil & criminal liability of the company.<sup>3</sup> Sturdy corporate governance ameliorates efficiency and transparency in the corporation and builds up investor's credence in the firm. Corporate entities with vigorous corporate governance also consider the certitude of the consumers, stakeholders and society to be of significance in fortifying reciprocal sustained developments. A self-policing corporation that is responsible of shareholder and debtholder capital inflates the company's public image. A firm without a system of corporate governance is contemplated as a body without a psyche. In the long run, corporate governance emboldens corporate triumph and economic escalation.<sup>4</sup>

The term "sustainability" has transpired over juncture from the "triple bottom line" facet of financial viability, social obligation and environmental responsibility. It has unfolded from the abstraction of corporate social responsibility (CSR) and for countless years the correlative upshot of corporate financial performance and corporate sustainability performance has been controverted. Nonetheless many preceding perusals on CSR chiefly pivoted on the short-term effect whereas sustainability engagement kingpins on the enterprise's long-term economic performance.<sup>5</sup> Business sustainability is a mechanism by which corporations govern their financial, social and environmental-threats, opportunities and responsibilities. It refers to business models and managerial resolutions established in

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- 1 *Corporate Governance*, Wikipedia, available at <[https://en.wikipedia.org/wiki/Corporate\\_governance](https://en.wikipedia.org/wiki/Corporate_governance)> , last seen on 15/05/2019.
  - 2 *Corporate Governance Definition*, Investopedia, available at <https://www.investopedia.com/terms/c/corporategovernance.asp> , last seen on 15/05/2019.
  - 3 *Why is Corporate Governance important?*, Business Dictionary, available at <<http://www.businessdictionary.com/article/618/why-is-corporate-governance-important/>> , last seen on 15/05/2019.
  - 4 *Corporate Governance- Definition, Scope and Benefits, Management Study Guide*, available at <https://www.managementstudyguide.com/corporate-governance.htm> , last seen on 15/05/2019.
  - 5 Wenxiang (Lucy) Lu, *An exploration of the associations among corporate sustainability performance, corporate governance and corporate financial performance*, SemanticScholar, 1, 1 (2013), available at <<https://pdfs.semanticscholar.org/dd85/4416d8021ecc04c2f8679d42bd9b23a838a9.pdf>> , last seen on 15/05/2019.

economic, social and environmental dimensions. These three impressions are referred to as profits, people and planet.<sup>6</sup> A sustainable corporation is one that fabricates profit for its shareholders while shielding the environment and tweaking the lives of those with whom its interfaces. By subsuming sustainable practices can lead business to have a better corporate culture and long-term profitability. Corporate sustainability accentuates to create long term stakeholder value by executing the business policy that centres on the social, cultural, economic, environmental and ethical aspect of carrying business. Business sustainability is imperative for the prolonged-term opulence of global corporations. Leading international corporations are proliferating pragmatic yardsticks and metrics to apply the sustainability propositions which will maximize their opportunities and prune the negative effects that their crucial activities have on the communities, environment and economies. Nowadays, business sustainability encapsulates scrutiny to such quandaries as corruption, human rights, women's empowerment, climate change and supply chain practices. On a collateral trail, they are tackling safety of the workers other challenges faced in their manufacturing supply chains, advancing right-respecting security policies in their oil fields and mines by laying cogent substantive benchmarks, augmenting internet privacy protections for the netizens and, fabricating intramural systems to attain allegiances and providing attainable solutions when those standards are not met. Business sustainability is indispensable because it's the virtuous thing to do and it fulfils a company's long- term mercantile interests. Hence, the business leaders are conceding that they require to encompass immense tenets of sustainability in their quotidian business resolutions as it is not merely a matter of doing righteous thing but it's smart business practice.<sup>7</sup>

### **Correlation between Corporate Governance and Sustainability**

Good governance is equally important for the society as it is for the corporations as it ameliorates the public's certitude and faith in the corporate leaders. It is in the best interest of the corporation to be socially accountable and ingenious because it is these things that assure sustainability. To assimilate sustainability into strategic planning, the corporations are required to take four essential facets into consideration- societal influence (impact of society on the corporation), environmental impact (effect of the

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6 *The 3 pillars of corporate sustainability*, Investopedia, available at <https://www.investopedia.com/articles/investing/100515/three-pillars-corporate-sustainability.asp> , last seen on 15/05/2019.

7 *Why it pays for businesses to boost sustainability*, GE Reports, available at <https://www.ge.com/reports/post/96692402429/why-it-pays-for-businesses-to-boost-sustainability/> , last seen on 15/05/2019.

corporate entity on the geophysical environment), organizational culture (correlation between the corporate entity and its internal stakeholders) and finance (impact of the corporation's financial return with regards to the potential for risk and the level of risk). Sustainability provides privileges to the corporations in the long run. In the recent years, everyone all around the globe have been increasingly conscious about preserving the natural resources in order to make them last longer. Business enterprises are the tremendous users of the natural resources and therefore they are trying to burgeon a culture that emboldens all the stakeholders to reserve energy, minimise waste, cut costs and enhance other environmental factors. Taking a conservationist panorama allows the corporations to expand to new marts, inflate corporation's credibility, furnish them with a competitive edge and get ahead of prospective regulatory matters. Business enterprises that incorporate environmentally sound policies and social responsibilities as fundamental constituents in their growth strategy typically generate sustainable economic values.

A sustainable business is one that conjures profit whilst ameliorating environmental and societal conditions. Energy, waste, workplace, purchasing and transport are the crucial areas that are being addressed by majority of the business enterprises.<sup>8</sup> Sustainability is beneficial for the business enterprises in numerous ways as it succours the business firms to become more efficient, provide a rostrum for innovation, revamp brand image & reputation, inflate productivity & truncate costs, minimize waste, escalate the ability of the corporations to comply with regulations, attain better growth, enthrall & perpetuate personnel and stiffen stakeholder relations.<sup>9</sup> A business pursuit that is socially accountable, economically feasible and environmentally convivial is generally deemed as being sustainable. The three pivotal balusters of sustainability are environmental, social and financial, hence, the objective in burgeoning sustainable business practices is to create stratagems that safeguard long-term viability of planet, people and profit.<sup>10</sup> A sustainable organization is one that accelerates profits for the shareholders while safeguarding the ecosystem and refining the existence of those with whom it interconnects. It operates in such a way that its business interests intersect with the societal and environmental interests. By following up sustainability principles and

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8 *Why should my business become more sustainable?*, Sustainable Business Network, available at <https://sustainable.org.nz/guide-to-sustainability/>, last seen on 16/05/2019.

9 Michael Rogers, *6 benefits of becoming a sustainable business*, Environmental Leader (29/03/2016), available at <https://www.environmentalleader.com/2016/03/6-benefits-of-becoming-a-sustainable-business/>, last seen on 16/05/2019.

10 *What is Sustainability ?*, UNF- Center for Sustainable Business Practices, available at <https://www.unf.edu/coggin/csbp/>, last seen on 17/05/2019.

corporate governance practices, the corporations turn their responsibilities into opportunities and hence, they are elemental for the success of the business in the 21<sup>st</sup> century.<sup>11</sup>

The precepts of corporate governance are based on transparency, responsibility, accountability and fairness which are inherently connected to the company's corporate social responsibility. Good corporate governance is vitally contrived on three precedents (of sustainability): social development, economic progress and environmental improvements. Good governance stimulates sustainability and helps the corporations to attain their sustainable values. By incorporating good corporate governance and sustainability practices, the corporations can reap prolonged-term benefits such as increasing its equity, enticing new investors & shareholders and reduction of risks.<sup>12</sup>

Corporate sustainability is the capacity of the corporations to positively impact economic, social and environmental development by their market existence and governance practices. A precondition for utterly operating corporate governance with respect to sustainability reflects sustainability by the entire procedure of business management.<sup>13</sup> Corporate governance and sustainability are the vehemently vexed issues at the business and governmental levels. Nevertheless, the corporation has volition about their level of rejoinder to sustainability, non-fulfilment to abide to institutionalized, critical norms can imperil the corporation's resources, legitimacy and, eventually, its actuality. The corporations who disregard to sustainability will "almost definitely face extinction." Sustainability is convoluted and multidimensional, in which corporations have three allegiances towards the society. Corporations are not only required to furnish economic corollaries, but they are also required to concomitantly demonstrate social and environmental performance. The rationales for the growing popularity of corporate sustainability are: firstly, in the current years' climate change has been overwhelmingly recognized as a ubiquitous issue entailing corporation's actions on environmental matters to succour arrest their prospective prolonged negative effects on societal welfare. Secondly, the reports evince that investment executives around the globe

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11 *Sustainable Business Strategies*, get sustainable, available at <https://www.getssustainable.net/who-we-are.html> , last seen on 17/05/2019.

12 *What is the relationship between corporate governance & sustainability?*, Diligent Insights, available at <https://insights.diligent.com/esg/what-is-the-relationship-between-corporate-governance-sustainability/> , last seen on 17/05/2019.

13 M. Krechovska, PT Prochazkova, *Sustainability and its integration into corporate governance focusing on corporate performance management and reporting*, 69 Elsevier, 1, (2014), available at <https://www.sciencedirect.com/science/article/pii/S187770581400349X> , last seen on 18/05/2019.

are progressively factorizing environmental and social performance into their appraisal of corporations, recommending that economic performance is no more the only benchmark for business valuations. Thirdly, some scholars regard sustainability as the extant battlefield for competitive edge, one in which corporation must find an equilibrium approach between social, economic and environmental stratagems so as to outperform contenders. In epigrammatic, corporate governance plays a central part in escalating social responsiveness, economic performance, and environmental quality. If the corporations intensify their efforts to embrace corporate governance and sustainability tenets, it will locale them to innovate, accelerate performance enhancements and compete in the dynamic and resource constrained international economy.<sup>14</sup>

### **Impact of corporate governance on sustainability performance and vice versa**

Corporate governance plays an indispensable role in corporate sustainability performance and hence, ensure the level of business enterprise's success. The business organizations face increased thrust from the government and stakeholders to vigorously act on sustainability related affairs. If the enterprises fail to proactively responding sustainability matters, it may endure a loss of legitimacy, business & profit and might even fail to subsist.<sup>15</sup> The corporate culture of sustainability plays a predominant part in assorted aspects of an enterprise's corporate performance and behaviour. Quality corporate governance can in vigoratelofty sustainability performance.<sup>16</sup> Numerous precursory researches have indicated that corporate governance system that embraces the mechanism of regulations, processes and practices by which a corporation is administered and controlled, plays a pivotal part in the transcendence of sustainability performance and reporting. Significant affirmative inters connections between the attributes of corporation board composition and sustainability disclosures brace a sublime corporate governance mechanism.<sup>17</sup>

Corporate sustainability has been appraised as a buildout for quality

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14 J. Galbreath, I. Singh & Zahn, *the link between corporate governance and sustainability: Evidence from the oil & gas industry*, 3, GSB Working Paper No. 72, Curtin University of Technology (2008).

15 Supra 4.

16 Paul Shrivastava & Amr Addas, *The impact of corporate governance on sustainability performance*, 4 Journal of Sustainable Finance & Investment 21, 21 (2013), available at <<https://www.tandfonline.com/doi/abs/10.1080/20430795.2014.887346>> , last seen on 19/05/2019.

17 T.Ong & H.G. Djajadikerta, *Impact of corporate governance on sustainability reporting: Empirical study in the Australian resources industry*, Eticanews (11/11/2017), available at <<https://www.eticanews.it/wp-content/uploads/2017/10/SSRN-id2902495.pdf>> , last seen on 20/05/2019.

governance. The interconnection between sustainability and corporate governance is of paramount significance as it tackles the stakeholder's economic, social, environmental and ethical needs. Corporations with good governance are likely to be more socially virtuous and accountable.<sup>18</sup> By fostering sustainability action and leadership at the board level and into each strand of decision making, the corporations will be in a better stance to methodically formulate decisions that refine their social and environmental performance and thus, exalting their overall resilience and competitiveness.<sup>19</sup> The sustainability governance paradigm men genders substantial reverberations, contributing to value protection and fabrication through revamped product innovation, risk management, employee engagement, cost-savings and client loyalty.<sup>20</sup>

When sustainability matters (such as water scarcity, climate change, human rights violations and other challenges) becomes material to the enterprise's economic performance, the boards have an obligation to act. It has been reported that the corporations that have robust board systems to administer sustainability are deftly positioned for efficacious performance. In fact, the corporations that address board governance in a coherent way encompassing the right directives, the right people and the right incentives for sustainability bespeaks the powerful sustainability performance. The corporation that is administered aptly for sustainability is a corporation that performs well for sustainability. The boards oversee sustainability because the risks of sustainability affect the global economy, sustainability is associated to financial performance, shareholders are expected to act on sustainability and regulatory insistence requires the companies to take necessary actions.<sup>21</sup> Hence, the good governance practices in sustainability matters retract the emphasis from short term profit to long term value creation of the business.

Good corporate governance practice oscillates on the sound risk

18 *Analysing the impact of corporate governance on corporate sustainability at Board-level*, Cranfield, available at [https://cord.cranfield.ac.uk/articles/Analysing\\_the\\_Impact\\_of\\_Corporate\\_Governance\\_on\\_Corporate\\_Sustainability\\_at\\_Board-level/7207616](https://cord.cranfield.ac.uk/articles/Analysing_the_Impact_of_Corporate_Governance_on_Corporate_Sustainability_at_Board-level/7207616) , last seen on 21/05/2019.

19 Veena Ramani, *Governance*, Ceres 11/04/2017, available at <[https://www.ceres.org/our-work/governance?gclid=Cj0KCQjw3PLnBRCPARIsAKaUbgvnBeH6EnpIMVvAR14yWqWhBU8Lo4p\\_aTktJNV97rpLkGjzIRIjVDYaAot-EALw\\_wcB](https://www.ceres.org/our-work/governance?gclid=Cj0KCQjw3PLnBRCPARIsAKaUbgvnBeH6EnpIMVvAR14yWqWhBU8Lo4p_aTktJNV97rpLkGjzIRIjVDYaAot-EALw_wcB)> , last seen on 21/05/2019.

20 *Governance and Sustainability: The New Normal*, SustainableBrands, available at <<https://sustainablebrands.com/read/organizational-change/governance-and-sustainability-the-new-normal>> , last seen on 22/05/2019.

21 *Systems Rule: How Board governance can drive sustainability performance*, Squarespace, available at <[https://static1.squarespace.com/static/5143211de4b038607dd318cb/t/5afc5e271ae6cf3092ecd7ed/1526488627169/Systems+Rule\\_Final.pdf](https://static1.squarespace.com/static/5143211de4b038607dd318cb/t/5afc5e271ae6cf3092ecd7ed/1526488627169/Systems+Rule_Final.pdf)> , last seen on 23/05/2019.

management, high quality business practices, integrity and ethics. The prime segment of any governance structure is reckoned on how it manages the prolonged term operational opportunities and threats that are progressively characterized “sustainability issues” in contemporary vernacular. Hence, sustainability is the fundamental responsibility for sagacious boards. Sustainability issues present threats and opportunities and their constructive administration aggrandizes the value creation and protection of the corporation in the long run.<sup>22</sup> Decision-making for sustainability is a convoluted process as the impediments can be approached from divergent angles. An organized decision-making structure labelled as “PrOACT” (Problem-Objectives & Measures- Alternatives- Consequences-Trade-offs) is a technique used for fabricating a concise and clear synopsis of a problem and the feasible solutions so that the decision maker can distinctly discern the corollaries of every alternatives.<sup>23</sup> The art of virtuous decision making plays a dominant role in the success of corporate governance which assures the sustainable growth of the corporate entity.

## Conclusion

Corporate governance is the mode by which a corporate entity policy and regulate itself. Good corporate governance aspires to increase the business enterprise’s accountability and circumvent the occurrence of sudden and massive catastrophes.<sup>24</sup> Due to non-compliance of the benchmarks of accountability and financial reporting by the Board of Directors and management of corporation foisting hefty losses on investors, the necessity for corporate governance was realised in India. A self-regulatory organization builds up the confidence of the investors and hence ensures the sustained growth of the corporation.<sup>25</sup> Quality corporate governance ensures transparency & lucidity in business transactions, commitment to ethical conduct and values of the business entity, apposite disclosures & efficacious decision making to attain corporate targets and safeguards the interest of the shareholder. In the swiftly changing business environment, it has become essential that the modulation of the corporations is in tune with the unfolding economic trends, embolden quality corporate governance

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22 *Canada 2030. Embedding sustainability into corporate governance, The Conference Board of Canada*, Canada May 2018, available at <[https://www.jflglobal.com/media/uploads/news/2018-06/Canada\\_2030EmbeddingSustainability.pdf](https://www.jflglobal.com/media/uploads/news/2018-06/Canada_2030EmbeddingSustainability.pdf)> , last seen on 24/05/2019.

23 *Decision-making for sustainability*, Government of Canada, available at [https://www.ic.gc.ca/eic/site/csr-rse.nsf/eng/h\\_rs00564.html](https://www.ic.gc.ca/eic/site/csr-rse.nsf/eng/h_rs00564.html) , last seen on 25/05/2019.

24 Supra 3.

25 *Corporate Governance in India: Need, Importance and Conclusion*, Economics Discussion, available at <<http://www.economicdiscussion.net/business-environment/corporate-governance/corporate-governance-in-india-need-importance-and-conclusion/10145>> , last seen on 26/05/2019.

and enable protection of the interests of various stakeholders and investors.<sup>26</sup> Corporate governance discourses have steadily repositioned to sustainability, usually adduced through three E's, i.e., Economic Performance,<sup>27</sup> Social Equity and Environmental Performance. The business entities are engaged in sustainability activities for multitudinous reasons: economic considerations, ethical considerations, regulatory compliance and to respond to the growing demands from customers and investors. Sustainability is a critical area of concern for today's corporate world as it has the potential to impact company performance. Corporate sustainability lays a foundation for safeguarding and augmenting the value of business firm.<sup>28</sup> The sustainability performance of a corporate entity is substantially affected by the profile of its corporate governance. In practice, there is a paucity of superlative practice when it comes to establishing the governance system that would permit the corporate entity to properly appraise the corporate's social and environmental impacts and how it affects the corporate's capability to create value.

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26 *Corporate Governance*, Shodhganga, available at <[https://shodhganga.inflibnet.ac.in/bitstream/10603/32650/5/05\\_chapter\\_1.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/32650/5/05_chapter_1.pdf)> , last seen on 26/05/2019.

27 Ashok Kumar Sar, *Impact of corporate governance on sustainability: a study of the Indian FMCG industry*, 17 *Academy of Strategic Management Journal* 1, 2 (2018), available at <<https://www.abacademies.org/articles/Impact-of-corporate-governance-on-sustainability-1939-6104-17-1-161.pdf>> , last seen on 26/05/2019.

28 Priyanka Aggarwal, *Impact of sustainability performance of company on its financial performance: a study of Listed Indian Company*, 13 *Global Journal of Management and Business Research Finance* 60, 61 (2013), available at <[https://globaljournals.org/GJMBR\\_Volume13/6-Impact-of-Sustainability-Performan.pdf](https://globaljournals.org/GJMBR_Volume13/6-Impact-of-Sustainability-Performan.pdf)> , last seen on 27/05/2019.

# VALIDITY OF LIFE IMPRISONMENT WITHOUT REMISSION

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Mohit Mishra\*

## Abstract

*Since the time democracy came into existence, it brought three cornerstones of the nation i.e. Legislature, executive and judiciary. But this also bring into the conflict of judiciary and legislature across all the nations. In India, this conflict has gone so far so that it has risked the cornerstone of crime and punishments. Reformation Judiciary has formulated a new kind of punishment which has taken away the Reformation factor from the prisoners. The punishment is life remission without remission, which is judiciary own creation born out of a landmark case of V. Sriharan. Not only this created a havoc across the legislature but also on the international platform because of its violation of Nelson Rule framed by United Nations. The prisoners in this case are left with no scope to join back with the society. This has created a brutal deterrence and classified them as separate entity. It is the basic right of the prisoners to reform but creations of such punishment leave no reason for prisoners to get even reformed.*

**Keywords: Life imprisonment, Reformation, Fundamental right, Penology, Nelson Mandela Rules, Deterrence, Liberty.**

## Introduction

“Society must strongly condemn crime through punishment, but brutal deterrence is fiendish folly and is a kind of crime by punishment. It frightens, never refines; it wounds never heals.”

Krishna Iyer J. once remarked on most vague and imprecise punishment meander by judiciary i.e. life imprisonment without remission. Life imprisonment was embarked by the most landmark case of SwamyShraddananda, where judiciary overstepped its ambit and enters the expanse of the legislature. To rationalize the above statement the bench embarked that there are some cases where the gravity of the offences is so odious and disgraceful that they fall just short of rare of the rarest therefore, they cannot be given death penalty nor life imprisonment with possibility

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to release after 14 years and that's why "special category of sentence" inaugurated. Hence, by this bench substituted the death penalty by the punishment of life imprisonment without the scope of remission to the sake of Justice. This was further solidified in *Union of India v. Sriharan*.<sup>1</sup> But this punishment can be seen in contrary to various fundamental laws and logical arguments. Firstly, doesn't it violates the basic principle of punishment i.e. Reformation, Secondly, it's a violation of Article 19 and 21 of prisoners and lastly, the serious disruption done to the separation of power? Therefore, it is essential to take into consideration the above contention by pieces.

### **Flawed penological practice**

The four most cardinal principle of punishment is deterrence, retribution, rehabilitation and restoration. The person doesn't relinquish his right and dignity merely because he has committed a crime; he has right and dignity which it ought to be protected by all the three organs. The punishment of life imprisonment excluding remission meanders by the judiciary falls foul of rehabilitation and restoration principle of punishment. This punishment leaves no reason for the prisoner to get reform as he is acquainted with the fact that how much he may fight tooth and nail; he has to abide within the four walls of the prison for rest of his life. So, in simplified terms, it means whether it tightening the noose or sentencing life imprisonment without remission both are interchangeable as in both cases prisoner get no prospect to get reformed.

The Supreme Court itself opined in the *Soman v. State of Kerala*,<sup>2</sup> while citing a number of ought to be taken into consideration while sentencing; proportionality, deterrence and rehabilitation as a rudimentary principle. Not only domestic laws support rehabilitation but international instruments like the international covenant on civil and political rights and United Nation standard minimum rule for treatment of prisoners (Prisoners Rule) contemplates the momentousness of the reformatory process. Doing away with the executive process of remission is a serious disruption to the penological practice. In *Ram Missar v. State of Bihar*,<sup>3</sup> it was observed: "Modern criminal jurisprudence recognizes that no one is born criminal and that a good many crime is the result of social-economical mitres."

International instruments like the International Covenant on Civil and Political Rights and the UN Standard Minimum Rules for the Treatment

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1 *Union of India v VSriharan* (2016) 7 SCC 191.

2 *Soman v State of Kerala* (2013) 11 SCC 382.

3 *RamjiMissar v State of Bihar* AIR 1963 SC 1088.

of Prisoners (also known as the Mandela Rules) reflect the importance of the reformatory process while executing a sentence of imprisonment. It contains a number of guiding principles (rules 86 to 90), the treatment (rehabilitation) of prisoners (91 and 92) and various other principles. Article 253 of the Constitution of India provides the Legislature for giving effect to international agreements.

But this conviction of Courts nullifies the image of provisions as progressive and reformatory for a better society and violates the reformatory theory.

### **Violation of article 21**

Justice Posner while emphasizing on the treatment of the prisoner remarked that while there are two ways to look upon the inmates “One is to look at them as a separate species; as a type of vermin, devoid of any humanity”, but he advised the alternate approach that “We must not exaggerate the distance between us, the lawful ones, the respectable ones, and the prison and jail population; for such exaggerations will make it too easy for us to deny that population the rudiments of human consideration.” Article 21 abides every prisoner the right to live with human dignity. As pointed out in *Maru ram*<sup>4</sup> case, the Supreme Court observed that “the remission is not liberty which one can claim but here prisoner is not claiming the right to get remission instead he is claiming the right to be considered for remission. Hence, taking this right from a person strikes at the very root of Article 21.

The major gaffe and error committed in *V. Sriharan* case<sup>5</sup> were that Life imprisonment is the euphemism of imprisonment of 14 years.” Remission power provided by Section 432 of the The Code of Criminal Procedure (CrPC) takes into consideration various factors and not all lifers are remitted after 14 years. These factors include the nature, behaviour and development within Prisoners as scripted in respective Jail Manual. Also, Section 432 of Crpc furnishes various procedure which is ought to be followed and subsection 2 even include approval from the judiciary. These factors need the eternal glance, which can only be done by the executive and not by the judiciary. Therefore, the misconception that all lifers are only for 14 years of imprisonment is vacuous and false.

The European Convention on Human Rights (ECHR) in *Vinter v. United Kingdom*,<sup>6</sup> came to find that law providing for a whole life sentence

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4 *Maru Ram v Union of India* (1981) 1 SCC 107.

5 *Union of India v VSriharan* (2016) 7 SCC 191.

6 *Vinter v United Kingdom* [2013] ECHR 786.

without the prospect of release and review fall foul to Article 3 of ECHR. Article 3 states that “No one shall be subjected to torture and inhumane or degrading treatment or punishment.” It can, therefore, be concluded that European Convention on Human Rights (ECHR) sees life imprisonment without remission as inhumane and degrading treatment.

Article 21 also provides to have a procedure established by law. But the said sentence has no set procedure but on the other hand, there is section incorporated in The Code of Criminal Procedure (CrPC) i.e. section 432 which is enacted by the legislature with the also set procedure.

### **Violation of article 14**

The ultimate discernment on this issue is *V. Sriharan*. But this case has left a lot of haziness and subjectivity on the issue as in the case itself the bench provided, “this issue needs further discussion”, but till now it is left vacuumed. The bench has paradox statement as in the later phases of the judgement, the bench stated “neither we have formed a new punishment nor infringed the power of legislature” but on the Kickstart of the judgement they inaugurated “Special category of the sentence.”

It is further contended that the judiciary has no fixed criteria or provision under which it put the particular case under the phrase “special category” while executing the convicts. This power is neither cross-checked by any other organs and neither by any provisions. This power of the judiciary is arbitrary and undefined. The judiciary has not defined the phrase “special category” in any precedent judgements. There is no classification provided by the judiciary is executing such punishment.

In *Haru Ghosh v. State of West Bengal*,<sup>7</sup> the court provided for 35 years and 25 years of imprisonment without remission. The punishment can be said to be arbitrarily decided as nowhere in the judgment’s judges give the reason why the specific time period they have provided is necessary and how in fact the time of 35 years in or 25 years case is going to serve as the time specifically needed to reform such criminals. This sentencing is arbitrary decided and therefore fall foul to Article 14.

Also, as mentioned in the *Golaknath*<sup>8</sup> case, *Subha Rao*, C.J opined that “the constitution brings into existence three major instrument of power, namely the legislature, the executive and the judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective power without overstepping their limit. They should function with the sphere allotted to them.” By sentencing such punishment, the bench has

7 *Haru Ghosh v State of West Bengal* (2009) 15 SCC 551.

8 *I. C. Golaknath&Ors vs State of Punjab* 1967 AIR 1643.

overstepped its ambit to make the new punishment which is incorporated into the legislature.

Therefore, the punishment of life imprisonment without remission is full of subjectivity and vagueness. The said punishment has no set procedure and is arbitrarily used. The punishment also violates Article 14 and 21 of the constitution of India. It also violates the principle of reformation. The subsequent uses of this sentencing would lead to injustice to the prisoner and his human dignity.

### Conclusion

There has always been a conflict between criminal Justice and punishment. Further, contrary views have appeared in its theoretical expression. Broadly two views are frequently discussed, firstly, if punishment is for remedial and benefit of convict then the remission should be granted. Another view is if sentence is given purely for punitive purpose and in public interest to vindicate the authority of Law and to deter others, then remission need not be given. Although the two views look simple but this is not the case. These views are very subjective and subjectivity adds discretion and discretion adds misuse. Thus, ignoring basic theories and principle of punishment.

As pointed out by Justice *V. Khalid*, “It will be a mockery of Justice to permit these appellants to escape the extreme penalty of law when faced with such evidence and cruel acts. To give the lesser punishment for the appellants would be to render the justice system of this country suspect. In such cases, Court understands and appreciates the language of deterrence more than reformatory jargon. But this doesn’t mean that the court ignores the need for a reformatory approach in the sentencing process.”<sup>9</sup> This was even followed in case of *State of Punjab v. Bawa Singh*.<sup>10</sup> From the above, it’s clear the Court does not want to curtail the power of Court in sentencing process but definitely wants reformatory theory to be given a considerable amount of importance.

The legal maxim “*Veniae facilis in cestiva eat delinquendi*” which means “Facility of pardon is an incentive to crime.” This power of Court of giving life imprisonment without remission could also be called “Grand Face”, which means if granted arbitrarily, without any justification, to privileged class deviants. Thus, any person shouldn’t be a “Favoured recipient of clemency.”<sup>11</sup>

9 Mahesh v. State of M.P, (1987) SCC (Cri) 379.

10 State of Punjab v. Bawa Singh, (2015) 3 SCC 441.

11 State of Haryana v. Jagdish, (2010) 4 SCC 216.

Not only reformation, liberty is another aspect that should be look upon. It is a precious and cherished possession of any human, any attempt to diminished it will meet with forceful resistance. Similarly, social reconstruction and rehabilitation of convict is of Paramount importance for State welfare. "Society without crime is a utopian theory." Hence, protecting the society includes the rehabilitation of prisoners, rather than putting them on prison with vague figures.

Another proponent of Reformatory Theory of convict was Nelson Rolihlahla Mandela, former president of South Africa. Although, in his initial stages, he led a successful movement to eradicate the all-white supremacy. But at later stages, when he was sent to prison for 27 years, initially on Robben island, and later in Pollsmoor and Victor Verster Prison. These years in prison motivate the Nelson to fight for right of prison. During his years in prison, he got in-depth perspective of life and inhumane treatment of prisoner. This also motivated United Nations to adopt Standard Minimum Rule for the treatment of prisoner in 1957 (also called Mandela Rules). From a historical perspective, prisoners, national or international, have always been ripped of their dignity and subjected to a treatment unfit for human beings.

Also, in the recent case of *Nitin Balkishan Gaikwad v. State of Maharashtra*,<sup>12</sup> the appellant was punished for the offence of killing his wife and thereafter tried to kill himself. For the said convict the trial court awarded death sentence, which was further converted into life imprisonment for the reason that the circumstances were not to be put into the category of 'rarest of the rare' case. The High Court on awarding the same also stated that the minimum period of the sentence would be of 30 years without remission. Therefore, a notice was issued that whether the High Court was justified in putting a cap of 30 years of life imprisonment or not? While keeping the facts and circumstances of the case into consideration, the Supreme Court decided that the High Court should not have stated that the life sentence for a minimum period of 30 years must be served without remission. The appeal was disposed of by deleting the portion of the impugned order by making it a case of life imprisonment simpliciter. This shows the Indian Courts still practices this sort of punishment, with no set rules and conditions leading to various violation of laws in India. Also, infringing the separation of power rule.

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12 *Nitin Balkishan Gaikwad v. State of Maharashtra*, 2018 SCC OnLine SC 690.

# IS IT TIME TO CRIMINALISE MARITAL RAPE IN INDIA?

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Saumya Upadhyay\*

## Abstract

*“Rape is an ancient crime which has received penal punishment in the old IPC of Macaulay, but this crime has escalated horrendously over the decades for the punishment remains static and has had no preventive impact on the community. There has been a sudden explosion of aggravated form of rape on such a larger scale that Indian womanhood as a class has begun to feel a grave danger to their safety and dignity and their very right to life.”<sup>1</sup>*

- Justice V. R. Krishna Iyer

For any law to have its successful implementation, the society should recognize that act as heinous, wrong, or abusive. Without the social recognition law, the implementation of law cannot be successful. A social enactment is a sine qua non before legal enactment of a law. Marital rapes although not accorded as an offence under Indian Penal Code due to spousal exception clause but it is recognized as a form of sexual violence which can be defined as non-consensual or forced sexual intercourse by the victim’s spouse. Despite, some countries have criminalised marital rape while others still believe it is impossible to rape one’s own wife and it would be a mockery of sacred institution of marriage. A bill was introduced in the parliament on Women’s Sexual, Reproductive and Menstrual Rights Bill 2018 by Dr. Shashi Tharoor and the issue of marital rape is most debated after the Supreme Court verdict of Independent Thought v. Union of India where the Hon’ble Court refrained from dealing with the overall aspects of marital rape exception clause of the Penal Code and the approach by the Delhi High Court in dealing with this exception clause. Law is a dynamic instrument to reach out to every human being in the Country. The focus of law must be human beings and thus this paper is presented to present an all-round legal analysis of marital rape in India and the contemporary world. It deals with various socio-legal aspects and is an attempt to answer if criminalization of marital rape be done or if it should be added as a ground for divorce and obtaining maintenance from husband.

**Keywords: Marital Rape, Rape, Cruelty, Husband, Sexual Violence, Decriminalizing, Crime, Punishment, Marital Exception.**

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1 Das P.K., *Handbook on New-Anti Rape Law*, Universal Law Publishing Company, New Delhi, India (1st ed., 2013).

## Introduction

*"It is not proper, by a gross and puerile joke, to deny the existence of this crime (rape) and to diminish the horror of it."*<sup>2</sup>

- Jeremy Bentham

There is a deep connection between gender, sexuality and sexual violence. The patriarchal set up creates an atmosphere of masculine pride in exclusive possession of a sexual object. There is a cancerous growth of rape and thus a comprehensive study to combat this crisis is required. The crime of rape is distinct from its causation to its impact. There is a relentless increase in the number of rape cases and the paradox is that the criminals/the victims are of all ages and all strata. Amidst all these facts, it is revealed by rape crime data that rape crimes that big majority of rape incidents are such where the victim knows the accused prior to the incident. Only 10-15% of cases are relatable to the category of crimes<sup>3</sup> in public places or where criminals have forced their way to reach the victim, a big majority is from the known like friends, family members, relatives, teachers, medical professionals, priests and holy men.

Most of the cases of rapes go unreported when they are committed by known persons where the victim would not ordinarily make the complaint because of variety of reasons or some adverse consequences that she may suffer financially, reputation-wise etc. it is unfortunate that the state does not bother to examine what measures can be taken to control the rape by known persons.

In India, it is sometimes a general rule that is followed that a man can't be guilty of rape upon his wife, for the wife is in general, unable to restrict the consent to sexual intercourse which is a part of contract of marriage.<sup>4</sup> Despite the vast prevalence of marital rapes, this form of violence is neglected, narrow and restricted when it comes to defining rape. The peculiarity existing in the definition of rape is that it cannot be committed against a particular set of women. A husband can't rape his wife is permitted in the eyes of law; it is a legal sexual intercourse where implication can be unwanted sex, sexual assault, violence etc. the statement made by Sir Matthew Hale in 1678 that a lawful wife, for their mutual matrimonial consent whereby she agreed for all when she agreed for marriage. In this paper, the author will examine if there is a necessity

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2 Bentham Jeremy, *Principles of Morals and Legislation*, 1789 Ch XIV..

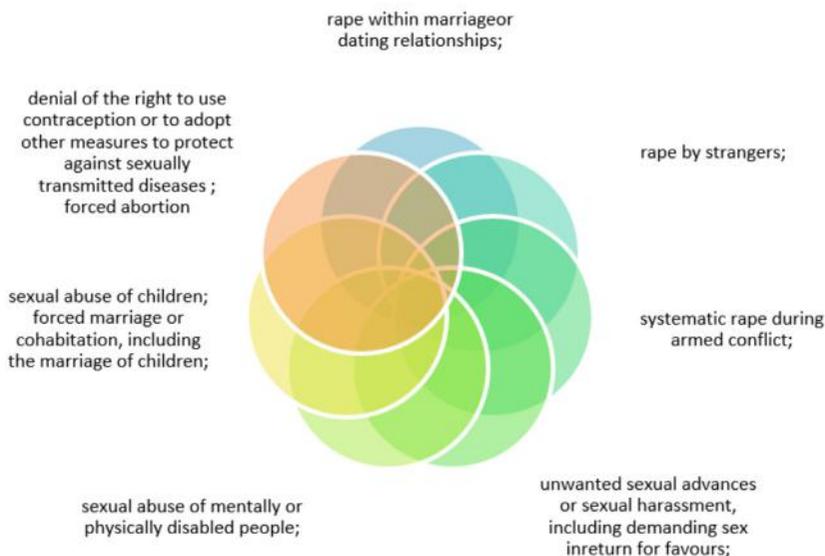
3 A Comprehensive Strategy to Combat the Crisis of Rape, 27<sup>th</sup> Law Commission of Karnataka Report.

4 R v. Miller.

for a legislation relating to marital rapes and examine the urge or need for such law considering the socio-legal dimensions associated with it. One of the major issues associated with rape is the exception associated with a spouse, where the premise is that marital unity means that the persons who are married are one and one married man can't be liable for raping himself. The instances of sexual assault within marriage cannot be denied and it is the most mystified of abuses perpetrated against women.

Mark of development of civilization can be known by the status of women in that country. The history of India has shown how the status of women has been changing from one extreme to another. Regardless of her education, income, age or country, women at present in any civilization are subjected to various forms of violence where sexual violence by intimate partners. According to UN report, 2015<sup>5</sup> half of countries in developing regions report more lifetime prevalence of intimate partner physical and/or sexual violence than the developed nations.

### Various forms of sexual violence<sup>6</sup>



### Social perception and religious view on marital rape

Women's position in society, social position of women, view of the

5 The world's women 2015 at <http://unstats.un.org/unsd/gender/worldswomen.pdf>.

6 The pictorial and graphical representations are original work of the author.

society, the religious superstitions, a notion of irrevocable implied consent and other marital exemptions or traditional justifications are the foremost reasons for notions and views of society about marital rape. India is a multi-cultural, multi-religious with different dialects, climate, and languages country with great diversities. In Islam or even in Hinduism, it is taught that a husband and wife should have a mutual understanding so that they minimize the scope of 'no' unless there are reasons such as health issues, they should not refuse. In Islam, both husband and wife are obliged by the shariyat to fulfill one's sexual demand with full satisfaction. Moreover, offering sex to wife because of her shyness or embarrassment is also an obligation in Islam.

This is one side of the coin of these religious teachings, this doesn't however encourage due to the fact that, both the partners should consent and endeavour for such sexual satisfaction from each other. However, according to a report, the prophet has commended in Islam that husbands should not directly start sexual intercourse instead they should start by flirting, talking or kissing<sup>7</sup> and do not treat women like chattels. In Hinduism, marriage is an institution which is sacred and they share a forever bond even after their death for seven lives<sup>8</sup> and it is between two families instead the whole family. This clearly indicates that the major religions followed in India also do not approve marital rape. The happiness of a woman in household is important and in the seven vows during 'saptapadi' both take the vow to respect each other's feeling, share household etc. Wife is considered as the goddess Laxmi of that house who should not be ill-treated. The Vedic culture existing in the past, is still followed for marriages, although the status of women has deteriorated from the Vedic times due to various reasons. Neither Hinduism or Islam or Christianity nor any other religion approves marital rapes. Paradoxically, the conjugal rights do have importance, but it is certain that any form of sexual violence is not preached but may be in practice due to women's status, education, awareness etc. the letters of law have to alter the country rife with misconceptions, religious stereotypes and changing social values.<sup>9</sup>

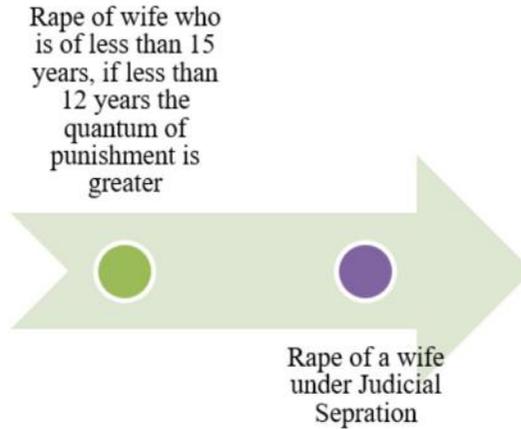
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7 Aqil Ahmad, *Mohammedan Law*, Central Law Agency (21ste.d., 2006).

