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LEGISLATIVE DRAFTING FOR THE UNITED STATES SENATE

Gary Endicott[1]

After winning the American Revolution, John Adams (our 2nd President) said the Founding Fathers of our nation created "A government of laws, and not of men". To maintain that government, George Washington (our 1st President) warned that "Laws made by common consent must not be trampled on by individuals." Drafting well-written legislation is important to accurately effectuate laws made by common consent through the legislature, to avoid laws being trampled on by "bad men" (as Oliver Wendell Holmes called them), and to minimize the many negative effects on society of poorly-written laws. As Professor Albert Menard once said "Poorly drafted statutes are a burden upon the entire state. Judges struggle to interpret and apply them, attorneys find it difficult to base any sure advice upon them, and the citizen with an earnest desire to conform is confused. Often, lack of artful drafting results in failure of the statute to achieve its desired result. At times, totally unforeseen results follow. On other occasions, defects lead directly to litigation."

ESTABLISHMENT OF OFFICE

Congress did not use professional bill drafters to draft its legislation for the first 120 years of its existence and the legislation written by Members, private lawyers, lobbyists, executive agencies, and others often led to many of the problems of interpretation, compliance, and unintended consequences, and other problems. To address these problems, in the early 1900's, Columbia University used the proceeds of a bequest to persuade Congress to allow the University to send several attorneys to assist in the drafting of Federal legislation.

Based on the roles of drafting offices in the British Parliament and various State legislatures, the Columbia University project was designed to show that a central office would be capable of providing attorneys trained in legislative drafting who could provide uniformity in drafting so that the intent of Congress would be made clearer to the public and those in the executive and judicial branches required to interpret legislation; and enhancing the role of Congress in the system of checks and balances contemplated by the Constitution by establishing the expertise to write legislation within the legislative branch.

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The attorneys assigned to the Columbia University project were originally assigned to draft tax legislation for the Ways and Means Committee of the House of Represenatives. The Members of the Committee were impressed both by the clarity of the language and the shorter length of drafts.

The good experience of the Ways and Means Committee with the Columbia University Project resulted in the enactment of legislation in 1918 that provided funds for the establishment of the Office of Legislative Counsel. Originally there was 1 Office that served both the House and Senate but that Office was split into 2 offices to separately serve each House of Congress. The Legislative Counsel of the Senate began in 1918 as a small Office with a limited number of attorneys and small workload but has grown into a much larger Office with 35 attorneys to draft a high and growing quantity of legislation for the Senate.

INCREASED WORKLOAD

Helen Dewar (a famous Washington Post reporter who covered the Senate for 25 years) once said "The United States Senate has three basic speeds: slow, slower and stop." The growth in the use of my Office by the Senate, however, has been anything but slow, slower, or stops. In the 111th Congress (2009-2010), the number of requests received by the Office increased 760% over the previous 30 years as the Office received 70,119 requests that were drafted by 34 attorneys for an average of 2,062 drafts per attorney for that 2-year period. During 2015, my Office prepared over 41,000 files, which is 41% more than the Office prepared during 2013 (the comparable latest year). The dramatic growth in the use of the Office by the Senate is probably due to the increase in the use of computers to generate and prepare requests, increasing partisanship in Washington, the growing size and complexity of Federal law and legislation, the increasing rate of turnover among Congressional staff outside the Office, and the ability of the Office to meet the growing demand with a high quantity of professionally drafted legislation and institutional knowledge. Although Senate offices are not required to use the Office, all authorizing committees of the Senate and over 90% of other Senate offices use the Office to draft their legislation.

IMPROVED PRODUCTIVITY

If "necessity is the mother of invention" as the English proverb tells us, the Office of the Legislative Counsel of the Senate has virtually reinvented itself over the last 30 years to meet the tremendous increase in the demand for its legislative drafting services (760% increase) with a relatively modest increase in the size of the Office (70% increase). This transformation has included everything from how the Office is structured to the tools attorneys use to draft legislation and interact with Senate clients.

TEAMS

When I first learned to draft legislation for the Senate 34 years ago, the Office was really more like a collection of independent contractors with individual attorneys who had primary responsibility for drafting legislation dealing with specific subject matter areas. If this approach was workable when the demands placed on the Office were relatively small, it was ill-suited to the new demands placed on the Office to draft huge bills during the Reagan presidency and beyond. To deal with its increasing workload, the Office established 5 teams composed of 6-8 attorneys per team that were responsible for drafting legislation under the jurisdiction of 1 or more Senate committees (e.g. a natural resources team). The establishment of teams of drafting attorneys allowed the Office to have the flexibility and resources to respond to and meet the growing demands placed on the Office for ever-changing areas of active legislation.

ATTORNEYS DRAFTING LEGISLATION ON SCREENS

Although some of the younger attorneys in the Office may think I originally drafted legislation using stone tablets or quill pens, the Office did use a more traditional approach for drafting legislation in the past in which attorneys wrote or dictated their drafts and staff assistants prepared drafts on the Office computer system. If this approach was feasible when the volume and speed of demands for legislation were relatively modest, it was too cumbersome to meet the growing demands placed on the Office to prepare numerous large bills and seemingly countless amendments. To help attorneys meet the growing demands for legislation, the Office installed a computer at the desk of each attorney complete with software which allowed attorneys to use their computers as drafting tools to craft legislation directly on their screens, using staff assistants only to input large quantities of new text or edits.

CONVERSION TO WINDOWS-BASED XML WORD PROCESSOR

To enable the Government Printing Office (GPO) to easily print legislation prepared by the Office, when I first started in the Office, the staff assistants of our Office used the same word processing software as GPO to manually insert GPO printing codes for each paragraph of new text. If this word processing and printing system allowed staff assistants to create documents for the sole purpose of printing documents, it was not optimal for highly trained attorneys to be forced to enter numerous printing codes to draft legislation or for multiple uses of legislation prepared by the Office. The Office evolved through a couple of DOS-based word processing systems and today uses a Window-based system customized by the Senate called LEXA to draft legislation. LEXA appears to be much like Word to new attorneys

with formatting on the screen that resembles printed bills but with no printing codes appearing on the screen (making it easier for attorneys to focus on drafting rather than printing codes) but with XML tags inserted in the background so that the Library of Congress and other users of our electronic files can exchange data with the Office and use the XML tags to enhance their databases.

CONVERSION TO INTERNET & ONLINE LEGAL RESEARCH DATABASES

Mark Twain once said "Good friends, good books, and a sleepy conscience: this is the ideal life". Mr. Twain would have felt right at home in the Office 30 years ago when the halls of the Office were lined with law books which Office attorneys used to draft legislation. Although the halls of the Office are still lined with law books, the reality is that the attorneys in the Office now heavily use online legal research databases to do the research necessary to draft Federal legislation. The attorneys in the Office can now use powerful online tools to retrieve and search up-to-date versions of the United States Code and regulations, cases that interpret or affect Federal law, and legislative support, executive agency, and other websites that provide useful information on the myriad subject areas in which Office attorneys draft Federal legislation.

ELECTRONIC COMMUNICATION WITH CLIENTS

When I first arrived in the Office, Senate clients made their legislative requests to the Office by phone, memoranda, or drafts or in meetings and Office attorneys prepared printed versions of legislation which were delivered or faxed to clients or picked up by clients. As technology advanced and the workload increased, most of the communication between Senate clients and the Office is now electronic. The Office receives most of the requests from Senate clients via email and the Office uses email to send the clients PDFs of requested legislation. In addition, attorneys may attach Word-lock versions of their legislation (that enable clients to use Word to indicate desired edits) and redlines showing differences between versions of legislation prepared by the Office.

IMPROVED RECRUITMENT AND TRAINING

The Office had a more informal and personal method of recruiting and training in the past in which the Office conducted limited recruitment and interviewing of new attorneys and trained new attorneys exclusively by assigning new attorneys to mentors for their first two years. To hire and train the high quality attorneys that are needed to deal with its increasing workload, the Office has improved its recruitment process by establishing a Recruitment Committee to recruit candidates nationwide and evaluate the huge number of applications the Office receives using

uniform criteria and an Interviewing Committee that interviews applicants in panels before offers are made. Once new attorneys start in the Office, each new attorney begins their training with a 4-week training program in which current and past attorneys in the Office provide training to the new attorneys in drafting, Senate procedure, and other areas for which training is needed to draft legislation for the Senate.

UNIFORM DRAFTING STYLE

The novelist Charles Morgan once said "If Moses had gone to Harvard Law School and spent three years working on the Hill, he would have written the Ten Commandments with three exceptions and a saving clause." Although Moses never worked in the Office or drafted Federal legislation to my knowledge, when I arrived at the Office, the previous 200 year-history of Members and others drafting Federal law had produced a body of Federal law that was not always clear, consistent, or well written. In the early 1990's, my Office and the House Legislative Counsel's Office began to both use a uniform drafting style to improve the quality and consistency of Federal legislation and Federal law. Whenever possible, drafters in both Offices use plain English, brevity, consistent organization and terms, and captions and subdivision to organize drafts and make the drafts more readable. Consistent use of the uniform drafting style by both Offices has led the vast majority of committees, Members, and staff in Congress to draft in, prefer, and use that style. As Congress amends law written in traditional style, an increasing percentage of Federal law is being converted into the uniform drafting style.

LAPTOPS AND TELEWORK

After the tragic events of 9/11 and anthrax attacks on the Senate, Congress understandably insisted that terrorists would not be allowed to shut down Congress and was adamant that Congress and its support offices (like my Office) should continue to operate after any attacks on Congress. To enable the Office to continue to produce legislation even if employees couldn't physically get into the Office, the Senate supplied to each employee of my Office a laptop, necessary software, and (for attorneys) a Blackberry. To enable Office employees to become proficient at using their laptops for drafting legislation in the event of emergencies and to help reduce congestion and pollution in the area, the Office allows employees to telework on a limited basis. This arrangement allows the Office to remain ready to produce legislation during and after emergencies regardless of whether they are physically in the Office. Laptops also allow attorneys who would otherwise have to remain in the Office to cover the frequently unpredictable late night or weekend demands of the Senate to go home and use their laptops to draft any high priority legislation if

and when it is needed. Laptops and tele-working have improved the work-life balance of employees of the Office while serving the needs of the Senate and have contributed to remarkably low rates of turnover in the Office.

Bismarck once said "Laws are like sausages. It's better not to see them being made." Although it still may be true that it's better for the faint-hearted not to see laws being made, there have been remarkable changes in legislative drafting and the procedure my Office has used to help draft those laws for the Senate over the last 30 years.