8 Sir Dinshaw Fardunji Mulla, *Hindu Law*, LexisNexis (23rde.d., 2018).

9 *Ibid.*

## Current status of marital rape in India



While the definition of rape is getting wider in its scope especially after the New Criminal Law Amendment Act, 2013, marital rape is still a grey area of law which needs attention of the legislators. The present legal provisions are as under:

1. **Exception Clause in Section 375 of Indian Penal Code:**<sup>10</sup> Exception 2 of the IPC, 1860 mentions that “*sexual intercourse /sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.*”
2. **Domestic Violence Act, 2005:**<sup>11</sup> Domestic Violence Act, 2005 deals with sexual violence a broader aspect.<sup>12</sup> Domestic violence is also named as domestic abuse, battering, family violence or within a couple who may be legally married or their relationship would be in the nature of marriage. It can be seen for both men and women and it includes different kinds of violence like physical violence, sexual violence, emotional violence, economic violence which may be a result of prevailing inequality in the society. The scope of Domestic Violence Act, 2005 is limited to Domestic Relationships. Marital rapes in this act can be dealt under various forms of violence. Marital rape may have a history of domestic violence or ill-treatment; non-consensus may cause physical harm to the victim. Thus, a husband

10 Section 375, India Penal Code, 1860.

11 Preamble, Domestic Violence Act,2005.

12 Section 3, Domestic Violence Act,2005.

in any circumstance is not allowed to induce any form of violence or cruelty against women.<sup>13</sup>

3. **Conjugal rights vis-à-vis Concept of Rape:**<sup>14</sup> Sexual autonomy of a women should not be compromised with the concept of conjugal rights. People might think that restitution of conjugal rights would have no value in the eyes of law. It is not true; these two are not overlapping or contradictory. The institution of marriage is not such where right to privacy is lost, it like its creation or dissolution is not similar to contractual relations. It is a sacrament and decree of restitution of conjugal rights is not such which allows marital rape but it is a way and means to protect the marriage institution where the individuals are compelled to share a household. Sexual intercourse is not the main purpose of its decree but it is an effort by the state to save the marriage institution. It is not an imposition by the state to surrender the body and sexual privacy without one's will.
4. **JS Verma Committee Report on Marital Rape:**<sup>15</sup> The Justice Verma Committee Report is a consequential reaction to rape cases increasing in India and after Delhi Gang Rape (Nirbhaya Case)<sup>16</sup> which compelled the government to change the rape laws in a more stringent manner which would create deterrence. The Criminal law amendment act, 2015 with effect from 3rdFebruary,2013 was majorly an outcome of JS Verma Committee report and Usha Mehra Committee Report.<sup>17</sup> The JS Verma committee suggested that the concept of hale has been replaced in England by the House of Lords decades back in 1991 where Lord Keith , said, "*marriage is in modern times regarded as a partnership of equals and no longer one in which the wife must be subservient chattel of the husband.*"<sup>18</sup> The view of marital rape is not different and the nature of rape cannot change with relationships. For comparison within the jurisdictions which allowed criminalization of marital rapes like Canada, Australia, South Africa etc was taken into consideration. The meaning of consent was addressed where it was said it cannot be implied by the relationship status. Sentencing which is a major issue was also addressed in this report whereby assuming that judges may consider marital rape as a less serious offence with lenient sentences

13 Y.P. Bhagat and Kumar Keshav, Our Views on The Protection of Women from Domestic Violence Act, 2005(2018 e.d.) Vinod Publications P. Ltd.

14 *Supra* Note 8.

15 Justice Verma Committee Report on Anti-Rape Law, 2013 available at [www.manupatra.com](http://www.manupatra.com).

16 Mukesh and Anr. v. Union of India (2017) SCC 1.

17 P.K. Das, *Handbook on New Anti-Rape Law*, Universal Law Publishing Co. 1st edition 2013.

18 R. v. R. [1991] 4 All ER 481 (484).

the South African model that is Criminal Law Sentencing Act of 2007 could be adopted where in sentences of rape a justification for deviation from the statutory minimum punishment requires reasonable justification. The recommendations of the CEDAW Committee were also emphasized upon. Sensitization, training, awareness should be the first stage where marriage should not be regarded as extinguishing the legal and sexual autonomy of wife. These recommendations in the light of marital rape in a more elaborate and suitable manner was one of the major contributions where sexual relations were distinguished with sexual activity and sexual violence. This extreme form of sexual violence towards wife however is still unenacted part of this report.

5. **172<sup>nd</sup> Law Commission Report on Review of Rape Laws:**<sup>19</sup> In *Sakshi v. Union of India*, there were certain recommendations which were sought by virtue of a writ petition, one of them was removal of marital exception clause and thus criminalization of marital rapes. The 172<sup>nd</sup> Report also recommended a gender-neutral approach to rape. However, it has not been adopted by India. The recommendations of this report did not include removal of exception marital rape.
6. **Gautam Bodhisatwa v. Subra Chakraborty:**<sup>20</sup> Interim Compensation was awarded in this case when a man was into sexual intercourse with another woman in an unlawful marriage and tried to get advantage to escape from the burnt of law. In this case, it was held that rape is a crime against Article 21 of a person i.e. right to live with human dignity.
7. **Independent Thought v. Union of India:**<sup>21</sup> in this landmark judgment Marital Rape of a minor was punished but it was also held that in india we still do not recognize criminalization of marital rape or marital rape as an offence. It was held that a wife can initiate the proceedings against her husband under Section 377 for unnatural sex but would be limited to sodomy, buggery and bestiality. Recognition coupled with punishment may deter the husbands from committing such acts.
8. **Sakshi v. Union of India:**<sup>22</sup> this case was a writ petition seeking various amendments to the law relating to rape. The 172<sup>nd</sup> law commission report contained many recommendations sought in this case. however, the plea to exclude marital exception clause was not in the recommendation.

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19 172<sup>ND</sup> Report Law Commission of India Report, available at <http://lawcommissionofindia.nic.in/reports/172rpt.pdf>.

20 Gautam Bodhisatwa v. Subra Chakraborty AIR 1996 SC 922.

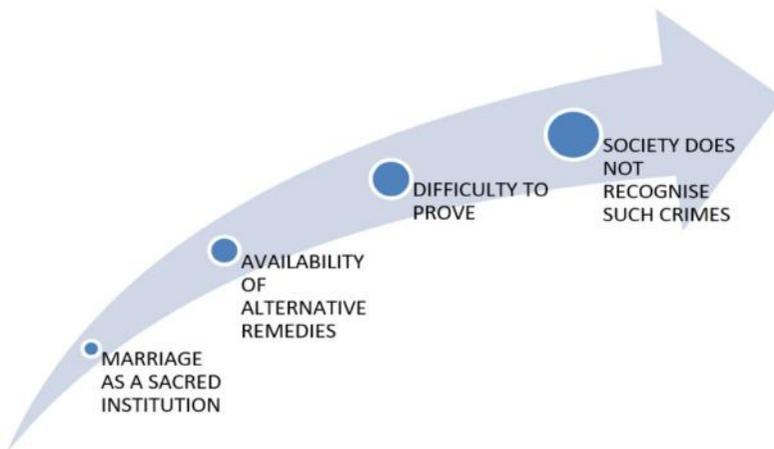
21 Independent Thought v. Union of India (2017) 10 SCC 800.

22 NimeshbhaiBharatbhai Desai v. Union of India available at [www.livelaw.in](http://www.livelaw.in).

9. **State v. Vikash:**<sup>23</sup> It was a Delhi High Court Case of 2014 where the issue of marital rape was discussed in detail but ultimately, the court decided that in India it is not the time to criminalise marital rape as 498-A is a sufficient ground to deal with its allied issues. A new legislation is not required neither the removal of exemption clause.
10. **Indian Penal Code Amendment Bill 2015**<sup>2014</sup>, **Criminal Law Amendment Bill:** In various bills presented in both the houses, it was raised that Indian society does not require laws on marital rape, thus it was presented but not enacted as a law.
11. **205<sup>th</sup> Law Commission Report:**<sup>24</sup> AMENDEMENT TO PROHIBITION OF CHILD MARRIAGE ACT, 2006 contained provisions which was further reiterated in Independent Thought v. Union of India. The consent of a female who is not 16 is invalid and amounts to rape. Such marriages are also considered invalid.

### Arguments Against Criminalising Marital Rape

Marital Rape has still not been given a place of a general enactment in the Indian Penal Code neither any special legislation is there for such offence because of some issues prevailing as a hurdle towards enactment of these laws. Let us examine each of the issues separately:<sup>25</sup>



23 State v. Vikash available at [www.livelaw.in](http://www.livelaw.in).

24 205th Report Law Commission of India Report, available at <http://lawcommissionofindia.nic.in/reports/205rpt.pdf>.

25 The figures, diagrams, pictorial representations or graphs are original work of the author.

## Constitution of india and marital rape

If we analyze Article 14 and Article 21 of the constitution, we can derive the conclusion that Marital Rape is unconstitutional where it can be said that it is necessary that rape be recognized. The law relating to divorce should also be changed. The allied laws and the civil laws should also be changed.

### ARTICLE 21

The apex court of India in has described rape as deathless shame and gravest crime against human dignity.<sup>26</sup> Right to life with human dignity under article 21 has been under the state of constant expansion of its arms by the judiciary. Supreme Court in various cases has recognized rape against human right and human dignity. Further, when a Bangladeshi woman was raped by the railway officials, it was held in contravention of her fundamental right though she was a foreign citizen. The opinion juris was that the fundamental right to life extends to a foreigner and such acts are completely a breach of her fundamental right to live with dignity and thus the Apex Court awarded a compensation of ₹10, 00,000. Rape is a crime against society at large and it is undeniable that such acts amount to humiliation<sup>27</sup> of a women and degradation of her entire life.

Article 21 includes not only right to live with human dignity but also right to health,<sup>28</sup> right to sexual privacy.<sup>29</sup> Right to privacy is a facet of Article 21<sup>30</sup> of the constitution and it includes right to sexual privacy<sup>31</sup> too.

### Status of marital rape in different jurisdictions

Several countries in Eastern Europe and Scandinavia made spousal rape illegal before 1970.<sup>32</sup> It is illegal in New Zealand, Canada, Israel, France, Sweden, Norway, Soviet Union, Poland And Czechoslovakia. Some other countries which criminalises marital rape include Albania, Algeria, Belgium, China, Germany, Hong Kong, Ireland, Italy, Japan, new Zealand, Scotland, Philippines, south Africa, Taiwan, Tunisia Indonesia, Mauritania etc. most developing countries do not recognize marital rape

26 Chairman Railway Board v. Chandrima Das (2000) 2 SCC 465.

27 Gautam Bodhisatwa v. Shubra Chakraworty AIR 1996 SC 922.

28 Parmanand Katara v. Union of India AIR 1989 SC 2039.

29 State of Maharashtra v. Madhukar Narayan AIR 1991 SC 207.

30 Retd. Justice K.S. PuttAswamy v. Union of India (2017) 10 SCC 641.

31 Dubey Dipa, *Rape Laws in India*, LexisNexis (1st e.d.,2008).

32 Vandana, *Sexual Violence Against Women: Penallaws and Human Rights Perspectives* LexisNexis, (1st ed., 2009).

but today, efforts are being taken by the counties to find a solution to this. Turkey, Mauritius and Thailand criminalized in 2007.

**Bangladesh:** a strong penal law exists, similar to India to deal with rape where the rape should be against her will, without her consent or when coercion is applied for obtaining consent or when consent is taken by making her believe that he married her lawfully and if she is of 14 years the consent is immaterial.

Marital rape is not recognized as an offence when the wife is above thirteen years of age and a similar exception clause relating to marital rape exists.

**Bhutan:** Article 199 of their Penal Code criminalizes marital rapes.

**Singapore:** The penal laws of Singapore do not criminalize marital rapes. However, it considers cases of minor family violence.

**England:** Position in Law Before and After R. V. R: The common law revolved around the concept of *hale* which stated that marriage was an implied consent for all and thus an offence like marital rape would not have any status. The Britishers also do not follow this concept, instead a decision by the House of Lords in 1991 penalised marital rapes which helped the women in England that an assurance in law existed to rescue them out of such relationships and get justice for them.

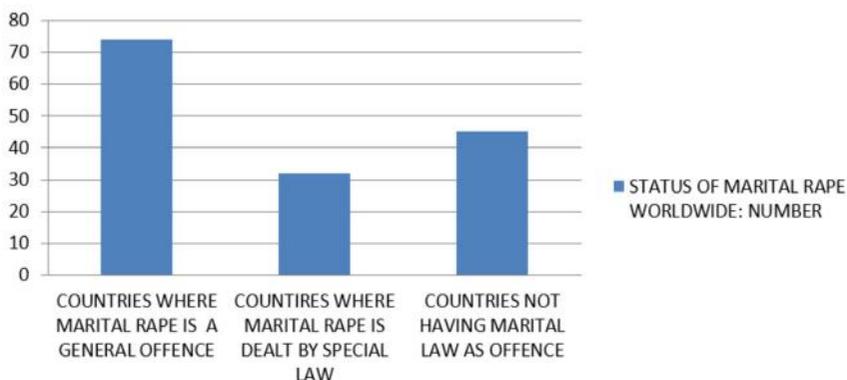
**USA:** In USA prior to the 20th century the concept of marital rape exemption was followed. This concept was from the 18th century common law. After 200 years, there was a change while Nebraska was the first state to abolish marital rape, New York case of *People Vs. Liberta* was the case where it was finally decided that there was no reason for differentiating between marital rape and non-marital rape.

**South Korea:** The Supreme Court of Korea in a landmark judgment decided that any act with duress, threat or violence should not be allowed in marriage. Marital rape should not be an exemption in law. This did not exist from the beginning but is a development of the recent past.<sup>33</sup>

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33 The Graph is an analytical representation of data collected by the author and is prepared by the author.

## STATUS OF MARITAL RAPE WORLDWIDE: NUMBER



### List of countries which does not recognise marital rape as an offence

|                                  |                |                             |
|----------------------------------|----------------|-----------------------------|
| 1. Afghanistan                   | 2. Algeria     | 3. Bahrain                  |
| 4. Bangladesh                    | 5. Botswana    | 6. Brunei Darussalam        |
| 7. Central African Republic      | 8. Chad        | 9. China                    |
| 10. Democratic Republic of Congo | 11. Egypt      | 12. Eritrea                 |
| 13. Ethiopia                     | 14. Haiti      | 15. India                   |
| 16. Indonesia                    | 17. Iran       | 18. Iraq                    |
| 19. Ivory coast                  | 20. Kuwait     | 21. Laos                    |
| 22. Lebanon                      | 23. Libya      | 24. Malawi                  |
| 25. Malaysia                     | 26. Morocco    | 27. Myanmar                 |
| 28. Nigeria                      | 29. Oman       | 30. Palestinian territories |
| 31. Saudi Arabia                 | 32. Senegal    | 33. Singapore               |
| 34. South Sudan                  | 35. Sri Lanka  | 36. Sudan                   |
| 37. Syria                        | 38. Tajikistan | 39. Tanzania                |
| 40. Tunisia                      | 41. Uganda     | 42. United Arab Emirates    |
| 43. Vietnam                      | 44. Yemen      | 45. Zambia                  |

### United nations report on marital rape

*“Educating boys and men to view women as vulnerable partners in life, in the development of society and the attainment of peace are just as important as taking legal steps protect women’s human rights”*

The present status of marital rape in India is in contravention to various

resolutions, ratifications and treaties. The UN Conference in Beijing, 1995,<sup>34</sup> passed a resolution where women had the right to say NO.

The United Nations, time and again has raised concerns on women related issues. It also gave a guideline to all its member nations on drafting legislations related to women.<sup>35</sup>

What is even more troubling is the fact that many countries have still not explicitly criminalized marital rape, even though the global statistics clearly reveal that women in intimate relationships are usually the one who suffer the worst kind of physical violence. While criminalizing marital rape may/ may not guarantee lower rates of violence against women. But that in no way is an excuse for the State to not carry out its duty of ensuring that women are protected legally from this travesty. The explicit criminalization of marital rape is a critical and major step towards promoting women's rights and safety within marital relationship.

### **International conventions explicitly against marital rape**

- Universal Declaration of Human Rights (UDHR)
- The International Covenant on Civil and Political Rights (ICCPR)
- The International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- International Covenant on Civil and Political Rights (ICCPR),
- International Convention on Economic, Social and Political Rights (ICESCR)

An International Convention like CEDAW has been adopted in India many a times by the judiciary in *Vishakha v. The State of Rajasthan*.<sup>36</sup> Also, it has been considered by the legislature in enacting the Domestic Violence Act, 2005. It however explicitly covers marital rape as an extreme form of violence against women but it has not been adopted to eliminate this form. We should endeavour to enact this convention with all its provisions with full force.

34 Vandana, *Sexual Violence Against Women: Penallaws and Human Rights Perspectives* LexisNexis, (1<sup>st</sup> ed., 2009).

35 Division for the Advancement of Women at: [http://www.un.org/womenwatch/daw/egm/vaw\\_legislation\\_2008/vaw\\_legislation\\_2008.htm](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/vaw_legislation_2008.htm).

36 *Vishakha v. The State of Rajasthan* AIR 1997SC 3011.

## Jurisprudence behind criminalisation

The Constitution of India guarantees certain fundamental rights irrespective of gender. A slave does not have the right to refuse or to take decision, the status of wife is not that of a slave but husband and wife enjoy equal status. John Stuart Mill observed in 1869 that marital rape lowers the dignity of women, her status becomes beneath to that of a slave and a wife is not a personal slave of a man. Gesture like marital rape is an unwelcome gesture and always would be, thus, it represents surrender of dignity which is absolute in nature. A woman if surrenders her dignity, it amounts to waiver of fundamental rights, which is not allowed in *India*.

## Recommendations

It is true that the Indian legal position on marital rape should be escalated from *de facto* to *de jure* state. Most of the reports, researches and according to opinion of various stakeholders of the legal fraternity it can be inferred that the issue of marital rape has always been marginalized and a sidelined issue. Although some do not deny that marital rape be criminalized but they disagree to treat the sentencing policy of punishing the marital rape convictions same as rape convictions. However, treating the same crime on a different pedestal can be associated with breach of equality. The deleting of marital exception clause is enough or not is the current debate when we talk about criminalising it.

To determine the quantum of punishment we should first understand that husband has no license to act in a horrific or a brutal way and nor it is his privilege. Therefore, dissenting to the majority opinion to treat marital rape differently, it is just to treat marital rape with the same punishment as that of a rape. To prove such cases is different but not impossible and, in such circumstances, when the guilt of the accused is proved, it amounts to more than domestic violence, cruelty and a lesser penalty would mean injustice. Determining lesser punishment pertaining to misuse is also not justifiable.

## Conclusion

“The common law fiction has always been offensive to human dignity and incompatible to the legal status of spouse”.<sup>37</sup>

These words of Justice Brennan might not hold well in 21<sup>st</sup> century. England, Australia, South Africa and many other names of common law

37 R v. L, [1991] HCA 48: 174 CLR 379 (390).

countries as discussed above have treated the issue of marital rape as any ordinary rape. India also should get over those religious stereotypes and other things and remove the exception clause under the Indian Penal Code. Sati was although a custom, but was against human rights and thus a law banning such practices was put into force. Such effort of the legislature is also required to meet the ends of justice by the law is required. Law is dynamic and the 19th century penal code should be replaced with new amendments as it is not fit and suitable to the requirements of 21<sup>st</sup> century.

The identity of the women can never merge with that of her husband. Sexual autonomy is an integral part of one's life and a part of fundamental rights under Article 21 of the Constitution of India. Rape laws have changed in India drastically especially after J S Verma Committee recommendation and enactment of Criminal law Amendment Act, 2013, the exception clause is also a change which is the need of the hour.

The Gujarat High Court has recently declared that marital rape is not a husband's privilege but a violent act which must be criminalized. Classification of rape victim is unreasonable and thus unconstitutional as it lacks *intelligible differentia*. It is a disgraceful offence that has scared the Trust and confidence in the institution of marriage and thus an overall amendment in law is required.

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# HONOUR KILLING

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Ms. Astha Bhatnagar\*

## Abstract

*“Everyone has the right to life, liberty and security of the person. Men and women of full age without any limitation due to race, nationality or religion, have the right to marry or to have a family. They entitled to equal rights as to marriage and its dissolution. Marriage shall be entered into only with the free and full consent of the attending spouses. The family is the natural and fundamental group, unit of society and is entitled to protection by society and state. “Universal Declaration of Human Rights, Article 3&16 and No one have right to kill anyone on any basis every Human have own rights.*

**Keywords: Human, Society, Marriage, Universal Declaration of Human Rights, Article 3 & 16.**

## Introduction

An Honour Killing (also called a customary killing) is the killing of a member of a family or social group by other members, due to the belief of the perpetrators that the victim has brought dishonor upon the family or community. Honour Killings are directed mostly against women and girls. The perceived dishonour is normally the result of one of the following behaviours, or the suspicion of such behaviours:

- a. dressing in a manner unacceptable to the family or community,
- b. wanting to terminate or prevent an arranged marriage or desiring to marry by own choice,
- c. engaging in heterosexual sexual acts outside marriage, or even due to a non-sexual relationship perceived as inappropriate, and
- d. engaging in homosexual acts. Women and girls are killed at a much higher rate than men.

*Human Rights watch defines “Honour Killings” as follow:*

Honour crimes are acts of violence, usually murder, committed by male family members against female family members, who are held to have brought dishonour upon the family. A woman can be targeted by their family for a variety of reasons, including: refusing to enter into an, being

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the victim of a sexual assault seeking a divorce even from an abusive husband or allegedly committing. The mere perception that a woman has behaved in a way that dishonours her family is sufficient to trigger an attack on her life.<sup>1</sup>

Honour Killing is an imprecise term for murder precipitated by the aggressor's loss of "honour" and can provisionally be defined as a "ritualized form of violence usually with male perpetrators and often, but not always, female victims". This extra-judicial punishment is meted out by private actors according to customary law and there is usually no way to the repeal the sentence. The offender is usually killed by close family members and most often brother, father or husband on their own accord. Honour Killing form part of what has been termed "traditional justice" or "tribal justice", a contested form of retribution that may find unwarranted illegitimate.<sup>2</sup>

### **Honour Killing in societies**

Honour Killing is a deep rooted brutal and burning human rights issue in India and other countries. Women particularly are the victims of the gross violation. They exist all over the world but no religion stipulates them. Outdated traditions and alleged honour violating behaviour are the motive for these crimes. The victims are almost always female. Young, unmarried women can "dishonour" their families easily. Every year hundreds of women are killed in India in the name of honour and many cases go unreported and almost all of them go unpunished. The criminal justice system is unable to combat it though it is claimed that the criminal justice system is the most legitimate institution to control this practice in the country.

Honour is the most precious moral attribute of mankind. It is deeply ingrained in its nature. Defence of honour even at the cost of life has been prevalent in human beings since ages. It is a commonwealth of close blood relatives. Defilement of honour is taken as the most atrocious social crime and its redemption becomes a joint and sacred duty of close-knit people. Debased groups have a soft approach towards transgression of honour. The sentimental chord dormant in them may react at times; its degree may vary from group to group. Tradition-bound rural societies invariably react violently for the redemption of their honour. To them honour is dearer than life.

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1 Integration of Human Rights of Women and The Gender Perspective: "Violence Against Women and "Honour" Crimes". Human Rights Watch Oral Intervention at the 57th Session of the UN Commission on Human Rights April 5, 2001.

2 Nancy V. Baker, Peter A. Gregware & Margery "Family killing Fields: Honour Rationale in the Burder of Women". *Violence Against Women* 5, no. 2 (1991): Pg-164-184.

Honour Killings are the most extreme example of instances where community values and interests are imposed on individuals at the expense of their most basic human right: *the right to life*. The United Nations Population Fund has estimated that around 5,000 women die in Honour Killings every year worldwide, the vast majority in Pakistan, India and Bangladesh.<sup>3</sup> In recent years, honour crimes have received an increasing amount of interest from the media, the police and politicians. This has been fuelled by the extensive coverage of the murder of several young women by their families. This growing public concern has been largely welcomed by women's groups and has prompted the government to take steps to tackle these crimes. However, the media's focus on Honour Killings and, to a lesser extent, forced marriages and Female Genital Mutilation (FGM) has obscured the true scale of honour-based crime. Honour Killings represent only the tip of the iceberg in terms of violence and abuse perpetrated against women in the name of honour.<sup>4</sup>

Though men are also victims of Honour Killings, it is largely the women who are murdered on the flimsiest of reasons. What makes these killings all the more despicable is that women form the larger segment of the victims, and none other than their own family and kin kills them. Thus, a father may kill his daughter, a son may kill his mother, or a husband may kill his wife, and a brother may kill his sister. The dominant role of the male members both in the decision making and horrible acts of Honour Killings is not only justified in a number of cultures and societies around the world, majority of such crimes are not reported at all. Further adding misery to the plight of women across such cultures and religions, is the fact that the perpetrators roam freely after the commission of such heinous crimes, without the least respect or regard for local laws or religion for that matter. The concept of family honour thus supersedes all natural or human laws setting aside religion as well, thus degrading the value of human life to such a level which has-been rarely witnessed in any recent civilized societies irrespective of any culture or religion. A number of studies and reports on the grave issue of Honour Killings have revealed a common factor; one that converges to reveal that these crimes are committed in cultures and religions where family reputation and honour supersedes all the customs, laws including religion. In addition, Honour Killings are also a common part of a culture and religion where the role and respect of women are considered as mere vessels or commodities of a family. *Thus,*

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3 The United Nations Population Fund: 'A Human Rights and Health Priority'. <http://www.unfpa.org/swp/2000/english/ch03.html>.

4 Mayell, H., "World Diary: Honour Killings", written for the National Geographic News issue of Feb 12, 2002, and available at [http://news.nationalgeographic.com/news/2002/02/0212\\_020212\\_honourkilling.html](http://news.nationalgeographic.com/news/2002/02/0212_020212_honourkilling.html).

*the focus in this paper is on women as victims of Honour Killing.*

Though the practice of Honour Killings has been reported to occur in countries such as Afghanistan, Bangladesh, Brazil, Ecuador, Egypt, India, Iraq, Iran, Israel, Italy, Jordan, Morocco, Sweden, Turkey and Uganda, the following dissertation will strive to evaluate the subject with particular focus on two countries, namely India and Pakistan. Both the social as well as the religious context of Honour Killings in the said two countries will conform the larger part of the following dissertation. The following dissertation will also take into account a number of issues directly associated with the heinous crimes of Honour Killings including but not limited to consent and marriage, the issue of adultery and false accusations, as well as the legality of Honour Killings in the eyes of both the judiciary as well as the religion of Islam.

In some cases, an ‘honour’ killing may be a formal collective decision, made by family members, who not only decide whether a girl or woman’s behaviour merits death, but may also plan how the murder will be committed and who will carry it out. Where this has occurred, the chances of the family ‘forgiving’ the insult to their ‘honour’ are slight, and a potential victim may need protection in perpetuity, particularly where the family can call upon an extended network of relatives, friends and associates to assist them.

Honour is both an individual and a kinship related phenomenon. It may transgress family unit and invoke sentiments within the caste groups. It may spill over a wider geographical area depending upon the nature of the issue at stake. Honour is not a prerogative of men alone. Womenfolk are more sensitive to safeguard their honour. Since they are incapacitated by the absence of manly-might, defence of women’s honour naturally devolves upon men. ‘The defence of female purity, however, is a male responsibility and men are therefore vulnerable to dishonour not through their own sexual misconduct but through that of their womenfolk —that is to say, members of the same nuclear family, including mother, wife, unmarried sister and daughter. Hence, sexual insults that impugn the honour of men refer not to them but to their women.’

The victims of Honour Killing range from pre-pubescent girls to grandmothers. They are usually killed on the mere allegation of having entered ‘illicit’ sexual relationship. They are never given an opportunity to give their version of the allegation as there is no point of doing so- the allegation alone is enough to defile a man’s honour and therefore enough

to justify the killing of the women.<sup>5</sup>

## **Conclusion**

The twin side of coin of “honour” and of “shame” and their use as justifications for violence and homicide crime can be found in many societies. Honour killings have historical roots in many countries of the world including Latin America, Europe, the Middle East and South Asia. In some Arab and South Asian states, where modern-day incidences of honour killings are more predominant, the practice of honour killings likely originates from ancient Arab culture, with its roots from Pakistan.

However, honour killings are not associated with particular person or persons practice: they have been recorded across Christian, Jewish, Sikh, Hindu and Muslim communities. Often, honour killings are not a religiously and society based motivated crime, but are based on personal agendas, personal ego and personal mindset. In some cases, there are psychological connotations, as studies have shown that some perpetrators have undiagnosed mental illness and psychopathic traits or disorders.

While honour as a cultural justification for killing is in keeping with the mindset of certain groups, certain people this motive cannot be attributed to entire populations, as many of the people from same state would not share that belief system. The existence of cultural norms and practices does not reduce individual responsibility except in those rare occasions where there is significant individual psychopathology.

Gaining a better understanding of the individual, family, community and cultural and society factors at play in honour killings is. Bad impression for Society and particular individual every citizen have own rights to live life with Liberty and Right to marry. Hopefully this paper will contribute to raising awareness of the complex dynamics at play in cases of honour killings with a view to preventing future plans.

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5 Document - Pakistan: Honour Killings of Women and Girls, available at <http://www.amnesty.org/en/library/asset/ASA33/018/1999/en/952457dd-e0f1-11dd-be39-2d4003be4450/asa330181999en.html>

# JURISDICTION IN CYBER SPACE: ISSUES AND CHALLENGE'S

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Mudassir Nazir\*

## Abstract

*The word “cyberspace” dates back to 1982 when it was used by Canadian science fiction writer William Gibson in one of his stories. With time the word has come to be used commonly and frequently to refer to the internet. However, as Fenz puts it that by definition the cyberspace is more than the internet, because every transaction or event which is not happening in “real” world is occurring in the cyberspace. Cyberspace can thus be described as a metaphor for an ‘abstract terrain’ which represents the real world with virtual objects and virtual communication which is happening between their users via e-mail or instant messaging. Cyberspace can be categorized into various subdivisions, which can be – the internet space which makes available a multitude of infotainment content online; the online gaming space which truly is a metaphor of the real in the virtual world where people are represented in their ‘avatars’ in an artificial mode; and that of the ‘machine-machine’ communication where there is little or no human interface – usually used for majuscular commercial purposes. In 21<sup>st</sup> century the information technology brings a new revolution. The “Information Revolution’ has created for itself one of the most debated questions i.e. of jurisdiction. Since jurisdiction is the ‘sin qua non’ of administration of justice, a judgment or order or decree is passed by the court without having the jurisdiction, such judgment, or order or decree can be said as “Coram non-judice” -before a court which has no jurisdiction of the matter or before one who is not adjudge, and its invalidity can be set up whenever it is sought to be enforced as a foundation for a right even at the stage of execution or collateral proceeding .it’s in this backdrop the researcher will try to highlight the various issues and challenges in cyber space jurisdiction.at the end of paper the author will provide the various suggestion as well.*

**Keywords: Cyber space, Jurisdiction, Judgment, Enforcement. Coram non-judice.**

## Introduction

With the advent of the internet and the transmission of information and transacting of business across borders, a host of issues have cropped up on

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the legal front. This paper proposes to deal with only one such major issue - that of jurisdiction of the courts to decide such disputes. The traditional approach to jurisdiction invites a court to ask whether it has the territorial, pecuniary, or subject matter jurisdiction to entertain the case brought before it. With the internet, the question of 'territorial' jurisdiction gets complicated largely on account of the fact that the internet is borderless. Therefore, while there are no borders between one region and the other within a country there are no borders even between countries. The computer as a physical object within which information is stored has given way to 'cyberspace' where information is held and transmitted to and from the 'web.' So where is this 'place' where the information is 'held'. The present government is promoting digitalization in full force which is a great step towards the future and transparency.

As a part of 'Digital India'<sup>1</sup> the government of India emphasizes on getting every place in India Internet enabled which will open up tones of opportunities, empower E-governance, employment and ease of doing business across the globe from any remote corner. Digital India is also a part of smart city projects launched by Narendra Modi government in India. 'Digital India' is where the technology ensures the citizen-government interface is incorruptible. This is vision of every youngster in our country. The world today looks at India for the next big idea. Digital technologies have been increasingly used in everyday life from retail stores to government offices. They help us connect with each other and also share information. One side as a nation we are striving to achieve a 'Digital India', on the other side the scope of crime in cyber space increases. Before stepping into "Digital India" it is important to get policies that would deal with any cyberspace related crimes ready for the future. Today internet has revolutionized, its reach is far more than any other of communication. But with this novelty also comes great risks where this boon called the internet can also be misused and hence giving rise to many criminal activities and instances of abetment of criminal activities which have to be regulated. The basic nature of the internet is that it is endless and has no boundaries. This is a primary characteristic of the internet and poses as a severe problem when one speaks of the issue of jurisdictions.

Jurisdiction is the concept where by in any legal system, the power to hear or determine a case is vested with the appropriate court. The main problem of cyber law jurisdiction is the presence of multiple parties in various parts of the world who have only virtual nexus with each other. Then the

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1 Ministry of information technology, government of India. -<http://www.mygov.in/group/digital-india/>(last visited on 6 Dec 2017).

problem of place is raised that where the party wants to sue and what remedy is available to him. Now cyber security has become an integral part of national security. Today computers play a major role in almost every crime that is committed. The applicability and effectiveness of our existing laws need to be constantly reviewed so that we can ably face the risks at present. Currently in India we have the Information Technology Act, 2000 (also called, IT Act, 2000) which is an enabling provision for regulating the activities that take place in cyberspace. Issues of jurisdiction and sovereignty have quickly come to the fore in the era of the Internet. The Internet does not tend to make geographical and jurisdictional boundaries clear, but Internet users remain in physical jurisdictions and are subject to laws independent of their presence on the Internet.

### **Meaning and types of jurisdiction.**

Jurisdiction is the authority of a court to hear a case and resolve a dispute involving person, property and subject matter. These principles of jurisdiction are enshrined in the constitution of a State and part of its jurisdictional sovereignty. All sovereign independent States possess jurisdiction over all persons and things within its territorial limits and all causes, civil and criminal, arising within these limits.<sup>2</sup> The word jurisdiction is derived from Latin terms "*juris*" and "*dicto*" which means "*I speak by the Law*". Encyclopedia Britannica<sup>3</sup> defines, "jurisdiction in general, the exercise of lawful authority, especially by a court or a judge and so that extent or limits with which such authority is exercisable. It has primarily a territorial signification, but where its power is otherwise limited, it is rather a matter of competence and in system of law based on codes this distinction is more clearly evident than it is in English and U.S. law".

Jurisdiction is the power or authority of court to administer justice on the litigating parties. The jurisdiction of court can be classified into following categories:

1. Civil and criminal jurisdiction; -. Civil jurisdiction is that which deals with cases of civil nature while as criminal jurisdiction deals with crime and punishment.
2. Territorial or local jurisdiction. Courts have jurisdiction only on those cases which arises in their territorial jurisdiction. These limits are fixed by statues. The district judge exercise jurisdiction on their district while as high court exercise jurisdiction over the whole state.

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2 Lord Macmillan in *CompaniaNavieraVascongado v Steamship 'Cristina'* [1938] AC 485.

3 C K Takwani, Civil Procedure Code (EBC Publication, 8<sup>th</sup> edition, 2017).

3. Pecuniary jurisdiction. - The courts have jurisdiction over only those cases which fall within their pecuniary limits. Some courts like high court and district courts have unlimited pecuniary jurisdiction.
4. Jurisdiction as to subject matter. Some courts have been vested with the power to have jurisdiction over a particular matter while other courts have been excluded to have jurisdiction over that.e.g., in respect of divorce cases, testamentary matters, insolvency proceedings, only district judge or civil judge (senior division) has jurisdiction.
5. Original and appellate jurisdiction. Original jurisdiction is jurisdiction inherent in, or conferred upon, a court of first instance. appellate jurisdiction is the power or authority conferred upon a superior court to re-hear by way of appeals, revision, etc., of causes which have been tried and decided by courts of original jurisdiction.
6. Exclusive and concurrent jurisdiction. exclusive jurisdiction is that which confers sole power on one court or tribunal to deal with and decide a case. While as con-current jurisdiction may be exercise by different courts or authorities between the same parties and over the same subject matter.
7. General and special jurisdiction. General jurisdiction extends to all cases comprised within a class or classes of causes. Special or limited jurisdiction, on the other hand, is jurisdiction which is confined to special, particular or limited causes.
8. Legal and equitable jurisdiction. Legal jurisdiction is a jurisdiction exercised by common law courts in England, while equitable jurisdiction is a jurisdiction exercised by equity courts. Courts in India are courts of both, law and equity.
9. Municipal and foreign jurisdiction. Municipal or domestic jurisdiction is a jurisdiction exercised by municipal courts, i.e., courts in a country. Foreign jurisdiction means jurisdiction exercised by a court in a foreign country. Judgment rendered by foreign court is called foreign judgment.
10. Expounding and expanding jurisdiction. Expounding jurisdiction means to define, clarify and explain jurisdiction. Expanding jurisdiction means to expand, enlarge or extend the jurisdiction. It's the duty of court to expound its jurisdiction. Its however not proper for the courts to expand its jurisdiction.

## Jurisdiction under Indian Law

Under the code of civil procedure, a civil court has jurisdiction to try all suits of a civil nature unless they are barred. Section 9 of the CPC are as under; -

“The court shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred”<sup>4</sup>

According to section 9 a civil court has jurisdiction to try a suit if two conditions are fulfilled, i.e., the suit must be of a civil nature, and the cognizance of such a suit should not have been expressly or impliedly barred.

The Supreme Court explained the concept of jurisdiction of civil courts under section 9 in the case of *Rev. P.M.A. Metropolitan v. Moran Mar Marthoma*,<sup>5</sup> observed, “This section is available in every case where the dispute was of the characteristic of affecting one’s rights which are not only civil but of civil nature”.

In all civil matters, the Code of Civil Procedure (CPC), 1908, basically formulates the Indian approach to jurisdiction. Under CPC, one or more courts may have jurisdiction to deal with a subject matter having regard to the location of immovable property, place of residence or work of a defendant or place where cause of action has arisen. Where only one court has a jurisdiction, it is said to have exclusive jurisdiction; where more courts than one has jurisdiction over a subject matter, they are called courts of available or natural jurisdiction. The jurisdiction of the courts to try all suits of civil nature is very expansive as is evident from the provisions of CPC.<sup>6</sup>

### Jurisdiction under criminal procedure code 1973.

Section 177 to 189 of criminal procedure code, 1973(CRPC) enunciate the general principles for determining which shall be the proper court to

4 Sec 9 of CPC contains two explanation as well. Which are as under; - Explanation 1. A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decisions as to religious rites or ceremonies. Explanation ii. For the purpose of this section, it is immaterial whether or not any fees are attached to the office referred to in explanation 1 or whether or not such office is attached to a particular place.

5 *P.M.A. Metropolitan v. Moran Mar Marthoma* AIR 1995 SC 2001.

6 The Code of Civil Procedure, 1908; Section 9.

inquire into or try an offence. The basic rule in context of local jurisdiction is contained in section 177 which provides that ordinarily every offence is to be inquired into or tried by a court within whose local jurisdiction it was committed. The subsequent sections namely section 178 to 186 and 188 considerably enlarge the ambit of the "local jurisdiction" in which the offence takes place.

### **Basis of Jurisdiction**

To formulate whether the jurisdiction of the courts is exclusive or non-exclusive, in the Internet setting, one must involve the following jurisdictional principles as highlighted in the CPC.

i. Pecuniary, ii. Subject-matter, iii. Territory and iv. Cause of action.

### **Jurisdiction under IT Act 2000.**

The State legislative enactments primarily reflect its prescriptive jurisdiction. For example, the IT Act, 2000 provides for prescriptive jurisdiction as it States: "The provisions of this Act shall apply also to any offence or contravention committed outside India by any person irrespective of his nationality."<sup>7</sup> Further this Act shall apply to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.<sup>8</sup> It is the legislative function of the Government to enact laws and judicial and/or administrative function to enforce those laws. Thus, the principles of jurisdiction followed by a State must not exceed the limits which international law places upon its jurisdiction.

### **Information Technology and Criminal Procedure Code. (S. 75 and S. 179)**

One of the interesting provisions of S. 75 of IT Act-2000 which contemplates for offences or contraventions committed outside India. According to this Section, this Act shall apply to an offence or contravention committed outside India by any person if the act or conduct. Constituting the offence or contravention involves a computer, computer system or computer network located in India.

Though India is not one of the signatories to the cyber-crime convention,<sup>9</sup>

7 The Information Technology Act, 2000; Section 75 (1).

8 *Ibid*; Section 75 (2).

9 *Id* at 13.

but it has adopted principle of universal jurisdiction to cover both the cyber contraventions and cyber offences under the Act. It has been argued that from the point of view of application, it would be extremely difficult to enforce the jurisdiction of Indian Courts on cyber criminals belonging to different nationalities. Moreover, the Extradition Treaties, which India has signed so far, do not cover ‘cyber-crime’ as an extraditable offence.

On the same footing S. 179 of Cr. P.C. defines, when an act is an offence by reason of anything which has been done and of a consequence which has ensued, if the thing has been done in one local area and the consequence has ensued in another local area. In this case, the consequence means only such consequence as is a necessary ingredient of the alleged offence. For instance, ‘A’ is wounded within the local jurisdiction of court ‘X’ and dies within the local jurisdiction of court ‘Y’. The offence of culpable homicide committed against ‘A’ may be inquired into and tried by court ‘X’ or Court ‘Y’. Section 179 contemplates a situation wherein the accused has done an act, prescribed consequence has followed such act, and that the accused is being tried for the offence as result of both the act and the consequence.

### **Jurisdiction in Cyberspace.**

The word “cyberspace” dates back to 1982 when it was used by Canadian science fiction writer William Gibson in one of his stories. With time the word has come to be used commonly and frequently to refer to the internet. However, as Fenz puts it “By definition the cyberspace is more than the internet, because every transaction or event which is not happening in “real” world is occurring in the cyberspace”.<sup>10</sup> Cyberspace can thus be described as a metaphor for an ‘abstract terrain’ which represents the real world with “virtual objects and virtual communication which is happening between their users via e-mail or instant messaging”.<sup>11</sup> Cyberspace can be categorized into various subdivisions, which can be the internet space which makes available a multitude of infotainment content online; the online gaming space which truly is a metaphor of the real in the virtual world where people are represented in their ‘avatars’ in an artificial mode; and that of the ‘machine-machine’ communication where there is little or no human interface – usually used for majuscular commercial purposes.<sup>12</sup> In simple terms, cyber jurisdiction is the extension

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10 Stefan Fenz, *Cyberspace Security: A definition and a description of remaining problems* (2005) (University Vienna - Institute of Government & European Studies) available at [http://www.univie.ac.at/frisch/isegov/ausshaengUniWien/CyberspaceSecurity\\_Fenz.pdf](http://www.univie.ac.at/frisch/isegov/ausshaengUniWien/CyberspaceSecurity_Fenz.pdf) (accessed on November 8, 2017 at 6:42pm).

11 Supra 6 p 3.

12 Supra.

of principles of international jurisdiction into the cyberspace. Cyberspace has no physical (national) boundaries. It is an ever-growing exponential and dynamic space. With a 'click of a mouse' one may access any website from anywhere in the world. Since the websites come with 'terms of service' agreements, privacy policies and disclaimers – subject to their own domestic laws, transactions with any of the websites would bind the user to such agreements. And in case of a dispute, one may have recourse to the 'private international law. In case the "cyberspace offences" are either committed against the integrity, availability and confidentiality of computer systems and telecommunication networks or they consist of the use of services of such networks to commit traditional offences, then one may find oneself in the legal quagmire.<sup>13</sup> The question is not only about multiple jurisdictions but also of problems of procedural law connected with information technology. The requirement is to have broad based convention dealing with criminal substantive law matters, criminal procedural questions as well as with international criminal law procedures and agreements.

### **Convention on cyber-crime.**

The Convention on Cyber-crime was opened at Budapest on 23rd November, 2001 for signatures. It was the first ever-international treaty on criminal offences committed against or with the help of computer networks such as the Internet. The Convention deals in particular with offences related to infringement of copyright, computer-related fraud, child pornography and offences connected with network security. It also covers a series of procedural powers such as searches of and interception of material on computer networks. Its main aim is to pursue a common criminal policy aimed at the protection of society against cyber-crime, inter alia by adopting appropriate legislation and fostering international co-operation. The Convention on Cyber-crime has made cyber-crimes extraditable offences. The offence is extraditable if punishable under the laws in both contracting parties by imprisonments for more than one year or by a more severe penalty. India is not signatory to this convention.

The Convention on Cyber Crimes of 2001 which allows the country to have jurisdiction if the cybercrime is committed:

1. In its territory.
2. On board a ship flying the flag of the country.

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13 Gray v. American Radiator & Standard Sanitary Corp., 22 III 2d 432 (1961).

3. On board an aircraft registered under the laws of the country.
4. By one of the countries nationals, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State.<sup>14</sup>

This convention also makes cybercrimes extraditable when the crime committed is illegal in both the signatory countries. The offence can be punished to an imprisonment up to 1 year or more severe penalty. Unfortunately, the convention is a produce of International law and the signatories are again let loose on its applicability and its implementation. International law being toothless allows the criminals across countries to commit offences and go scot free as the basic question of jurisdiction of a court confuses the justice system.

For the Jurisdiction of courts in the cyber space to be clear one internationally recognised body should be created which has enough power to decide on the jurisdiction of cyber space disputes and also has the power to penalise cyber criminals.

Cyber space is an imaginary system with equal pros and cons. Cyber space can help one achieve and equally deceive him. India has not faced many cases concerning this issue, but the time is near where internationally and domestically countries would have to cooperate and decide to form a uniform rule of jurisdiction which is strong enough to prosecute and catch hold of cyber criminals.

### **Foreign judgment and criteria for accepting the foreign judgment.**

Foreign judgment is a judgment rendered by foreign courts. These judgments are not accepted in India however these judgments can be quoted and has a pervasive value. A foreign judgment is not conclusive in certain circumstances in India. In this context, sec 13 of Code of Civil Procedure, 1908 provides that: “A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-

- a. Where it has not been pronounced by a court of competent jurisdiction
- b. Where it has not been given on the merits of the case.

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14 [https://www.academia.edu/3700793/Jurisdictional\\_Issues\\_in\\_Cyber\\_Crime](https://www.academia.edu/3700793/Jurisdictional_Issues_in_Cyber_Crime) (last Modified 2 nov. 2017).

- c. Where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable.
- d. Where the proceedings in which the judgment was obtained are opposed to natural justice.
- e. where it has been obtained by fraud.
- f. Where it sustains a claim founded on a breach of any law in force in India.

In *Smita Conductors Ltd. v. Euro Alloys Ltd.*,<sup>15</sup> the Supreme Court observed that, a foreign award cannot be recognized or enforced if it is contrary to

- a. Fundamental policy of Indian law; or
- b. The interests of India; or
- c. Justice or morality. Once it is held that an award is a foreign award, the provisions of Foreign Awards (Recognition and Enforcement) Act, 1961 would apply and where the conditions for enforcement of such an award exist, the court shall order the award to be filed and shall proceed to pronounce judgment granting award and upon the judgment so pronounced, decree shall follow.

In *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*,<sup>16</sup> the court held that it is now established law that for enforcement of a foreign award there is no need to take separate proceedings, one for deciding the enforceability of the award to make it a rule of the court or decree and the other to take up execution thereafter. In one proceeding the Court enforcing a foreign award can deal with the entire matter.

In *International Woollen Mills.v. Standard Wool United Kingdom Ltd.*,<sup>17</sup> in *ex parte* decree delivered by foreign courts must be decided on merits of case. If not then the judgment will have no effect.

### **Principles of cyber space jurisdiction.**

On the threshold of the twenty first century, the 'knowledge capitalism' is the guiding stars in the spectrum of social, economic and political fields, and by virtue of new inventions and innovations, it drafts history of e-era in realm of post modernization. In a country like ours there is a novel saying that, 'Ubi jus ebi remedies'- there is a right and there is

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15 *Smita Conductors Ltd. v. Euro Alloys Ltd.*, (2001) 7 SCC 728.

16 *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*, (2001) 6 SCC 356.

17 AIR 2001 SC.

a remedy. In the last two decades, the pervading impact of information technology being a transnational character poses a serious threat to the administration of justice. At this juncture a fundamental question crops up which courts would have jurisdiction to adjudicate disputes between the parties transacting on the internet. A widely recognised view which is gaining ground reality is that the existing law of jurisdiction is redundant for the cyber world and an entirely different set of rules is required to govern the jurisdiction over the internet which is free from the shackles of geographical borders. Generally, there are three principals which deals with jurisdiction<sup>18</sup> .i.e.

- Jurisdiction to prescribe
- Jurisdiction to enforce
- Jurisdiction to adjudicate.
- Jurisdiction to prescribe.

The jurisdiction to prescribe is the right of a state to make its law applicable to the activities, relations, the status of persons, or the interests of persons in things.<sup>19</sup> The jurisdiction has to be looked from two perspective: -

Prescriptive jurisdiction and Enforcement jurisdiction.

Prescriptive jurisdiction is the exercise of state authority to regulate local conduct, transactions and activity

Under international law, there are 5 generally accepted bases of jurisdiction or theories under which a state may claim to have jurisdiction to prescribe a rule of law over an activity. In the usual order of preference, they are:<sup>20</sup>

1. Territorial Principle
2. Nationality principle
3. Protective Principle
4. Passive Nationality
5. Universality principle

**Territorial Principle** A State's territory for jurisdictional purposes extends to its land and dependent territories, airspace, aircraft, ships, territorial sea and, for limited purposes, to its contiguous zone, continental shelf and

18 Darrel.C.Menthe, *Jurisdiction in cyber space;-A theory of international spaces*, vol.4.issue1(1998),(Michigan telecommunications and technology review).

19 Supra.

20 Ibid.

Exclusive Economic Zone (EEZ). The principle as adopted by the national courts has been that all people within a State's territory are subject to national law, save only for those granted immunity under international law. The territorial principle has following two variants:

*'Objective' territorial principle*, where a State exercises its jurisdiction over all activities that are completed within its territory, even though some element constituting the crime or civil wrong took place elsewhere; and

*Subjective' territorial principle*, where a State asserts its jurisdiction over matters commencing in its territory, even though the final event may have occurred elsewhere.

### **Nationality Principle**

It is for each State to determine under its own law who are its nationals. Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State. In *Nottebohm Case (Liechtenstein v. Guatemala)*,<sup>21</sup> it was held that 'the nationality serves above all to determine that the person, upon whom it is conferred, enjoys the rights and is bound by the obligations, which the law of the State in question grants to or imposes upon its nationals'. Under the garb of nationality principle, a State may exercise jurisdiction over its own nationals irrespective of the place where the relevant acts occurred. A State may even assume extra-territorial jurisdiction.

### **Protective Principle**

The state has every right to protect its citizens, sovereignty and integrity of nation. The concept of sovereignty as an important issue in today's world. After the victory of American president Donald trump, he withdraws from Paris pact on the question of sovereignty. A State relies upon protective principle when its national security or a matter of public interest is in issue. A state has a right to protect itself from acts of international conspiracies and terrorism, during trafficking, etc. In *Attorney-General of the Government of Israel v. Eichmann*,<sup>22</sup> the District Court of Jerusalem held: "The State of Israel's 'right to punish' the accused derives, in our view, from two cumulative sources –

- i. A universal source (pertaining to the whole of mankind), which vests the right to prosecute and punish crimes of this order in every State within the family of nations; and

<sup>21</sup> Nottebohm Case (Liechtenstein v. Guatemala), (Second Phase), ICJ Rep (1955) 4.

<sup>22</sup> Attorney-General of the Government of Israel v. Eichmann, 36 ILR (1961) 5.

- ii. A specific or national source, which gives the victim nation the right to try any who assault its existence.”

### **Passive Principle**

It extends the nationality principle to apply to any crime committed against a national of a State, wherever that national may be. It in a way provides that the citizen of one country, when he visits another country, takes with him for his “protection” the law of his own country and subjects those, with whom he comes into contact, to the operation of that law. The jurisdictional aspect of ‘passive personality’ has been elaborated further in the case of *United States v. Yunis*,<sup>23</sup> where the US District Court, District of Columbia held: “This passive personality principle authorizes States to assert jurisdiction over offences committed against their citizens abroad. It recognizes that each State has a legitimate interest in protecting the safety of its citizens when they journey outside national boundaries.” Though the principle may be referred to as a controversial one, because it extends the ‘arm of national laws further even in the foreign territories’, nevertheless, the principle has been adopted as a basis for asserting jurisdiction over hostage takers. Passive nationality is a theory of jurisdiction based on the nationality of the victim. Passive and “active” nationality are often invoked together to establish jurisdiction because a state has more interest in prosecuting an offense when both the offender and the victim are nationals of that state. Passive nationality is rarely used for two reasons. First, it is offensive for a nation to insist that foreign laws are not sufficient to protect its citizens abroad. Second, the victim is not being prosecuted. A state needs to seize the actor in order to undertake a criminal prosecution.<sup>24</sup>

### **Effects Principle**

It is an extra-territorial application of national laws where an action by a person with no territorial or national connection with a State, has an effect on that State. The situation is compounded if the act is legal in the place where it was performed. The ‘effects doctrine’ is primarily a doctrine to protect American business interests and is applicable where there are restrictive trades or anti-competitive agreements between corporations. In *Hartford Fire Insurance Co. v. California*,<sup>25</sup> the question was whether the London insurance companies refusing to grant reinsurance to certain US businesses, except on terms agreed amongst themselves are violative of the US anti-trust laws and tried in the United States. The US Supreme

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23 *United States v. Yunis*, 681 F Supp 896 (1988).

24 *Supra* note 14.

25 *Hartford Fire Insurance Co. v. California*, 113 S. Ct 2891 (1993).

Court held that the US court did have jurisdiction and that there exists no conflict between domestic and foreign law

### **Universality principle**

The canvass of the universality principle is quite vast. A State has jurisdiction to define and prescribe punishment for certain offences recognized by the community of nations as of universal concern. It includes acts of terrorism, hijacking of aircraft, genocide, war crimes etc. A state may assert its universal jurisdiction irrespective of who committed the act and where it occurred. The perspective is broader as it was deemed necessary to uphold international legal order by enabling any State to exercise jurisdiction in respect of offences, which are destructive of that order.

### **Personal jurisdiction in cyber space**

Personal Jurisdiction is the competence of a court to determine a case against a particular category of persons Personal jurisdiction looks into an issue from the point of 'physical presence', whether the person was a resident or a non-resident. If he is a resident, then there is no doubt about his being subject to municipal (domestic) laws. The problem arises, if he is a non-resident, what laws would be applicable municipal laws of the state where he is residing or municipal laws of the state whose laws he has transgressed. Personal jurisdiction is further classified into two types.

### **General jurisdiction and specific jurisdiction**

#### **Personal jurisdiction under CPC**

Indian courts adopt a personal jurisdiction to solve disputes related to the cyber world. Indian courts follow the principle of 'lex foris' that means Law of the Forum. This signifies that the Indian courts do not follow the rule of procedure of any foreign law. They accept the well -established private international law and the law of the forum in which the legal proceedings have been initiated is applicable for the purpose of all the procedures. Personal Jurisdiction is governed by the Code of Civil Procedure, 1908 (CPC) in the Indian Courts. The CPC does not treat private international law disputes differently. In the Code of Civil Procedure the basis for deciding territorial jurisdiction stays the same as any domestic dispute, but to decide on the subject matter jurisdiction of a suits the code has specified a distinction on which type of suits will be governed under it, these are –

- For suits on immovable property.

- For suits on movable property and wrongs to persons.
- For any other category of suits, Section 20 is a “default rule” as it provides for categories of suits not covered in the above two categories.

### **Issue of jurisdiction in United States of America, UK and India; - judicial approach.**

According to the U.S. constitution, the lawsuits can be brought either in a state or of federal court. Provided that the state in which the court is located must have a long-arm statute which allows the court to assert jurisdiction over non-resident defendant. Although these statutes will differ from state to state, Fifth and Fourteen Amendments of the U.S. Constitution lay down the outer limits for the courts while asserting jurisdiction. This means that before asserting jurisdiction over the non-resident defendant, the court has to comply with the provisions laid down in Fifth and Fourteen Amendments Due process Clause. Before moving further, it is pertinent that the United States has not codified the law of jurisdiction. Due to this, Courts (mainly Supreme Court) have evolved the various theories to measure the legitimate exercise of judicial power over the parties to the litigation. In view of above, it is necessary to study the history of the development of the American law of jurisdiction.

From early times, in United States the law of jurisdiction has been classified as follows;

#### **Subject matter of jurisdiction**

It is the cause, the object and the thing are dispute. The authority of a court to decide a particular type of case is called subject matter jurisdiction and is set by the federal or state constitution or by the statute of the other state.

#### **Personal jurisdiction**

Personal jurisdiction is concerned with the power of the court to decide a case between the parties. For a court to exercise jurisdiction, there must be a statutory or Common Law Source of jurisdiction, which does not surpass the limitations imposed by constitutional dues process. Personal jurisdiction may be specific or general.

#### **Prescriptive jurisdiction**

Prescriptive jurisdiction is the exercise of state authority to regulate local conduct, transactions and activities. The very first U.S. Restatement, laid

down in the 1934, mentioned some simple mechanical rules for choosing what law to apply in case of inter jurisdictional litigation. In such cases the substance of the claim will determine the application of the rule, e.g. in a wrong related to 'torts' the first restatement provided that the law of the place where wrong is committed will be applicable. Thus, the last event necessary to make a wrongdoer liable for the alleged tort would be considered

### **Different tests used in USA are as under; -**

- **Minimum Contacts Test.** *In International Shoe Co. v. state of Washington*,<sup>26</sup> a two-part test for determining jurisdiction of the forum court over a defendant not residing or carrying on business within its jurisdiction was evolved. It was held that in such instance the plaintiff had to show that the defendant has sufficient 'minimum contacts' in the forum state. In other words, the defendant must have purposefully directed its activities towards the forum state or otherwise 'purposefully availed' of the privilege of conducting activities in the forum state. Further, the forum court had to be satisfied that exercising jurisdiction would comport with the traditional notions of fair play and substantial justice. The minimum contacts test in *International Shoe* has been understood as to have performed "two related, but distinguishable, functions."<sup>27</sup> The first was to protect the defendant from the burden of litigating in a distant or inconvenient forum. The second was to ensure that the states do not "reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."<sup>28</sup> It established the following 3 criteria for establishing "minimum contacts":<sup>29</sup>
  - i. The defendant must "purposeful avail" himself of the privilege of doing business with the forum state,
  - ii. The cause of action arises from defendant's activities in the forum state, and,
  - iii. The exercise of jurisdiction would be fair and reasonable.

The 'minimum contact' principle laid the foundation of state's jurisdiction over other state's subject. It advocated establishment of 'minimum contacts' to give rise to obligations between the defendant and the forum

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<sup>26</sup> 326 U.S. 340 (1945).

<sup>27</sup> *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 291-92 (1980).

<sup>28</sup> *Ibid.*

<sup>29</sup> Vakul Sharma, *Information technology Law and Practice* 362 (universal law publishing co,3rd edition).

state. Primarily, it does not look into the issue whether the contacts were sufficient or insufficient to establish “purposeful availment”. The International Shoe Company’s Case was decided in the year 1945 and at that time there were no state long-term statutes.

Recently, the Court of Appeals for the Ninth Circuit in *Boschetto v. Hansing*,<sup>30</sup> while rejecting the ‘sliding scale’ test (laid down in the Zippo case) has followed the minimum contacts test. However, the traditional minimum contacts approach is limited to the category of cases to which International Shoe most directly applied, i.e., long-range commercial transactions. It would not be applicable to cases involving remote torts or goods that were moved after purchase and cases dealing with internet defamation and other non-commercial transaction cases.

### **Purposeful Availment Test**

The US Supreme Court’s focus on purposeful conduct of the defendant emerged in *Hanson v. Denckla*.<sup>31</sup> The facts here were that a Florida court asserted jurisdiction over a Delaware trust company, in an action challenging a Florida resident’s appointment of property of which the Delaware Company was trustee. The settlor had after the creation of the trust moved from Pennsylvania to Florida. However, the trust company had not solicited or conducted business in Florida other than routine correspondence with the settlor. Holding that the Florida court did not have jurisdiction, the US Supreme Court held that the trust company had not purposefully undertaken to conduct business in Florida. It was connected with the state only because the settlor unilaterally moved to Florida subsequent to the contractual relationship being established.

In *World-Wide Volkswagen Corp. v. Woodson*,<sup>32</sup> an automobile was involved in an accident while it was being driven by the purchasers through Oklahoma. The question was whether the wholesaler and retailer, both located in New York, could be made amenable to the jurisdiction of the Oklahoma court where a product liability claim was filed. In holding that the wholesaler and retailer were not subject to personal jurisdiction there, the US Supreme Court pointed out that the defendants had not undertaken to conduct any business in Oklahoma. Their only connection with that state arose as a result of the ‘unilateral activity’ of the purchasers driving the car there. The Court explained that the foreseeability that an automobile might be taken to Oklahoma was not relevant. According to

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30 539 F.3d 1011 (9th Cir. 2008).

31 357 U.S. 235 (1958).

32 444 U.S. 286 (1980).

it what was relevant was the foreseeability that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being hauled into court there.

In *Ballard v. Savage*,<sup>33</sup> it was explained that the expression 'purposefully availed' meant that "the defendant has taken deliberate action within the forum state or if he has created continuing obligations to forum residents." It was further explained that "it was not required that a defendant be physically present within, or have physical contacts with the forum, provided that his efforts are purposefully directed toward forum residents."

### **The Zippo 'sliding scale' test**

In the case of *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*<sup>34</sup> The plaintiff Zippo Manufacturing was a Pennsylvania corporation making cigarette lighters. The defendant was a California corporation operating an internet website and an internet news service. It had offices only in California. Viewers who were residents of other states had to go to the website in order to subscribe for the defendant's news service by filling out an online application. Payment was made by credit card over the internet or telephone. Around 3000 of the defendant's subscribers were residents of Pennsylvania who had contracted to receive the defendant's service by visiting its website and filling out the online application. Additionally, the defendant had entered into agreements with seven internet access providers in Pennsylvania to permit their subscribers to access the defendant's news service. The defendant was sued in a Pennsylvania court for trademark dilution, infringement and false designation. After discussing the development of the law till then, the District Court first observed that:

The Zippo court then noted that: a three-pronged test has emerged for determining whether the exercise of specific personal jurisdiction over a non-resident defendant is appropriate:

1. The defendant must have sufficient 'minimum contacts' with the forum state
2. The claim asserted against the defendant must arise out of those contacts,
3. The exercise of jurisdiction must be reasonable.

The court in Zippo classified websites as (i) passive, (ii) interactive and (iii) integral to the defendant's business. On facts it was found that the

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33 65 F.3d 1495 (9th Cir. 1995).

34 952 F. Supp. 1119 (W.D. Pa. 1997).

defendant's website was an interactive one. Accordingly, it was held that the court had jurisdiction to try the suit. The Zippo court's observation that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the internet has been compared by that court to a 'sliding scale.'

The court held that if the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site, which is accessible to users in foreign jurisdictions. A passive Website that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."<sup>35</sup>

Interestingly, Zippo has also been followed in Canada as well. Zippo has been criticised as being ineffective in lending legal certainty in the face of ever-changing technology which has witnessed a shift from the use of passive websites to those that are either partly or wholly interactive. If the test were to be static irrespective of the changes in technology, then it would become irrelevant if a majority of the websites answered the definition of an interactive website. That would result in a 'chilling effect' on international commerce of which the internet is a major vehicle. It would then fail to provide the balance between the interests of consumers and those of producers and marketers

### **The Effects Test**

The difficulty experienced with the application of the Zippo sliding scale test has paved the way for application of the 'effects' test. The courts have thus moved from a 'subjective territoriality' test to an 'objective territoriality' or 'effects' test in which the forum court will exercise jurisdiction if it is shown that effects of the defendant's website are felt in the forum state. In other words, it must have resulted in some harm or injury to the plaintiff within the territory of the forum state. Since some effect of a website is bound to be felt in several jurisdictions given

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35 952 F. Supp. 1119 (W.D. Pa. 1997).

the nature of the internet, courts have adopted a 'tighter' version of the 'effects' test, which is 'intentional targeting.'

The 'effects' test was first evolved in *Calder v. Jones*.<sup>36</sup> The plaintiff therein was a resident of California who commenced a libel action in a California court against the National Enquirer based on an article that it printed and circulated in California. Apart from the Enquirer and its local distribution company, its editor and the author of the article were all in Florida. Affirming the assertion by the California court of personal jurisdiction over the defendants, the Supreme Court held that "On facts it was held that the author and editor 'expressly aimed' their tortious actions at California and that they knew that the article would have a devastating impact on the respondent and that they should have reasonably anticipated that the brunt of that injury would be reasonably felt by the defendant in the state in which she lived and worked. The court went on to observe: Petitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must 'reasonably anticipate being hauled into court there' to answer for the truth of the statements made in their article."<sup>37</sup>

The "effect test" is a further extension of the 'forum state targeting', as it also takes into consideration the effect that "out-of-state" conduct has in the forum state. Thus, in order to have personal jurisdiction, there must be:

1. Intentional actions,
2. Expressly aimed at the forum state, and
3. Causing harm,

The brunt of which the defendant knows is suffered or likely to be suffered in the forum state. The application of the "effect test" in the online environment is to establish the tortious liability of the defendant and the long-arm reach of the plaintiff's forum state to have personal jurisdiction over such defendants.

In *Northwest healthcare Alliance Inc. v. Healthgrades.com*,<sup>38</sup> the court held

<sup>36</sup> 465 U.S. 783 (1984).

<sup>37</sup> 465 U.S. 783 (1984), at 789-90.

<sup>38</sup> Northwest healthcare Alliance Inc. V. Healthgrades.com., 2002 WL 31246123 [9th Cir. (Wash)].

that , the exercise of personal jurisdiction over an out-of-state defendant was proper if the defendant is ;- (a) engaged in intentional actions; (b) expressly aimed at the foreign state; (c) causing harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the form state.

## Conclusion

To summarise the position in the US, in order to establish the jurisdiction of the forum court, even when a long arm statute exists, the plaintiff would have to show that the defendant ‘purposefully availed’ of jurisdiction of the forum state by ‘specifically targeting’ customers within the forum state. A mere hosting of an interactive web page without any commercial activity being shown as having been conducted within the forum state, would not enable the forum court to assume jurisdiction. Even if one were to apply the ‘effects’ test, it would have to be shown that the defendant specifically directed its activities towards the forum state and intended to produce the injurious effects on the plaintiff within the forum state. Some courts have required the plaintiffs to show that the defendant should be shown to have foreseen being ‘hauled’ into the courts in the forum state by the very fact that it hosted an interactive website.

## UNITED KINGDOM

United Kingdom In *1-800 Flowers Inc. v. Phonenames*,<sup>39</sup> the defendant was a UK based Phonebook Company and the plaintiff was engaged in the business of delivery of flowers. Customers across the world could access the plaintiff’s website to place orders for flowers. There was, however, no evidence to show that UK residents had placed orders on its website. It was argued that because the website was accessible from the UK and the UK residents could place orders online, the use by the defendant of the mark 1-800 on its website amounted to use in the UK. It was held in the first appeal by the Bench that “mere fact that websites could be accessed anywhere in the world did not mean, for trade mark purposes, that the law should regard them as being used everywhere in the world.”<sup>81</sup> The intention of the website owner and what the reader will understand if he accesses the website was held to be relevant. The Court of Appeals also rejected the argument. Justice Buxton, in a concurring opinion pointed out as under:

“I would wish to approach these arguments, and particularly the last of them, with caution. There is something inherently unrealistic in saying that

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39 [2002] F.S.R. 12 (C.A.) (U.K.).

A 'uses' his mark in the United Kingdom when all that he does is to place the mark on the internet, from a location outside the United Kingdom, and simply wait in the hope that someone from the United Kingdom will download it and thereby create use on the part of A. By contrast, I can see that it might be more easily arguable that if A places on the internet a mark that is confusingly similar to a mark protected in another jurisdiction, he may do so at his peril that someone from that other jurisdiction may download it; though that approach conjured up in argument before us the potentially disturbing prospect that a shop in Arizona or Brazil that happens to bear the same name as a trademarked store in England or Australia will have to act with caution in answering telephone calls from those latter jurisdictions. However that may be, the very idea of 'use' within a certain area would seem to require some active step in that area on the part of the user that goes beyond providing facilities that enable others to bring the mark into the area. Of course, if persons in the United Kingdom seek the mark on the internet in response to direct encouragement or advertisement by the owner of the mark, the position may be different; but in such a case the advertisement or encouragement in itself is likely to suffice to establish the necessary use".<sup>40</sup>

## INDIA

*Casio India Co. Limited v. Ashita Tele Systems Pvt. Limited.*<sup>41</sup> It was held by the learned single Judge that "once access to the impugned domain name website could be had from anywhere else, the jurisdiction in such matters cannot be confined to the territorial limits of the residence of the defendant." According to the learned single Judge, since a mere likelihood of deception, whereby an average person is likely to be deceived or confused was sufficient to entertain an action for passing off, it was not at all required to be proved that "any actual deception took place at Delhi. Accordingly, the fact that the website of Defendant No. 1 can be accessed from Delhi is sufficient to invoke the territorial jurisdiction of this Court."

*In India TV Independent News Service Pvt. Limited v. India Broadcast Live LLC & Ors.*,<sup>42</sup> the court held under para 46 of judgment that a website is accessible in a particular place may not itself be sufficient for the courts of that place to exercise personal jurisdiction over the owners of the website. However, where the website is not merely 'passive' but is interactive permitting the browsers to not only access the contents thereof

40 Ibid. [2002] F.S.R. 12 (C.A.) (U.K.).

41 2003 (27) P.T.C. 265 (Del.) (India), overruled by *Banyan Tree Holding (P) Limited v. A. Murali Krishna Reddy*, CS(OS) 894/2008 (High Court of Delhi, 23rd November 2009) (India).

42 2007 (35) P.T.C. 177 (Del.) (India).

but also subscribe to the services provided by the owners/ operators, the position would be different. In this case, the website ‘indiatvlive.com’ of Defendant No. 1 is not wholly of a ‘passive’ character. It has a specific section for subscription to its services and the options (provided on the website itself) for the countries whose residents can subscribe to the services include India. The services provided by Defendant No. 1 can thus be subscribed to and availed of in Delhi (India) i.e. within the jurisdiction of this court. It was held that “the Defendant is carrying on activities within the jurisdiction of this court; has sufficient contacts with the jurisdiction of the court and the claim of the Plaintiff has arisen as a consequence of the activities of Defendant No. 1 within the jurisdiction of this court.

In the case of *Banyan tree holding (p) Limited v. A Murali Krishna Reddy & Anr*,<sup>43</sup> by the bench of Hon’ble chief justice of Delhi court, Dr Justice S Murlidhar, the court observed that merely accessing a website would not satisfy the exercise of jurisdiction by the Delhi court. Rather, it has to be shown that the defendant “purposefully availed” itself of such jurisdiction by demonstrating that the website was with intent conclude a commercial transaction, with the site user and such use resulted in injury or harm to the plaintiff.

### **Issues and challenges in cyber space and suggestions**

Loop holes within the issue of jurisdiction of Indian courts –

Jurisdiction of the Indian courts for disputes relating to the cyber space where the parties are situated in India is governed under the Information Technology Act, 2000 which has formed special forums to solve disputes in the cyber space, such as

- Adjudicating Officers- They are appointed by the Controller and their function is to decide by the geographical location as to which jurisdiction will apply to the disputing parties. The hearing officer also decides as to which party gains an unfair advantage.
- Cyber Regulations Appellate Tribunal- This tribunal is set up by the government and the government decides the matters which would be taken up and also the jurisdiction of the tribunal. It acts as the first appellate tribunal for any matter from the control board or the adjudicating officers.
- High court- The parties can appeal to the high court if they are not satisfied with the decision of the tribunal within 60 days.

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43 *Banyan tree holding (p) Limited V. A Murali Krishna Reddy & Anr*, CS. (OS) NO 894/2008 ON 23 NOV 2009.

The IT Act, 2000 has complete power to adjudicate and implement its judgement on disputes where both the parties are of Indian origin. But what happens when one party is of foreign origin? The IT Act is well applied in extra territorial cases, but is not strong enough to implement its decision on the foreign party. The court possesses no power to bring the foreign party to India for trial. For example, an Indian Citizen's credit card has been misused by an American citizen, he then approached the Indian courts for justice. under the IT Act, 2000 the court does have the extra territorial jurisdiction to adjudicate on this matter but how effective will it be to bring the American citizen to India to be prosecuted as the IT Act is not applicable to the American citizen. Consider another scenario in which a particular transaction that A and B get into is legal for A in A's country to get into but illegal for B in B's country to get into? The availability of several equally capable courts and the difficulty in gathering evidence of location and existence makes it difficult for Indian courts to gain jurisdiction.

## **Conclusion**

International jurisdiction is an ever-persistent issue that has been prevalent not only in cyber law but in several legs of law. It is unavoidable and extremely sensitive an issue because of the simple reason of world politics and diplomacy. There is not much anybody or country can do as there is such a great irreconcilable difference in each country's stand. Cooperation by countries is the basis for any of the current methods of tackling jurisdiction will work. What the flaw with these is that they all depend heavily on country cooperation. Hence the authors of this paper suggest creation of a separate dispute resolution body that specially deals with cybercrime. The decision of this body should be binding on the parties that approach it. The dispute resolution should work on basis of the guidelines that have already been provided by the UNCITRAL rules. It is extremely important that a strong body similar to the WTO (World Trade Organization) is made so that a permanent solution is found to this issue of problem of jurisdiction and international cooperation. The UNCITRAL rules in accordance with the rules of the Cybercrime Convention together should act as a strong guideline for the making of such a body. This solution will also allow the countries to do away with problem of extradictory crimes. Even if the present state of knowledge and understanding of cyberspace and legal issues related thereto does not permit a detailed law on this subject of jurisdiction, for aspects on which no consensus may be reached, an international monitoring or regulatory body with some binding authority may be assigned the task of analysing, etc. rules of cyber jurisdiction. Such a body may, on the lines of UNCITRAL

etc.<sup>44</sup> may propose and adopt certain model laws for the states to base their domestic legislations on, Still other aspects may have to be inevitably left to the domestic courts to rule upon since it is only in a real factual situation that issues which could not be contemplated will arise, requiring courts to adjudicate upon the legitimate interests of the parties. Expecting a comprehensive treaty-based solution on all possible issues is unrealistic and also undesired for cyberspace is only a few decades old and a number of more complex issues are yet to surface. And, to decline to act merely because a comprehensive agreement looks difficult is to act contrary to the collected wisdom from the past.

### Suggestions

1. An impartial body that acts as a dispute resolution body to deal with the cyberspace disputes that take place between people from different countries.
2. All domestic cyber disputes should be tackled by the domestic courts of the various countries in accordance with their own laws.
3. An international monitoring or regulatory body with some binding authority may be assigned the task of analyzing, etc. rules of cyber jurisdiction should be made that has binding control over the countries.
4. Necessary amendments should be made in CRPC, CPC and IT act.
5. Necessary steps should be made to boost the cyber police with necessary equipment's.

On a concluding note, the internet is big, vast, complex and here to stay. Our traditional methods of legal systems have miserably failed in front of technology. Instead of altering our current systems and trying to find a method that is new, innovative and a kind where all have to compromise a little so that the compromise can be used for a greater good of justice and equity. Coming back to how we started off, the 'Modi Government' has been propagating the use of internet and making the government's resources and documentation all online and easily accessible by all. As brilliant and forward as this idea is, it can become equally dangerous and a potential inspiration for greater cybercrime. While it is a great step towards becoming a more transparent and greater democracy it also invites and makes it easier for cyber terrorism, this calls for greater cyber security. Several unforeseeable cybercrimes will come to rise which will need immediate attention which they come and at that moment solving issues

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44 The UNCITRAL Model Law on Arbitration sets a valuable precedent as it forms the basis for domestic legislations in a number of states, including India.

like jurisdiction will only slower the process and create a snowball effect making things worse. If digitally advancing countries, such as India, fail to establish an efficient legal framework, then the jurisdictional problem of cybercrime legislation will continue to threaten state sovereignty.

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# AN ANALYSIS OF THE FUGITIVE OFFENDERS ACT, 2018

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Ms. Ritu Chaudhary\* Ms. Shally Gupta\*\*

## Abstract

*According to RBI Annual Report, the number of fraud cases has substantially increased in 2017-18. The numbers were hovering at around 4500 in the last 10 years and increased to 5835 in 2017-18. Former liquor mogul Vijay Mallya, has been recently declared as the first “fugitive economic offender” under the provisions of the new Fugitive Economic Offenders Act, 2018 thereby giving a sign of relief to the consortium of 13 banks led by State Bank of India who were beleaguered with a list of bad loans of over Rs 9,000 crore.*

*The author in this paper will discuss and analyses various provisions of the Fugitive Economic Offenders Act, 2018. The paper will also evaluate the exigency for such an enactment and effectiveness of the same. The author also attempts to include the key issues involved in the provisions of the act and a brief analysis of the International Cooperation against Fugitive Economic Offenders.*

**Keywords: Fraud, Fugitive Economic Offender, Scheduled Offence, Special Court, Non-Performing Assets.**

## Introduction

India has been witnessing a remarkable increase in the number of litigations pertaining to money laundering. Currently, a number of legislations like the “Benami Properties Transactions Act, 1988”, the “Companies Act, 2013” and the “Insolvency and Bankruptcy Code, 2016” deals with economic offences (for example, the offence of tax evasion, bank frauds etc.) However, such legislations are perforated with procedural delays and loopholes. Today, even after having ‘n’ number of laws dealing with economic offences, the judiciary has failed to curb these offences.

These loopholes permit big-ticket tax and loan dodgers, to evade the law and delay or indefinitely hold off the confiscation of their assets against their debt. Moreover, laws such as the “Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002”, the “Recovery of Debts Due to Banks and Financial Institutions

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Act, 1993”, and the “Prevention of Money Laundering Act (PMLA), 2002” mainly conceptualise the attaching of assets as a punitive measure, rather than a deterrent measure.

A large number of economic offenders have been successful in absconding from justice under the laws of India so as to extricate themselves from scams that have cost the country billions of dollars. In the wake of Vijay Mallya’s defrauding of loans of over Rs 9,000 crore and Nirav Modi and Mehul Choksi-PNB scam involving an amount of Rs 14,000 crore in addition to other cases, the “Fugitive Economic Offenders Act” was passed in 2018. This act gives authority to the Government of India to seize and confiscate the properties of the accused which are in India or in any foreign country. This confiscation of assets will act as a deterrent measure and prevent the economic offenders from absconding.

Therefore, in order to tackle the loopholes and procedural delays of various existing laws dealing with economic offences, the Fugitive Economic Offenders Act, 2018 was passed as it restructures, codifies and brings together various legislations into one comprehensive law.

Economic offences include offences such as tax evasion, evasion of excise duty, illicit trafficking in contraband goods (smuggling), illegal foreign trade, corruption and bribery of public servants, money laundering, trade in human body parts, bank frauds, fraudulent bankruptcy, counterfeiting of currency and valuable securities, hawala transactions and others.<sup>1</sup> These economic offences not only perpetrate serious pecuniary losses on individuals but also shakes and damages the economy of the entire nation thereby evoking serious concern about its impact on the nation’s security.

According to the RBI Annual Report of 2017-18, in past 10 years the number of fraud cases were generally hovering at around 4500 but it has increased to 5835 in 2017-18.<sup>2</sup> This rise in frauds in the year 2017-18 was on account of a huge value frauds committed in jewellery and gems sector, which largely affected Public Sector Banks (PSBs). PSBs account for approximately 92.9 per cent of the total sum involved in frauds of more than 0.1 million while the private sector banks account for 6 per cent.<sup>3</sup>

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1 NATIONAL CRIME RECORDS BUREAU (2015), <http://ncrb.gov.in/StatPublications/CII/CII2015/chapters/Chapter%209-15.11.16.pdf>.

2 *Annual Report 2017-18*, RESERVE BANK OF INDIA (Aug. 29, 2018), <https://rbidocs.rbi.org.in/rdocs/AnnualReport/PDFs/0ANREPORT201718077745EC9A874DB38C991F580ED14242.PDF>.

3 *Ibid.*

## Conclusion

A number of various laws have already been enacted in the country to deal with economic offences. Some of them are:

“The Prevention of Money-Laundering Act (PMLA), 2002” which primarily focuses on prohibition of money laundering;

- i. “The Benami Properties Transactions Act, 1988” which prohibits transactions in benami property;
- ii. “The Companies Act, 2013” which provides punishment for fraud and unlawful acceptance of deposits;
- iii. “The Insolvency and Bankruptcy Code, 2016” which consolidates and amend the laws relating to insolvency resolutions in a time bound manner.

In addition to the above, various recovery laws are also present, such as:

- i. “The Securitization and Reconstruction of Financial of Financial Assets and Enforcement of Securities Interest Act, 2002”,
- ii. “The Recovery of Debts Due to Banks and Financial Institutions Act, 1993”.

However, no law existed which would deter these high-value economic offenders who would evade the process of law by absconding the country in order to avoid prosecution.

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# TRADEMARK: ISSUES AND CHALLENGES WITH RESPECT TO DISPUTE RESOLUTION

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Meghna Sahay\*

## Abstract

*In today's competitive world, strong slogans, "with their range of denotations and connotations, are simply among the most powerful words in our dictionary. "Better said, – they are also amongst some of the most powerful words in our economy. Just ask Nike.<sup>1</sup> Because of which there has been a rise in trademark registration, this has consequently resulted in creation of significant costs that businesses have to incur in the form of legal expenditures for trademark protection and defence in trademark litigation.<sup>2</sup> The companies are more inclined towards expanding their brands. Corporate Giants like The Virgin Group, are constantly grown empires of "lucrative extensions" of their brands, thereby selling diverse products ranging from music, beverages, and clothes, as well as services in the nature of airfare, rail service, and financial services. The issue arises when the companies, as they expand, increases the potential of utilizing their brand names which are identical to those already in use by other companies offering different products or services. This in turn results in an increase in costly and time taking trademark litigation, as an effort by these companies to prevent consumer confusion. Alternative dispute resolution has been a growing legal option for years, gaining special recognition in commercial law, employment law, and divorce law. It is often recognized as giving the parties a faster, less expensive method of conflict resolution by offering an alternative to the huge, grinding machine that is the Indian legal system. This paper deals with the issues and challenges with respect to dispute resolution in Trademark infringement cases.*

**Keywords:** ADR, Trademark, Dispute Resolution, Intellectual Property.

## Introduction

*"The world of intellectual property law calls for dispute resolution mechanisms as fast paced and efficient as the evolution of the underlying technology and ideas which are the subject of the disputes."*

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1 David Allen Bernstein, *A CASE FOR MEDIATING TRADEMARK DISPUTES IN THE AGE OF EXPANDING BRANDS*, 7 CARDOZOJCR.COM (2006), available at: <http://cardozoocr.com/vol7no1/CAC102.pdf> (last visited on Jun 16, 2019).