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PREVENTIVE POWERS OF POLICE IN INDIA

Prof. (Dr.) Clemens Arzt[1]

Abstract

The debate about policing in India usually focuses on the lack of accountability and professionalization of the organization as well as on human rights violations. On the other hand, "digging" into the law of the land almost 70 years after Independence by thoroughly analyzing police powers under Union and State Police Acts is much less popular in academic writing. A widespread opinion seems to be that it does not make much sense to analyze shortcomings in statutory law because (i) India is a common law country and (ii) the Indian police do not obey the law anyway. At the same moment, it is objected that granting the police a set of clearly stated but also delimited statutory powers would automatically lead to even more powers of the police. Obviously, it has to be conceded that any revision and modernization of statutory powers, e.g. in Police Acts and the Code of Criminal Procedure, implies the peril of an increment of police powers detrimental to fundamental rights. While stressing rule of law values might lead to prioritizing fundamental rights, police powers rather point in the opposite direction. Since most of the existing Indian law stipulating police powers is still based on a pre-constitutional model of police, it does not seem to be premature in 2016 however, to discuss a fundamental rights based concept of police powers in India. Besides, the inevitable need to modernize the Indian police and to enhance accountability mutually requires scrutinizing the current law of the land, granting the police vast and not at all clearly delimited powers to encroach up fundamental and human rights.

Introduction

This paper only deals with "preventive" powers of police in contrast to police powers in criminal procedure after a crime might have been committed; i.e. criminal justice. The notion of preventive powers of police is rather uncommon in the Indian legal discussion even though "law and order policing" somewhat reflects the very idea. From this however no clear-cut statutory differentiation[2] follows, as I will

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[2] Cf. *Arshinder Singh Chawla*, Separation of Law & Order and Investigation, Presentation at the 39th All India Police Sciences Congress; at http://www.bprd.nic.in/writereaddata/linkimages/0378278658-separation-a-field-model.pdf (last access for this and all other Internet sources: 18/02/2016); see also SC in Prakash Singh & Ors. v. Union of India & Ors.

discuss in this paper. The underlying assumption of this paper is this: it would be in the interest of a better protection of fundamental rights protected by the Indian Constitution to "bundle" police powers in the field of preventive policing in one Act, precisely, narrowly, and exclusively describing which powers the police have to counter "public order" problems. This obviously does not include preventive detention within the meaning of Art. 22 (3) to (7) Indian Constitution, e.g., the National Security Act, 1980, or the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. Limitations on the powers of police to interfere with one's constitutional and human rights are warranted not only by the Indian Constitution but also by countless Supreme Court (SC) decisions on the realities of policing in India. More than a few of these decisions have almost systematically been ignored by both the legislature as well as by the police, even though the police are supposed to obey the rule of law.[3]

My somewhat "legalistic", German approach might seem a little narrow to a political or social scientist as well as to a human rights activist. And yet, while a lot has been written on the shortcomings of policing in India,[4] enriched and enhanced by many official Commissions and Committees on the Union as well as on the State level (see below), it seems that statutory law on police powers as such does not generate much attention in scholarly writing in India.[5] For a foreign observer the academic silence on the legal framework itself is surprising. For some reason India appears "stuck" in a legal system that in many aspects does not at all reflect the aspirations as well as the needs of a modern society, which promises its citizens liberty of thought, expression, belief, faith and worship, equality of status and of opportunity and other fundamental freedoms in its constitution.

As such a foreign observer, I consider it most appropriate to close this critical introduction by citing an Indian scholar, *Fali S Nariman*: "The stark fact is that whenever there was a choice between common law and the Roman law (which is the basis of modern continental codes), the decision has always been in favor of Roman law. The main reason was that the Roman law is in the form of a code, and

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[3] But see BIPAN CHANDRA MUKHERJEE, INDIAN SINCE INDEPENDENCE, New Delhi 2008, at, 21, referring to the "paradoxical" acceptance of the general concept of rule of law even by the colonial state, which was "basically authoritarian and autocratic".

[4] See, e.g., K. ALEXANDER, POLICE REFORMS IN INDIA, New Delhi 2006; SANKAR SEN, ENFORCING POLICE ACCOUNTABILITY THROUGH CIVILIAN OVERSIGHT, New Delhi 2010; JOSHUA ASTON, RESTRUCTURING THE INDIAN POLICE SYSTEM: NEED FOR ACCOUNTABILITY AND EFFICIENCY, 2011; CHRI, POLICE REFORM DEBATES IN INDIA, 2011.

[5] Exemplary exceptions are UMA B. DEVI, ARREST, DETENTION AND CRIMINAL JUSTICE SYSTEM, Oxford 2012, and N.KRISHNA KUMAR, HUMAN RIGHTS VIOLATIONS IN POLICE CUSTODY, New Delhi (2009).

is far more convenient to understand than the common law, the latter being a strange amalgam of case law and statute law. In fact, the 'common law' is not much 'law' as it is a unique *method* [italics and quotation marks in original] of administering justice, a method which lawyers not reared in the system find difficult to comprehend!".[6] And yet despite the primacy of common law, even in the "motherland" of Indian law, in Great Britain, today statutory law is prevalent if not exclusive when it comes to police powers.[7]

Police Powers as a Concept

The notion of police powers in this paper refers to means of policing like, e.g., arrest, search, but also interdictions to stay in a certain area or measures against assemblies, like dispersals (e.g. Sec. 129 CrPC). Interestingly, in India such powers are settled in both Union and State Police Laws and in the Code of Criminal Procedure (CrPC 1973)[8], like the power to issue an order in urgent cases of nuisance of apprehended danger (e.g. Sec. 144 CrPC). Thus the CrPC is most relevant in vesting the police with preventive powers even in the case of a mere prevention of dangers or public order policing. While preventive powers in the context of criminal justice on the one hand can be described as powers to prevent the commission of (cognizable) offences,[9] this does on the other hand not encompass major provisions in the CrPC which are directed at the maintenance of public peace and order which clearly have to be distinguished from criminal procedure.

Not being an Indian lawyer "reading" Indian law will never be completely detached from my own legal background. While police powers in Germany today go far beyond what seems to be desirable from a perspective of constitutional freedoms and human rights, German police law does have a clear-cut idea and system of how to delimit police powers by statutory as well as constitutional law. And yet the Courts have to block excessive restrictions on personal freedoms and lawmakers publicly have to justify any introduction of even more powers for the police; such court decisions and political discussion however may have some positive effect against the adaption of "too many" limitations on constitutional freedoms. Discussion on such topics goes far beyond the legal profession while in India many lawyers rather seem to oppose the idea of a clear-cut system of police powers (and limitations on such powers) which would always need to be a compromise

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[6] FALI. S.NARIMAN, INDIAN LEGAL SYSTEM: CAN IT BE SAVED?, New Delhi 2006, at 26-27.

[7] See "Police Powers" in: Dictionary of Policing, *Tim Newburn/Peter Neyroud* (ed.), 2008. On early deviations from common law powers in the UK in the 18th century see, e.g., *David Dixon*, Law in Policing, Oxford 1997, at 54 et seq.

[8] In this paper I will only refer to the Cr. P. C. but not to State amendments to this Code.

found in the legislative body under the "supervision" of the Courts, stating that this would open the door to even more powers of the police.

The British Police Act (BPA) of 1861 and its aftermath

The British Police Act (BPA) of 1861 was the outcome of the recommendations and a Bill drafted by the Police Commission 1860. The applicability of the Police Act of 1861 in the Indian States and its substitution by "modern" police laws is governed by Entry 2 of List II Seventh Schedule. Which Indian States enacted "new" police Acts to substitute colonial law to date and to what extent such acts substantially deviate from the 1861 "role model" has never been researched thoroughly by academic writing. According to the National Police Commission in 1979, the BPA of 1861 was "designed to make the police totally subordinate to the executive government in the discharge of its duties. No reference was made at all to the role of police as a servant of the law as such".[10] With special reference to Sec. 23 the Commission pointed out that an "average policeman would deem an order to be a lawful order provided it comes to him from someone above in the hierarchy. He would not pause to check whether there is any enabling provision in any law for such an order to be issued", continuing with the rather depressing statement that this still "is the present position".[11]

The BPA of 1861 was amended[12] several times without implementing major changes in the Indian police system and law. *Bayley* in his seminal book on Indian Police in 1969 comes to the conclusion that the BPA already in 1861 was neither revolutionary nor particularly novel. According to his judgment the significance rather lay in the fact that the Act provided authoritative answers to the two questions implicit in the experiments with policing British India, namely "what should be the relations between imperial and rural police and how imperial police administration should be coordinated with other functions of imperial authority".[13] According to him, the system at the end of the 1960s had been handed down virtually intact since 1861.[14] He goes on stating that "[w]hat is particularly striking about contemporary police structure is its permanence. Its fundamental principles of organization have remained fixed for over a century. (...) is the system still

[9] Cf. §§ 149, 151 Cr. P. C.
[10] National Police Commission, 2nd Report at 14.24 and 14.28.
[11] National Police Commission, 2nd Report at 14.26.
[12] See, e.g., Police Act 1888; Jammu and Kashmir (Extension of Laws) Act 1956; Police (Incitement to Disaffection) Act 1922; Police Act 1949; State Armed Police Forces (Extension of Laws) Act 1952; Police-Forces (Restriction of Rights) Act 1966.
[13] DAVID H. BAYLEY, POLICE AND POLITICAL DEVELOPMENT IN INDIA, Princeton 1969, at 45.
[14] *Id.* at 49-50.

compatible with a democratic political state as it was with a colonial one?"[15] Perhaps, as some suggest, the perpetuation of the British system was (and is) in the best interest of the new rulers as well.[16]

Critical Accounts on Policing in India

Starting in the 19th century and up to date many official committees and commissions have analyzed the state of policing in India, most of the time without "tangible" results in real life and on the legislative powers, neither during the *British Raj* nor in modern India. *Bayley* in 1969 concludes that "contemporary police philosophy in India is an ironic combination of British liberal tradition and British colonial practice".[17] Has policing in general and the respect of constitutional and fundamental rights by the police changed for the better since then? Police reform is a much discussed topic in India with many books by active and former police officers and scholars. Interestingly, however, the legal means and statutory police powers are hardly ever mentioned in any of such books. Some authors mention the basic idea of the rule of law. Nevertheless, this hardly ever transcends a passing mention without going into much detail. When discussing limitations of police powers, reference is made rather to human rights than to fundamental rights under the Indian Constitution, which is astonishing from my point of view. It seems that a well-grounded legal analysis of police powers and their necessary limitations under the rule of law still is on the waiting list in legal academia in India.

1. The public perception and the Supreme Court

Talking about the police to the *aam aadmi* will hardly ever result in a positive statement about the institution. Not different in academic writing. In short, unlawfulness, behavior and distrust in the police seem to be major problems of the Indian police.[18] Numberless examples of complaints about misbehavior, *mala fide* practices and unlawful action can be found in the media, in scholarly writing as well as in Jurisprudence. The National Human Rights Commission (NHRC) in 1999 alone received a total of almost 55,000 complaints, of which many concerned the police.[19] Obviously not satisfied with the police dealing with complaints, the

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[15] *Id.* at 57.
[16] Cf. K.S. SUBRAMANIAN, POLITICAL VIOLENCE AND THE POLICE IN INDIA, New Delhi 2007, at 63-64, 75.
[17] *Bayley*, note 13, p. 422.
[18] See, e.g., G.P. JOSHI, POLICING IN INDIA – SOME UNPLEASANT ESSAYS, New Delhi, 2013; KAMALAXI G TADSAD & HARISH RAMASWAMI, HUMAN RIGHTS AND POLICE ADMINISTRATION, New Delhi, 2012; SANKAR SEN, ENFORCING POLICE ACCOUNTABILITY THROUGH CIVILIAN OVERSIGHT, New Delhi 2010.
[19] See SANKAR SEN, TRYST WITH LAW ENFORCEMENT AND HUMAN RIGHTS, New Delhi 2002, at 294-96.