2 *Id.*

It is estimated that the word ‘Nike’ is worth \$ seven billion, and the word ‘Coca Cola’ is ten times worth the previous amount. In today’s volatile economic society, it can be said that nothing brings more value than the eternal brand. Companies today focus upon spending more effort and coinage on structuring solid brands because they are aware that consumers often respond better to a logo or slogan than to product quality.<sup>3</sup>

### **Need for Alternative Redressal Mechanisms**

Unfair competition practices and protection against them was not of much relevance until late eighteenth century. With the advancement of technology, consumers began to purchase goods from growing and well-known companies rather than local merchants, and this emerging trend highlighted the need to protect business clientele and reputations of such well-known brands.<sup>4</sup> In order to address the situation, existing tort law began to enlarge to provide protection to consumers from commercial fraud. However, with the burgeoning pace of commerce, the concept of trademark law became a milestone of designation of source in a busy industrial society. With the companies becoming all the more diligent in building a consumer base and a reputation represented symbolically by trademarks, it is now important than ever-before to prevent others from diluting, profiting, or harming those trademarks and consequently their reputations in a fast paced global scenario of commercial activities.<sup>5</sup> “As companies look for better ways to secure their economic holdings and reputations, what has emerged is a concept of branding, or attaching trademarks, to each and every product or service available for sale by a particular producer.”

### **Brand Names and Brand Extensions: Consent to Use Agreements**

The development on the online field is a contributor towards creating valuable assets apart from a company’s tangible or other physical assets. Due to this reason, there is a need to protect the trademarks, sometimes at high costs, that consumers associate with each company. Brand names have a powerful presence among consumers, and it is believed that the goodwill that companies have gained in their brand will encompass to

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3 David Allen Bernstein, *A CASE FOR MEDIATING TRADEMARK DISPUTES IN THE AGE OF EXPANDING BRANDS*, 7 CARDOZOJCR.COM (2006), available at: <http://cardozoocr.com/vol7no1/CAC102.pdf> (last visited on Jun 16, 2019).

4 KATARZYNA WI Ś NIEWSKA, COFOLA 2011: *The Conference Proceedings*, in CYBERSQUATTING AND RESOLVING OF DOMAIN NAME DISPUTES IN POLAND (1 ed. 2011), available at: [https://www.law.muni.cz/sborniky/cofola2011/files/IT/vlastnictvi/Wisniewska\\_Katarzyna\\_6038.pdf](https://www.law.muni.cz/sborniky/cofola2011/files/IT/vlastnictvi/Wisniewska_Katarzyna_6038.pdf) (last visited Apr 30, 2017).

5 *Id.*

any new product they choose to sell by stamping with that brand. One of the benefits of Brand extensions is cost efficiency. Brand extensions saves companies money in advertising and market entry costs by allowing them to immediately draw a certain customer base simply because of the goodwill attached to the previous products.<sup>6</sup> However, the problem arises when as companies which previously offered limited products or services look to expand themselves into new categories, there also increases a definite likelihood of increased conflicts with clashes of other brand names. Companies, in some cases prefer to compromise, thereby allowing both the parties to continue to use the brand in isolated product or service areas. This compromise, is known as a *consent to use agreement*, which is in most cases the best solution, and is suggestive to adopt as well as the problem of expanding brands continues.<sup>7</sup> Here comes into play the alternative method of dispute resolution (ADR) that safeguards the viability of brand names while avoiding litigation. However, it becomes imperative for the companies to be willing to enter into a progression which will enable to reach to a mutually beneficial solution, perhaps in the shape of a settlement agreement which enables both parties to use the mark or brand name subject to certain restrictions. The process best suited to guide such parties and achieve such a result is ADR.<sup>8</sup> “In the last decades, we can observe a global cultural, economic and legal integration which is affected by introduction of various innovations. The increased use of new technological developments such as the Internet and various internet services has not only accelerated the process of globalization and enabled a development of a constant and rapid integration beyond boundaries, but has also caused a growing interest in legal issues related to the global network. Nowadays one of the most popular matter, apart from copyright law or network security regulations, is that of legal aspects of internet domain names.<sup>9</sup> The development of computer science and mostly easy access to the Internet has significantly influenced the commerce all around the world, opened up new markets etc., but simultaneously ‘enabled’ committing infringements, e.g. in the field of industrial property rights as well as personal rights, copyrights, trademarks (registered and unregistered ones), company names etc. Today it is hard to find a sector

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6 David Allen Bernstein, *A CASE FOR MEDIATING TRADEMARK DISPUTES IN THE AGE OF EXPANDING BRANDS*, 7 CARDOZOJCR.COM (2006), available at: <http://cardozojcr.com/vol7no1/CAC102.pdf>.

7 *Id.*

8 *Id.* at 7.

9 KATARZYNA WIŚ NIEWSKA, COFOLA 2011: *The Conference Proceedings, in CYBERSQUATTING AND RESOLVING OF DOMAIN NAME DISPUTES IN POLAND* (1 ed. 2011), available at: [https://www.law.muni.cz/sborniky/cofola2011/files/IT/vlastnietvi/Wisniewska\\_Katarzyna\\_6038.pdf](https://www.law.muni.cz/sborniky/cofola2011/files/IT/vlastnietvi/Wisniewska_Katarzyna_6038.pdf) (last visited on Apr 30, 2017).

not influenced by the Internet. An Internet address seems to be one of the most important and frequently used tools on the Internet. Possessing an own place on the Internet – a unique internet address seems to be an indispensable condition for an online activity of an entrepreneur (not only for those entrepreneurs, whose business is strictly connected with the Internet or even based on it but also for those starting a company). It has become one of the fundamental and basic elements of a company's image. An internet address plays a role of an online business card which enables to localize the company and supports its commercial activity. A domain name registration is nowadays one of the first steps taken by entrepreneurs entering the market or intending to introduce e-commerce to their regular business activity. In order to obtain such an address, it is necessary to register, usually after paying a specific fee, a particular name (any word in principle)."<sup>10</sup>

The internet address/internet domain have the purpose of identifying particular computers on the Internet. And every computer device which is connected to the Internet possesses a unique 32-bit numeric address which is known as an Internet Protocol address (IP address). However, since these numbers are difficult to remember, in order to facilitate remembering such a string of numbers, every numeric address is replaced by domain name. These Domain names are assigned on a '*first come, first served basis*' which is a consequence of numerical system features and which means that only one specific domain configuration of domain name can be registered.<sup>11</sup> There have been exemplary sell prices of domain names.

### Case study

'Fb.com' – Facebook purchased fb.com in November 2010 at a price of \$ 8.5 million from American Farm Bureau Federation. At present this domain is redirected to www.facebook.com.<sup>12</sup>

### Domain Names and Cyber Squatting

According to the report of UN World Intellectual Property Organization (WIPO) cases regarding the practice of cybersquatting have risen severely.

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<sup>10</sup> *Id* at 10.

<sup>11</sup> KATARZYNA WI Ś NIEWSKA, COFOLA 2011: *The Conference Proceedings*, in CYBERSQUATTING AND RESOLVING OF DOMAIN NAME DISPUTES IN POLAND (1 ed. 2011), available at: [https://www.law.muni.cz/sborniky/cofola2011/files/IT/vlastnictvi/Wisniewska\\_Katarzyna\\_6038.pdf](https://www.law.muni.cz/sborniky/cofola2011/files/IT/vlastnictvi/Wisniewska_Katarzyna_6038.pdf) (last visited on Apr 30, 2017).

<sup>12</sup> By:Harsh Agrawal et al., TOP 20 MOST EXPENSIVE DOMAIN NAMES EVER SOLD : 2016 LISTSHOUTMELOUD (2016), available at: <https://www.shoutmeloud.com/top-10-most-expensive-domain-names-ever-sold.html> (last visited on Apr 30, 2017).

Trademark owners have filed an all-time record 3,036 cases under the Uniform Domain Name Dispute Resolution Policy (UDRP) with WIPO in 2016, an increase of 10% over the previous year, with over 1,200 new generic Top-Level Domains (gTLDs) now operational.<sup>13</sup> With the ever-growing importance of domain names there arises several cases of infringements of third parties' rights. Such cases arise when one party registers a domain name containing someone else's distinctive sign. This is known as cybersquatting or domain name piracy, domain name grabbing, domain squatting or domain (name) ware housing. This has in today's era emerged as one of the highly-discussed forms of law infringement occurring in the cyberspace.

Cybersquatting is generally associated with following practices:

- i. abusive domain name registration,
- ii. offering for sale or using an internet domain name which incorporates someone else's trademark, name of existing business or other company designation
- iii. block the domain, sell or license it with the intent of profiting from it.<sup>14</sup>

### **Origin of the term Cyber Squatting**

“The term is a combination of two English words – ‘cyber’, meaning involving, using or relating to computers, especially the Internet, and ‘squat’ or squatting, meaning the practice of inhabiting someone else's property without permission of the owner and without paying a rent.” However, the real meaning is a bit different from what the breaking up of the dictionary meaning suggests. Domain names that are being ‘grabbed’ are also paid for through a proper registration process by the cyber squatter who with the intention of benefiting from the domain name reserves it. The cause of action arises in a situation where the domain name is exactly identical or confusingly similar to:

- i. the trademark,
- ii. name of existing business or
- iii. other distinctive sign used by another person or entity,

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13 WIPO Cybersquatting Cases Hit Record in 2016, Driven by New Top-Level Domain Names, WIPO - WORLD INTELLECTUAL PROPERTY ORGANIZATION (2017), [http://www.wipo.int/pressroom/en/articles/2017/article\\_0003.html](http://www.wipo.int/pressroom/en/articles/2017/article_0003.html) (last visited Apr 30, 2017).

14 KATARZYNA WIŚNIEWSKA, *COFOLA 2011: The Conference Proceedings, in CYBERSQUATTING AND RESOLVING OF DOMAIN NAME DISPUTES IN POLAND* (1 ed. 2011), [https://www.law.muni.cz/sborniky/cofola2011/files/IT/vlastnictvi/Wisniewska\\_Katarzyna\\_6038.pdf](https://www.law.muni.cz/sborniky/cofola2011/files/IT/vlastnictvi/Wisniewska_Katarzyna_6038.pdf) (last visited Apr 30, 2017).

then the owner of such a distinctive sign has a cause of action against anyone who registered and is holding on to such an impugned name.<sup>15</sup>

Certain sets of circumstances are taken into consideration while dealing with domain name infringement cases which include taking into consideration whether the cybersquatted is violating someone's personal rights, copyright, etc. However, using the domain name which integrates someone else's distinctive sign doesn't mean that the sign owner is automatically entitled to take over the domain.<sup>16</sup>

In *Satyam Infoway v. Sifynet Solutions Ltd.*,<sup>17</sup> the supreme court, while finding that a domain name can be capable of distinguishing a product or service made available to internet users, stated that:

*As more and more commercial enterprises trade or advertise their presence on the web, domain names have become more and more valuable and the potential for dispute is high. Whereas a large number of trademarks containing the same name can comfortably co-exist because they are associated with different products, belong to business in different jurisdictions etc, the distinctive nature of the domain name providing global exclusivity is much sought after. The fact that many consumers searching for a particular site are likely, in the first place, to try to guess its domain name has further enhanced this value.*<sup>18</sup>

### **Trademark Registration and Protection Worldwide**

For extending one's businesses to international horizons, proper registrations of the concerned trademarks under one or more international trademark treaties are pre-requisite. Today, for protecting the due rights of the owners of trademarks in international arenas, there are four most significant and influential international trademark conventions or treaties in the entire world. These magnificent and globally reputed treaties are the following:<sup>19</sup>

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15 *Id.*

16 David Allen Bernstein, *A CASE FOR MEDIATING TRADEMARK DISPUTES IN THE AGE OF EXPANDING BRANDS*, 7 CARDOZOJCR.COM (2006), available at: <http://cardozoocr.com/vol7no1/CAC102.pdf>.

17 ((2004) 6 SCC 145).

18 Monica Dutta, *Luthra&Luthra Law Offices: Securing domain name protection in India*, WORLD TRADEMARK REVIEW 108–109, 108-109 (2010), available at: <http://www.worldtrademarkreview.com/Magazine/Issue/25/Country-correspondents/India-Luthra-Luthra-Law-Offices> (last visited on Apr 30, 2017).

19 India: Registration and Protection of Trademarks- In India And Abroad, REGISTRATION AND PROTECTION OF TRADEMARKS- IN INDIA AND ABROAD - INTELLECTUAL PROPERTY - INDIA, available at: <http://www.mondaq.com/india/x/320302/Trademark/Registration-And-Protection-of-Trademarks-in-India-And-Abroad> (last visited on Apr 30, 2017).

- i. ***The TRIPS Agreement (Agreement on Trade Related Aspects of Intellectual Property Rights)***: This international agreement which came into existence in the year 1995, is efficiently and prudently administered by the World Trade Organization (WTO), and has at present over 150 member countries of the world over.<sup>20</sup>
- ii. ***Berne or Paris Convention***: The Berne Convention has the great credit for being the oldest convention in the whole world, for protection of intellectual property. In 1971, this Berne Convention of 1886 was modified in Paris. This famous convention has been signed by as much as 170 countries, which are located in regions all across the whole world.<sup>21</sup>
- iii. ***Madrid Protocol***: This protocol resulted from the Madrid Agreement of 1989, and came into force in the year 1995. This highly significant system in connection with international businesses is administered by the International Bureau of the World Intellectual Property Organization (WIPO), Geneva, Switzerland. At present, there are 91 member countries to this Madrid Protocol in the world over. In year 2013, India also became a member to this international treaty for trademarks to provide a unique opportunity to all domestic companies to protect their mark across the world jurisdictions by filing one application with one set of fees.<sup>22</sup>
- iv. ***European Community Trademark (CTM)***: Any company can readily obtain registration and protection of his trademark in anyone or all member countries of the European Union, with a single application filed with the CTM Office in Alicante, Spain.

Any company or firm which desires to extend its businesses to any targeted country of the world, can select any of the above-mentioned international treaties for trademarks, to which the desired country is a member. As noted above, each of these treaties has a large number of party countries as members. Again, each of these treaties enables an applicant company to obtain easily and expeditiously registration and protection of its trademark in anyone or all-party countries, through filing just a single application.<sup>23</sup>

20 India: Registration and Protection of Trademarks- In India And Abroad, REGISTRATION AND PROTECTION OF TRADEMARKS- IN INDIA AND ABROAD - INTELLECTUAL PROPERTY - INDIA, <http://www.mondaq.com/india/x/320302/Trademark/Registration And Protection of Trademarks in India And Abroad> (last visited Apr 30, 2017).

21 *Id.*

22 *Id.*

23 India: Registration and Protection of Trademarks- In India And Abroad, REGISTRATION AND PROTECTION OF TRADEMARKS- IN INDIA AND ABROAD - INTELLECTUAL PROPERTY - INDIA, available at: <http://www.mondaq.com/india/x/320302/Trademark/Registration And Protection of Trademarks in India And Abroad> (last visited on Apr 30, 2017).

## The Singapore International Arbitration Centre

The SIAC started operations in 1991. In a quarter-century, it has emerged as one of top five arbitral institutions worldwide. It has an active caseload of approximately 600 cases, with 271 new cases filed in 2015. The SIAC is a preferred arbitral institution for Indian parties, with Indian parties contributing the largest number of case filings after Singaporean parties. The SIAC's popularity can be attributed primarily to:

- i. the pro-arbitration stance of Singapore's government;
- ii. Singapore's arbitration-friendly judiciary;
- iii. the advantages offered by the SIAC as an arbitral institution; and
- iv. other advantages of Singapore as a seat of arbitration.<sup>24</sup>

## Introduction to trademark protection in India

Trademark protection in India can be obtained by filing an application online or by paper at the trademark offices in Mumbai, Chennai, Kolkata, New Delhi or Ahmedabad.

The Indian trademark office follows the 10th edition of the NICE Classification in addition to a list of goods and services maintained by the Indian Trademarks Office. The registration of marks is acceptable in classes 1 – 34 in respect of goods and classes 35 to 45 in respect of services. Multi class applications are possible in India however there is no cost benefit as the official fee remains the same per class.<sup>25</sup>

Being a signatory of the Paris Convention for the Protection of Industrial Property, one can file convention applications claiming priority in India. A certified copy of the priority document is necessary for claiming priority. The same can be filed within 2 months from the date of filing the application in India.<sup>26</sup>

India acceded to the Madrid Protocol and with effect from July 8, 2013 it is possible to designate India in an international application. It is also

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24 WORKING PAPER ON INSTITUTIONAL ARBITRATION REFORMS IN INDIA, available at: <http://www.icaindia.co.in/HLC-Working-Paper-on-Institutional-Arbitration-Reforms.pdf> (last visited on May 1, 2017).

25 Introduction to trademark protection in India, SELVAM & SELVAM (2014), available at: <http://www.selvamandselvam.in/introduction-to-trademark-protection-in-india/> (last visited on Apr 30, 2017).

26 *Id.*

possible to file online an international application under the Madrid Protocol through the Indian trademark office.<sup>27</sup>

An application in India can be filed on an intent to use basis or by claiming use of the trademark in India. A trademark application filed in India is examined on absolute and relative grounds to determine whether it can be granted protection. The response to the objections should be filed within 1 month from the date of receipt of the examination report. Extensions of 1 month for any number of times can be requested and is given at the discretion of the examiner. When the application is accepted by the trademark office, it is published in the trademarks journal and is open to opposition for a period of 4 months from the date of publication and cannot be extended.<sup>28</sup>

The registration of the trademark is valid for a period of 10 years and renewable every 10 years. An application for renewing a trademark registration can be filed at any time during the 6 months prior to the expiration of the registration/last renewal validity. Late renewal is also possible after the expiry and within 6 months from the validity date. A restoration of the registration is possible after six months but before one year from the validity date of the registration. A cancellation petition on the grounds of non-use can be filed to remove a trademark from the register, if it has not been used for five years and three months from the date of registration. Recording the assignment of trademarks with or without the goodwill of the business, change of name and/or address of the applicant/proprietor, registered user agreements are possible. Amendments to the registered trademark without substantially altering the identity of the mark or the specification of goods and services covered by the registration of the trademark is also possible.

Use of the ® symbol on unregistered trademark, manufacture, import or sale of counterfeit goods, are offenses punishable under the laws in India. Legal action can be initiated before the District Courts or High Court of India.<sup>29</sup>

### **Indian Domain Name Dispute Resolution System**

As India continues to present itself as an attractive destination for investment, an increasing number of both Indian and international

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27 *Id.*

28 *Id.*

29 Introduction to trademark protection in India, SELVAM & SELVAM (2014), <http://www.selvamandselvam.in/introduction-to-trademark-protection-in-india/> (last visited Apr 30, 2017).

companies seek to assert their trademark rights by obtaining ‘.in’ country-code top-level domains (ccTLDs) as part of their Indian operations.

This .IN Domain Name Dispute Resolution Policy (the “Policy”) sets out the terms and conditions to resolve a dispute between the Registrant and the Complainant, arising out of the registration and use of the .in Internet Domain Name.

.IN is India’s Country Code Top Level domain (ccTLD). The Govt. of India delegated the operations of IN Registry to NIXI in 2004. The IN Registry operates and manages India’s .IN ccTLD.<sup>30</sup> According to statistics of domain names registered in NIXI, currently there is a total number of 22,35,471 IN domains registered.<sup>31</sup>

The Registrant is required to submit to a mandatory Arbitration proceeding in the event that a Complainant files a complaint to the .IN Registry, in compliance with this Policy and Rules thereunder.<sup>32</sup>

### **Procedure of Dispute Resolution**

- i. The IN Registry is an autonomous body under the National Internet Exchange of India (NIXI) and accredits registrars through an open selection process.
- ii. The .IN Registry shall appoint an Arbitrator out of the list of arbitrators maintained by the Registry.
- iii. Registrations are not carried out by the IN Registry itself. In line with the Code for Best Practice for ccTLD Managers, NIXI enters into standard form contracts with registrars setting out standard terms to be entered into with end users of their services (registrants).
- iv. To obtain accreditation, registrars are required to enter into a registrar accreditation agreement, which is largely similar in substance to the Internet Corporation for Assigned Names and Numbers (ICANN) global TLD registrar accreditation agreement.
- v. The agreement contains an arbitration clause making it compulsory for a registrar and NIXI to submit disputes to arbitration in India.
- vi. In 2005 NIXI implemented a narrow ‘sunrise’ period giving priority to trademark owners.

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30 Welcome to .IN Registry: INREGISTRY (2017), available at: <https://registry.in/> (last visited Apr 30, 2017).

31 *Id.*

32 .in.bharat, available at: <https://registry.in/IN%20Domain%20Name%20Dispute%20Resolution%20Policy%20%28INDRP%29> (last visited on Jun 16,2019).

- vii. The IN Registry has now introduced terms and conditions binding all registrants.
- viii. Registrars are required to attach these terms and conditions to all contracts between registrars and potential registrants. The terms and conditions impose an obligation on registrants to comply with all Indian legislation.
- ix. Publishing pornography, phishing and pharming are all considered illegal use of a domain name.
- x. The IN Registry also reserves the right to suspend or cancel operation of a domain name if a registrant violates the terms and conditions.<sup>33</sup>

### **Dispute resolution Framework**

The terms and conditions for registration mandates the registrants to submit to mandatory arbitration proceeding under the ‘.in’ Dispute Resolution Policy and Procedure (INDRP). This process is issued by NIXI as a solution for dealing with complaints related to the issues arising from domain name registration.<sup>34</sup>

When a complaint is received by NIXI, upon ensuring that the conditions required in the rules and policy are met, it serves notice to the registrant of the disputed domain name and thereby allocates an arbitrator to the dispute from the IN-Registry’s list which is available on its website.<sup>35</sup>

There are certain grounds upon which a complaint can be submitted. These grounds are similar to those set out in the ICANN Uniform Dispute Resolution Policy (UDRP):

- i. The registrant’s domain name is identical or confusingly similar to a name, trademark or service mark in which the complainant has rights;
- ii. The registrant has no rights or legitimate interests in respect of the domain name; and
- iii. The registrant’s domain name has been registered or is being used in bad faith.

The difference between the provisions of the UDRP and the INDRP is

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33 Monica Dutta, *Luthra & Luthra Law Offices: Securing domain name protection in India*, WORLD TRADEMARK REVIEW 108–109, 108–109 (2010), available at: <http://www.worldtrademarkreview.com/Magazine/Issue/25/Country-correspondents/India-Luthra-Luthra-Law-Offices> (last visited on Apr 30, 2017).

34 *Id.*

35 *Id.*

that, INDRP does not impose the burden of proof on the complainant.

However, in *Monster.com (India) Pvt. Ltd. v. Domain Leasing Company*, an arbitral tribunal held that this omission in the provisions of INDRP shall not be interpreted as the onus to disprove the complainant's assertions is on the respondent. The arbitral tribunal relied upon the provisions of the Evidence Act 1872, and held that the complainant would still have to prove these matters in accordance with the act. The Evidence Act requires a party to prove the facts on which it wishes to rely to obtain a judgment (*Jagdish Purohit v. Stephen Koeing*).<sup>36</sup>

- i. *Ex-parte orders*: In cases where the domain name registrant, be located outside India and somehow fails to respond to notices sent to the address maintained by the registry then ex-parte orders may be issued.
- ii. *Quasi-judicial nature of proceedings*: Proceedings initiated under the INDRP are of quasi-judicial nature and have been given statutory recognition under the Arbitration and Conciliation Act 1996 by the virtue of which, a judgment is enforceable in the same manner as a civil court decree. However, the contractual provisions that allow cancellation of the domain in the event of an arbitral decision enable IN Registry the enforcement of an arbitral award effectively, even in the absence of enforcement of the award in accordance with civil procedure.<sup>37</sup>

### The way forward for India

- Developing India as an arbitration hub has been on the agenda of Indian lawmakers for some time now. The changes brought about by the Arbitration and Conciliation (Amendment) Act, 2015 ("2015 Amendments") to the Arbitration and Conciliation Act, 1996 ("ACA") were focused towards achieving this goal by facilitating speedy and efficacious redressal of disputes through arbitration
- However, the promotion of institutional arbitration in India is an added issue that has come to the forefront.
- It is widely accepted that India prefers ad hoc arbitration. Despite of

36 INDRP/006, July 5 2006, available at: [www.inregistry.in/system/files/internet\\_0.pdf](http://www.inregistry.in/system/files/internet_0.pdf) (last visited on Jun 16, 2019).

37 Monica Dutta, *Luthra & Luthra Law Offices: Securing domain name protection in India*, WORLD TRADEMARK REVIEW 108–109, 108-109 (2010), <http://www.worldtrademarkreview.com/Magazine/Issue/25/Country-correspondents/India-Luthra-Luthra-Law-Offices> (last visited Apr 30, 2017).

the various arbitral institutions which have been set up in India in the last five years, more specifically ad hoc arbitration continues to be the preferred mode of arbitration. Some of the reasons for the growth in popularity of

- Why ad hoc arbitration is preferred over institutional arbitration in India is due to the following reasons:
  - i. lack of sufficient supporting infrastructure for institutional arbitration
  - ii. such as expert and experienced arbitrators,
  - iii. a well-qualified arbitration bar,
  - iv. and internationally and domestically recognized arbitral institutions that cater to parties' needs adequately.
- Other reasons are related to the perception of India as a seat that is 'arbitration-unfriendly', although that perception is slowly changing.
- In order to encourage arbitration, and particularly institutional arbitration, there needs to be a change on both these fronts.
- While there are over 30 arbitral institutions in India, the quality of these institutions are fluctuated. And this indirectly effects the efficiency and speed of the arbitration process as well as the quality of the arbitral awards made in arbitrations administered by them. Therefore, the creation of a regulatory body at the national level, which shall evolve certain minimum standards for arbitral institutions in India may be considered.

### **Need for Arbitral Institutions in India**

- One of the foremost reasons why parties choose a particular arbitral institution is due to the reason that particular set of arbitration rules apply as a result of such choice. Therefore, arbitral institutions which provide for rules which are clear, efficient and flexible to accommodate parties' needs and expectations tend to be favored. However, several other factors such as geographical location, reputation, neutrality, quality of the legal system where the arbitral institution is located, the panel of arbitrators and pricing policy are considered by the parties when selecting an arbitral institution.
- A 2013 survey by PricewaterhouseCoopers showed that contrary to the global practice fir opting for institutional arbitrations, there was a strong preference for ad hoc arbitration amongst both Indian

companies that had experienced arbitration and Indian companies that had no experience of arbitration. This finding was laid down in a 2008 worldwide survey of corporate preferences in dispute resolution by PricewaterhouseCoopers and Queen Mary University of London (“QMUL”) which showed that:<sup>38</sup>

- (a) 86 per cent of arbitral awards given during the preceding ten years were given in arbitrations administered by arbitral institutions and not ad hoc arbitrations; and
- (b) 67 per cent of arbitrations that states or state-owned enterprises were a party to, were institutional arbitrations.

The preference for ad hoc arbitrations by Indian parties is not limited to arbitrations where the amounts in dispute are small. For instance, construction and infrastructure, one of the fastest growing sectors in the Indian economy, spends crores of rupees on resolution of disputes. In 2001 alone, 54,000 crores of capital were blocked in construction sector disputes.<sup>39</sup>

The regulatory body may consider minimum standards for accrediting arbitral institutions on the basis of criteria governing:

- i. Governance structure;
- ii. Arbitration rules;
- iii. Rules concerning conflicts of interests by arbitrators;
- iv. Oversight by the arbitral institution over the arbitration proceedings;
- v. Expedited procedures for arbitration;
- vi. Data management;
- vi. Infrastructure etc.<sup>40</sup>

### **Major issues pertaining to ADR in Trademark Disputes**

However, it is pertinent to mention here that INDRP is neither a statute nor an act. The status of an under the INDRP is neither of a judge nor a judicial officer; he or she has only a limited mandate to adjudicate on the three questions referred to in the policy.

This is in direct contrast with, sec.134 of the Trademarks Act which

38 Working Paper on Institutional Arbitration Reforms in India, <http://www.icaindia.co.in/HLC-Working-Paper-on-Institutional-Arbitration-Reforms.pdf> (last visited May 1, 2017).

39 WORKING PAPER ON INSTITUTIONAL ARBITRATION REFORMS IN INDIA, available at: <http://www.icaindia.co.in/HLC-Working-Paper-on-Institutional-Arbitration-Reforms.pdf> (last visited May 1, 2017).

40 *Id.* at 39.

mandates that only a district court can deal with cases of trademark infringement or passing off.<sup>41</sup>

The major issue which arises is that, the arbitral tribunals under the INDRP is not capable of providing adequate and effective redressal for all dispute. Also, a ruling or damages obtained from an arbitral tribunal in a case of trademark infringement can be challenged on the grounds of being outside the mandate of the arbitrator.<sup>42</sup>

Delhi High Court, in a fairly recent case held that mere presence of a website and accessibility by an audience in a particular jurisdiction does not automatically give the courts of that country jurisdiction. Jurisdiction of the forum court is not based merely on the interactivity of the website accessible in the forum state. In addition to the degree of interactivity, the nature of the activity permissible and whether it results in a commercial transaction must be examined.<sup>43</sup>

### **The Problem of Law Lagging Behind Technology**

Over the past twenty years, there have been a number of cases which exhibit the problem of expanding brands and the conflicts that can arise. Various attempts have been taken in order to reach a compromise outside of litigation and many have even been fruitful to the parties.

The following two cases are examples of the problem and the need for better resolution techniques. In both cases, negotiations attempted to address the problem, and it is unclear precisely what, if any, other ADR techniques were employed. And in both cases, despite communication and various attempts at conflict resolution, the parties ended up in contentious litigation. These cases are paradigmatic of the problem, and may offer future parties a glance into what may lie ahead if they do not commit to ADR in good faith.<sup>44</sup>

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41 Monica Dutta, *Luthra & Luthra Law Offices: Securing domain name protection in India*, WORLD TRADEMARK REVIEW 108–109, 108-109 (2010), <http://www.worldtrademarkreview.com/Magazine/Issue/25/Country-correspondents/India-Luthra-Luthra-Law-Offices> (last visited Apr 30, 2017).

42 *Id.*

43 (Banyan Tree Holding (P) Limited v A Murali Krishna Reddy , MANU/DE/3072/2009; Sholay Media Entertainment v Yogesh Patel , MANU/DE/0262/2010; Presteege Propert developers v Prestige Estates Projects Pvt Ltd, MANU/KA/0695/2009); Monica Dutta, *Luthra & Luthra Law Offices: Securing domain name protection in India*, WORLD TRADEMARK REVIEW 108–109, 108-109 (2010), available at: <http://www.worldtrademarkreview.com/Magazine/Issue/25/Country-correspondents/India-Luthra-Luthra-Law-Offices> (last visited on Apr 30, 2017).

44 David Allen Bernstein, *A CASE FOR MEDIATING TRADEMARK DISPUTES IN THE AGE OF EXPANDING BRANDS*, 7 CARDOZOJCR.COM (2006), available at: <http://cardozoocr.com/vol7no1/CAC102.pdf>.

## Case Study

### *Apple v. Apple* (the legal tussle for 3 years)

Many a times negotiations and agreements between companies which are drawn for mutually benefitting the parties but are subsequently violated, resulting which the courts are called upon to resolve the dispute. The same happened in *Apple Corps. Ltd. v. Apple Computer Inc.*<sup>45</sup>

The Beatles, had been very protective of their intellectual property rights and had formed Apple Corps. to protect their rights. In this case, the defendant, Apple computers, signed two separate agreements in the past twenty years, and thereby agreed to stay out of the music business, only to return with the most important music product and service of our generation: iPod and iTunes. However, the agreement between the two was a mere volatile relationship, gearing up for the largest battle<sup>46</sup> Apple Corps came forward again in 2003 contending that the launch of iTunes was another breach in their trademark agreement. In 2007, Apple Corps finally settled both cases, including completely replacing their trademark agreement with Apple, Inc.<sup>47</sup> This case provides a tangible example of the problem of expanding brands, and shows why and how the parties should be willing to create a non-confrontational safeguard for unforeseeable changes in the business relationship.<sup>48</sup> This case was a clear example of how law lags behind technology.<sup>49</sup>

### **DC Comics v. Kryptonite Corp**<sup>50</sup>

Another recent case concerning expanding brand problems involves DC Comics, owner of a trademark in “kryptonite,” against Kryptonite Corp., a manufacturer of bicycle locks and other products. “In 1983, after years of settlement negotiations, the parties reached an agreement that allowed restricted use of certain marks associated with the “kryptonite” mark so long as they were limited to certain products and devices. Now, DC Comics claims that the limitations in the agreement were breached in the

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45 No. HC-2003-CO2428, 2004 WL 960848 (Ch. Apr. 7, 2004).

46 *Id.* at 45.

47 Why weren't The Beatles on iTunes? HOWSTUFFWORKS (2009), available at: <http://electronics.howstuffworks.com/beatles-itunes2.htm> (last visited Apr 30, 2017).

48 David Allen Bernstein, *A CASE FOR MEDIATING TRADEMARK DISPUTES IN THE AGE OF EXPANDING BRANDS*, 7 CARDOZOJCR.COM (2006), available at: <http://cardozoocr.com/vol7no1/CAC102.pdf>.

49 Sean, *APPLE CORPS V. APPLE COMPUTER POWERED BY SITES.UDEL.EDU*, available at: <http://sites.udel.edu/cisc356/2014/04/21/apple-corps-v-apple-computer-1978-2006/> (last visited Apr 30, 2017).

50 *DC Comics v. Kryptonite Corp.*, 336 F.Supp.2d 324 (S.D.N.Y. 2004).

1990's when Kryptonite Corp. applied for trademark applications for the use of the mark in connection with items other than those contained in the original agreement. DC Comics filed suit in the Southern District of New York, and the judge issued several summary judgment rulings favorable to DC Comics in a September 2004 opinion. Judge Richard Owen refused, however, to dismiss a claim that DC breached a contract with Kryptonite Corp. on limited trademark use, leaving that issue to be decided later at trial.<sup>56</sup> Although the breach of contract claim itself may not be ideal for conflict resolution, if the parties are both interested in continuing to capitalize on the "kryptonite" mark, their best chance is to engage in some form of ADR on that issue, and try to formulate a fair and equitable result."<sup>51</sup>

### **The problem with going to court**

The problem with these cases and many others is that the standard option of litigation is a closed universe of possibilities. To Apple and Apple, DC Comics and Kryptonite Corp., and any other similarly situated parties, litigation offers a limited, strictly regulated system. At trial, the judge or jury is likely to award a simple judgment, granting use of the trademark to one party or the other. This could result in a potentially fatal blow to one of the litigants. ADR, on the other hand, offers an open universe of possibilities, whereby the parties can fashion their own solution and continue to grow and work together indefinitely, adjusting to all changes in the relationship as they arise.<sup>52</sup>

### **Arbitration as the next panacea of lengthy trials**

Issues concerning IP matters require an understanding of scientific or technical concepts. This prevents key figures in the process, i.e., judges – from clearly understanding the issues before them. An expert arbitrator may however facilitate speedy and efficient resolution of disputes. The main purpose of alternative methods of domain name disputes resolution is to provide a forum in which cases regarding the abusive domain registration as well as infringement of a third-party rights as a consequence of registration and usage of domain name, can be resolute in a quick and comparatively inexpensive manner.<sup>53</sup> Arbitration is undoubtedly an attractive way out. However, it is an underestimated method of resolving

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51 *Id.* at 49.

52 *Id.* at 52.

53 David Allen Bernstein, *A CASE FOR MEDIATING TRADEMARK DISPUTES IN THE AGE OF EXPANDING BRANDS*, 7 CARDOZOJCR.COM (2006), <http://cardozoocr.com/vol7no1/CAC102.pdf>.

domain name clashes, which is often less formal when compared to the traditional court proceedings before the courts of general jurisdictions), less expensive and not so time-consuming. Parties should prefer to bring their cases to the arbitration court as submitting a dispute to arbitration does not rule out the possibility of using other legal remedies. Conciliatory methods of resolving domain names arguments also helps to solve a case outside the court system which can come to the rescue of those parties who are not willing to become involved in lawsuits. Litigation can involve lengthy delays, high costs, unwanted publicity etc. To add to the delay appeals might be filed, after a decision has been rendered. Arbitral proceedings on the other hand are usually faster and less expensive, and conclusive.<sup>54</sup>

### **ADR in Intellectual Property disputes generally**

There are several reasons why ADR is particularly relevant for intellectual property and, specifically, trademark disputes. Intellectual property litigation is often more complex and difficult to understand than other types of litigation. In addition, the financial costs of IP litigation can be exorbitant, mainly due to the costly discovery process necessary in such disputes. Because of the lengthy discovery process typical of IP disputes, they often drag on for excessive periods of time. One of the best reasons to apply ADR to IP disputes, however, is its ability to provide a flexible resolution which benefits all parties. No matter which type of IP law is at issue, ADR offers at least the possibility of a cheaper, faster, more creative, and mutually beneficial solution.<sup>55</sup>

In ADR, parties can select neutrals that are familiar with the particular type of technology or process at issue.<sup>96</sup> Trademark experts are better qualified to interpret the surveys which are frequently submitted as evidence and understand the crucial questions of “use” and “reliability” in trademark infringement cases. As a result, a neutral that is particularly familiar with trademark law and the data involved is a more desirable option than the average judge.<sup>56</sup> One of the most commonly cited reasons for relying on ADR in IP disputes is its potential to save all parties a tremendous

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54 KATARZYNA WI Ś NIEWSKA, COFOLA 2011: *The Conference Proceedings*, in CYBERSQUATTING AND RESOLVING OF DOMAIN NAME DISPUTES IN POLAND (1 ed. 2011), available at: [https://www.law.muni.cz/sborniky/cofola2011/files/IT/vlastnictvi/Wisniewska\\_Katarzyna\\_6038.pdf](https://www.law.muni.cz/sborniky/cofola2011/files/IT/vlastnictvi/Wisniewska_Katarzyna_6038.pdf) (last visited on Apr 30, 2017).

55 David Allen Bernstein, *A CASE FOR MEDIATING TRADEMARK DISPUTES IN THE AGE OF EXPANDING BRANDS*, 7 CARDOZOJCR.COM (2006), <http://cardozoicr.com/vol7no1/CAC102.pdf>.

56 David Allen Bernstein, *A CASE FOR MEDIATING TRADEMARK DISPUTES IN THE AGE OF EXPANDING BRANDS*, 7 CARDOZOJCR.COM (2006), <http://cardozoicr.com/vol7no1/CAC102.pdf>.

amount of money. IP lawsuits may take a long time to litigate, which can have adverse effects on a company's business. Because trademarks are utilized primarily in advertising, there is a need for immediate resolution to prevent companies from experiencing devastating financial setbacks.

### **Trademark and Internet Domain Name Disputes: UDRP**

The most common disputes in that area arise from "cyber-squatters" who bought domain names matching to names of famous people or brands in the mid-1990s, at the beginning of the internet boom, and are now hoping to vend the domain names back to the celebrities or companies for massive profits.<sup>57</sup>

The situation arises out of bad faith action of the cyber-squatters and trigger prickly disputes. Another common dispute in the trademark field exists where companies that sell products or services in different "product categories" try to resolve who has the right to the name on the internet. The UDRP, has proven to be a successful step forward by providing parties that seek remedies in trademark disputes on the internet with a firm set of standards and guidelines, as well as precedents that serve as warning of what will follow if their domain name infringes another's trademark.<sup>58</sup> It is important to note that arbitration is the method of conflict resolution required by the UDRP for domain name disputes, because most of these disputes are contentious and involve bad faith actions of cyber-squatters. There is a resulting need for a more formal and adjudicative ADR process, such as arbitration. Mediation's non-adjudicative, less combative process is less appropriate in such a context, but more appropriate, however, to address the expanding brand problem.<sup>59</sup>

### **Disadvantages of ADR in Trademark Law**

ADR in trademark disputes also has certain disadvantages.

- There is usually no direct appellate review.
- If a party is left dissatisfied, it can bring the case to court to be heard de novo, which means many of the costs which were supposed to be avoided are reintroduced.
- Third parties cannot be compelled to participate, meaning it may be difficult to get some witnesses or experts to testify.

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> David Allen Bernstein, *A CASE FOR MEDIATING TRADEMARK DISPUTES IN THE AGE OF EXPANDING BRANDS*, 7 CARDOZOJCR.COM (2006), <http://cardozoocr.com/vol7no1/CAC102.pdf>.

- ADR, due to its confidentiality and lack of precedential value, fails to satisfy the intentions of trademark plaintiffs who would be interested in successfully litigating in order to send a warning message to potentially infringing third parties.
- Perhaps the critical weakness of using ADR in trademark disputes is the inability to obtain a permanent injunction, an award often sought in trademark infringement cases.<sup>60</sup>

## Conclusion

There is a looming litigation explosion in our commercial world which is a consequence of expansion of trademark and brands initiated by many corporations today. Trademark laws undoubtedly offers for infinite protection, as well as the strongest economic promise for IP rights in the future. And then there are the variations and hybrids.

One of the unique benefits of ADR is that parties can manipulate it to create a process that is best suited for everyone's interest. There are combinations of the different types of ADR mentioned like Med-Arb or Co-Med Arb. One other possibility is the 'minitrial'. In such proceedings, management figures from both parties' present complete evidence, not including live testimony, to a judge, jury, or neutral. Furthermore, the increasing value of brands has led many companies to focus on these more vigorously than improving the quality of their products. All of this leads to the natural conclusion that lawsuits in this area of law will multiply exponentially. Mediation is the option most likely to help more parties walk away with a faster resolution and more capital left to invest elsewhere. More importantly, mediation, with its non-adjudicative, constructive methods will help commercial entities create new opportunities to co-exist and grow their respective businesses, leaving an open universe of possibilities for the future without disabling one or both parties indefinitely.

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60 *Id.*

# SWEDEN-INDIA TRANSFER PRICING

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Ms. Prerna Upadhyay\*

## Abstract

*Transfer pricing (TP) is a growing issue in the international tax regime. MNC's in particular have a growing interest in transfer pricing as it yields them profit maximization and by avoidance of tax. On the other hand, countries are extracting revenue from these the multinational on grounds of transfer pricing. Therefore, it can be said that transfer pricing has dual implications on the country as well as on the multinationals. Present study is an analysis of transfer pricing regulation in two jurisdictions of India and Sweden. A discussion on the relevant TP related provision, extent of compliance with Organization for Economic Co Operation and Development (OECD) guidelines. Countries have been chosen on the basis economic investment in them. One country is a developed country while another is a developing country. Attempt is to provide a holistic picture of the status of regulation in the two jurisdictions. (OECD) has stipulated multiple guidelines to deal with various issues related to (TP) from time to time. Essentially these guidelines include methods of computation, burden of proof, documentation requirements amongst others. This research paper aims at analyzing the legislation of India and Sweden from the standpoint of their compliance with (OECD) mandates. Since India is a developing country while Sweden a developed country, they together provide a good representation from the international trade perspective. The regulations have been analyzed on parameters of (ALP) requirements, computation methods, burden of proof, and administration, judicial recourse in case of disputes and penalty prescribed. Research has been achieved by studying of various reports, literature on the issue. Literature has been utilized to extract information relating to various aspects related to transfer pricing which includes various methods used to reach at (ALP), documentation process, penalties and provisions for advance pricing agreements and limitation therein.*

**Keywords: Transfer Pricing, Organisation for Economic Co Operation and Development, Arm's Length Price, Advance Pricing Agreement.**

## Introduction

Cross border transaction is not a new phenomenon as far as global trade is concerned. They notably account for around 30% of the sector, which is a large representation of the global economy.

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A subset of these transactions is the ones between associated enterprises of a multinational which are situated in two jurisdictions. Nature of these transactions is different from others in so far they are regulated and guided by the 'group driven forces. In line with collective self-interest of the associated enterprise. Where they may or may not replicate the market forces regulating uncontrolled transactions between unrelated entities. This is where, need for defining a 'transfer price' is acknowledged. Simply put, transfer pricing refers to the pricing of tangibles and intangibles in 'intra group' transactions Guidelines prescribed by (OECD) attempts to address mispricing, tax avoidance and other practical issues and concerns associated with the concept.<sup>1</sup>

These manipulations arise due to lack of a clearly defined scientific approach to compute the valuation of tangibles / intangibles involved. Therefore, MNE's usually shift profits from one jurisdiction where the taxable income of MNE is higher to one where it is lower and reduces the aggregate taxable income of such MNE.

### **Illustration**

H Corp. is a multinational. With two divisions namely transportation (A) and refinery (B). Each a separate profit generating entity. A has acquired rights in a n oil field in M area. Crude Oil secured from there is then sold to B for refining. The price at which crude oil is sold to refining division is 'transfer price' between two associated entities under H corp.<sup>2</sup>

### **Development over the past few decades**

To arrive at a 'transfer price' which is acceptable from all parameters is a continuous process. It essentially involves applying fixed economic principles to dynamic nature of global transactions. Thus, new techniques and approaches that satisfy most if not all stakeholders are preferred and continuously sought. (OECD) transfer Pricing guidelines were published for the first time in 1995 this was followed by reports of 1975 and 1985. An important term of relevance but not defined adequately is that of 'Associated Enterprise' which is an entity around which the mechanism revolves. Multinational Corporation is understood as constituting several small and large corporate groupings. Each having a different functional role and situated in a different jurisdiction. Operating as a separate profit generating entity and cumulatively contributing towards the parent

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1 Practical Manual on Transfer Pricing for Developing Countries, UN,2013, p.1-4.

2 Charles T. Horgren, Cost Accounting: A Managerial Emphasis, Pearson Education India, p.929.

corporations' profit. From the managerial perspective the control and management of these intermediaries or sub holdings present in several countries reside with only one. Thus, there is continuous relocation of resources and shifting of profits from one to another. Coupled with rising investment in foreign jurisdictions especially in developing countries on account of improved infrastructure, labor, plummeting production costs have made transfer pricing an important issue over the last few decades.

Another issue related to transfer price can be understood from standpoint of developing countries. Developed countries have always been vigilant and careful in planning their tax policies to effectively keep their tax base intact and safe from abuse. The real challenge was for developing countries with less sophisticated taxation regime to introduce more stringent regulations and exploitation.

A report was published by United Nations called 'International Income Taxation and Developing Countries' in 1988. Discussing this scope of misuse by MNEs to lower their tax bills by exploiting the tax bases of developing countries.<sup>3</sup>

### **Organisation For Economic Cooperation and Development ((OECD))**

Signed on 14 December, 1960 and enforced on 30 September 1961, (OECD) was established after the Second World War to undertake the task of reconstruction and development of European nations ruined due to the war. The first project spearheaded by (OECD) was the implementation of the Marshall Plan or European Recovery Program.<sup>4</sup> Formulating policies, improving global governance, controlling non state actor, identifying fairer economic practices, sharing experiences and offering modern solutions are few of the multiple functions of (OECD). All actions are guided by the principles of inclusive growth and sustainable development.<sup>5</sup> Outcomes of these deliberations are formal agreements, standards, models or recommendations and guidelines which is encourage for incorporation by (OECD) through moral suasion in absence of any formal rules of implementation.<sup>6</sup>

### **(OECD) – Role in Handling Transfer Pricing**

An intergovernmental organization whose membership roll consists of

3 Op Cit., p.7-9.

4 "About (OECD)", available at [www.\(OECD\).org](http://www.(OECD).org) (viewed on 15-10-2016).

5 Ibid., "What we do and how".

6 Ibid.

35 countries (OECD) provides a forum for deliberations amongst these nations on economic matters.

The international tax regime was never prepared for the burgeoning cases of Base Erosion and Profit Shifting. Since the global tax network was essentially an interaction of domestic laws which were inadequate for BEPS. In fact, for a long time it was assumed by nations that a cooperative approach will be adopted by the countries in case of overlap. That one country will forego eliciting of revenue in cases of double taxation. However, this did not sustained and soon world saw the exploitation of differentials in the tax system of home and host country. This causes trade distortions and revenue erosion to developing countries tax base regulated by fragile laws.

An effective solution to the problem was achieved because of (OECD) which encouraging its member nations to build a consensus-based framework where both international and domestic economic interest is secured. Results of BEPS deliberations were consequently published by (OECD).<sup>7</sup>

- Guidelines on Transfer Pricing along
- Model Tax Convention.

Relevant Articles of the Model Tax Convention that regulate transfer pricing are mentioned below: Article 4.1 defines the term resident as one liable to pay taxes on account of his domicile, residence, place of management under the laws of any State. Article 7.1 provisions for the separate entity approach. Whereby the profits of an enterprise are liable to taxation only up to the extent of it is present in a State. In case the enterprise is spread over more than one Contracting State through its permanent establishment, profits accruing in such PE are taxable in such other State. Article 9 stipules the application of (ALP) when dealing with transactions between two enterprises situated in different Contracting states. Let us understand the definition of an associated enterprise. It is understood upon reading Article 9 of the convention that for two enterprises to be 'associated enterprises' of each other either one should have control, capital or management of the other or such is vested with one person.

Article 24 mandates on practicing equality in treatment of enterprises by negating influence of ownership factors in determining the income liable

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<sup>7</sup> The (OECD) work on Base Erosion and Profit Shifting, (OECD),2013, p.1.

for taxation. Thus, all enterprises are to be identified with respect to the State they are operating.<sup>8</sup>

Article 26 proposes for ‘mutual agreement’ for addressing the grievances of enterprises. Enterprises by virtue of this provision are entitled to approach the competent authority in their contracting state notwithstanding the position of domestic law. Provided their operation has spanned beyond 3 years.<sup>9</sup>

Article 24 mandates on practicing equality in treatment of enterprises by negating influence of ownership factors in determining the income liable for taxation. Thus, all enterprises are to be identified with respect to the State they are operating.<sup>10</sup> Article 26 proposes for ‘mutual agreement’ for addressing the grievances of enterprises. Enterprises by virtue of this provision are entitled to approach the competent authority in their contracting state notwithstanding the position of domestic law. Provided their operation has spanned beyond 3 years.<sup>11</sup>

### Computation Method

Prescribed way of assessing the nature and impact of controlled transaction is to measure it through the arm’s length principle. Several methods are provided of which only one is required to be used. These methods are:

- Comparable Uncontrolled Price Method
- Resale Price Method
- Cost Plus Method
- Profit Split Method
- Transaction split margin method<sup>12</sup>

(OECD) insist on restricting to using of a single method in determining the Arm’s Length Price. However, in cases where such is not plausible aid can be taken of other methods to reach a satisfactory conclusion which is practically acceptable to all entities involved.

### Penalties

From functional perspective penalties are part of law to serve as

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8 Ibid.

9 Ibid.

10 Ibid.

11 Ibid.

12 (OECD),” Transfer Pricing Guidelines for Multinationals Enterprises and Tax Administrations”, available at [www.ilssole24ore.com](http://www.ilssole24ore.com) (viewed on 18-10-2016).

disincentives in cases of noncompliance. However, compliance can only be predicted when the rules are rigid and free from ambiguity. Transfer pricing rules are different from others in so far there is no scientific approach involved. Hence, what is provisioned are guidelines serving as a blueprint for different jurisdiction to study and build their rules on. These are either icivil or criminal.

Members of the (OECD) assert towards achieving equality or proportionality in penal regimes of various jurisdictions. As irrational disparity amongst them will encourage multinationals to overstate income and understate income in different jurisdictions solely directed on the basis of harshness of the penalty prescribed in each.<sup>13</sup>

### Taxation in Sweden

Swedish constitution stipulates that all legislations concerning taxation shall be enacted by the Parliament.<sup>14</sup> Its implementation shall be the duty of public authorities. From a long time, all decisions concerning revenue has been taken consensually by the King after deliberations with representatives of all factions of the society.<sup>15</sup> Extent of engagement of political, executive, judicial bodies in Sweden's tax collection mechanism is briefly discussed below. Member of the OECD and a constitutional monarchy the taxation in Sweden is regulated and administered by the Swedish Tax Agency known as *Skatteverket*. Other agencies apart from *Skatteverket* have a fair role in the overall revenue collection mechanism of the country as well.<sup>16</sup> Tax legislation in Sweden begins with presentation of tax bills in the Parliament based on government reports. Many committees are appointed under the Ministry of Finance which undertakes the task of framing policy on revenue matters. *Skatteutskottet* is the committee which attempts to analyze all nuances involved in the tax policy and make relevant recommendations. However, unlike India, Ministers are not vested with executive powers to ensure implementation of these legislations and policies. Rather this is performed by the Central agencies and its multiple branches through orders and regulations. A change in structure of revenue collection was made in 2006.<sup>17</sup>

Following 1<sup>st</sup> January 2006 each of the seven-tax region consist of a tax office to serve the public and a large tax payer unit located in Stockholm

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13 Ibid, p. 138-145.

14 The Constitution of the Kingdom of Sweden,1974, a4.

15 Susanne Ragvald," Uncertain Transfer Pricing Rules-A Comparison of Three Jurisdictions", *University of Lund*, 2007, p. 28.

16 An English Summary of Tax Statistical Yearbook of Sweden, Swedish Tax Agency, 2012, p.41.

17 Ibid., p.41.

was set up. Then in 1<sup>st</sup> July, 2006, the Enforcement Authority was separated from the Tax Agency. Which now undertakes functions such as debt collection, check on bankruptcy amongst others. This effectively segregated and streamlined the revenue collection procedure yielding better accumulation.

Three kinds of administrative courts are identified as part of the Swedish judicial system.

County administrative courts Supreme Administrative Courts Administrative Courts County Administrative Courts. Responsibility of the judiciary is to redress disputes before the above-mentioned courts and enforcement of Tax Fraud Act which is appealable. Thus, complaints against the Tax Agencies are usually settled after a review by the agency itself. However, in case the issue persists for the taxpayer he is entitled to approach the county administrative court. If that also fails to give satisfactory resolution to the dispute, he can follow this up by an appeal to the administrative court of appeal or *kammarrätten*. Finally, to the Supreme Administrative Court provided a pertinent question of law is involved in the dispute.<sup>18</sup>

Additionally, a Commissioner appointed by the government on 1<sup>st</sup> January, 2004 is empowered to appeal against decisions of Tax Agency. Simplifying the system and making it more accessible.

## Transfer Pricing in Sweden

The first instance when the issue of transfer pricing was recognized can be traced back to 1928. In 1965 Sweden made necessary amendment in its Transfer Pricing regulation to meet the guidelines prescribed by OECD. The legislation controlling transfer pricing in Sweden is the Swedish Income Tax Law or *Inkommstskattelagen*.<sup>19</sup> Chapter 14, Section 19 of the Act stipulates that where from dealings between related entities the revenue of the MNE is lower than normal levels then adjustments in income must be made to negate this advantage.<sup>20</sup> Provided the enterprise to which higher revenue is attributable is not taxable in Sweden and that a common economic interest subsists between the parties. Where common economic interest is upheld when a person participates in the management and control of other person's enterprise (directly or indirectly) or when one

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18 Swedish Tax Agency, op. cit., p.42.

19 Ibid., p.42.

20 Susanne Ragvald, op.cit., p.29.

person participates in management and control of both these enterprises. This adjustment is subject to Statute of Limitations prescribing a period of 6 years from the end of financial year.<sup>21</sup> Chapter 14, section 19 introduces the concept of arm's length principle in "intra group transactions" but rules for implementation and application are absent.<sup>22</sup> Another feature of all transfer pricing related computation is exchange information and procedural compliance. Section 15 -16 of chapter 39, Tax Procedures Act provide for the same.<sup>23</sup> Important change post February 7th, 2007 was that of fulfilling requirement pertaining to documentation in all cases of transactions between two associated enterprises. Rulings regarding documentations are present in SKVFS 2007:1. Mainly particulars regarding methods used for computation, details of transactions undertaken have to be specified. Though extent of details to be disclosed is not clearly stipulated but records are recommended to be kept for a period of 10 years for every financial year.

### **Methods**

SKVM 2007:4 assign acceptability to using of computation methods only when they synchronize with OECD prescribed guidelines. It details all requirements to be undertaken in transfer pricing cases including judgments. Thus, methods within chapter 2 of OECD guidelines are acceptable. Where there is no priority amongst them. Thus, best method rule does not apply.

### **Choosing Comparables**

As far as decision regarding choosing of comparables is concerned. Tax authority does not have any outright preference policy but experiences have shown that they tend to bend in favour of domestic comparable in case where a foreign entity is the tested party.

### **Penalty**

In case the taxpayer fails to meet the documentation or disclosure norms the burden of proof is shifted from tax authority to such tax payer. Not specific but general penalties are imposed to the tune 40% of the additional tax.

### **Advance Pricing Agreement**

A contract entered by taxpayer and tax authority of a nation, wherein the

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21 Global Transfer Pricing Review, KPMG,2013, p.2.

22 Ibid, p.2.

23 Ibid, p.2.

pricing policy adopted by the tax payer is specified in advance for all its transactions with that country.

After its introduction in 2010, with fees of SEK 150,000 per country APA's can be filed.<sup>24</sup>

### **Double Taxation**

Sweden has multiple treaties to achieve double taxation relief with several nations. In case of violation of which the taxpayer is entitled to approach the competent authority in a span 3 years from the time when such violation comes to his knowledge.<sup>25</sup>

### **Analysis**

Transfer Pricing regulations of Sweden are not free from ambiguity. First of all, the principle of arm length has only been prescribed. Guidance on how to implement it has not been provided. Furthermore, the Skatteverket is vested with the power by the Government to issue circulars providing specifications on documentation and disclosure norms. The jurisprudence on this subject is also limited and not enough precedents in the form of case laws are available to address all possibilities. Though the SKVM circulars are not authority as far as interpretation of the Transfer pricing rules is concerned, however they clarify the Swedish tax agency viewpoint on a legal issue. These provide a useful insight to the companies. The extensive documentation requirement insisted on by the Government has several shortcomings such as added cost, auditing, ensuring harmonization in practice amongst foreign entities. APA mechanism in place with respect to Swedish Transfer pricing is insufficient in providing safety net to the companies. This fails to develop MNE's trust in the regime. Disputes relating to transfer pricing involve huge amounts of money.<sup>26</sup> Therefore, it is only reasonable that the penalty prescribed must exceed or at least meet the losses incurred by any State. In case of Sweden the penalty is insufficient in acting as an effective deterrent and fails to discourage companies from indulging in transfer mispricing.

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24 Ibid, p.2.

25 Ibid, p.2-4.

26 Susanne Ragvald, op.cit., p.29.

# SEXUAL HARASSMENT AT WORKPLACE

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Mr. Aniket Dwivedi\*

## Abstract

*India is a country where women always held in high esteem from Vedic period. From time immemorial women enjoyed a considerable amount of freedom and are treated as equal with men. But later Vedic period the status of women deteriorated. In Indian Constitution women are provided with many fundamental especially right to equality under article 14 & 15 of the Indian constitution and her right to life and to live with dignity under article 21 of the constitution. The most recurring problem around the globe is sexual problem. Since industrialization, women working in factories and offices have had to endure sexual comments and demands by bosses and co-workers as the price for economic survival. Large numbers of women into the paid labour force over the last twenty years and their increasing involvement in workers' organizations have heightened awareness of the extent and destructive consequences of sexual harassment. Since the whole economy rests on the society, economic empowerment can never be a meaningful reality without rooting out existing gender inequalities situated in the social structure. Sexual harassment is one of the ways that men resist gender equality in the workplace. It creates an adverse environment for working women. Today, sexual harassment of women at workplace constitutes an extremely important kind of violence, which has been comprehensively defined for legal purposes. Sexual harassment occurs in the workplace, but unfortunately there are no public records of the cases. The research will provide an in-depth view into sexual harassment, and its role in today's work environment. The purpose of this research paper is to investigate the current status of sexual harassment in the workplace today.*

**Keywords: Sexual Harassment, Causes, Sexual harassment at workplace, Sexual harassment act in India.**

## Introduction

There are certain rights which are inalienable from a human being and are guaranteed by birth. The Protection of Human rights Act, 1993 defines human rights as the rights related to the life, liberty, equality and dignity

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of the individual which are guaranteed by the Constitution or embodied in various International Covenants which are enforceable in the Courts in India. Right to live with dignity forms a part of human rights and sexual harassment is a breach of the right to live with dignity. Article 15(3) of the Constitution of India provides that nothing shall prevent a state from making special provisions for women and children. Sexual harassment is not just the violation of dignity, right to social security and right to equality guaranteed to human beings in every social system but it is also a violation of right to life and peaceful existence guaranteed by law. It is the most pervasive violation of human rights in the world today. It underlines that discrimination and attack on women's dignity violate the principle of equality of rights.<sup>1</sup> In India, violence against women is a manifestation of the historically unequal power relations between men and women, which have led to domination over and discrimination against women by men. It is basically an extension of the patriarchal violence, at home and in society, at large, but it is not enough. At the basic level, it is a show of male dominance and the inherent inability to deal with women at par with men. Gender disparity, as a living reality, is perhaps the most endured social aberration across times. It affects women in all settings whether public or private and has psychological, medical, social, political, legal and economic implications. It is so deeply embedded in cultures around the world that it is almost invisible and to the prevention of women's full advancement, and violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men. Instances of sexual harassment should not be viewed as isolated incidents; rather they should be construed as a gendered aggression against the rights and dignity of women.<sup>2</sup>

### **Sexual Harassment: An Analytical Approach:**

Sexual harassment often reflects an abuse of power within an organization, where members of one group of people yield greater power than others, generally women. It is linked with women's disadvantaged status at work and, more generally, in society. Sexual harassment is a hazard encountered in workplaces across the world that reduces the quality of working life, jeopardizes the well-being of women and men, undermines gender equality and imposes costs on firms and organizations.<sup>3</sup> For the International

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1 Universal declaration of Human Rights- <https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html>.

2 Bhattacharyya, Arundhati. *Sexual Harassment in the Indian Bureaucracy: Violation of Human Rights*. Cambridge Scholars Publishing, 2017.

3 Davis, Adrienne D. "Slavery and the Roots of Sexual Harassment." *Directions in Sexual Harassment Law*, 2013.

Labour Organization, workplace sexual harassment is a barrier towards its primary goal of promoting decent working conditions for all workers. Sexual harassment is basically an unwanted conduct related to the sex of a person which violates the dignity of a person, and to create intimidating, hostile, degrading, humiliating or offensive environment. Suggestive jokes or insulting remarks directed at one sex may be considered sexual harassment in the legal sense, but not always, depending on context and frequency. It includes sexual teasing, jokes, remarks, questions; sexual looks, gestures; deliberate touching, leaning, cornering, pressure for dates, letters, calls, sexual materials; stalking, pressure for sexual favors, and actual or attempted rape or assault. Sexual harassment has been identified as the most frequent form of “sexual victimization” and as a category of violence against women. It has also been described as a form of social control exerted by men to “keep women in their place. During the last decade, however, as it has become increasingly accepted that sexual harassment cannot be considered a problem confined to industrialized countries, research has been conducted and preventive measures developed in countries across a range of economic and cultural conditions.

### **Where is it most likely to occur?**

Sexual harassment occurs in all occupations and industries, and organizational culture is key to understanding how and why it occurs in some places and not in others. Sexual harassment, bullying and physical violence can all be seen in terms of ‘organizational violation’. This is where the culture of an organization makes it possible for individual employees to be treated abusively or with disrespect. Hierarchical and managerial power is central to understanding how such a culture develops and continues. As the climate of disrespect within an organization worsens, the more likely it is for certain inappropriate behaviour to be taken for granted, leading to the creation of an ‘incivility spiral’. This is where discourteous behaviour becomes routine and regarded as normal by employees and employers. Sexual harassment has been found to be more prevalent in certain work situations, for example, in jobs where there is an unequal sex ratio; where there are large power differentials between women and men; during periods of job insecurity; or when a new supervisor or manager is appointed.<sup>4</sup> Two types of leadership style are particularly, although not exclusively, associated with harassment and bullying: an authoritarian style where there is limited consultation with staff; and a laissez faire style where management fails to lead or intervene in workplace behaviour.

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<sup>4</sup> Bhattacharyya, Arundhati. *Sexual Harassment in the Indian Bureaucracy: Violation of Human Rights*. Cambridge Scholars Publishing, 2017.

People who belong to a socially advantaged group, the 'in-group', tend to have a preference for members of their own group and are likely to be biased against members of any socially disadvantaged 'out-group'. What this means in terms of sexual harassment is that the greater the distinction between the in- and out-group in the workplace, for example in the power held by men and women, the more likely it is that sexual harassment will occur.<sup>5</sup>

### **Historical Methodology: case study**

Historically, traditionally, culturally and socially violence on women has long been accepted as part of every day's life. Moralistic, patriarchal, strict hierarchical power structures in our societies demand enforcement by any means necessary. It is said that behind every man's success there is a woman'. In our society there is great disparity between a man and a woman. The history of mankind is witness to the fact that the gender inequality has been used as a facade to perpetuate violence against women from time immemorial. Solutions to such problems of related to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations. A nation that does not respect its women cannot be described as a civilized nation at all. Such a nation cannot grow and develop and will ultimately perish due to its own rudimentary. Thus, the national consensus should concentrate on betterment of women by suitably empowering them. Women have inherited this maltreatment from generation to generation, sometimes voluntarily and at other times with protest. The end result, however, remained the same. The patriarchal nature of society always allowed legitimizing the most heinous acts and omissions on the part of men women. Sexual harassment is a complex social issue that adversely affects individuals, organizations, and society. It is contended that sexual harassment cannot solely be based on socio-cultural model, but should also be examined from behavioral as well as subjective perceptions of harassment. Studies have found that individuals have different perceptions of sexual harassment. For example, women are more likely than men to label certain behaviours as sexual harassment, similarly non-manual staff compared with manual staff. Behaviour is more likely to be seen as harassment when there is a large power difference between the person being harassed and the person doing the harassing. Thus, sexual harassment affects the social and psychological behavior of women within and outside the workplace. Subsequently sexual Harassment hinders the job security of women and threatens their earning potential. The

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5 Ritu Gupta, Sexual Harassment at workplace: A detail study of the sexual harassment of women at workplace (Prevention, Protection and Redressal) Act, 2013,1(1st ed., 2014).

women parliamentarians of Indian legislature provided their concern and sensitiveness to the matter of sexual harassment. A bill was moved by Ms. Kamla Sinha in the parliament in May 1994 to provide for the prevention of sexual harassment of women employees at their workplace. The offences like physical assault and molestation have been made punishable under the Indian penal code, yet working women feel insecure since all aspects are not covered by that code. Accordingly, an urgent need is felt to deal with the situation more stringently. The bill therefore, takes care of the offences related to sexual harassment of women at workplace. It was first observed in the Case of *Vishaka v. State of Rajasthan*<sup>6</sup> owing to the gang rape of Bhanwari Devi, who was a social worker in a programme initiated by the state government of Rajasthan aiming to curb the evil of Child Marriage. Amidst, the protest to stop a child marriage in one Ramakant Gujjar's family Bhanwari Devi tried her best to stop that marriage. However, the marriage was successful in its completion even though widespread protest. In 1992, to seek vengeance upon her, Ramakant Gujjar along with his 5 men gang raped her in front of her husband. The police department at first tried to dissuade them on filing the case on one pretext or other but to her determination; she lodged a complaint against the accused. Adding to their misery, their request to spend the night in the police station was also refused. The trial court acquitted the accused but she didn't lose hope and seeing her determination all female social workers gave their support. They all filed a writ petition in Supreme Court of India under the name 'Vishakha'. The apex court was called upon to frame guidelines for preventing Sexual Harassment at Workplace. The hon'ble court did come up with such guidelines as Vishakha Guidelines which formed the basis of The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.<sup>7</sup>

### **Reasons of Sexual Harassment at Workplace**

There are many causes of sexual harassment but most important one is the culture and values system and the relative power and status of the men and women in our society. The way in which men and women are brought up in India strongly influences their behavior in an organization. Women often lack self-confidence because of the way they have been socialized and are customized to suffer in silence. Women are vulnerable to sexual harassment because they more often lack power and often work in insecure positions. There can be probably many reasons. however, let's see a few of them

6 *Vishaka v State of Rajasthan* (1997) 6 SCC 241.

7 Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 at <https://en.wikipedia.org>.

## **1. Gender Inequality**

India is very male dominant country. Why because of their family generations, they were created to some policies to follow the male members of the family. The men in power making sexual favours towards female subordinates by this one can commonly understand that this kind of male behaviour is only about the sex to which we call popular perception. Much of the harassment women face at the workplace isn't "sexual" in content or design but the motive behind this is to show the domination of male over females. And this kind of behaviour determine the gender difference and to claim work as a domain of masculine mastery.

## **2. Status of women:**

The status of women is often thought to be secondary to men. However, women living in India are treated as second class citizens to society on a higher level. Indian women today deal with the everyday struggles of indignity. A women's future is held in the hands of a man. They are slightly educated, poorly trained for professions. Indian women lose Women usually wield less hierarchical power in organizations, and men have more, sexual harassment serves as one method of the powerful asserting control over the powerless. This suggestion is supported by findings that women are more likely to be harassed when they move into higher levels in organizations or into non-traditional areas. The individuals with less power tend to be more attentive to the individuals with more power than the reverse. This clearly shows that the persons with inferior job position in an organization or in institute are more prone to sexual harassment than a person in power.

## **3. Moral values and cultural differences:**

Today's parents are giving sufficient freedom to their kids with a good intention of making them feel comfortable so that they won't feel that they are in a cage. But, some of them are misusing this freedom and going in a wrong way. Modern nuclear family culture made many people unaware of the importance of relations. If we know how to respect our people, then we obviously know how to treat others. It may sound odd but it's really true. Why can't one change the way they look at others?

## **4. Improper response to harassment complaints:**

If concerned authorities respond quickly to harassment cases and if proper actions are taken, the rate of growth of such cases may reduce. Present punishments given by law seem to be just to such beasts. If a person

accused in a harassment case is given such a punishment which literally makes others sweat like anything, it might be helpful.

### **5. Higher Academic Profile and Lesser Job Opportunity:**

In our present-day society, we are familiar with the fact that there are a large number of women populations who are with higher academic degrees rendering for job but the available job position is lesser than these highly educated young women. When these talented and efficient women began their journey to find a job in an organization may it be an educational institute or other private or government sector they are harassed and advanced by sexual favours by the person in charges and for that they are assured to be offered a job. Later when these girls are attached to a particular job position in an organization, they are often asked for sexual offers for promotion, salary increase and other.

### **What is the impact of sexual harassment?**

Sexual harassment can have a negative effect on the individual, in both the short and long term. Those who have been harassed may experience illness, humiliation, anger, loss of self-confidence and psychological damage. Sexual harassment may also lead to workplace problems such as decreased performance, lower job satisfaction and higher absenteeism. In some cases, it may lead to resignation. Observing someone else in the organization experience sexual harassment may also have a detrimental impact on an employee, by affecting their attitude towards work and even leading to psychosomatic problems. If employees believe that sexual harassment is not being tackled in the organization this may lead to decreased job satisfaction and poorer physical health. On the other hand, the investigation of sexual harassment complaints may cause serious divisions between staff. The presence of sexual harassment within an organization may damage business performance due to low morale, lost productivity, damage to reputation and public image, and the cost of any compensation awards to sufferers of harassment who have taken a claim to employment tribunal. It may also have an impact on employee turnover, particularly that of female employees.<sup>8</sup>

### **Legal Provisions to Deal with Sexual Harassment Aat Workplace**

It is against the law to harass a co-worker, potential employee, supervisor, or subordinate in a sexual manner. The harassment does not have to be sexual in nature for it to be unlawful, but it can include remarks that are

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8 Crime against women –National Crime Records Bureau at [ncrb.nic.in](http://ncrb.nic.in).

constituted as unpleasant; to include pestering based on a person's sex. The increasing rate of women participation in workplaces made it necessary for the Legislature to enact Act focusing on prevention of Sexual Harassment at workplace as well as redressal to the same. The Act is named as, The Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013. The Sexual Harassment Act (Hereby called as an 'Act') was finally enacted in the year 2013 for the prevention of sexual harassment against women at workplace in the whole of India. The main objective of the act was protection of Women, prevention and redressal of sexual harassment complaints. Sexual harassment has been termed as a violation of basic Fundamental Rights of women under Article 14 and 15(3) that deal with Right to Equality and State shall not be prevented to make any special provision related to Women and Children respectively. And right to life and to live with dignity under Article 21 of the Constitution of India. Sexual Harassment is also considered as violation of the right to practice any profession or to carry on any trade, occupation or business under Article 19(1) (g) of the Constitution of India.<sup>9</sup>

### **Scope and Ambit of the Act:**

The Prevention of Workplace Sexual Harassment Act applies to both the organized and unorganized sectors in India. The statute, inter alia, applies to government bodies, private and public sector organizations, non-governmental organizations, organizations carrying out commercial, vocational, educational, entertainment, industrial, financial activities, hospitals and nursing homes, educational institutes, sports institutions and stadiums used for training individuals and a dwelling place or a house.

The scope of workplace in this Act is inclusive in nature. It includes:

- i. Any department, organization, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided by the appropriate government or the local authority or a government company or corporation or a co-operative society
- ii. It also includes private sector organization or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organization, unit or service provider carrying on commercial, professional, vocational, educational,

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<sup>9</sup> Rajesh Arora, "Prevention of Sexual Harassment of Women at Workplace: Need for changes in the policy", *Chartered Secretary: The Journal for Corporate Professionals*, Vol. XLIV No. 05 May 2014 at 555, also see Section 3 of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

- entertainment, industrial, health services or financial activities including production, supply, sale, distribution or service.
- iii. Hospitals or nursing homes.
  - iv. Any sports institute, stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating thereto.
  - v. Any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such journey.
  - vi. In relation to unorganized sector, workplace means an enterprises owned by individuals or self-employed workers and engaged in the production or sale of goods or providing service of any kind whatsoever and where the enterprise employs workers, the number of workers is less than ten.

**The Criminal Law Amendment Act of 2013**, which commenced on April 3, 2013, included Section 354A of the Indian Penal Code, 1860 that defined sexual harassment. Section 354 A- Sexual harassment is: unwelcome physical contact and advances, including unwanted and explicit sexual overtures, a demand or request for sexual favors, showing someone sexual images (pornography) without their consent, and making unwelcome sexual remarks. Punishment: Up to three years in prison, and a fine.

The India Penal Code, 1860 has also defined the term sexual harassment and related offences and put forth punishments for the same:

**Section 354B-** Forcing a woman to undress

**Punishment:** From three to seven years in prison, and a fine.

**Section 354C-** Watching or capturing images of a woman without her consent (voyeurism).

**Punishment:** First conviction – one to three years in prison and a fine. More than conviction—three to seven years in prison and a fine.

**Section 354D-** Following a woman and contacting her or trying to contact her despite her saying she does not want contact. Monitoring a woman using the internet or any other form of electronic communication (stalking).

**Punishment:** First conviction – up to three years in prison and a fine. More than one conviction—up to five years in prison and a fine.

**Section 509**-Insulting the modesty of a woman by saying any word or sound or making any gesture which intrudes on her privacy.

**Punishment:** Up to three years in prison and a fine.

### **Me Too movement in India**

The MeToo movement which initially started in US which has gained significant momentum in India. MeToo is a global campaign against sexual harassment and assault where women from all over the world open up and share their stories throwing light on sexual abuse prevalent in our society.. The movement has created a critical mass of survivors and spurred a conversation worldwide about breaking silence, combating shame, shattering disbelief; and creating safe environments, empowered communities and avenues for redress. Now the movement has finally arrived in India and women from media & entertainment industry came forward to share their experiences. The lesson from our own movement and that sexual harassment is dictated not only by sex or gender, but also by factors like people's race, caste, religion, colour, region, age, disability and sexuality.<sup>10</sup> Race and caste divides aggravate the experiences of sexual harassment, while privilege in terms of the two make a difference in averting, seeking help and recovering from abuse. For a country where over 833 million people live in villages, we must find a way to relate the movement to the subaltern. According to a nationwide online survey on sexual harassment at workplace, conducted by Local Circles, around 80 percent women never report harassment in India. More than 28,000 votes were polled in the survey from over 15,000 unique participants located across India. Approximately 6,100 or 40 percent of respondents were females. The participants from tier 1 cities were 40 percent, tier 2 cities were 28 percent and tier 3 cities and rural areas were 32 percent. The Indian National Bar Association conducted a survey on sexual harassment at workplace between April and October 2016. Around 6,047 participants, both male and female, and 45 victims responded to their questionnaire. Most of the respondents were from sectors like IT, media, education, legal, medical and agriculture. The respondent victims were mainly from Delhi, Mumbai, Bengaluru, Kolkata, Hyderabad, Lucknow and other areas. Around 38 percent of the respondents said they faced sexual harassment in the workplace. Around 69 percent of the victims did not complain to the management fearing repercussions or retaliation. The survey also revealed that the nature of the sexual harassment involved inappropriate comments, touching and physical harassment. What's shocking was around 65 percent

10 Kurian, Alka (2018): "#MeToo is riding a new wave of feminism in India," *The Conversation*, 1 February, <https://theconversation.com/metoo-is-riding-a-new-wave-of-feminism-in-india>.

of the respondents' answer was no when asked did the company follow the process prescribed under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

### **Suggestions**

In the light of above, following suggestions need consideration for the effective redressal of sexual harassment of women at workplace. Here are some of the suggestions which will help in prevention of sexual harassment incidents at workplace:

- Adopt a clear sexual harassment policy- In your employee handbook, you should have a policy devoted to sexual harassment. That policy should, define sexual harassment, state in no uncertain terms that there will be no tolerance to sexual harassment state that you will fire any wrongdoers, state a clear procedure for filing sexual harassment complaints, state that you there will be full investigation of any complaint received, state that there will be no toleration for retaliation against anyone who complains about sexual harassment.
- Train employees- Conduct training sessions for employees, at least once a year. These sessions would teach employees what sexual harassment is, would explain that employees have a right to a workplace free of sexual harassment, review your complaint procedure, and encourage employees to use it. Teach employees and tell them about laws which are made by government to prevent these sexual harassment offences.
- Train supervisors and managers- Conduct training sessions for supervisors and managers that are separate from the employee sessions, at least once a year. The sessions should educate the managers and supervisors about sexual harassment and explain how to deal with complaints.
- Monitor your workplace- Employer should get along with employees periodically and talk to them about the work environment and ask for their input. Look around the workplace itself. Do you see any offensive posters or notes? Talk to your supervisors and managers about what is going on. Keep the lines of communication open.
- Take all complaints seriously- If someone complains about sexual harassment, take it seriously and act immediately to investigate the complaint. If the complaint turns out to be valid, your response should be swift and effective.
- Create and communicate a clear anti-harassment policy, including anti-retaliation components. Get legal advice on this policy to ensure

it is complete and that it complies with all federal, state, and local laws. Once complete, ensure that your policy is in the employee handbook and that every employee has a copy.

- Conduct sexual harassment training and retraining for everyone, especially all supervisors and managers, on at least an annual basis. Everyone in the organization should understand what sexual harassment is and what to do if it occurs.

So, it is duty of all organizations to train their employees about sexual harassment and its legal implications where it is suitable. Seminars, workshop and mock drills should be organized by the competent authority about the evil practice of sexual harassment. Maximum job opportunity and promotion slots should be reserved for women which will help them not get emotionally tracked and avoid their future worry. Internal complaints committee and grievance cells should be established in every organizational setup wither it is governmental or private, to monitor the cases of sexual harassment. Legal awareness programmes should be arranged and organized by each department under government and private sectors which will familiar the women employees about their rights and privileges.

## **Conclusion**

Sexual harassment in the workplace is still very much in existence today more than ever. Our study revealed that sexual harassment is a recent emerged social evil which is growing with extreme speed and gives much concern to the authorities about the issue. With the new law in India relating to safety of women in workplace with all stringent provisions for awareness and retentive measures, every woman at the place of work should be protected from sexual harassment, intimidation and exploitation. Workplace policies and programmes on sexual harassment both reinforce legal prohibitions and play a powerful preventive role. There should be greater public awareness and people should have greater participatory role in governance. Regarding sexual harassment, NGO 's should play proactive role and demand for judicial activism because every woman shall have a right to be free from Sexual Harassment and the Right to Work in an environment free from any form of harassment at workplace.