Commission in a drastic step in November 2013 asked the Government of Maharashtra to arrest and bring the Commissioner of Police, Pune, before the Commission on a set date, because of his "casual and mechanical approach (...) in a matter relating to the human rights violation of a person of Scheduled Caste."[20] In 2011 the SC, with reference to *D.K. Basu v. State of West Bengal*[21] summarized with most obvious discontent: "Policemen must learn how to behave as public servants in a democratic country, and not as oppressors of the people."[22] When studying the plethora of SC rulings on police misbehavior and use of illegal means, there remains little doubt that in many, perhaps most of the cases the victims belong to the poor and marginalized sections of society. Even though changes may have taken place in the police of at least some States, in general the Indian police still seem to face a major problem when it comes to adherence to human and fundamental rights as well as to the rule of law.[23] On the other hand, because of the wide-spread perception of a malfunctioning criminal justice system, probably quite a significant share of the public do not mind when the police resort to illegal means as far as fake encounters, i.e. extrajudicial killings[24]. As *Sen* puts it, the "police are encouraged to do the dirty work of society because the criminal justice system is not functioning and overhauling of the entire administration of justice is too big a task."[25]

2. Illegal Means and Third Degree Methods

Discussion on the use of illegal means by police is "standard" in books on policing.[26] The use of illegal means to produce evidence and to obtain confessions is commonly referred to as "third degree" methodology of investigation. In addition, evidence not only in a few cases is said to be a product of padding and concoction, due to (too) high standards of evidence required by the courts.[27] This at least

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[20] NHRC press release, (NOV. 25, 2013), available at http://nhrc.nic.in/dispArchive.asp?fno=13021.

[21] (1997) 1 SCC 416.

[22] *Mehboob Batcha* v. *State*, (2011) 7 SCC 45 (53), introducing the case against police officers with the remarks: "If ever there was a case which cried out for death penalty it is this one ..." (ibid. p. 47).

[23] See, e.g. *Sen*, note 19, p. 333-379; see also NHRC reports on some individual cases at http://nhrc.nic.in/PoliceCases.htm.

[24] See, e.g., the case in Peoples Union for Civil Liberties v. Union of India, 1997 SCR (1) 923 at 929, where the police seized "two persons along with some others (...) from a hut, taken to a long distance away in a truck and shot there. This type of activity cannot certainly be countenanced by the courts even in the case of disturbed areas." Most actual Rotash Kumar v. Haryana, AIR 2014 SC (Supp) 182, were compensation of 2 Mio. Rs. was granted.

[25] *Sen*, note 19, p. 352.

[26] See also NPC, 4th Report, at 27.26.

[27] See, e.g., KIRPAL DHILLON, POLICE AND POLITICS IN INDIA, New Delhi 2005, at 154.

seems to be a broad perception on the side of police officers even though already in 1978 the SC pointed out that the "[c]redibility of testimony, oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect (...). Why fake up?"[28] Especially when it comes to "gang dacoity" or "terrorism", fake encounters (illegal killings by the police) as well as true encounters often seem to be the easiest device to earn rewards and recognition for a police officer.[29] It seems to be widely believed inside the police that the only effective strategy to deal with criminal and extremist violence is to "overcome" inadequacies and loopholes in the laws and procedures that govern criminal trials.[30] The National Human Rights Commission (NHRC) recently documented 555 cases of alleged fake encounters alone from October 2009 till February 2013 across India[31] while the number of cases registered with the NHRC amounts to almost 3000 for the period from October 1993 to April 2010. How many of this cases really involved illegal killings by the police is highly controversial, however there is no doubt that such cases do exist[32] to a significant amount.[33]

3. Arrest and Custodial Death

A person being taken into arrest by the police finds her- or himself in a very vulnerable position which the National Police Commission (NPC) appropriately betokens as the "trauma of arrest".[34] According to the Commission's findings, legal provisions granting discretionary power of arrest to the police, which might be unavoidable in general, on the other hand lead to corruption and malpractices.[35] Therefore the arrest of a person according to the NPC can only be governed by public interest and the actual requirements of an investigation and not by a "mere desire of the police to show off their power".[36] The NPC summarizes that public

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[28] *Inder Singh* v *State*, (1978) 4 SCC 161 at 162-63.
[29] See NPC 8th Report, at 61.38; JAMES VADACKUMCHEY, WOUNDED JUSTICE AND THE STORY OF THE INDIAN POLICE, New Delhi 2001, at 11-31; Sen, note 19, at 352.
[30] Dhillon, note 27, at 174-176 and 193, giving examples of official "approval" of such methods.
[31] INDIA TODAY (JULY 4,.2013) available at http://indiatoday.intoday.in/story/fake-encounters-congress-ruled-states-narendra-modi-gujarat/1/286891.html.
[32] For some most recent cases see, e.g., *Mehboob Batcha* v. *State*, (2011) 7 SCC 45 and *Prakash Kadam* v. *Ramprasad Vishwnath Gupta*, (2011) 6 SCC 189.
[33] Cf. Sanjeev Sirohi, *Fake Encounters Must be Punished with Death*, (2) 2012 Criminal Law Journal, at 164-67.
[34] NPC 3rd Report, at 22.22.
[35] Ibid at 22.20-21 and 22.28.
[36] NPC 4th Report, at 27.24.

"fear of police essentially stems from the fear of an arrest by the police in some connection or other."[37] However, the NPC also points to the fact that it is not only the police who may be responsible for a high number of arrests that at the end turn out to be unnecessary.[38] "Apart from a legal perception of the necessity to make arrests in cognizable cases, the police are also frequently pressed by the force and expectations of public opinion in certain situations to make arrests, merely to create an impression of effectiveness. (...)"[39]

The National Human Rights Commission right after its constitution in 1993 ordered that all cases of deaths in police custody have to be reported to the Commission within 24 hours for further inquiry.[40] Cruel treatment and death of persons in custody or arrest give reason for many rulings in individual or Public Interest Litigation (PIL[41]) cases and the SC already in 1985 urged "to amend the law appropriately so that policemen who commit atrocities on persons who are in their custody are not allowed to escape by reason of paucity or absence of evidence. (...) Bound by ties of a kind of brotherhood, they often prefer to remain silent in such situations and when they choose to speak, they put their own gloss upon facts and pervert the truth (...)."[42] Again in *D.K. Basu v. West Bengal* the SC raised the point: "Custodial violence, including torture and death in the lock ups, strikes a blow at the Rule of Law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. (...)."[43] Not much seems to have changed in policing since then. Still the very law of the land and its statutory foundations are in urgent need of close examination,[44] not only excesses of the police in enforcing the law. To counter illegal methods and shortfalls the Model Police Act of 2006 proposed to introduce criminal penalties for common defaults committed by the police, such as non-registration of a First Information Report (FIR) under Sec. 154 CrPC[45], unlawful arrest, detention, search and seizure, to bring into sharp focus for the police personnel that some of their practices are not only illegal, but also criminal offences under the law of the land.[46]

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[37] NPC 3rd Report, at 22.24.
[38] See NPC 3rd Report, at 22.23.
[39] NPC 3rd Report, at 22.27.
[40] See, e.g., http://nhrc.nic.in/cdcases.htm; see also Defining an Absence: Torture 'Debate' in India; E. P. W. (June 28, 2014), at 69.
[41] On the constitutional base of PIL see S.P. Gupta v. President Of India, AIR 1982 SC 149, at 188 et seq.
[42] State of U.P. v. Ram Sagar Yadav, AIR 1985 SC 416 at 421.
[43] *D.K. Basu* v. *State of W. B.*, (1997) 1 SCC 416 at 424.
[44] One noteworthy exception is *Devi*, note 5, which remarkably has been published in the UK.
[45] A very common problem; see, e.g. *Lalita Kumari* v. *Govt. of U.P.*, 2014 AIR SC 187.

Since the Judiciary in cases of police misbehavior and infringements of fundamental and human rights often cannot provide for redress in due time,[47] the SC since the 1980s is putting an emphasis on financial compensation for police abuse of powers also as a means of preventing illegal action and enforcing due compliance with human and fundamental rights by the police in the future.[48] Thus financial compensation to some extent has become a remedy under public law which not only has the function to "civilize public power" but also to assure the citizens that they live under a legal system wherein their rights and interests shall be protected and preserved.[49] However, such compensation most probably will not have any effect unless police officers are personally made liable.[50]

Police Commissions and Committees

Several official and high-ranking commissions and committees on police reform have been set up in India on the Union level[51] since Independence last decades. However, the first one was inaugurated only 30 years after independence clearly demonstrating that at a "colonial hangover"[52] was accepted by government and legislators for a long time after independence. The National Police Commission (NPC) 1977-81 was installed by the Union government in 1977. It was given a very broad mandate, stating that "[f]ar-reaching changes have taken place in the country after the enactment of the Indian Police Act, 1861 and the setting up of the second Police Commission of 1902, particularly during the last thirty years of Independence."[53] The NPC produced no less than 8 extensive reports, making wide-reaching recommendations on police reform.[54] 120 years after the enactment

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[46] http://www.mha.nic.in/sites/upload_files/mha/files/pdf/Press_Brief_Oct_30.pdf.
[47] Cf. Sebastian Hongray v. Union of India, (1984) 1 SCC 339.
[48] See *Rudul Sah* v. *State of Bihar*, (1983) 4 SCC 141, commonly referred as the first case; see also *Sebastian Hongray* v. *Union of India*, (1984) 1 SCC 339; *Bhim Singh* v. *State of Jammu & Kashmir*, (1985) SCC 677; *D.K. Basu* v. *West Bengal*, (1997) 1 SCC 416; *Rotash Kumar* v. *Haryana* AIR 2014 SC (Supp) 182, were compensation of 2 Mio. Rs. for illegal killing by police was granted.
[49] DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA, Agra 2007, at 3215-16.
[50] *Devi*, note 5, p. 74; see also *Arvinder Singh Bagga* v. *State of U.P,* 1995 AIR SC 117 at 119: "... it will be open to the State to recover personally the amount of compensation from the police officers concerned".
[51] Many states set up State Police Commissions since Independence, which cannot be dealt with here.
[52] *Dhillon*, note 27, p. 52, using this notion in a slightly different context.
[53] NPC 1st Report, Preface.
[54] Short summary at CHRI, Police Reform Debates in India, p. 3-19 at www.humanrightsinitiative.org/publications/police/PRDebatesInIndia.pdf; full reports at http://bprd.nic.in/searchdetail.asp?lid=407.

of the BPA of 1861, the NPC in 1981 also submitted the first comprehensive bill for a complete replacement said Act. Chapter IV deals with duties, powers and responsibilities of the police without clearly separating duties and powers of the police. The draft grants – inter alia – vast powers to the police to limit the exercise of fundamental rights, e.g., freedom of assembly or freedom of speech by mere police regulation. The ambitious project of the first NPC however never attracted much interest, however.[55]

Fifteen years later two former senior police officers filed a PIL in the SC requesting the Court to direct the governments of India to implement the recommendations of the NPC 1979-81,[56] which had not yet been implemented by the Union or by State governments. In response to the directions of the SC in May 1998 the Union government set up the so-called *Ribeiro* Committee. The Committee released two reports which both focused on police organization and accountability, but not on the powers of the police. However, the Committee was closing ranks with the NPC in its call for a new Police Act. Shortly after the release of the two reports, the Union government installed yet another committee to look again into police reform. The *Padmanabhaiah* Committee was vested with a broad agenda to be finished within a few months. The committee released its only report in August 2000.[57] Yet another Committee, the Police Act Drafting Committee (PADC), also known as the *Soli Sorabjee* Committee, was set up by the Ministry of Home Affairs and concluded its works in October 2006. The draft prepared by the PADC was also published on-line to maintain transparency in the Committee's deliberations. The Police Act Drafting Committee delivered a comprehensive draft for a new Police Act.[58] The Preamble already outlines a rather new approach, inter alia stating "respect for and promotion of the human rights of the people, and protection of their civil, political, social, economic and cultural rights" to be "the primary concern of the Rule of Law". In the following year some States adjusted their Police Acts to a broader or smaller extent (but see next chapter) to this Model Police Act, which cannot be analyzed here in detail. However, with regards to statutory preventive powers major changes did not take place to my knowledge.