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# TRANSPARENCY AND ACCOUNTABILITY IN FINANCIAL TRANSACTIONS

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Preeti Goel\*

## Abstract

*Finance is a part of our everyday life, and we need to record the financial transactions to better able to manage things. The financial records reflect the position of an organization and in turn, of our economy. The true picture of an economy depends upon the extent to which these financial transactions are transparent. With the increasing complexity of financial matters and ever-changing economy, there has been an increasing emphasis upon full disclosure due to Right to Information Act (RTI). Timely and full disclosure of all the information must be provided to the general public and the market participants to safeguard their interest and to give a clear picture about our economy. So, transparency acquires the topmost significance in recording any financial transactions, and transparency can be brought more easily when we are able to fix accountability. If all the organizations are left to themselves, they definitely will not generate the required level of disclosure. So, it is the need of the hour that all the financial recordings should be transparent. This paper gives an overview of transparency and accountability in financial transactions, why companies escape from maintaining transparent records, and what problems the users of financial information face in case the information is not transparent. It then throws light on what is currently being done, with the enforcement of accounting standards and GAAP by the laws and institutions in our country, and what else the regulatory agencies can implement to bring transparency and accountability in financial transactions.*

**Keywords: RTI, Accounting Standards, GAAP, transparency, accountability.**

## Introduction

Financial transactions are the base of every economy. They reflect the position and working of any economy. These are pervasive in nature, meaning thereby that every sector of our economy discloses its information in the form of financial transactions. Their accuracy thus acquires the topmost significance in any economy. Timely and full disclosure of all the information must be provided to the general public and all the

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market participants. The quality and quantity of information disclosed must be true to present a clear picture. If all the market participants are left to themselves, they definitely will not generate the required level of disclosure. The quality of information is one of the high priorities of the regulatory authorities. The quality of information, viz. financial transactions is improved if we make them transparent. So, transparency is one of the most important preconditions for recording of these transactions. Whatever is being recorded, should be clear and transparent. Also, the provision should be made for fixing the responsibility for recording such transactions. So, transparency and accountability should go hand-in-hand while recording financial transactions.

### **Transparency and Accountability Defined**

Transparency refers to the quality of being easily seen through. Transparency of a transaction means that it is expressed in a clear way and nothing is hidden to be revealed, i.e. revealing all information in its true form and not presenting it in a manipulated way. Disclosure of all information should be done and that too timely and should be easily understood. All such documents that support the recording of financial transactions should be kept ready, so that responsibility can be fixed if any discrepancy happens. To sum up, when all the actions taken and information provided on existing condition are disclosed, clearly visible and understandable, and all the information is made accessible, we say there is transparency, i.e., timely dissemination and openness of all the information and decisions.

Accountability means that the person who has recorded the transactions is accepting the responsibility that he has recorded all the information and decision areas as transparent as possible, and he can justify the actions to market participants and the authorities. There are three major groups of market participants; borrowers, investors, and authorities to whom one must be accountable. When officials know that they will be held responsible for all their actions and decisions, they will present a transparent picture and this in turn will bring in light the reality of situation. So, transparency is ensured when we are able to fix accountability. One the one hand, transparency is prerequisite for accountability and on the other hand, it fosters accountability. So, both transparency and accountability are mutually reinforcing. Together, they will bring an environment that will improve the quality of decision making in banking sector, corporate sector, public sector, etc. and will improve the efficiency of policies.

## Transparency in Financial Statements

Financial statements such as balance sheet, income statement, and cash flow statements are prepared to provide information about financial position, performance, and changes in financial position respectively of an organization. It reflects the position of an entity in terms of assets, profit, and finance. Hence, majority of decisions for future planning, like investment decisions, expansion decisions, credit decisions, taxation decisions, etc. are based upon the information provided in the financial statements. So, fair presentation of these statements is very crucial for knowing the current status as well as for future planning. So, the organization need to establish an adequate system for recording and reporting on financial transactions in order to demonstrate that it is transparent and accountable. The records should be accurate and verifiable. It should show how much was received, how much was spent, and how it was spent. It also needs to comply with accounting statements and reporting guidelines. An organization is said to be transparent and accountable if:

1. Recording and disclosure is full – An organization must be able to show how much money was received and from where the money received, how much was spent, and on what activities? In other words, all the transactions should be recorded and disclosed so that everyone can know from where in the funds flowed in and where they flowed out. No omission should be made in recording the transactions.
2. Recording is clear, accurate, reliable, verifiable, and easily understood – All the transactions that are recorded must be accurate. An organization must be able to maintain receipts of all financial transactions, invoices, bank statements, etc. so that all financial transactions can be traced and verified by auditors, i.e., it should have sufficient documents to support that all financial transactions are transparent.
3. Accountability can be fixed for such recording – The provision should be made for fixing the responsibility for recording such transactions. One must know who has recorded it or verified it, and if any discrepancy is found, someone must be made answerable for such act. Hence, accountability forces an accountant or an auditor to be transparent.

To ensure high level of transparency, qualitative characteristics of financial statement must be given due importance. The four main characteristics that enhance the usefulness of financial information are:

1. **Timeliness**- Being able to provide information at right time so that decisions can be taken timely,
2. **Verifiability**- Being able to verify the recorded information,
3. **Comparability**- Being able to compare the company's information with its past year records and with other companies' records, and
4. **Understandability**- Being able to understand the information, i.e., reader friendly information. Thus, relevant and faithful representation of financial statement is said to be done when all the material information is disclosed neutrally and free from error.

### **Why Some Companies Escape From Transparency & Accountability?**

A study of past records reveals a number of reasons why the companies in different sectors suffer from lack of transparency. Many companies are just simply more complex than the others. They find it difficult to present the financial information in compliance with the accounting standards. When they enter into a new line of business, the level of complexity goes up and that of transparency comes down. Some companies actively try to defraud investors by releasing misleading information and technically assuring that their statements conform to legal standards. Some argue that off-balance sheet financing, new tax vehicles, forward sales, increasing use of derivatives, etc. have made their task more complex. For handling emerging complex issues, either they do not have sufficient expert accounting personnel or they do not want to hire them because of the cost involved. Some firms are too small to bear that cost. Some people argue that transparency hampers confidentiality, and the competitors and monitoring bodies may take unfair advantage of this; but due to the enforcement of RTI Act, it requires that full and transparent disclosure is mandatory. The cost to the financial system of not being transparent is ultimately higher than the cost of being transparent. So, even if some problems are experienced in the short run, it is beneficial to follow full disclosure regime in the long run as it ultimately benefits all market participants in the economy. So, policy of transparency should not be argued and must be followed fulfilling all legalities involved, and those who will not follow must be brought under the umbrella of penalty.

### **Who all are Interested in Financial Statements?**

Influenced by either one or more problems as listed above, many firms may not want to follow the standards of transparency, and some of them do design their financial statements to hide the information for whatever

reason. They just think of themselves and ignore the harm that is caused to the others. There are many users of their financial information, and their decisions depend upon the facts and information revealed by the entities. The list of the users and the reasons why they want to access the information is exhaustive. First of all, the company management itself needs this information to take day-to-day financing and operational decisions and to assess the cash flow, liquidity, profitability, etc. of the company. Actual and potential investors are in continuous need of this information to assess risk and return of their investments so that they can timely take decisions about buying, holding, or selling the investments. Banks and financial institutions do need to review the creditability of the business before giving any loans. Lenders are interested in knowing whether the company can timely pay back the loan and the interest. Suppliers would like to give credit facility only when a company has sound financial position. Shareholders want to know the ability of the firm to pay dividends. Employees want to know whether company is able to pay their remunerations and if the company is growing, whether it is sharing the returns with its employees by giving them fringe benefits, salary hike, bonus, etc. Customers too would want to remain loyal with financially sound companies and that has growth potential. Government needs to determine whether the organization has paid timely the right amount of taxes. They also need to look upon whether an entity promoting economic development is in need of any kind of grant or subsidy. If the companies do not make transparent disclosure of financial information, one cannot be sure about the company's real risk and its debt level, one cannot estimate the exposure to bankruptcy risk, and one cannot take timely action to correct the problem. As such, everyone will lose trust in the company's management and it will lower company's credibility and valuation. If every firm would go on this route, it will ultimately hamper the growth and development of our economy. We need to understand that the transparency does not alter the nature of risks inherent in the financial transactions but it reduces the chances of panic and corruption. The transparency in financial transactions will help in better risk management and will help in preventing financial crises, leading to improved economic performance.

### **Role of Legal Framework in Bringing Transparency in Financial Statements in India- RTI, Accounting Standards, GAAP and Auditing**

With the increasing demand of different financial users, increasing cases of companies escaping their responsibilities, increasing complexity of financial matters, and increasing need of dynamic economy, the transparency in financial statements has become the topmost priority of our economy. If all the organizations are left to themselves, they definitely

will not generate the required level of disclosure. So, the need of the hour is to bring them under the umbrella of legal framework to make their records transparent. Without the enforcement of certain laws and regulation of certain institutions, the aim of transparency and accountability would remain only a dream. Let us now examine what has been done up until now to bring this into force.

**A. RTI-** Right to Information Act, 2005 was a big step towards bringing transparency and accountability. It is an initiative taken by Department of Personnel and Training, Ministry of Personnel, Public Grievances and Pensions to provide a- RTI Portal Gateway to the citizens for quick search of information on the details of first Appellate Authorities, PIOs etc. amongst others, besides access to RTI related information/ disclosures published on the web by various Public Authorities under the government of India as well as the State Governments. The basic objective of the Right to Information Act is to empower the citizens, promote transparency and accountability in the working of the Government, contain corruption, and make our democracy work for the people in real sense.<sup>1</sup> With enforcement of RTI, all entities became vigilant that they should keep their records transparent.

**B. Accounting Standards-** The Institute of Chartered Accountants of India, recognizing the need to harmonize the diverse accounting policies and practices, constituted Accounting Standard Board (ASB) on 21st April 1977. 'Accounting Standards' means the standard of accounting recommended by the ICAI and prescribed by the Central Government in consultation with the National Advisory Committee on Accounting Standards(NACAs) constituted under section 210(1) of Companies Act, 1956.<sup>2</sup> According to The Institute of Chartered Accountants of India, the list of accounting standards mandatory as on 1st July, 2017 is as follows:

- AS 1 Disclosure of Accounting Policies
- AS 2 Valuation of Inventories
- AS 3 Cash Flow Statements
- AS 4 Contingencies and Events Occurring After Balance Sheet Date
- AS 5 Net profit or Loss for the period, Prior Period Items and Changes in Accounting Policies

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1 <https://rti.gov.in/>.

2 <https://www.saralaccounts.com/blogs/indian-accounting-standards/>.

- AS 7 Construction Contracts
- AS 9 Revenue Recognition
- AS 10 Property, Plant and Equipment
- AS 11 The Effects of Changes in Foreign Exchange Rates
- AS 12 Government Grants
- AS 13 Accounting for Investments
- AS 14 Accounting for Amalgamations
- AS 15 Employee Benefits
- AS 16 Borrowing Costs
- AS 17 Segment Reporting
- AS 18 Related Party Disclosures
- AS 19 Leases
- AS 20 Earnings Per Share
- AS 21 Consolidated Financial Statements
- AS 22 Accounting for Taxes on Income
- AS 23 Accounting for Investments in Associates
- AS 24 Discontinuing Operations
- AS 25 Interim Financial Reporting
- AS 26 Intangible Assets
- AS 27 Financial Reporting of Interests in Joint Ventures
- AS 28 Impairment of Assets
- AS 29 Provisions, Contingent Liabilities and Contingent Assets<sup>3</sup>

Sub Section(3A) to section 211 of Companies Act, 1956 requires that every Profit/Loss Account and Balance Sheet shall comply with the Accounting Standards. Both the preparation and presentation should comply with the accounting standards.

**C. GAAP-** For the purpose of preparing financial statements and to bring uniformity, a set of accounting rules, principles, and conventions have been generally agreed upon by the accounting professionals, known as Generally Accepted Accounting Principles (GAAP). Some of these

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3 [https://www.icaai.org/post.html?post\\_id=8660](https://www.icaai.org/post.html?post_id=8660)

GAAPs are enshrined in the Accounting Standards issued by Institute of Chartered Accountants of India. For example, Accounting Standards (AS)-1 Disclosure of Accounting Policies issued by the Institute of Chartered Accountants of India covers a number of accounting conventions and principles that must be followed in preparation of financial statements: going concern, consistency, accrual concept, etc. GAAPs in India are influenced by the Ministry of Corporate Affairs, ICAI, SEBI, RBI, CAG and provisions of Indian Companies Act, Income Tax Act, etc.

**D. Auditing-** Due to the complexity of accounting framework, GAAP, and IFRS and the ongoing increasing fraudulent cases by companies, there is an increasing need of auditing. To ensure that the information provided in the financial statements are of high quality and are acceptable worldwide, the Auditing and Assurance Standards board under the council of Institute of Chartered Accountants (ICAI) have formulated few Standards,<sup>4</sup> namely

- i. Standards of Quality Control (SQC)
- ii. Standards on Auditing (SAs)
- iii. Standards on Review Engagements (SREs)
- iv. Standards on Assurance Engagements (SAEs)
- v. Standards on Related Services (SRSs)

Also, the Securities and Exchange Commission requires that all entities that are publicly held must file annual reports with it that are audited.<sup>5</sup> So, the report of an independent auditor/auditing firm must accompany the financial statements before making them available to the interested parties. By confirming to these standards, auditing brings fairness and reliability to the financial statements.

So, the legal framework of our country has provided a number of laws and institutions to better regulate the disclosure of information. General disclosures in the Annual Report can be grouped into four categories – Requirements as per the Listing Agreement with Stock Exchanges, Requirements as per the Companies Act, 2013, Additional Disclosures mandated as per accounting standards and Voluntary Disclosures. In addition to the mandatory disclosures required by various bodies, certain additional disclosures are being made by the companies on voluntary

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4 <https://cleartax.in/s/standards-on-auditing>.

5 <https://www.accountingtools.com/articles/what-is-a-financial-statement-audit.html>.

basis (such as human resource valuation, economic value added) so as to increase the transparency and improve investment decision making of investors. Convergence of Indian Accounting Standards (IAS) with International Financial Reporting Standards (IFRS) has already gained momentum in phased manner since April 1, 2016. This has been done to ensure uniformity and transparency in reporting standards worldwide. Without the support of legal framework in our country, transparency in financial statements could not be made mandatory.

### **Suggestions (What still needs to be done?)**

A lot has been done to promote and enforce transparency, but still there is a need to focus on the ways the companies adopt to escape their responsibility so that we can find the solutions. There is a need to refocus on the structuring of financial transactions such that they are in compliance with GAAP so that the proper interpretation of financial statements can be communicated to its users. The use of hidden entries and complex accounting and financial terms should be minimized, and both favourable and unfavourable sides should properly be elaborated. Accounting standards strictly need to be followed. Independent auditor's report should always accompany the financial statements. The audit committees and the Board of Directors must acknowledge that whatever information is communicated, is true and fair. Strict and heavy penalties should be imposed to bring about more accountability.

Sometimes, the companies follow the practice of off-balance sheet financing, thereby presenting a misleading picture of their total debt. It is an accounting practice in which the liabilities are kept off from balance sheet, i.e., a company does not include a liability on its balance sheet. For example, if the company buys the equipment or building, the company records the asset (the equipment) and the liability (the purchase price). By using the operating lease, the company records only the rental expense, which is significantly less than the entire purchase price and results in a cleaner balance sheet.<sup>6</sup> Some examples of OBS financing item are joint ventures, partnerships, operating leases, etc. By following OBS financing, the companies do show reduced liability in the balance sheet, making it more appealing to the investors than it actually is. Under current accounting rules, the disclosure of OBS is not mandatory. Although some rules are there, governing how they can be used, there is only partial disclosure of them. So, even after complying with all the accounting standards and

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<sup>6</sup> <https://www.investopedia.com/articles/investing/071513/understanding-offbalance-sheet-financing.asp>.

GAAP, the companies can mislead the users of financial statements.

The investors need to be more vigilant while analyzing the documents. They must look for the keywords (such as operating lease, partnerships, etc.) which indicates the use of OBS financing. Some disclosures as per accounting standards should be made in footnotes. A keen understanding about company's financial statements can be achieved after clarifying from the company's management if and to what extent the OBS financing agreements have been used. So, the understanding of OBS arrangements needs to be instilled in the users of financial information.

Besides all these, there is a need to instill the ethical awareness in the individuals so that they themselves do not adopt the deceitful practices. It is time for regulatory bodies that they bring more transparency and accountability in financial transactions by strict enforcement of accounting standards and by closing all the possible loopholes. What is currently being done is not enough, and some more strict actions and monitoring and ethical awareness need to be adopted to bring transparency and accountability in financial transactions.

### **Conclusion**

The financial transactions are involved in every sphere of human life, and the scenario of our economy depends upon the degree of transparency and accountability in these financial transactions. So, strict supervision, guidance, and evaluation are needed for the proper implementation of transparency and accountability in financial transactions. This is possible only when legal authorities play their role by enforcing strict laws and penalizing those who do not follow the norms of being transparent, and the administration of justice regarding this should also be transparent and accountable.

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# TRIPLE TALAQ: JUDICIARY IN DEFENSE OF MUSLIM WOMEN'S RIGHT TO EQUALITY

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Arti Sharma\*

## Abstract

*Right to equality is a right protected under article 14 of the Constitution of India. The concept of equality strikes at arbitrariness. Where an act is arbitrary, it is against the principle of equality and the Constitution of India. In Shayara Bano case, the Hon'ble Supreme Court of India has acted as the guardian and protector of the fundamental right to equality of Muslim women, by declaring 4000 years old custom of triple talaq as arbitrary and unconstitutional, hence invalid. Although the practice is banned by the Supreme Court of India, but it is still adopted by Muslim husbands, unabatedly, to pronounce talaq upon their wives. In the backdrop of such situation it is necessary to ascertain the available rights and remedies to Muslim women. Thus, this article focuses on different modes of talaq, evil effects of triple talaq, discourse taken by judiciary to ban the practice of triple talaq, the Ordinance promulgated by the President of India and concludes with the rights and remedies available to Muslim wife in case her husband arbitrarily pronounces triple talaq upon her.*

**Keywords: Muslim Women, Right to Equality, Talaq, Triple Talaq.**

## Introduction

Right to equality is a fundamental right guaranteed under part III of the Constitution of India. It is fundamental because it is a basic right, essential for the overall development of the human personality. This right is available to every person by birth, irrespective of their caste, sex, religion, race, place of birth, etc. and so is available to Muslim women. Article 14, of the said part mandates that "the state shall not deny to any person equality before law and equal protection of laws within the territory of India" and article 15(1), mandates that "the state shall not discriminate against any citizen, on the grounds only of religion, race, caste, sex or place of birth or any of them". Nevertheless, there are still grey areas under Muslim Personal law where the invidious discrimination against Muslim women continue to exist; firstly, under section 24 of the Hindu Marriage Act, 1955, a divorced Hindu woman or a judicially separated wife is entitled to claim maintenance from her husband until she does not

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remarry or is not subject to disqualifications as mention under section 25 of the Hindu Adoption and Maintenance Act, 1956. Beside this, she is also entitled to claim maintenance from her husband under section 125 of the Code of Criminal Procedure, 1973. But, as per section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986, a Muslim woman can claim maintenance from her husband within iddat period, which is three months. Apart from this, she is also not entitled to claim maintenance under section 125 of the Cr.P.C, from her husband without a declaration from him under section 5 of the Muslim Woman (Protection of Rights on Divorce) Act, 1986.<sup>1</sup> Secondly, the provisions relating to divorce under Muslim Personal law confers on the husband 'unilateral and exclusive' right to pronounce talaq upon his wife, which he can exercise without rhyme and reason, according to his whims and caprice in arbitrary manner, even without giving an opportunity to the wife. But such is not the case in all the other communities.<sup>2</sup> To exemplify, under section 13 of the Hindu Marriage Act,1955, either 'husband or wife' on a petition presented to 'the competent court' may get the marriage dissolved on 'specified grounds' as mentioned in the said section.

At this juncture, it can be deduced that the plight of Muslim women is pathetic due to the existing provisions relating to talaq, which confer upon the husband unilateral power to pronounce talaq, which he can exercise without the intervention of the courts and without rhyme and reason, according to his whims and caprice in arbitrary manner, even without providing an opportunity to the person going to be affected adversely.

### **Talaq: The Husband's Power to Dissolve Marital Tie**

Talaq is an Arabic word meaning divorce.<sup>3</sup> It carries the literal significance of "freeing or the undoing of a knot".<sup>4</sup> Under Islamic law, when divorce proceeds at the instance of the husband, at his will and without the intervention of the court, it is called Talaq. Talaq, namely, divorce at the instance of husband, is of two kinds; talaq-e-sunnat and talaq-e-biddat. Talaq-e-sunnat may further be divided into two kinds: talaq-e-ahsan and talaq-e-hasan.

Talaq-e-ahsan is a single pronouncement of talaq made during the period of tuhr (period between two menstruation courses), by the husband,

1 Mohd. Umar Khan v. Gulshan Begum, 1992 Cr.L.J. 899(MP).

2 See Hindu Marriage Act, 1955, no. 25 of 1955, 13, The Special Marriage Act, 1954, no. 43 of 1954, 27, The Divorce Act, 1869, No. IV of 1869, 10, The Parsi Marriage and Divorce Act, 1936, No.III of 1936, 32.

3 Sri Jiauddin Ahmed vs Mrs. Anwara Begum, (1981)1Gau LR 358.

4 Must. Rukia Khatun vs. Abdul Khalique, (1981)1Gau LR 375.

followed by a period of abstinence called iddat. The duration of iddat, in case of divorce, is ninety days or three menstrual cycles or three lunar months (in case wife is not subject to menstruation). If the couple resumes cohabitation, within the period of iddat, the pronouncement of divorce is treated as having been revoked.<sup>5</sup> Thus, talaq-e-ahsan is revocable. Conversely, if there is no resumption of cohabitation within the period of iddat then the divorce becomes final and irrevocable after expiry of the said period of iddat. It is considered irrevocable because, the couple is forbidden to resume marital relationship thereafter, unless they contract a fresh nikah with a fresh Mahr.<sup>6</sup>

In talaq-e-hasan, the formula of divorce is successively pronounced thrice during a tuhr. After the pronouncement of talaq, if there is resumption of cohabitation within a period of one month, the pronouncement of talaq is treated as having been revoked.<sup>7</sup> The same procedure is adopted after the expiry of the first month, if the marital ties have not been resumed. Likewise, the second pronouncement of talaq may be revoked by resumption of cohabitation within a period of one month. The first and second pronouncement of talaq may be revoked by the husband either expressly or by resuming cohabitation and talaq pronounced by the husband becomes ineffective, as if no talaq had ever been expressed.<sup>8</sup> But if first and second pronouncements have not been revoked and the husband pronounces third talaq it becomes irrevocable and the marriage stands dissolved irrespective of the period of iddat. Where after, the wife has to observe the required iddat and the husband and wife cannot remarry unless the wife performs nikah halala.

Talaq-e-biddat is the second form of talaq pronounced by the husband. It is recognized by Hanafi sect of Sunni Muslims. In talaq-e-biddat one definitive pronouncement of talaq such as, I talaq you irrevocably or three simultaneous pronouncements like talaq, talaq, talaq is uttered at the same time, simultaneously.<sup>9</sup> Talaq-e-biddat becomes effective immediately as soon as it is pronounced without giving a chance to the husband to revoke it. Thus, there is no chance of reconciliation. It becomes irrevocable the very moment it is pronounced. Thereafter, the wife has to observe the period of iddat and the parties are barred to remarry unless wife performs nikah halala.

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5 *Supra* note 8 at 4.

6 *Id.*

7 *Id.*

8 *Id.*

9 *Supra* note 9 at 4.

## Incidents of Triple Talaq

The practice of triple talaq permitting unilateral and exclusive right to divorce, without rhyme or reason, according to whims and caprice in arbitrary manner, have the effect of placing and casting havoc and disastrous effects on the life of the husband, wife and children born to the couple. The case of *Saiyid Rashid Ahmed v. Anisa Khatun*,<sup>10</sup> is a case which illustrates, how terrifying, terrible, how harsh to the poor woman, her children and many a times to the husband, is the effect of triple talaq. In the instant case plaintiffs were the brother and sister of the Ghiyas-ud-din, who would have been the heirs, if respondent's no. 1 to 6 were unable to establish their claim to be widow and legitimate children. The dispute related to the succession to the estate of Ghiyas-ud-din, a Muhammadan, who died on April 04, 1920. On September 13, 1905 he pronounced the triple talaq in the presence of the witnesses, though in the absence of his wife. Though, the later received Rs. 1000 as a payment of her dower on the same day for which a registered receipt was produced. There was also prepared a talaqnama, a deed of divorce on September 17, 1905. Anisa Khatun – respondent no.1, challenged the validity of divorce on two grounds that the divorce was pronounced in her absence and second that after divorce Ghiyas-ud-din and she lived as husband and wife for fifteen years and five children were born to the couple. Thus, Ghiyas-ud-din did not intend to divorce her. The Privy Council held that triple talaq pronounced in the absence of wife by Ghiyas-ud-din was valid and immediately effective. The validity and effectiveness of the talaq would not be affected by Ghiyas-ud-din's mental intention. Further, since the respondent had not undergone nikah halala after divorce, the Privy Council held that she was not legally married to Ghiyas-ud-din and the children born were held to be illegitimate, resulting in rejection of her claim for succession.

Again, in *Sarabai v. Rabiabai*,<sup>11</sup> one Haji Adam Haji Sidick, a suni mussulman taking with him two attesting witnesses went to Mahomed Ali Murghay, who was the Kazi of Bombay and there pronounced the divorce of the plaintiff and had talaqnama written out by the Kazi which talaqnama, Adam and his witnesses signed. Soon after divorce Adam died. Assuming her to be the widow, Sarabai brought this suit against the estate for maintenance and residence. The defendants - widow and daughter resisted the claim on the ground that the plaintiff was validly divorced by Adam. Sarabai challenged that she had no knowledge of any such divorce and that, if in fact, she was divorced then, the divorce was invalid under

10 *Saiyid Rashid Ahmed v. Anisa Khatun*, AIR 1932 PC 25.

11 *Sarabai v. Rabiabai*, (1905)30 Bom.L.R.537.

the Mahomedan Law, but the Bombay High Court refused to accept her contentions and held Triple talaq on irrevocable footing. Hence, her claim for maintenance and residence was rejected.

As also in, *Fulchand v. Nazab Ali Chowdhry*,<sup>12</sup> the claim for the deferred portion of Moharana provided for by a Kabinnaah was dismissed and the court held that Talaq pronounced in the absence of wife, though in the presence of various witnesses including the wife's father is valid.

Again, in *Asha Bibi v. Qadir Ibrahim Rowther*,<sup>13</sup> the suit for restitution of conjugal rights filed by respondent husband failed on the ground that the talaq addressed to father, though in the absence of the wife but referred to wife, is a valid talaq.

The husband's sudden and irrational act of divorcing his wife without rhyme or reason by pronouncing triple talaq on the spur of moment in one sitting, brings all sorts of disasters and calamity to her. This act rendered her without any substantial source of maintenance, deprived her of right of maintenance and made the life of women miserable till she did not remarry someone else and also in the case, when she wants to remarry her husband who has pronounced triple talaq but could not validly remarry each other without the wife undergoing the custom of nikah halala. It also made the life of her children miserable, as in the case of Saiyad Rashid Ahmed, where the husband and wife divorcing each other, after peace and calm thinking tried to retract their steps and later started a new life of their own as husband and wife and as a result, thereof, children were born.<sup>14</sup> The clouds of ill fate shadowed their lives because the Privy Council held that the legal bar created by divorce in irrevocable form of talaq-ul-biddat negatives the legitimacy status of those children, unless the children prove that their mother had undergone halala after divorce from her husband i.e. father of these children.<sup>15</sup> These realities lead one to think that the unilateral and unbridled power to divorce by pronouncing triple talaq i.e., talaq-e-biddat, appears to be contrary to the provisions of article 14 of the Constitution of India.

### **Triple Talaq: Judiciary in Defense of Muslim Women's Right to Equality**

Although, triple talaq is recognized and enforced by Indian judiciary since

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12 *Fulchand v. Nsab Ali Chowdhry*, (1909)36Cal.184.

13 *Asha Bibi v. Qadir Ibrahim Rowther*, (1910) 3Mad.L.R. 22.

14 *Supra note 4* at 3.

15 *Id.*

inception, as early as, in 1905 in the case of *Sarabai v. Rabia Bai*<sup>16</sup>, the Bombay High court recognized triple talaq on irrevocable footing. Again, the Privy Council in the case of *Saiyid Rashid Ahmed v. Anisa Khatun*<sup>17</sup> recognized triple talaq pronounced in the absence of wife validly effective. Also, in *Kathiyumma v. Urathel Marakkar*,<sup>18</sup> Privy Council held that mere statement by a husband in pleadings filed in answer to petition for maintenance by wife, that he had already divorced the petitioner, operates as divorce.

However, in *Jiauddin Ahmed and Rukia Khatun* cases, the Guahati High Court insisted on the fact that the husband must satisfy the court about the reasons for divorce and that there was an attempt at reconciliation preceding talaq. By doing so, the courts reduced the husband's proclivity to pronounce talaq.<sup>19</sup>

In *Jiauddin Ahmed*<sup>20</sup> case a plea of previous divorce i.e. the husband having divorced the wife on some day much previous to the date of filing of the written statement in the court was taken and upheld by the lower Court. The question for consideration before the High Court was whether there has been a valid talaq of the wife by the husband under the Muslim Law? The learned judge expressed his disapproval of the statement that, "the whimsical and capricious divorce by the husband is good in law, bad in theology" and observed that such a statement is based on the concept that women were chattel belonging to men which the Holy Quran does not brook. The court held that, the correct law of Talaq, as ordained by the holy Quran, is that a Talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters, one from wife's family and the other from the husband's; if the attempts fail, Talaq may be effected.

Also in *Rukia Khatun*<sup>21</sup> case, the division bench stated that the correct law of Talaq, as ordained by the Holy Quran, is: 1. that talaq must be for a reasonable cause; 2. that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his.

In 2002, the above said observations of the High courts have been endorsed

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16 *Supra* note 17 at 6.

17 *Supra* note 16 at 6.

18 *Kathiyumma v. Urathel Marakkar*, (1931) 133 I.C. 375.

19 *Supra* note 3 at 3.

20 *Supra* note 9 at 4.

21 *Supra* note 10 at 4.

by the Supreme Court and finally culminated in Shamim Ara<sup>22</sup> case. In the instant case, the question before the Apex court was whether the appellant/wife can be said to have been divorced on July 11, 1987 and that the said divorce communicated to the appellant so as to become effective from December 5, 1990, the date of filing of the written statement by the respondent/husband? The Apex court observed that the respondent/husband had vaguely made certain generalized accusations against the wife/ appellant. The particulars of the alleged talaq were neither pleaded nor the circumstances under which and the persons, if any, in whose presence talaq was pronounced had been stated. Such deficiency continued to prevail even during the trial and the respondent/ husband except examining himself adduced no evidence in proof of talaq said to have been given by him on July 11, 1987. There were no reasons substantiated in justification of talaq and no plea or proof that any effort at reconciliation preceded talaq. Thus, the court held that neither the marriage between the parties stands dissolved on July 11, 1987 nor the husband's liability to maintain comes to an end.

Again, in Masroor Ahmed<sup>23</sup> case, Justice Badar Durrez Ahmed, held that in circumstances where there is: 1. no evidence of pronouncement of talaq. 2. no reason and justification of talaq. 3. no plea or proof that talaq was preceded by efforts towards reconciliation of the marriage, was not dissolved and that the liability of the husband to pay maintenance continued. Also, in, *Nazeer @ Oyoor Nazeer v. Shemeema*,<sup>24</sup> the High Court of Kerala has inter alia referred to Shamim Ara and has disapproved triple talaq.

Thus, after Shamim Ara, the position of law relating to talaq, where it is contested by either spouse, is that, if it has to take effect, first of all the pronouncement of talaq must be proved (it is not sufficient to merely state in court in a written statement or in some other pleading that talaq was given at some earlier point in time), then reasonable cause must be shown as also the attempt at reconciliation must be demonstrated to have taken place.<sup>25</sup>

In August 2017,<sup>26</sup> finally the five-judge constitutional bench of the Supreme Court by 3:2 majority set aside the practice of triple talaq. Two out of three assenting judges expressed that they are in respectful agreements

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22 *Shamim Ara v. State of UP & Anr*, (2002)7 SCC 578 (India).

23 *Masroor Ahmed v. State (NCT of Delhi)*, (2008) 103 DRJ 137 (Delhi).

24 *Nazeer @ Oyoor Nazeer v. Shemeema*, (2017) 1 KLT 300 (Kerala).

25 *Supra note 8 at 4.*

26 *Id.*

with the observations made by the learned judges in Jiauddin Ahmed and Rukhia Khatun's case and further observed that, triple talaq is instant and irrevocable. It is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital ties, cannot ever take place, also, as understood by the Privy Council in Rashid Ahmed's case, such triple talaq is valid even if it is not for any reasonable cause. It is clear that, this form of Talaq is manifestly arbitrary in the sense that the marital ties can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. Thus, the judges held that, this form of talaq must, therefore, be held to be violative of fundamental right contained in article 14 of the Constitution of India. The judges further held that the Muslim Personal Law (Shariat Application) Act, 1937 in so far as it seeks to recognize and enforce triple talaq, is within the meaning of the expression Laws in force in article 13(1) and must be struck down as being void to the extent that it recognizes and enforces triple talaq.

The third assenting judge expressly endorsed and reiterated the law declared in Shamim Ara case and held that what is held to be bad in Holy Quran cannot be good in Shariat and in that sense what is bad in theology is bad in law as well. The judge further said that after the introduction of the 1937 Act, no practice against the tenants of Holy Quran is permissible. Hence, there cannot be any constitutional protection to such a practice.

### **The Muslim Women (Protection of Rights on Marriage) Ordinance, 2018**

After Supreme Court's judgment in Shayara Bano case, the practice is still adopted by the Muslim husband to divorce their wife's. This is evident by the news flashed by the times of India, on August 05, 2018 whereby it is alleged that two women of Sambhal area in Uttar Pradesh were allegedly divorced by triple talaq. In order to prevent continued harassment to helpless married Muslim women due to talaq-e-biddat, the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 was promulgated by President of India after being approved by the Union Cabinet on 19th September, 2018. Earlier the Muslim Women (Protection of Rights on Marriage) Bill was introduced in Lok Sabha on December 28, 2017 but the same got lapsed in the Rajya Sabha. According to the Ordinance, "Talaq means talaq-e-biddat or any other similar form of talaq having effect of instantaneous and irrevocable divorce pronounced by a Muslim husband". The Ordinance makes pronouncement of talaq by a Muslim husband upon his wife by words, either spoken or written or in electronic form or in any other manner whatsoever to be void and illegal. The Ordinance makes

pronouncement of talaq-e-biddat a punishable offence. The punishment for pronouncement of talaq-e-biddat is imprisonment which may extend to 3 years and shall also be liable to fine. The Ordinance also provides for the subsistence allowance from the husband for the livelihood and daily supporting needs of the wife and dependent children. The wife would also be entitled to custody of minor children.

## Conclusion

To conclude we can say that, now if the Muslim husband pronounces triple talaq and the victim Muslim wife, approaches the Court, then she would be considered as his legally wedded wife and the legal consequences of valid marriage would ensue. She would have the following rights and remedies;

1. Maintenance under the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018: Muslim wife can claim maintenance for herself and her children under the Ordinance as per section 5 and 6, respectively.
2. Maintenance under the Code of Criminal Procedure, 1973: the Muslim wife may apply for the maintenance order for herself and for her children, under section 125 of the Cr.P.C, if her husband having sufficient means neglects or refuses to maintain her and her children.
3. Cohabitation between the couple is perfectly valid and the children born to them, in circumstances as mention in the Rashid Ahmend case,<sup>27</sup> would be considered legitimate and would be entitled to inherit their father's property.
4. Mutual rights of the parties to inherit the property of each other would continue.
5. Nikah halala: As per section 336(5),<sup>28</sup> where the marriage is dissolved by section 311(1) i.e. by talaq-e-biddat, it was not lawful for the husband to marry his wife again until she has married to another man and the latter has divorced her or died after actual consummation of the marriage. But, since the practice of talaq-e-bibbat is declared void in Shayara Bao case,<sup>29</sup> consequently the Muslim wife would not be required by law to undergo the practice of nikah halala even if her husband pronounces triple talaq upon her and latter retreats his step and starts living with her.

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<sup>27</sup> *Supra* note 16 at 5.

<sup>28</sup> Mulla, Sir D.F., *Principles of Mohamedan Law*, 429, (22nd ed. 2017).

<sup>29</sup> *Supra* note 8 at 4.

## Suggestions

As per, article 123 of the Constitution of India, an ordinance is promulgated when both the houses of Parliament are not in session and if at any such time an ordinance is promulgated under the said article, it has the same force and effect as an Act passed by the Parliament [article 123(2)] but, every such ordinance shall cease to operate either at the expiration of six weeks from the reassemble of Parliament or if before the expiration of the said period the resolutions disapproving it are passed by both the houses. To put it in another way, the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 was passed in exercise of the powers conferred by clause (1) of Article 123 when the Parliament was not in session. Now when the parliament has come in session, it would either pass the ordinance turning it into an Act or disapprove the ordinance. Thus, it is recommended that Parliament should pass the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 and turn it into an Act to ameliorate the plight of Muslim women.

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# GST AS A TOOL TO CURB BLACK MONEY

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Shweta Desai\* Kumkum Shah\*\*

## Abstract

*The step for implantation of Goods and Service Tax has proved to be a historical move in India that has carved a significant reform from the indirect taxation treatment in the country. The amalgamation of a number of taxes which were levied previously at the Central as well as State level into one single tax is expected to bring a big change in the curbing the black money that is existing inside the system and is said to have large number of advantages. The Goods and Service tax policy due to its transparent nature is easy to administer on overall scale. Goods and Service Tax will not only help as a tool to remove the cascading effects of taxes but will set up an initiative to curb the black money. The tools such as itemized and documented chains, uniform tax collection system, simple and transparent procedure, dual monitoring system, sectors that are alleged responsible can help in curbing black money. The Goods and Service Tax if implemented successfully and in correct way will help the Indian economy considerably. It will not only facilitate the interests of the people but will also promote financial accountability by curbing black money marketeering and the inflow of illegal cash into the Indian Financial Market.*

**Keywords: Tax Evasion, Goods and Service Tax (GST), Taxation Reforms, Black Money.**

## Introduction

The word 'Tax' is derived from a Latin word 'Taxare' which means to estimate. Tax can be defined as a pecuniary burden which is laid upon the individuals or property owners to support the government, it is a payment exacted by the legislative authority.<sup>1</sup> It is basically kind of an imposed contribution, and is made compulsory by the government, either under the name of toll, tribute, duty, custom, excise, subsidy, aid, supply or any other name.<sup>2</sup> The 101st Constitutional Amendment, Act, 2016 which was

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1 Naseema P.K., History, *Constitutional Framework and Evolution of Indian Tax system and Goods and Services Tax*-A study, Bharti Law Review (2016), <http://docs.manupatra.in/newsline/articles/Upload/197FAA37-956C-4573-8F58-20464016819D.pdf>.

2 Anand Nayyar, Inderpal Singh, *A Comprehensive Analysis of Goods and Services Tax (GST) in India*, Indian Journal of Finance (2018) [https://www.researchgate.net/publication/323007997\\_A\\_Comprehensive\\_Analysis\\_of\\_Goods\\_and\\_Services\\_Tax\\_GST\\_in\\_India](https://www.researchgate.net/publication/323007997_A_Comprehensive_Analysis_of_Goods_and_Services_Tax_GST_in_India).

implemented in 2017 is a landmark reform brought in the taxation regime of India to boost the Gross Domestic Production and introduce a more effective tax regime for the tax payers. It is a comprehensive tax, levied on manufacture, sale and the consumption of goods and services in the country. This new regime is a win- win position for the entire nation as it tends to lower down the costs of goods and services to give a boost up to the economy and make the services and products competitive at global level. In a way this subsuming of most of the central and state taxes into a single tax and by allowing the set-off of prior-stage taxes for the transactions across the entire value chain, this would lessen the ill effects of cascading taxation and improve competitiveness in the market.

Conventionally India had been following a tax regime which relied heavily upon indirect taxes, which had a cascading effect; it hampered productivity by distorting tax on production of goods and services. There was endless number of taxes present in the system levied by either Center or State, hence in order to remove this multiplicity GST was brought in. The existence of so many taxes, in a way was also triggering the activities of tax evasion and mal practices of corruption and was one of the reasons behind the black money circulating in the system. This amalgamation of various taxes which were levied previously by both Centre and State into one single tax has curbed and thrown light on activities which act as loop holes giving entry to black money and is likely to bring more change in the curbing the black money which is circulating in the system. The GST due to its transparent nature facilitates easy administration on an overall basis in the country. It will not only help as a tool to remove the cascading effects of taxes<sup>3</sup> but will also help to curb the black money.<sup>3</sup>

The multi layered tax system that was implemented earlier followed a concept of narrow base of 'pass through' taxes, the benefits to keep the transactions outside the books of account was significant, especially in some segments of the society. This would usually trigger the other areas of evasion particularly at the supplier's end such as income tax and other statutory taxes. Now this sector is within the ambit of Goods and Service Tax where sale and leasing of commercial properties attracts Goods and Service Tax the most. Now this input of Goods and Service Tax that is paid is set off and this forces the need for the purchaser to look out for the suppliers who would sell on cash basis. One of the major reasons behind adopting this new regime was also that once this cash component in the economy reduces, it would directly result into eviction of black money; to some extent this has even yielded good results. Earlier the discretionary

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3 GST- A Brief Introduction by LVR Prasad and GJ Kiran Kumar, (2017).

powers with the authorities was quite high but now this new regime puts a strong root for uniform and stable tax policies, the element of discretion gradually reduces. This means lesser the discretion lesser the amount of corruption. Further by increasing the role of technology has brought in transparency and lessened the physical control of the authorities, since most of the tax filing applications is now online. Hence, the GST was adopted with a view that it will not just help as a tool to eliminate the cascading effects of the taxes but will also set up an initiative to eliminate black money from the Indian economy. Tools like documented and itemized chains, uniform tax collection system, simple and transparent procedure, dual monitoring system, sectors that are the alleged to be responsible and can help in eliminating black money from the market. The GST since its implementation has brought in transparency; it has not only facilitated the interests of people but has also promoted financial accountability by curbing the practice of black money marketeering and inflow of illegal cash into the Indian Market.<sup>4</sup>

So, the authors in this article will discuss the key features of the Goods and service tax regime, the historical background of taxation and the financial relations between the center and the state and how this whole revamping of taxation regime is helping curb the giant black money.