The Supreme Court on Police Reform

In 1996 again two former police officers joined by an NGO filed a PIL writ with the SC urging police reform to bring the police in line with the needs of a

[55] For a critical evaluation see *Arvind Verma*, The Indian Police: A Critical Evaluation, New Delhi 2005, p. 206-28.
[56] *Prakash Singh & Ors.* v. *Union of India & Ors*, Writ petition (civil) No. 310 of 1996.
[57] As for the *Ribeiro* Committee no official documentation of this commission can be found.
[58] http://www.mha.nic.in/sites/upload_files/mha/files/pdf/ModelAct06_30_Oct.pdf.

democratic system bound by the rule of law, thus finally leaving behind the legacy of the colonial BPA of 1861. With a delay of 10 years the SC in 2006 in the landmark decision *Prakash Singh v. Union of India* took a stand on the lack of modernization of the police in India giving very clear directions to the legislative and executive in charge. The Court, *inter alia*, states that "[b]esides the Home Minister, all the Commissions and Committees ... have broadly come to the same conclusion on the issue of urgent need for police reforms. There is convergence of views on the need to have (a) State Security Commission at State level; (b) transparent procedure for the appointment of Police Chief and the desirability of giving him a minimum fixed tenure; (c) separation of investigation work from law and order; and (d) a new Police Act which should reflect the democratic aspirations of the people".[59] The Court mandated the Central Government, State Governments or Union Territories to comply with its directions by the end of 2006 and to file affidavits of compliance by January 2007. As a consequence of the obvious delay the SC extended the period for compliance for a couple of weeks. Apparently the granted extension time did not solve the problem. On May 16, 2008[60] the SC set up a Monitoring Committee to evaluate compliance, giving this commission a time limit of 2 years suggesting that extension might be granted if necessary. Summarizing its findings the Committee[61] in 2010 stated that practically no State had fully complied with the SC's directive while others did so only in part. Some States chose to not even respond to several request of the Committee. The Committee concluded that "it would like to express its dismay over the total indifference to the issues of reforms in the functioning of Police being exhibited by the States".[62] However, it seems that neither the SC's directives nor the Committee's findings could cut the Gordian knot. Therefore, in October 2012 the SC ordered all State governments and Union territories to file affidavits stating to what extent the September 2006 judgment had been complied with. In August 2013 three major States in an attempt to block the SC's interventions - years after the first decision was handed down - raised constitutional objections against any interference on the part of the SC claiming that the whole matter was within executive powers and functions alone.[63] At the end of 2013 many if not most of the States still had not complied with many directions of the Court for police reform.[64]

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[59] Prakash Singh & Ors. v. Union of India & Ors.

[60] Prakash Singh & Ors. v. Union of India & Ors., 16.05.2008.

[61] https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbnxwcmFrYXNoMXBhZ2V8Z3g6NmYxOGM3NzJlZTExNjdkYw&pli=0.

[62] *Id.* ¶ 29.

[63] See THE TIMES OF INDIA, (Aug. 16, 2013), available at http://articles.timesofindia.indiatimes.com/2013-08-16/india/41416778_1_police-reforms-maharashtra-government-police-establishment-board

Fundamental Rights under the Indian Constitution and Police Powers

Fundamental rights are protected under part III of the Constitution, which includes reference to generally accepted Human Rights as well.[65] Most important in this context are Articles 19, 21 and 22 Indian Constitution. Restrictions of the rights to freedom while martial law is in force (Art. 34) shall not be dealt with here because of their inherent discrepancy from the very idea of fundamental freedoms and also because this is outside of the scope of this paper.

1. Freedom of Speech, Assembly, Movement and Other Rights under Art. 19

Freedoms protected by Art. 19(1) are considered to be "great and basic rights which are recognized and guaranteed as the natural rights inherent in the status of a citizen of a free country"[66] by the SC. Freedoms are not without limitations or restrictions though, as clauses (2) to (6) demonstrate. While Art. 19 does not grant absolute freedom, the Constitution also provides for limitations on the power of the legislature to restrict such freedoms.[67] "Reasonable restrictions" on said freedoms can be implemented by the State to protect, *inter alia*, public order, decency or morality, which are the most important justifications for limitations on freedoms protected under Art. 19 by the police. Emergency or terrorism law, lying outside regular or standard powers of police will not be covered by this piece.[68] Any restriction on a fundamental right thus has to withstand the test of reasonableness, subject to supervision by the courts.[69] According to the SC, "reasonable restriction" signifies that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. Any restriction which arbitrarily or excessively invades a fundamental right "cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedoms guaranteed in Art 19(1) (g) and the social control permitted by clause (6) of Art. 19, it must be held to be wanting in that quality."[70]

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[64] See THE HINDU (Nov. 1, .2013), available at www.thehindu.com/news/national/fiat-on-police-reforms-still-remains-on-paper/article5302489.ece.
[65] *Railway Board* v. *Chandrima Das*, (2000) 2 SCC 465 at 481.
[66] State of West Bengal v. Subodh Gopal Bose, AIR 1954 SC 92 at 95.
[67] M.P. JAIN, INDIAN CONSTITUTIONAL LAW, Gurgaon, 2013, at 1421.
[68] Emergency or terrorism law, lying outside "standard" powers of police will not be covered by this piece; on this cf., e.g., Jatinder Singh, *Democracy and Anti-terrorism Laws*, E. P. W., (July. 15, 2015), at 27; Alok Prasanna Kumar, *Unconstitutionality of Anti-Terror Laws*, E.P.W.,(July 11, 2015), at 35.
[69] V.N. SHUKLA, CONSTITUTION OF INDIA, Lucknow, (11th eds., 2012) (reprint), at 11; *Jain*, note 67, p. 1422-1427, for a more detailed discussion.
[70] Bishamber Dayal Chandra Mohan v. State of Uttar Pradesh, AIR 1982 SC 33 at 46.

Art. 19(1)(b) protects the right to assemble peaceably and without arms, which excludes any riotous assembly. Comparable to restrictions on Art. 19(1)(a), Art. 19(3) gives the State the right to put "reasonable" restrictions on the freedom of assembly in the interest of public order. The SC has pointed out that, unlike under Common Law in England, the right to assemble peacefully cannot be abridged except by imposing reasonable restrictions.[71] By the way this is an interesting counterpoint to the "common law argument" in discussing the necessity of a critical analysis of statutory law. According to the SC request for prior permission before holding a public meeting on public streets is within constitutional limits. But the "State can only make regulations in aid of the right of assembly of each citizen and can only impose reasonable restrictions in the interest of public order."[72] According to the SC, anticipatory action under Sec. 144 CrPC against assemblies is constitutional under the public order clause in Art. 19 (2) and (3).[73] It is, however, uncontested that reasonable regulation or restrictions of an assembly from a constitutional perspective can never amount to a complete extinction of the fundamental freedom.[74]

The right of free movement under Art. 19(1)(d) and residence in the territory of India under Art. 19(1)(e) gives every citizen the right to move freely between the States as well as within a single state without any restriction whatsoever. Nevertheless, removal or externment from a given place, e.g., a district or city, is one of the most relevant police powers given its widespread use.[75] This preventive means clearly has to be distinguished from punishment, even though the *male fide* practice of the police seems to be different in more than a few cases.[76] Limitations are only permissible in accordance with Art. 19(5) as far as reasonable in the "interest of the general public". While the SC does not negate the constitutionality of externment orders in general, the Court has put limitations on such orders with respect to Art. 19(5) in various cases.[77] An "order of externment must always be restricted to the area of illegal activities of the externee",[78] which may cover the territory of an entire State but may not specify any place outside that State where

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[71] Himat Lal K. Shah v. Commissioner of Police, Ahmedabad, AIR 1973 SC 87 at 95.
[72] Id.
[73] Babulal Parate v. State of Maharashtra, AIR 1961 SC 884 at 891.
[74] *Basu*, note 49, at 2730; see also *Express Newspapers* v. *Union of India,* (1986) 1 SCC 133 at 195.
[75] *Jain*, note 67, p. 1487; *Basu*, note 49, p. 2796-2814, with many references to case law.
[76] See, e.g., *Prem Chand* v. *Union of India*, AIR 1981 SC 613.
[77] See, e.g., *State of Madhya Pradesh* v. *Thakur Bharat Singh*, 1967 SCR (2) 454 at 458; *Madhya Pradesh* v. *Baldeo Prasad*, 1961 SCR 970 at 978 and 980; more restrictive in *Prem Chand* v. *Union of India*, AIR 1981 SC 613 at 616-17.
[78] Lt. Governor, NCT Delhi v. Ved Prakash, (2006) 5 SCC 228 at 237.

the externee must remain. The duration of such orders must also be reasonable, but the SC has not hesitated to uphold Acts that provided for an externment of up to two years.[79] Even externment orders for an indefinite period of time were held not to be unreasonable by the SC if the law provided for the possibility of the aggrieved person to apply for review of such order.[80]

2. Protection of Human Life and Personal Liberty under Art. 21

Constitutional protection against illegal or unconstitutional use of police powers is also vested in Art. 21, warranting the protection of human life and personal liberty. It is settled that Art. 21 has to be read together with Art. 19 and 14.[81] According to Art. 21 no person[82] shall be deprived of life or personal liberty except according to a "procedure established by law" which requires a valid law enacted by parliament.[83] Besides, such law has to be constitutionally valid under all (other) fundamental rights, too.[84] The notion of "personal liberty" over the decades was construed in a progressively broad sense by the SC,[85] which can perhaps be attributed to the experiences of the proclamation of emergency from 1975-77[86] and the attempt of the SC to resurrect its credibility. Today it is settled that Articles 19(1) and 21 are not mutually exclusive.[87] The "procedure established by law" has to be valid under constitutional auspices and cannot be read "narrowly" to give the State every right to delimit life and liberty almost at zero as long as the procedure is established by law. However, the SC only in 1978 adopted an approach that any "law" under Art. 21 has to satisfy the test of fair, just and reasonable law itself, not very different from the American due process concept.[88] With reference to *Maneka Gandhi* and later decisions the majority of the SC in *Mithu v. State of Punjab* summarized that these "decisions have expanded the scope of Art. 21 in a significant way and it is now too late in the day to contend that it is for the Legislature to prescribe the procedure and for the Court to follow it ...", adding that "the last word on the question of justice and fairness does not rest with the legislature."[89]