### **Historical Background of GST**

The concept of GST first gained attention in the year 2000, when Atal Bihari Vajpayee created an Empowered Committee constituting finance ministers from all the states to review GST. The committee was headed by Asim Dasgupta, the finance minister of West Bengal. Later the same idea was made to unify indirect tax in the form of GST. However later in 2007 the Empowered Committee of state finance commission was re-constituted, to analyze the impact of GST on revenue of different states of India and implementation of the Goods and Service Tax regime, further in the year 2008-09, The Kelkar Task force in its report gave a model and a roadmap for Goods and Service Tax implementation in India. The proposed date to implement was 1<sup>st</sup> April, 2010.<sup>5</sup> In 2011, the 115<sup>th</sup> Constitution Amendment Bill was introduced for the levy of GST on all goods and services in the Lok Sabha.<sup>6</sup> However, various oppositions against this bill were raised by the opposition party and various States as well, and hence

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4 Pradip Kumar Das, *an Insight into Black Money and Tax Evasion- Indian Context*, 3(4) Journal of International Business Research and Marketing, (2018).

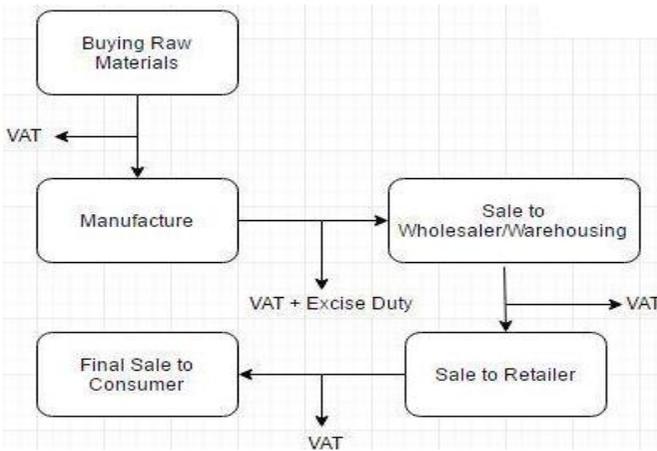
5 History of GST, <https://www.gstindia.com/history-of-gst/>.

6 Concept and Status of GST, CBIC, <http://www.cbic.gov.in/resources/htdocs-cbec/gst/01022019-%20GST-Concept%20and%20Status.pdf;jsessionid=17AB96727DCE3FF190223C4AEC9C5363>.

the amendment bill lapsed in the year 2014. Soon after, Shri Narendra Modi became the Prime Minister of India and the Finance Minister Arun Jaitley introduced 122nd Amendment Bill, 2014 in the Parliament.<sup>7</sup> In 2016, the Bill finally got the assent of the President of India and it became an Act in September, 2016. In September, 2016, first GST Council was conducted. In March 2017, four GST bills; including CGST, SGST, IGST and GST for Union Territories was introduced by the government and on 30th June, 2017 the Finance minister, Arun Jaitley announced that GST regime will be adopted on the lines of the night of Independence, on the midnight of June 30, 2017.<sup>8</sup>

**Concept of GST**

GST basically is a comprehensive indirect tax levied on manufacture, sale and consumption of goods as well as services at national level. The main objective is to consolidate all the indirect taxes and levy a single tax, except on customs, replacement of multiple tax levies, overcoming the limitations of existing tax structure and increasing efficiency in tax administration. The Goods and Service tax is basically triggered by the supply of goods or services. Now under the GST regime, the tax is levied at every point of sale:<sup>9</sup>



Now let us try to understand the definition of Goods and Service Tax – “GST is a comprehensive, multi-stage, destination-based tax that will be levied on every value addition.”

7 *ibid.*

8 Genesis, Goods and Services Tax Council, <http://www.gstcouncil.gov.in/brief-history-gst>.

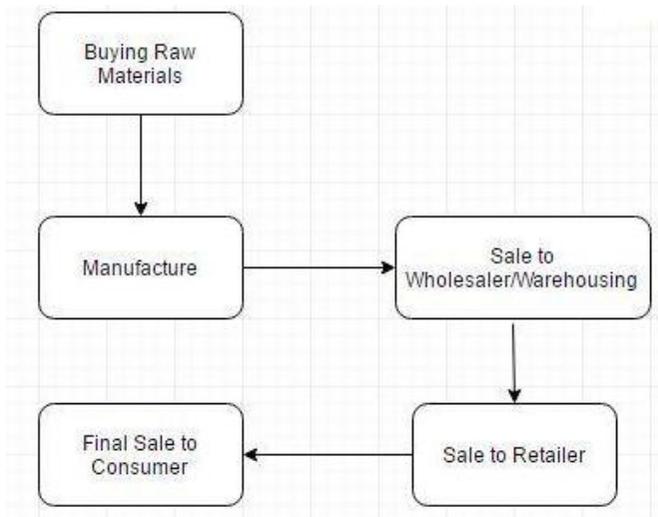
9 <https://cleartax.in/s/gst-law-goods-and-services-tax>.

**Multi-stage**-There are multiple change-of-hands an item goes through along its supply chain: from manufacture to final sale to the consumer.

Let us consider the following case:

- Procurement of raw materials
- Manufacture or production
- Warehousing of finished goods
- Sale to the wholesaler
- Sale to the retailer
- Sale to the end consumer

The tax will be levied on each of the stages where values additions are made; this makes GST a multi-stage tax.



**Destination based Tax-** A destination or consumption-based tax means that the place of consumption will decide the State that will collect tax. This type of tax is a boon for all the less developed states whose consumption is more than what they produce. In this regime the tax rate of the consumer state is applied on the sales of the products, however it may act as a problem in case of sales- in –transit. For example, ‘A’ a manufacturer of goods in Gujarat sells his goods to ‘B’ a buyer from Rajasthan, then in such case the tax will be levied and collected and accrue in Rajasthan, as it were consumed there.<sup>10</sup>

<sup>10</sup> *ibid.*

## Components of GST

Mainly there are three components which are applicable under GST regime: CGST, SGST and IGST.

- **Central Goods and Service Tax-** It is a tax which is collected by the Central government on intra-state sale of goods or services (i.e. within the boundaries of one State).
- **State Goods and Service Tax-** It is a tax which is collected by the State government on intra-state sale of goods or services (i.e. within the boundaries of one State).
- **Integrated Goods and Service Tax-** It is a tax which is collected by the Central government on inter-state sale of goods or services (i.e. from one State to another State).

## Present structure of GST

Before the implementation of GST, the Central government was having the power to levy customs duty, excise duty and service tax whereas the State government was having the power to levy Value Added Tax. Previously the Central government did not have the power to levy tax on sale of goods while the State government did not have the power to levy tax on service and manufacture of goods.

Now under the 122<sup>nd</sup> constitutional amendment it has amended various Articles in the Constitution of India and has provided powers to both i.e. the Central government as well as the State government in order to levy tax on supply which has included manufacture and sale.

The GST Act provides for levy of Central Goods and Service Tax on intra supply of goods and services. The State Goods and Service Tax provides for levy of tax on intra supply of goods and services. The Integrated Goods and Service Tax provides for levy of tax on inter-state supply of goods and services. In short, CGST and SGST are levied on intra-state supply of goods and services whereas IGST is levied on inter-state supply of goods and services. Each State government has enacted different statute for levy on supply of goods and service.

## Illustration

Let us take for example that Mr. X is a dealer who is residing in Gujarat has sold goods to a dealer Mr. Y who is residing in Punjab worth Rs. 50,000.

Firstly, the rate of GST is 18% which is applicable on IGST. In such case, the dealer will be charged Rs. 9,000 as IGST. This IGST revenue will go to the Central Government.

In the second case the same dealer Mr. X sell goods to a dealer Mr. Y in Gujarat only. The GST rate which is applicable on goods is 12%. This rate comprises of CGST at 6% and SGST at 6%.

This means that the dealer has to collect Rs. 6000 as GST out of which Rs. 3000 will go to Central government and Rs. 3000 will go to State government as the sale of goods is within the boundaries of the State.

### **Tax slabs under the GST Regime**

- **Zero % Tax slab-** There are certain common use goods on which are exempted from Goods and service Tax, such goods includes such as sanitary napkins, raw material used in brooms, deities made up of stones, marbles or wood, fortified milk, fruits, vegetables, curd, bread, salt, natural honey, bangles, judicial papers, newspapers and other common use goods.<sup>11</sup>
- **5 % Tax slab-** Most of the common use goods and fresh foods are exempted from tax but many other packaged foods, frozen vegetables, coffee and powdered milk, cashew nuts, fiber products, coal and some other goods fall under 5% tax slab. Along with these goods' certain services like restaurants, railways and air transport also fall under this slab.
- **12% Tax slab-** In certain cases goods fall into more than 1 category depending upon their value for example clothing which having priced above Rs. 1000 fall in under this slab but those apparels which are priced lower than Rs. 1000 fall under previous tax slab. Further, Ayurvedic medicines are covered in this slab however all other medicines like insulin etc. are covered in 5 % tax slab. This slab cover goods like spoons, fish knives, bells and state-run lotteries etc. fall under 12% slab.
- **18% Tax slab-** Service tax in this category includes air-conditioned hotels which serve liquor and also includes telecom, financial

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11 Goods and Service Tax (GST) Concept & Status, Central Board of Indirect Taxes and Customs (CBIC) Department of Revenue, Ministry of Finance, Government of India <http://www.cbic.gov.in/resources/htdocs-cbec/gst/01022019-%20GSTConcept%20and%20Status.pdf;jsessionid=17AB96727DCE3FF190223C4AEC9C5363>.

services and IT. Other goods like ice-cream, pastries, cakes, printers, optical fibers and corn flakes etc. In 2017, GST council moved 178 items form luxury tax slab to this slab.

- **28% Tax slab-** This slab covers luxury goods and services, only few goods and services like dishwashers, vacuums, club betting, cinema, five-star hotels etc.<sup>12</sup>

### **Advantages of Goods and Service Tax**

The taxpayers now pay an individual tax which is in form of GST as it is said to be the biggest and most important tax reform in India till now.

#### **i. One Tax System**

Only one tax is imposed due to the evolution of GST in spite of multiple other taxes being levied by the State and Central government. GST has replaced multiple taxes that were hidden and imposed by state government and has brought an ease in carrying business activity.

#### **ii. Easy Compliance**

The compliance under GST system has been made hassle free and transparent as the process which includes registration; returns, payments etc have been made online under the surveillance of Central government.

#### **iii. Identification of Product**

Under the previous tax collection regime, product classification was done into various categories by the government which created a lot of confusion and was also considered as a litigious issue. Now with the implementation of GST, it has solved this issue by bringing in “Harmonized System of Nomenclature” or HSN, which is an eight-digit code used to identify products as per international standards.

#### **iv. Eliminating tax on tax effect**

Before the implementation of GST various multiple taxes were levied on the same product again and again due to which the price of product gradually increased. But now the tax on tax

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12 Confused about revised GST rates? Here’s a quick guide, The Economic Times Jan 19, 2018, 11.40 AM IST, <https://economictimes.indiatimes.com/news/economy/policy/a-quick-guide-to-india-gst-rates-in-2017/articleshow/58743715.cms>.

effect has been eliminated by providing credit for the taxes paid.

#### **v. Regulation of unorganized sector**

The industries such as construction and textile were mostly unregulated and unorganized before the implementation of GST. But now various online provisions have been formed due to which the amount of input credit will be received back to the tax payer once the supplier has accepted the amount. Due to these provisions construction and textile industries have also come into the ambit of accountability of tax.<sup>13</sup>

### **Central and State Financial Relations**

Prior to the adoption of GST in the taxation regime, the fiscal powers between the Centre and States were undoubtedly separated in the Constitution of India and there was no overlapping between their respective subjects. However, in every federal country, as both the centre and the state are collecting the revenue from a same body of taxpayers, trouble arises in allocation of the revenues between the Union and the State. Majority of the beneficial and unrestrained sources of tax lie with the Centre.

In the Constitution of India Article 268-281 provide for the distribution of revenues between the Centre and the State. Centre had the power to levy tax on the manufacture of goods which excluded goods like alcohol for human consumption, narcotics, opium, etc, whereas the States had powers to impose tax on the sale of goods. In cases of interstate sales, Centre had the power to levy the tax however it was collected and retained by the State only.<sup>14</sup> But in case services only the Centre had the power to impose the Service Tax. As the States were not empowered to impose tax on sale or purchase of the goods in the course of their importation into or exportations from India earlier, the union levied and collected this tax is additional to the basic customs duty (BCD). This extra duty of customs (also known as CVD and SAD) counterbalanced the excise duty, State VAT, sales tax, and other taxes levied on the same kind of domestic product.

So basically, prior to GST “the taxes were divided in the Indian Constitution

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13 Anand Nayyar, Inderpal Singh, A Comprehensive Analysis of Goods and Services Tax (GST) in India, *Indian Journal of Finance* (2018) [https://www.researchgate.net/publication/323007997\\_A\\_Comprehensive\\_Analysis\\_of\\_Goods\\_and\\_Services\\_Tax\\_GST\\_in\\_India](https://www.researchgate.net/publication/323007997_A_Comprehensive_Analysis_of_Goods_and_Services_Tax_GST_in_India).

14 Article 268, The Constitution of India.

under the three categories namely Central Taxes (Entries 82-92A), State Taxes (Entries 45-63) and Concurrent Taxes. The tax must be thus, be levied under these three categories only and not under a 'non-tax' entry as ancillary or incidental matter.<sup>15</sup> If any of the entries does not cover the other types of taxes, then it was to be regarded as Residuary Taxes which is levied under Entry 97 in the Union List.<sup>16</sup>

Hence, a unique institutional mechanism was required to give concurrent jurisdiction to the Centre and the State to levy GST, a kind of jurisdiction that would ensure that the decisions are taken jointly by both centre and state about the structure, design and operation of GST. In order to achieve this, the government has been given certain powers by way of bringing the constitutional amendments. Article 246A has been incorporated to provide powers to make laws with respect to GST. Article 246 A, this article starts with a non-obstante clause which says that, "*notwithstanding anything contained in Article 246 and 254*", hence it provides power to the "Parliament and legislature of every State to make laws with respect to goods and services tax imposed by Union or by state".<sup>17</sup> Clause (2) of the article further provides that the parliament has exclusive power to make laws with respect to goods and service tax when the transaction is in the course of inter-state trade and commerce (Integrated Goods and Service Tax).

Now under the GST regime to determine the whether the assessee has to pay CGST, SGST, IGST or UTGST it is essential to ascertain the nature of the transaction –

- Intra State supply of goods and services- When the location of supplier and the place of supply are in the same state, the buyer has to pay both Central GST and State GST.<sup>18</sup> The Center and the state combine their tax revenue with an appropriate revenue sharing agreement.
- Inter State supply of goods and services – If the place of supplier and place of supply are in different states, or in the case of export and import or when the supply is made by or to SEZ unit, the transaction is a inter- state transaction and in such case the buyer has to pay IGST.<sup>19</sup>

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15 Abdul Quader & Co. v. STO AIR 1964 SC 922 (India).

16 Hari Krishna v. Union of India AIR 1966 SC 619, Second Gift Tax Officer v. DH zareth AIR 1970 SC 999 (India).

17 Article 246 A, The Constitution of India.

18 Section 8, The Goods and Services Act, 2017.

19 Guide to CGST, SGST and IGST, <https://www.indiafilings.com/learn/guide-to-cgst-sgst-and-igst/>.

## Amendments under Schedule VII

### • List –I

- **Entry no. 84:** Earlier the center was empowered to charge excise duty on tobacco and other goods manufactured in India but now after the introduction of GST the Center does not have power to levy duty on petroleum crude, high speed diesel, motor spirit, natural gas, aviation, tobacco and tobacco produce. All these are kept outside the ambit of GST.
- **Entry 92& 92C:** Earlier, entry no. 92 provided center to levy taxes on sale or purchase of newspaper and on the advertisements published therein, and entry 92C provided for taxes on services but now after the GST, these entries have been deleted. Now the Center or the State can levy tax on the goods or services as per article 246 A.<sup>20</sup>

### • List II

- **Entry no. 52:** The entry prior to GST provided that the taxes on the entry of goods into local area for consumption, use or sale shall be levied by the state, but now it has been omitted. This tax was one of the major hurdles in the free flow of goods across the country, and was one of the major areas where the corruption practices were rampant; however, this has now been subsumed under GST.
- **Entry no. 54:** This entry now stands replaced; this replacement is based on same the same concept of replacement of entry no.84 under list I. Before GST, it provided that the taxes on the sale or purchase of goods other than newspapers subject to the provisions of entry 92A, List 1, however now VAT/ sales tax is subsumed under GST.
- **Entry no. 62:** In order to curtail the wings of entertainment tax and to make it applicable to a certain extent only this entry was replaced. Now the Panchayats or Municipality or a Regional Council or a District council has been given the power to collect taxes on entertainments and amusements.<sup>21</sup>

Hence it is clear now that, a dual control regime has been established by GST, wherein both the Central Government as well as the State Government has the power to levy taxes. In case of ‘interstate transactions’, Integrated

<sup>20</sup> List I, Seventh Schedule, The Constitution of India.

<sup>21</sup> List II, Seventh Schedule, the Constitution of India.

Goods and Services Tax is levied by the Central government; however, the tax is apportioned between Centre and State.<sup>22</sup> The scope of IGST model is that the Centre would levy the IGST which is aggregate of CGST plus SGST on the interstate transactions of taxable goods and services. The interstate seller pays IGST on a value addition after adjusting available credit of IGST, CGST and SGST on the purchases made by him. While the importing dealer claims the credit of IGST and uses while discharging his output tax liability in his own state.<sup>23</sup>

The adoption of Goods and Service Tax regime by India is a shining example of cooperative federalism. Both the Centre and the States have come together by giving up their powers to levy taxes and hence a lot of taxes like excise duty, customs, and others state taxes like State VAT, Central Sales Tax, Luxury tax, entry tax etc have been eliminated and accordingly the above mentioned amendments have also been brought. This fundamental reordering of federal fiscal relations for the cause of common good shows the strength and determination of the federal structure.<sup>24</sup>

### **Generation of Black Money into Financial System**

Transactions such as Value Added Tax, Excise, and Service Tax were not reported to the tax department; hence incomes through such transactions were never recorded in the income book, making it easy for tax defaulters to conveniently avoid paying direct as well as indirect tax in order to save taxes illicitly. Such bills, unlike legitimate bills, were only written on a plain piece of paper, which were never put into accounting books.

Previously, VAT charges on goods were somewhere between 5% and 20%, depending on the type of the product and in compliance with state law. However, the Government missed out on such incomes in several instances as traders aim at increasing their margin by skipping the tax net completely and customers look at lowering product cost.<sup>25</sup>

### **Effect of unrecorded transactions in Business Ecosystem**

Lowering of product costs by certain entrepreneurs through unaccounted transactions lead to unhealthy competition, which provoked other entrepreneurs to indulge into illegitimate activities and compromise on

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22 Article 269, The Constitution of India.

23 S.S. Gupta, *GST Law & Practice- A complete guide to new model GST law*, (1st ed. 2017).

24 GST: Cooperative Federalism, <https://iasscore.in/topical-analysis/gst-cooperative-federalism>.

25 Pradip Kumar Das, *An Insight into Black Money and Tax Evasion- Indian Context*, 3(4) *Journal of International Business Research and Marketing*, (2018).

the quality of goods, which had an adverse impact on the entire business ecosystem.

Previously, the tax rates on commodities varied from one state to another. While state 'A' charged, 5% VAT on a specific item, state 'B' charged 15% on the same. Traders had to pay central sales tax on buying goods from another state. Due to different tax levels across states, people were indulged in various illegal means to avoid paying taxes.

### **Changes after implementation of GST**

In the present system, GST aims at simplifying the procedure and bringing in transparency to the tax structure. Now after the implementation of GST, with every transaction an individual is required to provide a valid identification proof such as your PAN or Aadhaar number to track the tax incidences at each dealing point. This has significantly boosted the fight against black money. It is now easier for the Income Tax Department to track transactions and even circulation of black money.

After implementation of GST, there is uniformity in the tax system across different states in the country which in turn has eliminated instances of tax arbitrage. In the previous tax structure the retailers were allowed to manipulate purchase data which is not possible with GST in place. Every deal is recorded from beginning to end.

Under GST, a dual monitoring system has been proposed in order to enable both the central and state government to keep track of every transaction on goods and services.<sup>26</sup> So, even if the state government misses out on taxes on a transaction, the central government will identify and correct it, and vice-versa. GST has also encouraged tax officials to trace out black money invested in assets such as real estate and gold.

Kaccha and pakka bills might not disappear all of a sudden, but with the tax-net tightening in the future, tax evasion is eliminated eventually. The new tax regime looks promising on paper in term of cleaning up the system by fighting creation and circulation of black money.<sup>27</sup>

### **Reduction in Tax Evasion**

After the implementation of GST, it has subsumed various taxes likes Service tax, VAT, Excise duty etc. The taxation system has not only

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26 Rakesh Nangia, Rajat Mohan, India: *GST Impact and the States*, <http://www.mondaq.com/india/x/533716/sales+taxes+VAT+GST/GST+Impact+And+The+States>.

27 How GST Will Fight Black Money Generation, <https://in.finance.yahoo.com/news/gst-fight-black-money-generation-053017311.html>.

become simplified due to the removal of multiple taxes but it has also removed various causes related to double taxation where in the previous taxation system firstly excise duty was being levied and after that VAT was being levied again on the same item.

Apart from the benefits that are mentioned above another benefit which is obtained from GST is the Invoice Matching Concept. This concept has ensured that there are nil revenue leakages in the system at the same time the business deposit is in the rightful hands of the government.

### **Tax Evasion in the Previous System**

In the previous tax regime, let us take for example Mr. X had availed some services worth Rs. 10 lakhs from Mr. Y on which Service tax @ 15% is applicable which means Rs. 1.5 lakh was required to be paid by Mr. X to Mr. Y, after which Mr. Y was required to deposit the same amount to the government. As a result of which Mr. X would take the benefit of Input Tax Credit of Rs. 1.5 lakh.

But due to unknown reason Mr. Y did not deposit the amount of Rs. 1.5 lakh with the government which could be either fully or partly. Let us take for example now in his Service tax return he has mentioned that he has paid Service tax of Rs. 50,000 to Mr. Z and Service tax of Rs. 50,000 to Mr. W and had claimed the input tax credit for the same amount. The remaining Rs. 50,000 was paid to the government. But in reality, the amount which was paid to Mr. Z was the actual claim and the amount paid to Mr. W was a fake claim in order to save tax on that amount.

Previously in the Service tax return, the details were not required to be mentioned detailed wise but only the consolidated details were required to be mentioned. Due to this reason the government was unable to track such transactions. This system of tax evasion was mostly prevalent among small businessmen who were not traced by the government and so did not receive any notice from the government.

### **Removal of Tax Evasion under GST Regime**

Under the new GST regime all the details regarding the invoices are to be mentioned in the GST Return. The major reason behind doing so is to track all the transactions on the basis of invoice details and to ensure that even the benefit of input tax credit has not been misused in negative sense.

In continuance with the example mentioned above, if the same transaction is dealt under the GST regime i.e. Mr. X avails services of Rs. 10 lakh

from Mr. Y on which GST is applicable at 18% so Rs. 1, 80, 000 are to paid to Mr. Y and Mr. Y will deposit the same amount to the government.

Moreover, in the previous tax regime Mr. Y with the help of fake claims and taking misuse of Input tax credit did not pay tax to the government and was not traced in the system due to consolidated return. But now under the GST regime the details are to be mentioned as per invoice which should match GST returns. Further these transactions will be cross checked in the GST portal in order to ensure that the tax has been actually paid. If any fake claims are caught in the portal the benefit of Input Tax credit will not be given to the tax payer. This means that till the time last person to whom amount of tax is paid does not deposit the same with the government, the previous person who has paid the amount will not be allowed to take the benefit of Input Tax Credit.

Now as a result of which the tax collection of tax by the government will increase and there will be decrease in claiming fake transactions which will stop the practice of tax evasion. On the other hand, it will reduce the revenue leakages in the system.

### **GST as a tool to curb Black Money**

Under the GST regime each and every transaction is captured as well as recorded based from starting till the end of transaction due to which there is no space left for uncertainty and ambiguity. As per the advantages which are mentioned above GST has enhanced the base of tax due to which there is reduction in evasion of taxes. The GST regime has removed the difficulties along with discrepancies with the help of GST portal due to which tax evasion is reduced from the financial system. Apart from these the following are the points which have also helped in removing black money from the financial system:<sup>28</sup>

#### **i. Itemized and Documented Chains**

A restriction on back dated transactions and entries are kept under GST regime as a result of which an itemized and documented chain has been created to record all the transactions on that particular day itself. As the activity of maintaining all the bills has started the chances of circulation of black money in the financial system has gradually decreased. Secondly, the element of discretion has reduced due to the uniform and stable tax policies under GST regime. Another thing is that the applications have been automated

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28 Timsy Jaipuria: The GST impact, Hindustan Times <https://www.hindustantimes.com/business-news/the-gst-impact-how-this-tax-will-curb-black-money/story-HhdUHfSUCoRo0kn2miDTYJ.html>.

which has much lesser physical connection between tax payers and authorities.

## ii. **Uniform Tax Collection System**

Previously it was difficult to keep a proper record of taxes and it was easy to hide such transactions as it had multitude of taxes. Such transactions are reduced due to the organized structure under GST regime as the tax policies are made simpler.

## iii. **Simple and Transparent Procedure**

The tax collection process is now carried out online through Goods and Service Tax Network i.e. GSTN. Now it is compulsory for each and every trader to get registered under this on the basis of their Permanent Address Number, so that a clear record of collection of all taxes as well as transactions are maintained.<sup>29</sup>

## iv. **Reduced Net Taxes**

The taxpayers are also allowed to take back credit of their taxes on all the inputs across India, which would gradually reduce his net tax liability.

## v. **Dual Monitoring System**

The Center and the State now after the implementation of GST regime maintain two different accounts in tax system through GSTN so the chances of getting trapped are doubled under GST regime.

## vi. **Reduced Interface**

All the returns of the taxpayers will now be paid online. Facility to get their returns is also made available to the taxpayers online only. This will automatically reduce the interface between the taxpayers and authorities and this will result into reduction of corruption.

## **Conclusion**

GST is said to be the key to compliance for tracing all unrecorded transactions that were not caught under the indirect taxation regime till now. The GST regime has been implemented successfully throughout India and it has helped the economy considerably. It has not only helped in facilitating the interests of the people but has also helped in promotion

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<sup>29</sup> Ashok Batra, GST Law & Procedure, (2<sup>nd</sup> Ed., 2018).

of financial accountability by curbing black money marketeering and the inflow of illegal cash into Indian Financial Market. Due to this reason the implementation of GST is said to be one of the best decisions taken by the Indian government. Apart from curbing black money from the financial market the GST regime has increased the number of foreign investments in our country. After the implementation of GST, a better level of monitoring has been possible on the transactions in financial market.

### **Suggestions**

- GST would have been implemented better if there was no demonetization as the idea that the Reserve Bank of India will be able to make a big transfer to the government was misplaced.
- It was considered a very good signaling device that the government was serious about curbing corruption and black money. But we do not think that it was effective to a great extent in curbing black money from the system as there are no clear evidences that the economy of the country has been affected in positive way.
- GST has a much better tracking ability to prevent black money as compared to demonetization. Thus, if the government had not done demonetization, they would have taken more time to iron out all the problems with GST implementation.<sup>30</sup>
- Now, if we take a look upon the GST regime, the threshold for composition levy in respect of goods and services is different. It is 1% for goods and 6% for services. Thus, it is suggested that the rates should be same for goods and services.
- Apart from these, Petroleum and Alcohol should be included under the ambit of GST at the earliest.
- The tax slabs can be made three by merging the slabs of 12% and 18% somewhere in between.
- Priority should be given to revised returns and mechanism of Invoice on procedural matters as it will help in reducing tax evasion.

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30 Pradip Kumar Das, *An Insight into Black Money and Tax Evasion- Indian Context*, 3(4) Journal of International Business Research and Marketing, (2018).

# **“THE SC’S DECISION TO REVEAL IT ALL: UNDERSTANDING THE ‘LIVE TELECASTING’ JUDGEMENT; SWAPNIL TRIPATHI AND Ors. V. SUPREME COURT OF INDIA AND Ors.”**

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**Ms. Priyadarshree Mukhopadhyay\***

## **Abstract**

*The case that has been discussed in this article is about the live-streaming of cases of Constitutional or national importance that has massive effect on the public. This landmark judgement has been pronounced by the Hon'ble former Chief Justice of India Dipak Misra, Justice A. M. Khanwilkar and Dr. Justice D. Y. Chandrachud. It argues fundamental concepts like Article 21 of the Indian Constitution. The right to attend public hearings has been elaborately analysed due to the immense importance it holds with respect to this case and its judgment. Another important article that holds a similar value is Article 145(4): Right of access to justice. This in the latter part of the judgement gets associated with open court system and open justice as philosophised by Bentham. Scenarios in foreign countries have been deeply and critically analysed regarding their implementation and consequences. It has been explained that restriction becomes a potential hindrance for law students and interns in gaining practical knowledge. Factors like limited working space which aids such deadends have also been critically analysed. The SC took active initiation by prescribing an improvised guideline. Justice Chandrachud introduced the applicability of Information and Communication Technology (ICT). He engaged on various effects like democratic values and privacy concerns. The theme about which this entire judgement revolves is judicial accountability and transparency, which has been critically scrutinized in the analysis section. It has been comprehensively explained how this judgement will cause a huge paradigm shift in the current client- attorney system. This is one of the boldest steps of the SC so far. This judgement holds a unique position due to its heavy focus on solving the common people's problems during justice administration like distance, time and money, the factors due to which people have reluctant attitude towards availing the aid of the justice system.*

**Keywords: Supreme Court, Live telecasting, Court procedures, Transparency, Open Justice System, Access to Justice, Technology, Legal awareness, Client- Attorney System, Global Approach.**

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\* National Law University, Odisha

*SWAPNIL TRIPATHI AND Ors. v. SUPREME COURT OF INDIA AND Ors.*<sup>1</sup>

### **Brief Study of the Case**

“Justice should not only be done, but should manifestly and undoubtedly be seen to be done.”

- Lord Chief Justice Hewart.

26<sup>th</sup> of September, 2018. On this day a curtain was unveiled which changed the entire face of the Indian legal system i.e., we get to see how justice is done. Till now, the basic process of a judgement can be summarized as follows: A case gets filed, court looks into the matter and a judgement is pronounced which then gets implemented. We do not get to know the process through which such a decision had been reached and even if we know it's from secondary source and never to the fullest extent i.e., the entire middle order process remains behind a curtain which the public faces thereby causing its restriction. Now, knowing a problem and its end result is extremely mechanized in manner which slowly but surely degrades the critical thinking faculties of the general public. If we do not know the middle process, we do not know the foundation on which the structure of the decision was made and consequently, we fail to understand it completely. This is the causative phenomenon due to which we do not question the decisions. The lack of questioning can be considered as the most dangerous factor that the human race can face. The consequence of not enquiring or being curious or demanding for the full information is essentially robotization i.e., elimination of the human thinking factor. This case reveals the entire working procedure of the court and its decisions due to which we can access entire contexts and perceptions, which makes this case as the boldest step an entity can take to enhance our critical thinking power and the distinguishing ability of the human species i.e., to ask the logical reasoning. This leads us to the conclusion that the understanding this case is of utmost importance. The case at hand is the very recent landmark judgement involving the live streaming of court proceedings in *Swapnil Tripathi and Ors. v. Supreme Court of India and Ors.*,<sup>2</sup> which originated via the civil petition No. 1232 of 2017. It was argued and decided upon in the Supreme Court on the 26th of September, 2018.

It was decided by Hon'ble former Chief Justice Dipak Misra, Hon'ble, Mr. Justice A. M. Khan Wilkar and Hon'ble Dr. Justice D.Y. Chandrachud. The

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1 *Swapnil Tripathi and Ors. v. Supreme Court of India and Ors.* [2018] 10 SCC 639.

2 n 1.

judgement was written in two parts wherein the first part was authored by former CJI Dipak Misra and Justice A.M. Khan Wilkar while the second part was authored by Dr. Justice D.Y. Chandrachud. This case has three angles from which we can view. The first being by a law student Swapnil Tripathi who petitioned that live streaming of the case be done so that the law interns get a holistic view of the legal proceedings of the case. The next being by an NGO Centre for Accountability and Systematic Change which demanded that all cases be made public through their live streaming for the public benefit and the third being the accumulation of petition under the basic theme of live streaming of cases of National and constitutional by senior counsels Ms. Indira Jaising and Mr. Mathews Nedumpara.

### **Understanding the Inception: Background and Facts**

The foundation on which this case can be traced to two main ideas that can be inferred from this judgement i.e., this will give a positive thrust and full justice to the public right to know and also increase the transparency in the court proceedings. The public has full right to know about the workings of the judiciary about the cases which affects them individually as well as a member of the society in a wholesome and elaborate manner so as to understand how such judgements came to be pronounced. The cases which are constitutional or are of national importance as pointed out by this article like “environment, triple talaq, air pollution, ban on liquor sales near to national highways, ban on firecrackers and extra judicial killings, all of which affect the public who, however, do not get to see how decisions are made by the court”.<sup>3</sup> Another article which clearly explains the rights of the people in this context can be analysed as “Their decision is rooted in the right of access to justice, which flows from Article 21<sup>4</sup> of the Indian Constitution, which gives citizens the right to attend public hearings. This right of access to justice is also protected by Article 145(4) of the Constitution,<sup>5</sup> which requires all judgments to be pronounced in open court. Technically, this means that anyone interested in witnessing the courts in action should have access to the courtrooms.”<sup>6</sup>

Another major fact that was brought to light by the petition is that countries such as Australia, Brazil, Canada, China, England, Germany, Ireland, New

3 Priyanka Mittal, ‘SC approves live-streaming of court proceedings’ (2018) Livemint<<https://www.livemint.com/Politics/GrWwxGSHTseJAEfinR8AwI/Supreme-Court-allows-for-livestreaming-for-cases-of-constit.html>> accessed on 24 December, 2018.

4 Constitution of India 1950, art 21.

5 The Constitution of India, art.145.

6 Tuhina Joshi, ‘SC Live-Streaming: True Access to Justice Now a Reality in India’ (2018) TheQuint<<https://www.thequint.com/voices/opinion/sc-live-streaming-true-access-to-justice-now-a-reality-in-india>> accessed on 24 December, 2018.

Zealand, Scotland, South Africa and United States of America has already implemented the live streaming of the court proceedings a long time ago although in varying degrees of exposure, then why not our SC which as is apparent one of the excellent medium of justice administration at par with the global standards cant implement a similar approach towards the just demands of the petition? Even the International Criminal Court has allowed this type of liberty and access to justice. One factor that must be considered here is that the granting of this demand is in no way to violate the rights of privacy and dignity of the persons undergoing the trial. So, the petition mentions that the allowance should be restricted to certain special circumstances like cases of the nature of sexual offences, marital conflicts or juvenile crimes where the justice for the greater good shall prevail.<sup>7</sup>

The fact that the working space in the court rooms are limited are a potential hindrance for better learning of the legal interns as well as the people who are interested in the proceedings is a major reason why the court system should be extended beyond the four walls through the application of virtual medium and communication technology that is available as of now. The following statistics are enough to paint a picture in the reader's mind about the reality

“The Supreme Court alone sees an average daily footfall of 10,000 currently – over ten times the number in 1950 – with no corresponding increase in space. The lower courts face even greater constraints – with many district courts bursting at the seams”<sup>8</sup>

### **Summary of the Decision: The Landmark Judgement**

The above stated points were carefully considered by the learned judges to come to the following conclusion. Various cases were considered by the bench but one on them occupied a special role of importance. *Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Ors.*,<sup>9</sup> which has considered the arguments of journalists that they had a fundamental right to carry on their occupation under Article 19(1)(g) of the Constitution; that they also had a right to attend the proceedings in court under Article 19(1)(d); and that their right to freedom of speech and expression guaranteed under Article 19(1)(a) included their right to publish a faithful report of the proceedings which they had witnessed and heard in Court as journalists.<sup>10</sup>

7 Akansha Jain, 'India To Get Virtual Access to Courtroom Proceedings: Read SC Directions on Live Streaming' (2018) Livelaw <<https://www.livelaw.in/india-to-get-virtual-access-to-courtroom-proceedings-read-sc-directions-on-live-streaming/>> accessed on 24 December, 2018.

8 n 6.

9 *Naresh Sridhar Mirajkar and Ors. v. State of Maharashtra and Ors.*, (1966) 3 SCR 744.

10 The Constitution of India, art.19.

The court here discusses the advantages of open court and goes on to evaluate its implications in the Indian scenario. Various quotes from Bentham have been discussed in this part of the judgement as he had correctly said about the malpractices that can prevail if the proceedings are not brought out to the public:

“In the darkness of secrecy sinister interest, and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion, and surest of all guards against improbity. It keeps the Judge himself while trying under trial (in the sense that) the security of securities is publicity.”<sup>11</sup>

The court has also pointed out that since ignorance of law is not a defence that is acceptable the state has a responsibility in dispersing of legal knowledge and awareness i.e., they have the right to receive information and be informed. It has also considered the problems that persons face while attending the court as in leaving their daily job to attend the hearings which can be prevented by granting the above said allowance. Next the court had asked for suggestion of guidelines about how the live streaming would be conducted from the Attorney General for India Shri K.K. Venugopal. The implementation of this practice has to be aided by amending certain provisions which do not expressly mention the open court’s inclusiveness as in provisions such as Section 327 of the Code of Criminal Procedure, 1973 (CrPC)<sup>12</sup> and Section 153-B of the Code of Civil Procedure, 1908 (CPC ).<sup>13</sup>

The court also mentioned about the E-Court Mission Mode Project in which the Advisory Council of the National Mission of Justice Delivery and Legal Reforms proposed to initiate audio video recording on an experimental basis in the Courts.<sup>14</sup> The court notes:

“In its meeting held on 26th August, 2014, it was noted that audio video recording of Court proceedings was proposed in the Policy and Action Plan Document for Phase II for the e-Courts Mission Mode Project. However, in the meeting of the E-Committee held on 8 th January, 2014, the issue was taken up but was deferred as it required consultation with Hon’ble Judges of the Supreme Court and the High Courts.”

11 *Scott V Scott* (1911) All. E.R. 1, 30.

12 Code of Criminal Procedure 1973, Sec 327.

13 Code of Civil Procedure 1908, Sec 153(B).

14 n 1 [10] (A M Khanwilkar, J.).

The first half of the judgement takes into consideration of the fact that the allowance asked in the petition is already in practice in a large no of countries. It then analyses how they were implemented and what were their consequences because if we take lesson from those incidents, we may be able to formulate a less erroneous policy and its implementation. It also gives us a fair idea about the technological requirements as well as the other technicalities involved. The court has hinted upon not only live streaming of the court proceedings but also radio broadcasting, TV channels akin to the Rajya Sabha TV, YouTube channels and mobile applications including archiving on a website. It also prescribes a delay in the real time broad casting to edit out and screen any content that must not percolate to the public.