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[79] Gurbachan v. State of Bombay, 1952 SCR 737; State of Maharashtra v. Salem Hasan Khan, 1989 SCR (1) 970.
[80] *State of U.P.* v. *Kaushaliya*, 1964 SCR (4) 1002.
[81] *R.C. Cooper* v. *Union of India* 1970 SCR (3) 530 passim; see also *Maneka Gandhi* v. *Union of India* 1978 SCR (2) 621; *A. K. Roy* v. *Union of India* 1982 SCR (2) 272 at 327-28.
[82] While §19 refers to citizens, §. 21 encompasses any person.
[83] *Basu*, note 49, p. 3152, 3154.
[84] *Id.* at 3155.
[85] *Shukla*, note 69, p. 196.
[86] *Jain*, note 67, p. 1571.
[87] *Maneka Gandhi* v. *Union of India* 1978 SCR (2) 621 at 670.
[88] ZHIA MODY, 10 JUDGMENTS THAT CHANGED INDIA, New Delhi 2013, at 43; see also *Ganguly*, J., in: *Rameshbhai Chandubhai Rathod* v. *Gujarat*, (2009) 5 SCC 740 at 784.
[89] 1983 SCR (2) 690 at 698-99.

Another widespread means is (secret) police surveillance of one's home and movements, watching and keeping a record of visitors, or domiciliary visits at night, periodical enquiries of officers into habits, income etc., and others means, aimed at the prevention of the commission of crimes by the aggrieved person. The SC in an early finding refused to consider such measures of surveillance to be an encroachment upon Art. 19(1)(d) or any other fundamental right while the domiciliary visits were judged to be unconstitutional under Art. 21 because the relevant "police regulation" did not constitute a "law" under the constitutional notion.[90] With the advent of "a right to privacy" in the SC jurisprudence this understanding could no longer be perpetuated and regulations under police law of Madhya Pradesh were therefore held to be interpreted narrowly, subject to reasonable restrictions on the basis of compelling public interest.[91] A few years later the Court, while dismissing the case, emphasized that "[p]revention of crime is one of the prime purposes of the constitution of a police force. … But surveillance may be intrusive and it may so seriously encroach on the privacy of a citizen as to infringe his fundamental right to personal liberty guaranteed by Art. 21 of the Constitution and the freedom of movement guaranteed by Art. 19(1)(d)"[92] (see also next paragraph). Thus, while a right to privacy is not explicitly laid down in the Indian Constitution, the SC has construed such a fundamental right by interpretation of Art. 19(1)(a) and, more importantly, Art. 21.[93] After some controversy in an early case[94] with a majority rejecting a fundamental right to privacy being enshrined in the Indian Constitution, a bench of two Justices more than a decade later declared that the "right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Art. 21. It is a "right to be let alone".[95] Consequently the lack of an explicit fundamental right to the secrecy of letters, post, and telecommunications did not preclude the SC from construing the protection of telecommunications under Art. 21, stating that the right to privacy also grants protection against telephone tapping unless legitimately restricted by a procedure established by law.[96] To summarize, it seems to be appropriate to state that after *Maneka Ghandi* the notion of "life" in Art. 21 has been given a very broad meaning

[90] *Kharak Singh* v. *State of Uttar Pradesh*, 1964 SCR (1) 332, but see also the dissenting opinion which held § 19(1) (a) and (d) to be infringed.
[91] *Govind* v. *Madhya Pradesh*, 1975 SCR (3) 946.
[92] *Malak Singh* v. *Punjab & Haryana*, 1981 SCR 311 at 317.
[93] See "Architecture of Surveillance" in: E. P. W., (Jan. 4, 2014), at 10-12.
[94] Kharak Singh v. State of U.P., 1964 SCR (1) 332.
[95] *Rajagopal* v. *State of Tamil Nadu* 1995 AIR SC 264 at 276; referring however to the relationship of a private person versus the media.
[96] People's Union for Civil Liberties v. Union of India AIR 1997 SC 568 at 574; see also State of Maharashtra v. Bharat Shanti Lal Shah (2008).

as it is the case for "personal liberty" making this Article a "source of many substantive rights and procedural safeguards"[97] in Indian law.

3. Arrest and Preventive Detention under Art. 22

In addition to the fundamental rights guaranteed by Art. 21 on the one hand, Art. 22 on the other hand specifies the procedural rights of a person under "arrest" or "detention" to substantially protect his right to life and personal liberty. According to Clause (1) no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. As an exemption to Clause (2), Clauses (3) to (7) lay down special provisions for persons who are "alien enemies" or under "preventive detention". "Preventive detention" according to its wording and legal history in England and in British India[98], however, refers to a precautionary measure under special laws to be distinguished from police law and criminal procedure law in general which I will not investigate here for lack of space. Arrest refers to any arrest on the allegation that a person has committed, or is likely to commit, an act of criminal or *quasi*-criminal nature, or some activity prejudicial to the public interest.[99] In *Joginder Kumar v. State of Uttar Pradesh* the SC pointed out that because "[a]rrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person", no "arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so."[100] For lack of space I am not able to deal with arrest in this paper unfortunately.[101]

Preventive Powers of Police under the British Police Act of 1861

Even though to date many Indian States have enacted new Police Acts, the BPA of 1861 to some extent still is a "blueprint" with regards to police powers and thus will be dealt with here. However, the following remarks can only refer to a few selected topics important with regard to the fundamental rights briefly dealt with above.

1. Section 23: Duties of Police Officers are Different from Powers

According to Sec. 23 it "shall be the duty of every police-officer promptly to

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[97] *Jain*, note 67, at 1575-86.
[98] See *Shukla*, note 69, at 218-19.
[99] *Jain*, note 67, at 1664, with reference to *State of Punjab* v. *Ajaib Singh*, 1953 SCR 254.
[100] AIR 1994 SC 1349 at 1353-54.
[101] But see *Devi*, note 5.

obey and execute all orders and warrants lawfully issued to him by any competent authority, to collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances, to detect and bring offences to justice and to apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists: and it shall be lawful for every police-officer, for any of the purposes mentioned in this Sec., without a warrant, to enter and inspect any drinking shop, gaming house or other place of resort of loose and disorderly characters."

Notwithstanding its heading, Sec. 23 commonly is understood not only to implement "duties" but also to grant "powers" to the police.[102] The underlying assumption seems to be that any duty transferred to the police automatically includes the necessary powers. This, however, is in conflict with the idea of the rule of law. With regards to the discrepancy of heading and full text obviously the Section requires interpretation and needs to be construed according to the general rules for the interpretation of legal rules.[103] The meaning of words and expressions used in an Act must also consider the context in which they appear and statutes must be read as a whole.[104] In general reference to the historical intentions of the lawmaker may also be helpful, in this case however a reference to the pre-constitutional setting under the British rule does not appear to be justified in the context of a modern constitutional State.

The literal meaning of "duty" refers to a legal obligation or responsibility.[105] From a grammatical point of view Sec. 23 determines that it "shall be the duty to" carry out certain onuses, comprising the collection of intelligence, the prevention of offences as well as the detection of such offences. Under Sec. 23 police officers also have "the duty to … apprehend" while subsequently it is clearly stated that he may only apprehend "whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists". From my point of view a critical analysis leaves no doubt that Sec. 23 in general does not grant any "power" (or authority) to apprehend a person but only makes clear that a police officer has a "duty" to apprehend those persons mentioned under the legal provisions for such an apprehension.[106]

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[102] See, e.g., CHANDRA BEHARI, POLICE ACT, 1861, Allahabad 1961, at 18.
[103] Most sophisticated G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION, Agra 2008; see also *Raichurmatham Prabhakar* v. *Rawatmal Dugar*, AIR 2004 SC 3625 (3630).
[104] *Singh*, note 103, p. 338.
[105] Oxford Dictionary of English (2010).
[106] See also P.P. BHANAGE, THE BOMBAY POLICE ACT, 1951, Bombay 1974, at 142, who, however, interfuses duties and powers.

While most of Sec. 23 clearly refers to duties of police officers, wording and grammar only indicate a shift in perspective at the very last part of Sec. 23 really grants a "power" to act against citizens by also stating that "it shall be lawful for every police-officer, for any of the purposes mentioned in this Sec., without a warrant, to enter and inspect any drinking shop, gaming house or other place of resort of loose and disorderly characters." From the wording it is unambiguous however that such powers are granted only in very limited circumstances, i.e. when the place the officers enters itself is special kind of place either explicitly mentioned in the Act (drinking shop or gaming house) or described by the Act (place of resort of certain characters). A comparative look into the Bombay Police Act of 1951 supports that there is a clear distinct difference between "duties" and "executive powers" of the police as laid down in Chapter VI of said Act. Much in accordance with Sec. 23 BPA of 1861, Sec. 64 of the Bombay Police Act refers to duties of police officers, while the "power" to enter places is stipulated in Sec. 65(1) which under Sub Sec. (2) also empowers police officers to search suspected persons on the street. According to a decision of the Gujarat High Court[107] "it is very clear that Sec. 64 does not refer to any authority or power given to a police officer to obtain or record statement of person in respect of (...) cognizable offences". Sec. 18 BPA of 1861 also confirms a clear-cut distinction between powers and duties of police officers. According to this rule every special police officer under Sec. 17 "shall have same powers, privileges and protection, and shall be liable to perform the same duties ... as the ordinary officers of police".

In conclusion it must be emphasized that the equalization of "powers" and "duties" which is still widespread in legal discussion in India does not correctly reflect the legal setting but rather a lack of differentiation also present in the interpretation of Sec. 149 CrPC (see below). To impose certain duties on a police officer does not *per se* vest the officer with powers or authority to execute such duties because it is the legislator that has to decide under the rule of law and in the light of the Constitution which powers are granted and what should be the legal prerequisites and thresholds for such powers to protect the fundamental rights of citizens.

2. Sections 30 - 32: Public Assemblies and Processions

Sec. 30 provides for the regulation of public assemblies and processions by the police but also vests the Magistrate with some powers (which I will not deal with in detail here). According to Sub Sec. (1) the "District Superintendent or Assistant District Superintendent of Police may, as occasion requires, direct the

[107] *Kantilal Damodardas* v. *Gujarat*, 1970 Cr. .L. .J. 1359.

conduct of all assemblies and processions on the public roads or in the public streets or thoroughfares, and prescribe the routes by which, and the times at which, such processions may pass. Sub Sec. (2) makes it obligatory to apply for a "license" if required by the police to do so by general or special notice in case that an assembly or procession in the judgment of the Magistrate "if uncontrolled, be likely to cause a breach of the peace". From the wording it is clear that the Magistrate may ask for such permission only in reaction to a particular meeting or occasion but not in general for a specified or even unlimited period of time.[108] Even though it is agreed upon that the power to "control" does not include the power to prohibit an assembly or procession,[109] Sec. 30 grants the police very broad power and discretion to refuse a license for an assembly altogether. Even though this raises severe legal questions,[110] the SC so far has not declared the unconstitutionality of this Section.

According to Sec. 30A any assembly or procession which violates the conditions of a license granted under Sec. 30 may be stopped or ordered to disperse by any Magistrate or any of the police officers enumerated in Sub Sec. (1). According to Sub Sec. (2) any procession or assembly which neglects or refuses to obey any order given under aforementioned sections shall be deemed to be an unlawful assembly, making participation liable to prosecution.[111] Interestingly, the procedure of dispersal is not regulated in the Police Act itself but under Sec. 129 to 132 CrPC which gives a first hint to the preventive powers under the CrPC.

According to Sec. 31 it "shall be the duty of the police to keep order on public roads and in the public streets, thoroughfares, ghats and landing places, and at all other places of public resort, and to prevent obstruction on the occasions of assemblies and processions on the public roads and in the public streets, or in the neighborhood of places of worship, during the time of public worship, and in any case when any road, street, thoroughfare, ghat or landing-place may be thronged or may be liable to be obstructed." In terms of a very general approach and comparable to Sec. 23, this Section too imposes certain duties on the police. There is nothing in this rule that literally makes reference to any "power" vested in the police to fulfil such "duty", a difference that again is not discussed in legal writing.

Interestingly Sec. 32 provides for penalties for disobeying orders issued under the aforementioned three sections. Thus the Act itself implies the power to "order" a person to do or not to do something while in a procession or assembly. Such orders can be very broad as long as they can reasonably be considered necessary

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[108] B.R. BEOTRA, THE POLICE ACTS, Allahabad 1970, at 123, 126; *Behari*, note 102, p. 29.
[109] *Beotra*, note 108, p. 119-21; *Behari*, note 102, p. 27.
[110] *Basu*, note 49, p. 2732-35.
[111] See Sec. 141 Cr. P. C.

for keeping "order" within the meaning of the BPA of 1861.[112] However, different from, e.g., Sec. 68 Bombay Police Act of 1951, the BPA of 1861 does not provide that "[a]ll persons shall be bound to conform to the 'reasonable' directions of a Police officer given in fulfilment of any of his duties under this Act". While the latter one tacitly implies an obligation to follow police orders the Bombay Act makes it a duty to obey orders only if such order is reasonable.[113] This at least puts some limitations on such penalties and the reasonableness test could be the legal barrier to unconstitutional limitations.

Preventive Powers of Police under the Criminal Procedure Code of 1973

From a German lawyer's perspective it seems to be rather disturbing to find most of the preventive powers of police dedicated to public order in the CrPC, essentially a statute that deals with criminal justice not with public order policing. In effect, there exists a parallel statutory "anchorage" of preventive police powers, both under police law as well as under criminal procedure law. Besides, other preventive powers are provided for under special law, e.g., on preventive detection or arms control, which cannot be analyzed here. Thus, the CrPC is not only adjective law of criminal justice, providing the rules for prosecution and punishment of offenders under the Indian Penal Code (IPC), but also comprises powers that constitute substantive law for the prevention of dangers, nuisance, or offences. From a systematic point of view this might call for a more articulate delimitation between preventive powers under Police Law on the one hand and Criminal Procedure Law on the other hand, both providing for significant powers of the police to encroach upon fundamental rights. Besides, legislative powers on criminal procedure are a Union prerogative while legislation on police law is a States issue according to Art. 246 Const. and the Seventh Schedule. Again a legal problem that does not draw much attention in scholarly writing on the police in India. Alternatively it might also be in the interest of the protection of constitutional freedoms to combine preventive powers in only one Act, as elaborated above for systematical reasons preferably police law. This might help enhance a concept of clear-cut separation of duties and powers of the police. However, such delimitation for whatever reason does not seem to be in the focus of legal writing in India.[114]

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[112] *Beotra*, note 108, p. 150.

[113] *Id.* at 149.

[114] Cf. R.V. KELKAR, CRIMINAL PROCEDURE, Lucknow, 2011, at 743, stating: "it was felt expedient and necessary to include in the Code certain pre-emptive measures for the prevention of crime and certain other precautionary measures for the safety and protection of society"; without bothering to mention who felt such need in which context? See also Gulam Abbas v. State of Uttar Pradesh, 1982 SCR (1) 1077 at 1083: "The power conferred

1. Powers for Maintenance of Public Order and Tranquility

Chapter X of the CrPC stipulates for a broad range of powers of police for the maintenance of public order and tranquility, using again some very vague legal notions that have to be scrutinized here as far as the police itself is empowered to take action under its own discretion.[115]

Section 129: Dispersal of Assemblies

Sec. 129 deals with the powers of specified police officers (as well as the Executive Magistrate) to disperse any unlawful assembly or assembly of five or more persons likely to cause a disturbance of the public peace. It does not seem to be very clear how this power can be delimited from the power to disperse under Sec. 30-A BPA of 1861.

Obviously the dispersal of an assembly in effect infringes on the fundamental right under Art. 19(1)(b) of the Indian Constitution.[116] However, the Constitution itself provides for restrictions on the fundamental right in Art. 19(3). Whether the dispersal amounts to an encroachment upon the constitutionally protected freedom of assembly therefore depends on (i) what the Constitution protects, (ii) whether statutory restrictions exist and (iii) whether these restrictions are reasonable means to protect sovereignty and integrity of India or public order. "Unlawful assembly" under Sec. 129(1) refers to an assembly unlawful under Sec. 141 IPC.[117] Only if the elements of an offence under said provision are fulfilled, an assembly can be considered to be unlawful. This requires a common object of the participants to commit any of the acts falling under Sec. 141 IPC.[118] Failure of an assembly to disperse does not make it unlawful but might entitle the police to disperse such assembly according to Sec. 129(2).[119] The question whether an assembly is unlawful under Sec. 141 IPC does not open discretionary power to the police but strictly is a legal question.

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under section 144 Criminal Procedure Code 1973 is comparable to the power conferred on the Bombay Police under section 37 of the Bombay Police Act, 1951 - both the provisions having been put on the statute book to achieve the objective of preservation of public peace and tranquility and prevention of disorder ..."

[115] RATANLAL RANCHHODDAS & DHIRAJLAL KESHAVLAL THAKORE, CODE OF CRIMINAL PROCEDURE, Gurgaon 2011, at 219.

[116] See Himat Lal K. Shah v. Commissioner of Police, Ahmedabad AIR 1973 SC 87.

[117] *Ratanlal & Dhirajlal*, note 115,at 219; S.C. SARKAR, THE CODE OF CRIMINAL PROCEDURE, Gurgaon 2014, at 448.

[118] DURGA DAS BASU, CRIMINAL PROCEDURE CODE, 1973, Gurgaon 2010, at 676 with reference to case law.

[119] R.C. SOHONI, THE CODE OF CRIMINAL PROCEDURE, 1973, Allahabad 2003, at 1153.

Much more troublesome from a constitutional point is the second alternative of Sec. 129(1) which allows for the dispersal of any assembly of five or more persons "likely to cause a disturbance of the public peace". Obviously the notion of "public peace" needs to be construed in accordance with the constitutional guarantees, including the question of which amount of probability is necessary to make a disturbance "likely". The very concept and notion of "public peace" seems to be far from clear. Construing this narrowly under the auspices of the Constitution, an assembly is likely to cause disturbance to public peace only if there is evidence to establish that this assembly would, in the immediate future, develop into an unlawful one.[120] Sec. 129(2) provides for the power of police or the executive Magistrate to disperse an assembly by force if (i) upon being so commanded, the assembly does nor disperse or (ii) without being so commanded, it conducts itself in such a manner as to show a determination not to disperse.[121] While alternative (i) at least requires an explicit order of the police (or Magistrate) that stipulates clearly and precisely for the participants that they are supposed to leave and gives them a chance to comply, this is not the case with alternative (ii). Here it would be necessary for the participants, who at least might presume to be protected under Art. 19(1)(b) to anticipate the legal assessment of the police or Magistrate to escape the use of force, i.e., an encroachment upon their fundamental right protected by Art. 21. This does not seem not to be acceptable from a constitutional point of view because the police could always first resort to an explicit order under the first alternative, i.e. command the dispersal of an assembly before force is to be used against participants.[122] Hence the dispersal of an assembly without prior explicit command to disperse is in conflict with the constitutional safeguards for the fundamental right of freedom of assembly under Art. 19(1)(b).

Section 144: Power to issue order in urgent cases of nuisance or apprehended danger

Especially with regards to freedom of speech and assembly[123] protected by Art. 19(1)(a) and (b), Sec. 144 must be scrutinized although it does not explicitly vest the police with any powers. Given the possibility of appointing the Commissioner of Police as a special executive Magistrate according to Sections 21 and 20(5), powers under Sec. 144 are being conferred to the Police at least in metropolitan areas (Sec. 8 CrPC) where the State law provides for such measure. This is the case - at least - in Mumbai, Kolkata, Chennai, and Delhi.[124]

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[120] *Id.* at 1155.
[121] See also Sections 145, 151 IPC.
[122] Cf. Chauhan, J. (concurring), Ramlila Maidan Incident v. Home Secretary, Union of India, (2012) 5 SCC 1 at 122.
[123] *Id.* at 44.