After careful analysis of the prevailing situation in other countries, the SC has given an eight-point guideline as to how the live streaming would be implemented which is summarized as follows:<sup>15</sup>

There are provisions which call for the necessary equipments for the live streaming process. Many interested litigants who have residences in distant locations like Kerala, The North-East face resistance in attending the court proceedings due to distance, cost etc. would be resolved by this process of virtual extension of the courtroom. The structural incapacity issue for law students and interns have also been discussed. The SC has also directed that a separate room or hall may be created where the live streaming would be available for the interested persons within the court complex. That this project should be carried out on a pilot basis and if it is found successful it will be implemented in a much larger scale across the country. The court must have power to restrict the recording where it deems fit as in privacy violation of the parties. The court shall determine which cases are of the nature to be broadcasted. In addition to the before mentioned exceptions cases involving volatile witnesses fall under the same umbrella to protect them from fear leading to injustice as well as cases involving National security or which can cause communal conflicts. The court also lays down very strictly that the footage may be used for current affair, news or educational purpose and not in any way for commercial or satirical purpose and without the written permission of the court the footage shall in no way be edited or republished. Any unauthorized usage of the live streaming and/or webcasts will be punishable as an offence under the Indian Copyright Act, 1957<sup>16</sup> and the Information Technology

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15 n 1 [11] (A M Khanwilkar, J.).

16 Indian Copyright Act, 1957.

Act, 2000.<sup>17</sup> Also, the camera angle is to be restricted in two ways i.e., one towards the Judge the other towards the lawyer and in no way should focus on their notes or violate the conversation of the client, lawyer or the judges.<sup>18</sup> Provisions are also made for specialist video-operators and court appointed officers for the same purpose.<sup>19</sup> They have agreed to suitably modify the Supreme Court Rules, 2013<sup>20</sup> in order to make room for this new policy.<sup>21</sup>

The second part of the judgement is given by Justice Dr. D.Y. Chandrachud which gave rise to landmark statements like “Sunlight is the best disinfectant”<sup>22</sup>. It is clearly and precisely divided into five parts namely open justice, Indian jurisprudence, Technology and open court, Comparative law and guidelines for broadcasting of the court proceedings.

Here he raises the query that whether there should be live dissemination of proceedings before this Court with the aid of Information and Communications Technology (ICT)? He discusses the basic principles of open justice and how it will be implemented through this scheme.

Next he elaborately explains the need of open court system and how the people would get a direct source of knowledge from it rather than the films and other forms of secondary sources. He also states that Section 327 of the CrPC<sup>23</sup> mandates that criminal courts should be open in nature.<sup>24</sup> He dwells on the case of *Life Insurance Corporation of India v. Prof. Manubhai D. Shah*, for expressing his views on the significance of disseminating information in a democracy.<sup>25</sup> In *Santhini v. Vijaya Venketesh*, where this Court was re-considering the issue of permitting video-conferencing for matrimonial disputes, one of the judges (D Y Chandrachud, J.) in his dissenting opinion, discussed the importance of using technology to enhance the delivery of justice.<sup>26</sup> He also discusses the various internet and other type of platforms that are presently available for their implementation and application in the judiciary. Next the importance of live streaming has been significantly cemented by the lucidly explained arguments which span across his judgement. He also stresses upon the

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17 Information Technology Act, 2000.

18 n 1 [11] (A M Khanwilkar, J.).

19 n 1 [16] (A M Khanwilkar, J.).

20 Supreme Court Rules, 2013.

21 n 1 [17] (A M Khanwilkar, J.).

22 n 1 [66] (D Y Chandrachud, J.).

23 n 12.

24 n 1 [39] (D Y Chandrachud, J.).

25 *LIC v. Manubhai d Shah* (Prof.) [1992] 3 SCC 637.

26 *Santhini v. Vijaya Venketesh* [2018] 1 SCC 1.

various countries which have already implemented this policy of live streaming and how it is turning out to be beneficial on various perspectives.

Next he comprehensively analyses and lays down various guidelines as provided by The Attorney General for India Shri K. K. Venugopal, where exceptions, special circumstances, technical specifications, general rules and the manner in which the project is to be carried out are also elucidated in a very wholesome manner.

### **The Problems, Lacunae and the Pending Questions**

- Constitutional importance and impact of cases of national importance on the public.
- How the judgement will facilitate the Natural right of Access to Justice as well as Article 21,<sup>27</sup> through which the former right flows?
- How far are the guidelines provided by the Attorney General for India Shri K. K. Venugopal efficient and can improvisations, recommendations, additions or suggestions be made to strengthen it, and if so, what are they?
- What are the technological solutions to realize the right to access of Justice?
- How the privacy and confidentiality concerns of the clients, parties, attorneys, Judges and other concerned people are affected by the decision to allow live telecasting of court proceedings?
- Comparative analysis of telecasting of court procedures in other countries and platforms.
- How the common people will be affected in terms of legal awareness etc.?
- Understanding the concept of open justice as postulated by Bentham and its realistic application and effects.
- Merits and demerits of live streaming
- Implementation planning.

### **Understanding, Interpreting and Critically Unraveling the Judgement: A Comprehensive Analysis**

This case is an exemplary judgement pronounced by the learned judges of the Hon'ble Supreme Court of India due to a multitude of factors. The live telecast of cases has been temporarily restricted to certain benches and

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<sup>27</sup> The Constitution of India, art.21.

some particular type of cases which have significant public importance. The SC has decided to first test its feasibility as well as the merits and demerits of implementing it across India. During this process it has considered the current status and the advantages and disadvantages faced by countries which have implemented this policy earlier than us, thereby providing scope for retrospective analysis for more accurate implementation. Thus, the SC has ordered a reality test of this project on a pilot basis, the success of which will lead to country wide implementation. It is very efficient on the SC’s part to take this realistic approach.<sup>28</sup>

It is imperative for us to note this basic dictum. To grow a durable and strong tree we must first focus on how we are growing the seeds. To put it simply, good investment in the past gives us better results in the future. Our country is held together in place by the spectacular judiciary and the jewels of the same i.e., the learned judges. These all have a particular origin, a law student. Therefore, when law students and interns acquire half baked knowledge of the court proceedings due to inaccessibility we should not expect a stellar judiciary in the future. It stems from this that the proposed policy would help a law student to understand the working of the judiciary in a much better and clarified way. Thus, this judgement is a blessing on all the law students of the current and the future generations to develop a much stronger foundation than the students of the past who had to assume and imagine the proceedings from a very few glances. This judgement has given boundless access to the law students and legal interns for developing their acumen as well as skills like oration, poise, observation etc. for their career.<sup>29</sup>

This judgement reaffirms the judiciaries believe on the efficiency and naturalness of the open justice system. The following quote cements this current view:

“Our legal system subscribes to the principle of open justice”<sup>30</sup>

The judgement then introduces us to the four pillars of open justice along with its comprehensive analysis.<sup>31</sup>

Here, Bentham’s theory of open justice has been appositely incorporated to link the three concepts of publicity, justice and security.<sup>32</sup> It explains how publicity acts as a check on the accountability of the court workers

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28 n 1 [11] (A M Khanwilkar, J.).

29 n 1 [11] (A M Khanwilkar, J.).

30 n 1 [11] (A M Khanwilkar, J.).

31 n 1 [28] (D Y Chandrachud, J.).

32 n 1 [31] (D Y Chandrachud, J.).

and Judges due to which effective administration of justice is carried out as a result of which security is established. It ends with the quote which appropriately summarizes the whole literature in a precise, aesthetic and poetic manner:

“The doors of all public establishments ought to be, thrown wide open to the body of the curious at large- the great open committee of the tribunal of the world.”<sup>33</sup>

One of the major debates that this judgement gave rise to is the Natural right of access to Justice which flows from Article 21.<sup>34</sup> This allowance, if it is implemented will be the largest step taken by our nation as well as the judiciary to realize the underlying principle of this right. It can be actualized to the fullest extent when any interested party would get access to the real time happenings of the court and the factors which led to the judgement as well.

The main crux of this debate revolves around two words i.e., accountability and transparency.<sup>35</sup> Incidentally, in the course of the judgement these evolve to confidence and trust. It would be interesting to note that, if observed through the lens of generalization, it can be said that the fundamental concepts around which the entire administration of justice system is formed, pivots its existence and foundation on these two words. The latter two words can be said to be the two pillars on which the relation between the judiciary and the people is based.

This brings us to the realization of the importance of these few words. Now, it can be noted that the judgement gives immense importance to these words as well. Live telecasting of the court proceedings will open the doors of the court to the public’s plain sight, thereby gaining trust and confidence from them. Accountability and transparency of the judicial system will also receive a mammoth boost due to this. This essence has been best represented in the quote from the judgement:

“Trial held subject to the public scrutiny and gaze naturally acts as a check against judicial caprice or vagaries, and serves as a powerful instrument for creating confidence of the public in the fairness, objectivity, and impartiality of the administration of justice”<sup>36</sup>

The judgement has shown extreme consideration and respect for the protection of privacy of those who are to be recorded during the proceedings.

33 n 1 [23] (D Y Chandrachud, J.).

34 n 27, n 1 [2] (A M Khanwilkar, J.).

35 n 1 [9] (A M Khanwilkar, J.), [27] (D Y Chandrachud, J.), [66] (D Y Chandrachud, J.).

36 n 1 [1] (A M Khanwilkar, J.).

It has also provisioned restrictions in order to prevent social, communal and political conflicts by taking the onus of permitting the live telecast upon them in cases involving sensitive issues such as rape, POCSO etc.<sup>37</sup> It has also recommended that steps should be taken to prevent facial and voice recognition of the victims. The privacy of the parties is preserved without any scratch upon it due to the order of the SC that prior consent of all the parties must be taken before the live telecast.

This judgement is landmark in nature due to its wide spread impact and the potential constructive changes that it can bestow upon the general public. Legal awareness has always been on top of the priority list of the State, Legal academia, officials and the judiciary in order to disseminate legal knowledge helpful for the common people. This judgement has the potential to increase the legal awareness drive by leaps and bounds as it brings the legal affairs conducted within the four walls of the Court directly to the common people. This is an unprecedented event which is absolutely brilliant in its essence due to its high impact which can revolutionise the entire definition of legal awareness. This can also be accessed by the vast majority of the people as the SC has directed for TV channels like Rajya Sabha TV, Door darshan etc., while noting alternative routes which exponentially increase the accessibility like YouTube channels, Radio, mobile applications etc.<sup>38</sup>

The fact that the apex court is genuinely serious about this issue can be inferred from the judgement’s tone while the court has asked the Attorney General for India Shri K. K. Venugopal to come up with comprehensive guidelines for its implementation, while taking into account the views of the petitioners, parties and the legal fraternity.<sup>39</sup> The court has itself taken gargantuan effort in providing a model guideline for the same after closely scrutinizing and analysing the different methods in which live telecasting is practiced in other countries.<sup>40</sup> The model proposed by the court is water tight in nature with no apparent loopholes or fallacies as it covers almost all the facets that can be considered including technical, procedural and regulation guidelines.

The SC has yet again proved that it can manage the great responsibility that it has been trusted with it from the following section:

After analysis of the technicalities of live telecasting it has recommended a definite delay (70 seconds as in England) in telecasting of the court

37 n 1 [98] (D Y Chandrachud, J.).

38 n 1 [14] (A M Khanwilkar, J.).

39 n 1 [4] (A M Khanwilkar, J.).

40 n 1 [10] (A M Khanwilkar, J), [68] (D Y Chandrachud, J.).

proceedings to censor and edit any information that may cause conflicts or negative impact on the viewers. This shows that it not only thinks about the persons facing the camera but also the people on the other side i.e., the viewers and thereby ensuring moral, social and balanced values amongst all.

The most interesting and remarkable part of this judgement is that if implemented adequately it has the potential to successfully solve the common problems of the people i.e., the time and money spent by people in large amounts to solve their cases.<sup>41</sup> This acts as a deterrent factor due to which a considerable portion of the people do not report cases, file complaints or initiate legal proceedings and opt for alternate settlements methods like mediation etc. The problem arises when people consider that the amount of money and time spent on getting justice through the court system is arithmetically greater than the damage they have sustained and the compensation they will get in the due process. This causes them to forego their problems and compromise the very foundation of the justice system. Another integral factor considered by the SC is the distance. Many litigants who hail from southern India or the North-Eastern states find frequent hearings as a major factor due to the transportation cost, exhaustion and money spent for their journey to get justice.<sup>42</sup> People often have to leave their jobs and other duties to attend court proceedings due to which they incur losses which becomes more severe for the lower socio-economic population. Live telecasting solves the economic problem as parties can track their cases from home, the distance problem as India is one of the heaviest telecom users and court proceedings can be observed from home and the exhaustion problem as people can watch it from the comfort of their residences and do not have to leave their duties for getting justice. This judgement acts as a panacea which solves all the problems at once and more importantly it helps the grassroot people get justice thereby following the path for achieving the perfect judicial system as per socio-economic standards.

When a judgement is pronounced, a large no. of people tries to access it in order to understand how it has affected them and the society at large. These include lawyers, legal academicians, political scientists, jurists, sociologists, researchers and other sections that may have been affected by this. Not everyone has access to paid platforms which provide the judgement in its original form. So, they rely on secondary sources like newspaper reporting<sup>43</sup> etc. From there on the butterfly effect starts

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41 n l [11] (A M Khanwilkar, J.).

42 n l [11] (A M Khanwilkar, J.).

43 n l [66] (D Y Chandrachud, J.).

because wrong or misleading information upon which these people work will subsequently produce wrong and undesirable results because the judgement is absolute but the interpretations are not, they vary from person to person as per their perspectives. Thus, live telecasting will provide every interested individual with access to the judgement directly eliminating the middlemen and thereby removing their dependence on secondary sources whose authenticity may be dubious. It would also be a permanent archive of Judgements which can be referred to in the future generations due to its immunity from getting lost or any other physical process which can diminish or destroy it.<sup>44</sup>

In recent times, fake news has reached the top most position in the sector of misinformation, manipulation and out-of-context editing.<sup>45</sup> It has nearly every type of news under its tentacles. It becomes important to note that if judgements made by the Apex Court were to be manipulated in such ways it can cause harm to people whose severity as well as extent is unimaginable. Therefore, through live telecasting there is no room for such distortions as the people are able to see the phenomenon of pronouncement of judgement directly through their eyes and in a real time basis, which reduces the importance of fake news to minimal. Thus, this judgement is an essential counter-measure for fake news. Another factor which may be too minute superficially is public perception of courtroom working. We perceive and assume certain characteristics about events that we have not witnessed directly from secondary sources. This extends to courtroom workings as well. At any given time, it would be safe to say that any man/woman has seen greater no. of courtroom drama films than real court proceedings. Those films which are purely fictional leave an imaginary perception on the individual. Now, it can be noted that the proceedings in the silver screen hugely differ from the real proceedings. This form distorted view of the justice system in the mind of the general public. This problem can be eradicated with a simple solution, showing the people the real court process, which is what this judgement will fundamentally do. Thus, live telecasting will induce realistic perceptions of the court system on the people’s mind.

Live telecasting, if implemented will revolutionise the entire legal system starting from the grass root level to the topmost parts. The reason this statement is made is due to the difference it will bring upon the client-

44 n 1 [66] (D Y Chandrachud, J.).

45 Ibid.

‘Live streaming of SC cases: Justice must be seen to be done, and now, we can all watch it’ (2-18) Dailyo<<https://www.dailyo.in/variety/live-streaming-of-cases-supreme-court-right-to-information-transparency-democracy-cji-dipak-misra-justice-dy-chandrachud/story/1/26958.html>> accessed on 24 December, 2018.

attorney system which has been practiced since the origin of the justice system. Currently, advocates and lawyers are engaged by the clients solely on the basis of reputation and word of the mouth about his/her performance. Now if the live telecasting system is installed, then the clients will be able to evaluate the lawyers on the basis of how they perform in the court room on a real time scenario. This will indirectly provide the client who is essentially a consumer of the service given by the lawyer, large variety to choose from and also validate their right to make an informed choice. This system will give the clients better opportunity to represent themselves as well as the budding lawyers to make a name from themselves based on their hard work and quality i.e., the current legal system will undergo a huge paradigm shift which will not only increase the quality of the process but also the very foundation of the client-attorney system.

In the 21<sup>st</sup> century, nearly every revolution is either directly or indirectly linked to technological advancement. Technology can help make life better by solving a large no of problems. The judgement of the SC which goes in the favour of live telecasting of court proceedings requires simultaneous advancements in technology and most importantly acceptance and active implementation of the same. The appreciable thing here is that the decision in itself is acceptance of the fact that technology should be used in every possible way to reach the end goal of good governance, social integrity and effectively reducing problem in people's daily life. This has been considered so important that Dr. Justice D. Y. Chandarchud has dedicated an entire section of his judgement to link the concept of open court with Information and Communication Technology (ICT).<sup>46</sup> He further went on to comprehensively analyse the technicalities involved therein. These include services and transparency measure like National Judicial Data Grid (NJDG) which received praise from the World Bank.<sup>47</sup> He notes the various forms of telecasting possible, which countries has implemented them and their advantages.

“Thus, technological solutions can be a tool to facilitate actualization of the right of access to justice bestowed on all and the litigants in particular, to provide them virtual entry in the Court precincts and more particularly in Court rooms.”<sup>48</sup>

“This Court cannot be oblivious to the reality that technology has the potential to usher in tangible and intangible benefits which can consummate the aspirations of the stakeholders and litigants in particular”<sup>49</sup>

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46 n 1 [58] (D Y Chandrachud, J.).

47 n 1 [63] (D Y Chandrachud, J.).

48 n 1 [8] (A M Khanwilkar, J.).

49 n 1 [9] (A M Khanwilkar, J.).

This judgement also has a tint of global approach in it due to the consideration given to the prevailing systems in other countries. It can be inferred from the fact that Justice A. M. Khanwilkar has included a comparative analysis of countries like Australia, Brazil, Canada, China, England, Ireland (Northern), Ireland (Republic), Israel, New Zealand, Scotland, South Africa, and the United States of America, International justice delivery systems like European Court of Human Rights, International Criminal Court, International Criminal Tribunal for the former Yugoslavia.<sup>50</sup> The importance is further stressed when Dr. Justice D. Y. Chandrachud again analyses them in his portion of the judgement.<sup>51</sup>

This allowance also increases the democratic value of our nation as can be understood from the following quote from the case *Life Insurance Corporation of India v. Prof. Manubhai D. Shah*:<sup>52</sup>

“The print media, the radio and the tiny screen play the role of public educators, so vital to the growth of a healthy democracy”

This can be associated with the basic three pillars of democracy i.e., of the people, by the people and for the people. Of the people as the Judicial system is made up by the people of India and its citizens, by the people as in the judicial process is initiated by the people and for the people as in that every judgement that is pronounced is so produced keeping in view of the wellbeing of the society which is constituted by the people of India.

The relationship between the Judiciary and technology in India is currently going through a phase of disruptive innovation. This is evident from the fact considered by Dr. Justice D.Y. Chandarchud with regard to Canada:<sup>53</sup>

“The Canadian Supreme Court is considered a pioneer for adapting itself to technology and permitting audio-visual broadcasting of its proceedings. In 1993, the Canadian Supreme Court conducted a successful pilot project, live televising the hearings of three high profile cases”

Thus, India as a developing country is trying to inculcate positive and progressive values and instances from other countries which have established their advancements in different fields of Governance and transparency including accountability.

**Bold and inclusive** are some of the words that can be attributed to a particular

50 n 1 [10] (A M Khanwilkar, J.).

51 n 1 [67] (D Y Chandrachud, J.).

52 n 25.

53 n 1 [67] (D Y Chandrachud, J.).

section of the judgement which aims for bringing the oath ceremonies of the Judges of the Supreme Court and other related events under the umbrella of live telecasting.<sup>54</sup> This shows that the apex court has further steps in mind to open the gates of its courtrooms to the common people in order to reach the zenith of judicial transparency and accountability.

It can be noted that the *Obiter Dicta* of this judgement is highly important and meaningful from the futuristic point of view.

No trace of issues has been found throughout the judgement that has not been discussed comprehensively, on the contrary every possible angle related to the live telecasting has been explored critically.

The court's decision comes at an appropriate time when the no of consumers of Internet are on the rise and when the amalgamation of Technology with the Justice delivery system can produce revolutionary results.<sup>55</sup>

No apparent opposition of this idea has been observed rather this issue has received praise from the Legal fraternity, academia, Bar as well as the common people.<sup>56</sup>

### **Conclusion: Charting the Future**

Conclusion as can be understood from its meaning is to put an end to any ongoing discussion, event or literature, while predicting certain consequences of the event in discussion. In our case, making an accurate conclusion is particularly not that appropriate as this judgement has the potential to revolutionize the entire legal system of India. No specific results of this can be pinpointed and graded as constructive or destructive. Yet, from preliminary research and understanding certain features can be attributed to this judgement.

This is indeed an extreme step by the judiciary to bring a radical change in the realization of the concept of judicial accountability and transparency to the maximum extent. The people who are the integral part of this ecosystem will be affected on a larger scale due the heavy importance given to their welfare.

It will act as a huge step forward for the legal academia, as they now have access to the entire process of the court workings, which will indeed boost the quality and quantity of the literature as well as open up various new,

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54 Chandrachud 26 E a 2 a.

55 n 1 [53] (D Y Chandrachud, J.).

56 n 1 [8] (A M Khanwilkar, J.).

unexplored perspectives. The next gargantuan effect this judgement will cause is the approach in which legal awareness was spread in our country, now, the public has direct, unlimited access to feed their curiosity and also evolve to a society where the morals of law and order and much more pronounced.

The open justice system which was till now, a hypothetical concept to be physically realised, can be now converted into reality, thereby symbolizing the landmark achievement of the Indian judiciary and the society at large. The common factor in all the effects that are to be gained from this allowance intersect at a particular point, i.e., technology. Technology, that leads the human race forward by evolving one of the most integral part i.e., the legal dynamics of our system, is being used to the maximum to benefit all.

It can be concluded by saying that this judgement is a unique one in terms of its reach, effect and paradigm shifting properties. The consequence of this will unravel only with the flow of time. We, as a part of this ecosystem should positively contribute to reach the ultimate state of constructive organization for the betterment of the world.

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# EERA V. STATE - A CRITIQUE ON ABLEIST PERSPECTIVE

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Ms. Rajalaxmi Joshi\*

## Abstract

*Who is a child? the question is answered in terms of age. In law age is a number expressed in unit of years. But what is age is not defined by law. In the case of Eera v. State the Supreme Court was confronted with the question whether the term age can be read to include 'mental age'? Whether a mentally retarded adult whose mental age is below the age of 18 years will be treated as a child under The Protection of Children from Sexual Offences Act, 2012? The age as apparently simple concept put the court in perplexing situation. The present paper is an attempt to revisit the decision of the Supreme court from the disability rights perspective. The judgement of the Supreme Court is another glaring example of how ableist approach of legal system results in discrimination and denial of fair trial to persons with mental disabilities.*

**Keywords: Eera v. State, Supreme Court, Sexual Offences Act, 2012, Protection of Children, Discrimination.**

## Introduction

Regulation is a primary object of any legal system. The same is achieved by balancing competing interests.<sup>1</sup> The process of balancing can be achieved either by putting limitation on certain interests or by giving recognition and protection to certain interests. There are number of parameters used to justify such limitations or special protections. 'Age' of a person is one such parameters which has always been considered as the most objective, self-explanatory and simple. Reference to age as a parameter can be found in different areas of law ranging from personal law to public law. Despite being very common parameter, the word 'age' is not defined in any legislation. Even the legal literature including commentaries on statutes hardly devote any space to discuss the wisdom of the legislators in fixing a particular age as a qualification or disqualification. The concept of age is always understood in terms of numbers, measured in unit of years. The importance of concept of age would have gone unnoticed or unchallenged had the case of *Eera v. State*,<sup>2</sup> not confronted the Supreme Court on this issue.

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1 DIAS, JURISPRUDENCE, Fifth ed., 2013 Butterworths Publication, 430.

2 Eera through Dr. Manjula Krippendorf v. State (NCT of Delhi) And Anr., (2017) 15 SCC 133.

In a recent case of *Eera v. State*, the division bench<sup>3</sup> of Supreme Court had to grapple with perplexing questions as to who is a child? and what does age mean?

In this case comment the researcher has critically analyse the reasoning given by the Supreme Court from the disability rights perspective.

The case comment is divided into four parts (1) factual matrix of the case and issues before the court; (2) contentions and arguments before court and decision of the court; (3) critical analysis of the judgment; (4) conclusion.

## 1. Factual Matrix

Eera (the Appellant), 38 years old was suffering from cerebral palsy. Admittedly, the mental age or functional age of the Appellant was not beyond 6 years.<sup>4</sup> She was alleged to have been raped in the year 2014. The First Investigation Report in this regard was filed by her mother. Post investigation the trial began. The Appellant was represented through her mother. As the trial reached the stage of examination of the Appellant and recording of evidence the Appellant faced difficulties due to unfriendly and non-cogent atmosphere in the trial court. It was contended that during the examination of the Appellant, the Appellant used gestures and childlike language to narrate the alleged incident of rape. However, the trial judge refused to accept the childlike language despite the fact that the interpreter was interpreting the same for the trial judge.<sup>5</sup> The Appellant was distressed due to repeated questions. After undergoing this experience, the mother of the Appellant filed a petition before the Delhi High Court contending among other things that the case be transferred and be tried by the Special Court established under Protection of Children from Sexual Offences Act, 2012 (herein after POCSO). The Delhi High Court rejected the contention. Against the said order of the Delhi High Court the Appellant approached the Supreme Court by filing a special leave petition.

## Issues before the Supreme Court

Whether definition of the word ‘child’, as defined in Section 2(1)(d) of POCSO to mean any person below the age of 18 years, should engulf and embrace in its scope the ‘mental age’ of a person?

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3 Comprising of Justice DipkaMisra and Justice Rohinton Fali Nariman.

4 Eera through Dr. Manjula Krippendorf v. State (NCT of Delhi) And Anr., (2017) 15 SCC 133, Para 6 Pg. 152, Certificate of neuro-physician and psychologist of AIIMS, New Delhi was filed on record as the evidence of mental age of the Appellant.

5 <https://www.scribd.com/doc/311869630/Manjula-Krippender-Final-1?query=eera#>, last visited 24/02/2019.

Whether the Appellant could be treated as a ‘child’ for the purposes of the application of procedure under POCSO, considering the fact that the mental age of the Appellant was below the age of 18 years?

## 1. Contentions and arguments before the court

### (i) By the Appellant

It was contended that the definition of the word ‘child’ under POCSO should be read compositely to include biological and mental age. The Appellant whose mental age was below the age of 18 years should be treated as child and be allowed to take benefit of the special and victim friendly procedure under POCSO.

Arguments presented in support of the contentions,

- (a) The development process of mental capacity of the Appellant who suffered from mental disabilities was unable to keep pace with her biological age. Though, the physical characteristics of such person may be matching the biological age of an adult, the mental capacity of such person could be equated with that of a child much below the age of 18 years. Therefore, by expanding the scope of the term ‘age’ to include mental age, the Appellant be treated as a child under POCSO considering her mental age.
- (b) Liberal and purposive approach in interpreting the term ‘child’ should be adopted. Welfare and dignity of the child should be taken as paramount considerations while interpreting the beneficial legislation. With such approach the aim of the legislation would be achieved without violating language of the legislation.
- (c) To further substantiate and to draw support the Appellant relied on the Judgments<sup>6</sup> of the South African court wherein the court took into account the ‘mental age’ of the victim (whose biological age was 19 years) though not explicitly mentioned, to extend the benefit of recording the evidence through the intermediary under the provision which dealt with protection of witnesses under the age of 18 years.<sup>7</sup>

The Respondent no.2 the accused, did not appear before the court. The court decided to appoint Amicus Curiae, to represent him, who brushed

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6 Daniel Johannes Stephanus Van der Bank v. State; 2014 ZAGPPHC 1017 (High Court of South Africa) and 2016 SCC Online ZASCA 10 (Supreme Court of South Africa).

7 Criminal Procedure Act 51 of 1977, Sec. 170-A Evidence through intermediaries.

aside all the arguments made by the Appellant.<sup>8</sup> The occurrence of death of the accused during pendency would have abated the matter but the Supreme Court decided to address the issue of interpretation of the term 'age' and whether the Appellant would be entitled to compensation under POCSO and rules framed thereunder as claimed.

(ii) By the Respondents

The Respondent- State, supported the contentions raised by the Appellant and further added that no prejudice would be caused to the Accused if the trial would be conducted by the Special court, as the punishment remains the same.

The Amicus Curiae denied the contentions raised by the Appellant and argued that the definition of the word 'child' was plain and unambiguous. It should be given literal meaning and be restricted to include biological age. He emphasised on the mental age not being constant, vary with time and circumstances would unsettle the principles of criminal jurisprudence and lead to uncertainty. He claimed that absence of specific reference to mental age in the provision was intentional and was speaking of legislative intent. The court ought not to add words to the statutes. Therefore, reading of mental age in the definition would defeat the very purpose of legislation.

### Decision of the Supreme Court

The petition was dismissed denying the contentions raised by the Appellant on the following reasoning.

Dealing with the contention of purposive interpretation the court held that the tools of purposive interpretation and *casus omissus* can be used only when the meaning of the provision is not intelligible and there is clear necessity which can be determined from the four corners of the statute. The court observed, that the legislation had referred only to the biological age of a child which was substantiated by words 'below the age of 18 years'. To support this observation the court illustrated provisions from Juvenile Justice (Care and Protection of Children) Act, 2006, which in turn only makes reference to biological age and not mental age. The court went ahead to support its reasoning by stating that POCSO dealt with minors as a separate class and makes a distinction between minors and adult on the basis of the statutory age at which legal eligibility to give consent is

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<sup>8</sup> Eera through Dr. Manjula Krippendorf v. State (NCT of Delhi) And Anr., (2017) 15 SCC 133, Para 7, page 152, Nowhere the judgment sheds light on reasons and need for appointing the Amicus Curiae for the accused. The court did not consider the question as to who deserved representation through Amicus Curiae, whether the Respondent no. 2 or the Appellant?

recognised. Reading of mental age would lead to anomalous situations. In conclusion the court held, stretching meaning of the words 'age' and 'years' would amount to encroaching upon the legislative function which is beyond the 'Lakshman Rekha' that is the beyond the scope of judicial function.

In response to the South African Court's judgment, the Supreme Court agreed with the stand taken by the Court but did not find it fit to rely on the ground of it being a different situation.<sup>9</sup>

At the end while recording its formal conclusion the court directed under Sec. 357-A of Criminal Procedure Code, 1973 the Legal Services Authority, Delhi to award maximum compensation as envisaged under the Scheme framed by the Delhi Government to the Appellant.<sup>10</sup>

## 2. Critical analysis of the Judgment

With this backdrop the researcher presents a critical analysis of the arguments and the reasoning given by the court. At the very outset the researcher categorically disagrees with the decision of the court and would like to throw some light on the reasons for such disagreement. The below analysis of the judgment is an effort to project how superficially and with ableist lens the court looked at the concept of age.

### Concept of Age in law

By placing emphasis upon legislative intent, the court avoided reading of mental age within the term 'age'. The court by putting stress upon legislative intent stated that the intention of Parliament was only to make reference to biological age and not to the mental age of a person which was clear from the plain reading of the provisions. Before making such distinction between biological and mental age the court could have firstly dealt with a question as to why at all the legislation incorporates the concept of 'age' as a parameter in law? The scrutiny of laws (including civil and criminal) invariably shows that age as a parameter is expressed in terms of years, without expressly making reference to mental age. Apparently, when the concept of age is looked at as discussed under various legislations, one is bound to form an opinion that concept of age in law interacts only with biological age of a person and has no reference to developmental aspects of mind and mental capacity. However, on a deep inquiry one can see a close connection between mental age and

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<sup>9</sup> *Id at* Para 76, Pp 181-182.

<sup>10</sup> *Id at* Para 100,101; Pp 190-191.

biological age. The real intention behind prescribing the biological age is to assume that brain being an organ in the body of a person normally reaches a specific developmental stage at a particular biological age.<sup>11</sup> Once such biological age is acquired by a person then he is presumed to have gained required functional mental capacity. Therefore, under the regime of Contract law minor's contracts are considered as void ab initio because the law presumes incapacity on the part of a minor to form any legal intention to be bound by his promise. The Contract Act, 1872 nowhere makes any express reference to the term 'mental capacity' of a minor, on the contrary the entire concept of minority is approached by law in terms of years i.e. in literal sense in terms of biological age. Even if the concept of minority does not expressly refer to mental capacity, it does not justify reading of age as merely a biological factor, totally alienated from its mental characteristics. Many such illustrations can be taken from field of different laws wherein particular age prescribed as a parameter differs depending upon the mental capacity and maturity required to perform a particular function involved.<sup>12</sup> Based on this reasoning the court could have arrived at a conclusion that legislative intent reflects 'age' inclusive of biological and mental age.

While the court itself expressed a nexus between age of 18 years referred under POCSO and same being the age at which legal eligibility to give consent is recognised, court fails to appreciate that the concept of eligibility to give consent is not based on mere physical/biological development of a person rather has a very close connection with the 'ability to understand' and 'capacity to give consent' which are connected with cognitive or mental capacity of a person.

The researcher intends to point that the concept of 'age' in law cannot be restricted only to mean biological age. No legislative intent would be given effect to if the concept age is divided into 'biological' and 'mental' age. The composite reading of both biological and mental age is essential for all purposes.

### **Understanding age through ableist lens**

Having established that the concept of age revolves around the idea of mental capacity or cognitive development the author would now analyse

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11 The author owes this idea to her husband Mr. Aviraj Deshmukh.

12 Indian Contract Act, 1872, Sec. 12; See also Hindu Marriage Act, 1955, Sec. 5 read with Sec 12 (1)(c); Constitution of India, 1950, Art. 58(1)(b) the age prescribed for being appointed as President is 35 years, Art. 66 (3)(b) for Vice President it is 35 years, which is far above the standard age prescribed for attaining majority. Art. 326 read with Representation of Peoples Act, 1950 gives a person right to vote at the age of 18 years.

the same with the critical theory of ‘ableism’ to show how the present legal systems fails to protect the exceptional cases like the one of the Appellant in the present case.

The prescription of a particular age as a uniform parameter to acquire ability to perform a given function shows that law presumes that development of biological and mental capacity both would necessarily keep pace with each other in every person. And inevitably on acquiring a particular biological age a person must have normally acquired the mental capacity of a particular level. Such equations are formed on the basis of model set by a normal able-bodied person. This idea of ‘normalcy’ is ableist and not inclusive, and does not review connection between biological age and cognitive development from the angle of disability.

Therefore, the cases of persons with mental disability like that of Appellant are denied the protection of law or excluded from getting benefits of the special provisions because they fail to comply with ideal standards of ableism. The lack of expected cognitive development, in proportion to developing biological age goes against the concept of normalcy, making a person like Appellant unfit as she had reached the prescribed number referred to as age by law.

By interpreting the law with ableist lens the court had denied right to fair trial and in consequence justice to the Appellant. With this ableist normative presumptions the court also refused to treat the Appellant as ‘child’ denying her any protection of the friendly and accessible procedure.

### **Ableism as a barrier to access to justice**

Access to justice is a human right<sup>13</sup> and can be understood in two senses; narrower and broader. The narrow understanding of the term is equated with notion of ‘formal accessibility’ which is in turn concerned with providing facilities in terms of infrastructure.<sup>14</sup> However, when looked at in deeper sense the concept of ‘access to justice’ is considered as wider and not limited to ‘accessibility to adjudicatory mechanism’.<sup>15</sup> In wider sense it guarantees promotion of justice by removing social inequalities, environmental and perception-based barriers. In the present case, the judiciary’s perception was fully loaded with the ableist norm failed to provide access to justice to the Appellant in both narrower and wider sense.

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13 Anita Kushwaha v. Pushap Sudan (2016) 8 SCC 509, Para 10-12, Pp 521.

14 *Id* Para 33-36, Pp 529& 530.

15 <http://www.uvicace.com/blog/2016/2/2/what-does-access-to-justice-mean>, last seen 27/02/2019 at 12.24am See also, [https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/op00\\_2-po00\\_2/b4.html#sec15](https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/op00_2-po00_2/b4.html#sec15), visited on 27/02/2019.

The fact that court did not take cognizance of the obligations cast upon by the United Nations Conventions on Rights of Persons with Disabilities 2006 (UNCRPD)<sup>16</sup> resonates the indifferent approach of the court. Article 13 of UNCRPD categorically lays down the obligations on the state parties to ensure effective access to justice to persons with disabilities (PWD) on equal basis with others. This ensures that any action that is discriminatory in purpose or effect must be prohibited. Article 2 of UNCRPD coins the term ‘discrimination on the basis of disability’ to include failure to provide reasonable accommodation. A reasonable accommodation can be achieved by making suitable modification to standard practice or procedure which would remove a particular disadvantage faced by a disabled person. Article 13 emphasises on providing procedural and age appropriate accommodations. In the present case the court could have provided reasonable accommodation to the Appellant by extending the benefit of trial as contemplated under POCSO without even equating the Appellant to status of the child. At this juncture a compounding effect of the two Articles i.e. Article 12 and Article 13 of the UNCRPD can be highlighted. As per Article 12 a PWD is entitled to have legal capacity in all matters on equal basis with others. It is important to note, that in order to exercise effective access to justice by PWDs, the legal capacity of PWDs must be first recognised.<sup>17</sup> The arguments advanced for Appellant if accepted would have reduced the status of the Appellant to that of the child resulting in denial of legal capacity on the ground of minority. The inaccessibility, hurdles and complete apathy on part of the criminal justice system might have had compelled the mother of the Appellant to take up such stand. In such case by invoking its power under Art. 142 of the Constitution of India the Supreme Court could have protected the interest of the Appellant through the device of reasonable accommodation whereby offering to the Appellant similar beneficial procedure as contemplated under POCSO.

### **Rights of Persons with Disabilities Act, 2016 and access to justice**

While the court made reference to the Rights of Persons with Disabilities Act, 2016; it is very disappointing to note that the Supreme Court showed complete indifference to the provisions of Section 12. The section categorically imposes obligation on the appropriate Government to provide for measures ensuring effective access to justice to PWDs. The Section enumerates measures to be taken to facilitate effective participation of

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<sup>16</sup> India has ratified UNCRPD in 2017.

<sup>17</sup> I. Bantekas, M.S. Stein, D. Anastasiou, the UN Convention on Rights of Persons with Disabilities a Commentary, (Oxford Publication 1<sup>st</sup> ed. 2018).

PWDs in adjudicatory process.<sup>18</sup> It is evident that the justice system is inaccessible from the fact that the Appellant's mother had to approach the court. The court did not notice lack of measures on the part of appropriate government leading to justice system becoming inaccessible to the Appellant at the trial court. Considering this fact, the court could have simply provided the Appellant with POCSO like procedure. However, in reality by taking a technical and myopic stand the court refused to protect the Appellant's interest. Even by referring to principles of justice, equity and good conscience the court could have adopted the tool of reasonable accommodation and would have dealt with the Appellant's case in the most dignified manner. The indifferent approach of the court has resulted in complete injustice and denial of fair trial to the Appellant which was her fundamental right.

### **Purposive interpretation from Ableist lens**

The scrutiny of preamble, statement of object and the scheme of legislation makes the purpose of the legislation abundantly clear. It is clear that the 'explicit text' of the legislation refers to 'children below the age of 18 years' as a class to be governed and protected. However, if this 'explicit text' is read in the 'context' of the purpose then one realises that 'children below the age of 18 years' are not identified randomly as class worthy of protection, but because of certain characteristics that this class possesses. Such characteristics as vulnerability, prone to abuse, exploitation, and most importantly lack of maturity of mind and body. Considering these if the legislation provides protection to a class referred to as 'children below the age of 18 years' then without a doubt everyone who is similarly situated is entitled to the protection of the same legislation. Article 14 of the Constitution of India guarantees that equals to be treated equally. The denial of the court to extend the protection to the Appellant under POCSO like procedure is also against the basic notion of equality. While this argument of equality is proposed, its tone should not be taken to mean that the Appellant should be treated as a child, while respecting the difference (biologically the Appellant being an adult) the court could have extended the benefit to the Appellant on the anvil of substantive and transformative equality.<sup>19</sup> The court could have suitably tailored the procedure to accommodate the Appellant keeping in mind that the rules of the procedure are handmaid of justice.

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18 Rights of Persons with Disabilities Act, 2016 Sec. 12 (4) (c) make available all necessary facilities and equipment to facilitate recording of testimonies, arguments or opinion given by persons with disabilities in their preferred language and means of communication.

19 Convention on the Rights of Persons with Disabilities, General comment No. 6 (2018), Article 5: Equality and non-discrimination, Committee on the Rights of Persons with Disabilities.

Therefore, it is seen that the court applied a very narrow understanding of 'purposive interpretation'. The influence of ableist ideology has also affected the court's effort of identifying the purpose of the legislation.

## **Conclusion**

Tool of purposive interpretation is a key that courts bear to unlock the doors of justice. While applying the rule of purposive interpretation, if the vision of the court is clouded by the ableist perception, then the courts would fail to unlock such doors for persons with disabilities. The present case is a missed opportunity on the part of court wherein the court could have made the justice system inclusive by discarding ableist perspective to look at law. The case demanded that the court should have set a new path leading towards access to justice and transformative society based on transformative constitutionalism. The 'disabled criminal justice system' denied Eera a dignified life and a fair trial.

Eera of transformative constitutionalism has not made any transformation in the life of 'Eera'.

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