According to Sec. 144(1) it is possible to "direct any person to abstain from a certain act". Even though Sec. 144 provides for very wide powers with a significant impact on fundamental rights the wording is very vague and the police seem to make broad use of the provision.[125] However, from a constitutional point of view only exceptional circumstances can legitimize an encroachment upon fundamental rights under this provision.[126] Thus Sec. 144 needs to be limited to extra-ordinary situations of "emergency"[127] or "urgent cases of nuisance or apprehended danger".[128] The latter one seems to be a more appropriate notion to make it clearly distinguishable from "emergency law". An imminent danger to values like human life and safety certainly may legitimize such measure. Nevertheless, it seems that Sec. 144 also in cases of disturbances of the public tranquility seems to be a "door-opener" for abuse, its powers broadly being used within the realm of freedom of assembly, e.g., to prohibit an assembly or a meeting, the uttering of "provocative slogans" or the use of loudspeakers.[129]

Sec. 144 also seems to be broadly used against persons held to be "criminals" or "anti-social elements" by the police. Given the possibility of severe restrictions on fundamental rights, the question of constitutionality of this Section and orders under this provision has to be raised. The SC never repudiated the powers under this Section *in toto* but requested the restrictions to be reasonable.[130] The SC therefore set certain standards to be followed. With reference to reasonable limitations to protect "public order" as mentioned in Art. 19(2), the SC in *Madhu Limaye* required "urgency of the situation and its efficacy in the likelihood of being able to prevent some harmful consequences. (…) As it is possible to act under the Section absolutely and even ex-parte it is obvious that the emergency must be sudden, and the consequences sufficiently grave".[131] The Court also held it to be admissible to pass an order not directed against a specific person but general orders "when the number of persons is so large that the distinction between them and the general public cannot be made (...). (…) "[t]hat Sec. 144 is not unconstitutional if properly applied and the fact that it may be abused is no ground for striking it

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[124] See *Sarkar*, note 117, p. 65 and 492.
[125] *Manupatra* gives 1600 counts on this provision (as of 16/02/2016).
[126] *Sarkar*, note 117, at 487, 489 with reference to case law.
[127] Id. at 487-90; see also Ramlila Maidan Incident v. Home Secretary, Union of India, (2012) 5 SCC 1 at 67.
[128] *Gulam Abbas* v. *State of Uttar Pradesh*, 1982 SCR (1) 1077 at 1083.
[129] See, e.g., *In Re Ramlila Maidan Incident* v. *Home Secretary, Union of India*, (2012) 5 SCC 1; see also reference to cases in *Basu*, note 118, at717.
[130] See, e.g., *Babulal Parate* v. *State of Maharashtra*, AIR 1961 SC 884 at 889.
[131] Madhu Limaye v. Sub-Divisional Magistrate, (1970) 3 SCC 746 at 757.

down. The remedy then is to question the exercise of power as being outside the grant of the law".[132]

With regards to restrictions on public assemblies the SC summarized the legal requirements under Sec. 144 "being an order which has a direct consequence of placing a restriction on the right to freedom of speech and expression and right to assemble peaceably" emphasizing that "such an order is revisable and is subject to judicial review".[133] Furthermore it was pointed out that "the perception of the officer recording the desired/contemplated satisfaction has to be reasonable, least invasive and bona fide. The restraint has to be reasonable and further must be minimal. (...) the perception of threat to public peace and tranquility should be real and not quandary, imaginary or a mere likely possibility".[134] However, even an incorrect order is not necessarily a colorable and/or *mala fide* exercise of power on bad faith, according to the SC.[135]

2. Preventive Action of the Police under the CrPC

Police powers under Chapter XI are considered to be very wide and extensive and the police are authorized to act on their own initiative and knowledge.[136] Coming back to the idea of strictly delimiting preventive powers from criminal justice it is not clear how preventive provisions under the CrPC can be delimitated against "comparable" powers in police law, which in terms of transparency and constitutional limitations under the rule of law does not seem to be a good solution.

Section 149: Prevention of Cognizable Offences by the Police

According to Sec. 149 "every police officer may interpose for the purpose of preventing, and shall, to the best of his ability, prevent, the commission of any cognizable offence." The exact content and the powers of police stipulated here are far from clear and most scholarly writing does not bother to get into detail. One commentator states that Sec. 149 "enables a police officer to prevent the commission of a cognizable offence"[137] while others are more permissive in terms of legitimizing encroachment of fundamental rights[138] stating that "a police officer may do many things, e.g., arrest preventive action [sic!], dispersion of unlawful assembly and so

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[132] Id.
[133] In Re Ramlila Maidan Incident v. Home Secretary, Union of India, (2012) 5 SCC 1 at 45.
[134] *Id.* at 46.
[135] *Id* at 54, where order under Sec. 144 was held to be against the law not being justified by the facts and circumstances of the case (passim).
[136] *Ratanlal & Dhirajlal*, note 115, at 269.
[137] *Id.*
[138] *Sohoni*, note 119, at 1641: Sec. 149 and 151 result in "curtailment of valuable fundamental rights in the interest of public order".

forth" continuing that he "may do those things while investigating or even without investigation".[139] Another author at least points to the necessity of certain limitations stating that "interpose" in Sec. 149 does not "cover all sweeping orders that would be unreasonable with the liberty of the citizens".[140] Another opinion points to the fact that this Section does not specify which acts can be carried out by a Police Officer for this purpose, excepting arrest without warrant[141] which seems to presume that Sec. 149 does not grant any power at all.

Understandig these contrarieties requires a bit of bushwhacking because power to arrest without warrant is already settled in Sec. 41 and power to disperse an unlawful assembly in Sec. 129. More importantly, Sec. 151 also vests the police with the power to arrest in order to prevent the commission of cognizable offences. So exactly what powers, to what aims, are transferred under Sec. 149? Starting from a perusal, Sec. 149 either grants a police officer whatever means and powers he "needs" to whatever he thinks fit to prevent a cognizable offence or it describes a mere duty of police officers without transferring any power to interfere with citizens' fundamental rights which might be supported by the fact that, e.g., the power to arrest or the power to disperse an unlawful assembly are already explicitly stipulated by other Sections of the CrPC.

That Sec. 149 provides for a mere duty[142] but no powers[143] seems to be supported by the very idea of the rule of law which certainly requires that any citizen – as well as the police – are able to understand and to know for sure if under the proviso of a specific Act the police are vested with powers to interfere with fundamental rights or not. Even more, the rule of law not only requires that citizens and the police can deduce from the written law whether the police are vested with such powers; also, the extent of such powers must be specified clearly and exclusively by the law. This might be done in more generic terms like "public order" if such notion is understandable and its boundaries and content are well settled by jurisprudence, but Sec. 149 does not even approximate to this basic requirement from my point of view.

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[139] *Sarkar*, note 117, at 593.
[140] SURYA NARAYAN MISRA, THE CODE OF CRIMINAL PROCEDURE, Allahabad, 2011, at 202.
[141] *Basu*, note 118, at 794, referring to Sec. 151 for arrest.
[142] HENRY THOBY PRINCEP, THE CODE OF CRIMINAL PROCEDURE, 1973, Delhi 2008, at 593, seems to support this point of view, when referring in effect only to "duties of police" with regards to Section 149.
[143] Rather confusing C. K. THAKKER TAKWANI, CRIMINAL PROCEDURE, Gurgaon 2011, at 363-64: "Sec. 149 enables police officer to prevent … it imposes on him a duty".

Section 151: Arrest to prevent the commission of cognizable offences

It is a general understanding that Sec. 151 grants the police a "very vast power"[144] and discretion[145] to arrest in order to prevent any cognizable offence. Sec. 151 however does not grant any power to detain a person, which is uncontested with reference to Sub Sec. (2).[146] Regardless of these broad powers, Sec. 151 gets rather little attention in commentaries on the CrPC and the SC considered said provisions to be constitutional, pointing however to the procedural safeguards applicable under this Section.[147] There are two prerequisites for an arrest under this Section: The police officer (i) must "know" and not only "apprehend" that a person has a design to commit a cognizable offence, and (ii) the commission of such offence cannot be otherwise prevented, which is a matter of proportionality. The latter prerequisite requires urgency of an arrest; otherwise, the arrest is illegal.[148] Comparing Sec. 149 and Sec. 151 (as well as Sec. 152) from my point of view[149] demonstrates that Sec. 149 does not vest the police with any "power" to arrest or any other power to encroach upon citizens' fundamental rights. On the other hand, Sec. 151 could also affirm the view that Sec. 149 grants a more than broad variety of permissible police actions without any explicit limitations at all, except for arrest and cases handled under Sec. 152. This interpretation however does not convince under the basic principles of the rule of law. Certainly Sec. 151 facilitates more than mere safeguards to the person arrested, because Sub Sec. (2) explicitly refers to the power to arrest under Sub Sec. (1) which hence cannot be included in Sec. 149.

Section 152: Prevention of injury to public property

Sec. 152 is aimed at the prevention of injury to public property. According to this provision a "police officer may of his own authority interpose to prevent any injury attempted to be committed in his view to any public property, movable or immovable, or the removal or injury of any public land mark or buoy or other mark used for navigation." Unlike Sec. 151 this Section allows for police action regardless of whether the offence is cognizable or not.[150] So Sec. 152 has to be distinguished from Sec. 151 in case a cognizable offence against public property is concerned,

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[144] Law Commission 177th Report on "Law Relating to Arrest", at 21.
[145] *Sohoni*, note 119, p. 1617.
[146] Cf. *Sarkar*, note 117, p. 595; *Sohoni*, note 119, p. 1618; see also *Basu*, note 118, p. 798, with a less than clear notional differentiation between arrest and detention.
[147] Ahmed Noormohmed Bhatii v. Gujarat, AIR 2005 SC 2115.
[148] *Sohoni*, note 119, p. 1617, with reference to case law.
[149] To the opposite *Sarkar*, note 117, p. 593.
[150] Law Commission 177th Report on "Law Relating to Arrest", p. 68.

which would permit an arrest under the latter one.[151] As outlined above under Sec. 151 this (again) confirms the opinion that Sec. 149 does not provide for all necessary means whatever this may be but emphasizes only a duty of police.

Concluding Remarks

Discussion about the police in India is predominantly focused on accountability and professionalization of the police and with a few exceptions seems to neglect constitutional limits and standards under the rule of law when it comes to preventive police powers while police powers in criminal proceedings draw more attention in public and academic debate. The apprehension seems to be that granting the police a set of clearly stated but also delimited statutory preventive powers would inevitably lead to even more powers of the police, interestingly a controversial topic already in early 19th century debate on modernization of police in the UK.[152] Of course, any revision and modernization of statutory powers of the police implies the risk of an expansion of police powers detrimental to fundamental rights. While stressing rule of law values might lead to prioritizing fundamental rights, "police powers" rather point in the opposite direction.[153] Rule of law in this context obviously refers to a substantive,[154] not only a formal concept. Since most of the existing law stipulating police powers in India is still based on a pre-constitutional model of police it does not seem to be premature in 2016 to discuss a fundamental rights based concept of police powers in India. The purpose obviously has to be a better protection of fundamental rights by clear-cut statutory limitations of police powers. From my point of view this would add another important feature to the discussion on police reform in India. If policing in India is to ever comply with essential standards of a democratic society under the rule of law, police training, professionalization, better working environment, adequate payments schemes, attitudinal changes in the police etc. certainly are indispensable prerequisites of change for a modern police in a democratic society based on fundamental rights of its citizens. But for all that, the current law of the land, granting the police vast and not at all clearly delimited powers to encroach up fundamental and human rights needs to be scrutinized, too. This, in my humble opinion, has yet to be done in India.

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[151] *Sarkar*, note 117, p. 596.
[152] Cf. *Dixon*, note 7, p. 56 et seq.
[153] Cf. *Andrew Sanders/Richard Young*, Police Powers, in: Handbook of Policing, Newburn (ed.), Cullompton 2008, p. 282, on "due process" vs. "crime control" values.
[154] Cf. D.K. Basu v. West Bengal, (1997) 1 SCC 416 at 424; see also *Jain*, note 67, p. 1575.

JUDICIAL IMPACT ASSESSMENT AS A TOOL TO STRENGTHEN ACCESS TO JUSTICE AND DEMOCRACY IN INDIA: LESSONS TO LEARN FROM THE EXPERIENCE OF USA

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Abstract

Access to Justice constitutes as one of the chief attributes of democracy. However, mere constitutional recognition of the concept without proper judicial institutional support cannot augment the rights of people to exercise freely their guaranteed fundamental rights. A good judicial legal system with financial autonomy, certainly, augments to check the abuse of executive and legislative enforcement of human or fundamental rights, and provides quick legal remedies to the litigant parties. A balanced, shift, accessible and fair justice delivery system helps not only promoting law and order, but also strengthens the tenets of democracy, good governance . Such a system helps to develop tools to strengthen the markets, which includes attracting direct investment both from domestic and from that of foreign.

Key Words: Judicial Impact Assessment, Salem Bar Association, Access to Justice, Congressional Budget Act, Nidhi Ayaog

Introduction

Congestion of courts, legal costs, and delays in adjudication are the common problems of many countries. Inadequate institutional prop up to judiciary considered as one of the chief attributes of good governance, to which India is not an exception.[1]

In India, the constitution has guaranteed independence to judiciary. However, lack of financial autonomy constitutes as one of the chief attributes besides court delays, overcrowding of cases and denies millions of litigants' easy accessibility to justice.[2] The delayed justice system often cited as one of the important reasons for investment in India especially, by foreign investors. In India, lack of sufficient number of judges and financial autonomy to judiciary many a times upsets the apple cart of equality before law, quick justice, and brings to fore a number of issues relating to

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[1] Buscaglia, E. and M. Dakolias, *Judicial Reform in Latin American Courts: The Experience in Argentina and Ecuador,* World Bank Technical Paper. 350 (1996)

[2] TSN Sastry, *Excellence in Public Service: The Need for Financial Autonomy to the Judiciary*, LII The Indian Journal of Public Administration. 478-83 (2006)

human development index such as gender inequality, social tensions, health care, malnutrition, unemployment, so forth and so on.

According to a World Bank Report on Justice Sector At a glance of 2007, the data on 30 selected countries indicate that 2,000 the average number of judges for 100, 000 inhabitants was 6.38.[3] Where in the figures stand in India is for 2.7 judges.[4] The Parliamentary Committee on Empowerment of Women in its report in 2013 on Victims of Sexual abuse and Trafficking and their Rehabilitation had opined that with the present strength of 18,000 Judges (this includes the judges of entire legal system of the country i.e., Supreme Court, High Courts and Lower judiciary), it will take at least more than 200 years to clear the 32 million cases pending in various courts. If the vacant position of judges taken into consideration, it will depict more horrendous picture than as stated in the report.[5] For instance as per a report of the Ministry of Law and Justice of Government of India as on 2015.07.01 the Supreme Court has three vacancies of its total strength of 31, and the corresponding figure in the High Courts of various states is 377 out of 719 sanctioned judges.[6] This being the situation of higher judiciary, the situation of lower judiciary is beyond imaginable. Apart from above, inadequate funds allocated to judiciary by legislature, and the legislature continuously passes legislations, without any cognizance of workload that adds fire to the fore on judiciary in administering justice. All this resulted in denial of easy access to justice to public at large, especially the poor and under privileged to seek quick justice, and a number of problems arise continuously, which in a way prevents the democratic growth of India.

In order to overcome such problems, the Judiciary needs financial empowerment, to increase the number of judges, sufficient work force to assist courts and litigants, (especially at the lower rung) and the assessment of workload of courts to overcome present day problems. To gauge the workload of judiciary to allocate the required finances, Judicial Impact Assessment regarded as one of the best tool, implemented successfully in many countries. In the light of above, this paper examines the conceptual perspectives of Access to Justice, Judicial Impact Assessment and draws an analogy from the experiences of USA,[7] as it is the

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[3] India Development Foundation, Judicial Impact Assessment: An approach Paper (last accessed on Jan.1, 2008), http://lawmin.nic.in/doj/justice/judicial impact assessment reportvol2.pdf.(last accessed on Apr.15, 2015)

[4] Hara, Arnab. K. and Maja. B. Micevska, The Problem of Court Congestion: Evidence from Indian Lower Courts , Proceedings of CEA 38th Annual Meetings (June 6, 2004) Ryerson University, Toronto

[5] Committee on Empowerment of Women, 19th Report ¶ 2.8. Lok Sabha Secretariat, New Delhi, 2013

[6] Ministry of Law and Justice, Government of India, available at http://www.doj.gov.in

preferred system accepted even by the Supreme Court, and its possible affects on the Indian context to empower the right to access to justice.

Access to Justice: Historical and conceptual perspectives

Whenever we speak of 'access to justice', we mean a particular perspective in mind, and, mostly talk of access to justice as one of the key concepts of law and justice system with a number of dimensions such as Legal protection, Legal Awareness, Legal aid and Counsel, Adjudication, Enforcement, and, Civil society and Parliamentary oversight.[8] In general, access to justice many a times viewed by people those who work in the area to improve justice system discusses of a particular problem or particular group. In the contemporary era, it means settlement of disputes and alternatives for redresses of disputes in a quick span. However, access to justice its historical roots across the world attribute a number factors to it. In societies that of India it was governed mostly by moral, ethical and legal principles and mostly based on the principles of ***dharama*** before its modern tenets of legislative history invented by the British legal system. [9]

In the West, the concept of access to justice, generally, ascribed to the traditions of Common Law developed under the British during the twelfth century under Henry II, followed by the singing of King John's Magna Carta in 1215. The commentaries of Blackstone, the judicial decisions of the courts of UK and USA strengthened the concept expanding its realm from civil law to constitutional province.[10] In later periods, it evolved as a human right and developed as an important tool to address the concerns of poor and vulnerable across the frontiers through the concept of 'Public Interest' or 'Social Action Litigation'.[11] The definition of

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[7] As the Committee appointed by the Government of India to submit proposals to work on Judicial Impact Assessment in India and as the committee preferred the experiences of USA, the US Experience has been taken into consideration.

[8] UNDP: Access to Justice: PRACTICE NOTE, at 7 (On Mar. 9, 2004), available at http://maarefah.net/portal/resource/undp-access-justice-practice-note-2004.

[9] For a discussion on the ancient legal system and duties of King in the administration of justice and access to justice M. Rama Jois: Legal And Constitutional History Of India: Ancient Legal, Judicial and Constitutional System, Universal Publications, Delhi, 1984, also see: L.N. Ranga Rajan, *The Arthashastra - Kautalya*, (9th ed. Penguin Books India, N. Delhi, 1987) 348-461.

[10] Leonard W. Schroeter, The Jurisprudence of Access to Justice: From *Magna Carta* tó *Romer v. Evans* via *Marbury v Madison* available at http://www.seanet.com/~rod/marbury.html (last visited on May 20, 2015); Justice M. Jagannadha Rao, Access to Justice, SPEECH AT DELHI HIGH COURT (2015), available at http://www.delhihighcourt.nic.in/library/articles/Access%20to%20justice.pdf, (last visited on Sep. 20, 2015)

[11] Baxi Upendra, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, Third World Legal Studies 4 (1985) available at: http://scholar.valpo.edu/twls/vol4/iss1/6; *cf:* K.G. Balakrishnan, Justice, Supreme Court of India, Annual Lecture at

access to justice seen in the context of socio-legal research or in the backdrop of legal need defies an accurate definition and restricts its purview to seek a set of legal actions to secure certain legal rights guaranteed under a legal system, especially, from the purview of public and private law.[12]

Access to justice, on the other hand, analyzed as a substantial aspect in a holistic perspective or looked at the other side it is a procedural or institutional aspect. This means it brings forth the economic parameters, where in justice be rendered as a cost effective factor. Accordingly, justice needs to be pervasive and to provide quick recourse to litigants from the traditional formal institution of judiciary without recourse to pendency, and cost effective. In the light of above, the reforms suggested by Law Commission of India[13] and Report of the JIA committee appointed by the Supreme Court of India to examine the impact of legislations enacted by Parliament of India on judiciary, needs an critical examination a recourse of recount the significance of JIA as a tool to access to justice.[14] In this regard, National Committee to Review the Work of the Constitution already highlighted on the significance of empowerment of judiciary both in financial and structural management[15] already highlighted the significance of empowering financial autonomy to judiciary as a vital element to achieve the concept of access to justice. To fulfill the dreams of the constitutional makers and to ensure fundamental human rights of citizens, it is imperative to implement the suggestions of the above commissions, which in turn help to strengthen tenets of access to justice in the post constitutional era, to tinsel as an emerging economic player.

What is Judicial Impact Assessment

Apart from regular litigation, legislative proposals certainly increase the workload of judiciary both operationally and substantially. The enactment of any

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15th Annual Lecture at Singapore Academy Of Law, Growth of Public Interest litigation in India (Oct. 8, 2008), available at http://supremecourtofindia.nic.in/speeches/speeches_2008/8%5B1%5D.10.08_singapore_growth_of_public_interest_litigation.pdf.(last visited on Nov. 25, 2015); F.M. Ibrahim Kalifulla, Justice, Supreme Court of India, at Tamil Nadu Judicial Academy in South Zone Regional Conference, Rule of Law and Access to Justice (Feb. 1, 2014), available at http://www.tnsja.tn.nic.in/Scheule%202014/Jan%2031-Feb%202-NJA-Sch.pdf (last visited on Jun. 20, 2015)

[12] Louis Schetzer, Joanna Mullins, Roberto Buonamano, *Access to Justice and Legal Needs*, N. S. W. Law & Justice Foundation, New South Wales, 5-7, 2002 available at www.lawfoundation.net.au/report/background.

[13] See the 230th Report of the Law Commission of India, 2009, available at http://lawcommissionofindia.nic.in/reports/report230.pdf (last visited on Aug. 15, 2015)

[14] Report of the Committee on JIA in India, (June 15, 2008) available at http://lawmin.nic.in/doj/justice/judicialimpactassessmentreportvol1.pdf, (last visited on May 23, 2015)

[15] NCRWC, Financial Autonomy of Indian Judiciary, (2002) II, Book-2, at 773-825

new law increases workload of a judiciary on two major fronts. In the operational front, it increases the operational costs affecting the procedures of court, such as trial, sentencing, appeal to higher courts. Secondly, it impinges on court administration, especially on the human resources of judiciary. Thirdly, it has a direct bearing on the finances of judiciary, which has a great effect on infrastructural facilities and on its finances. On the substantial side, firstly, interpretation of a legislation by judiciary either to fill the gaps in it or to define the exact objects of such legislation, certainly increase fresh litigation, which affects the affective functioning of judiciary and lead to overcrowding of courts. Finally, all this will have an ultimate bearing on people to have an easy Access to Justice.[16]

Judicial impact assessment is calculating the workload of judiciary that increases due to enactment of substantial and procedural law by legislature at regular intervals. Parliamentary legislation enacted every time, adds burden on judiciary, especially on the courts of State governments, which function without any support system of financial or operational costs either by Union or State Governments. In fact, they are under more pressure, due to judicial interpretations of higher judiciary, apart from the burden of new legislations of both Union and States. Ultimately, it all affects administration of justice besides law and order situation in the country.[17] In brief, an operational cost that increases the burden of judiciary in several ways and means has a direct impact on its effective functioning. Theoretically, the assessment of burden on judiciary that increases due to enactment of new legislations by legislature regarded as judicial impact assessment, apart from the litigation that arose out of judicial interpretations.

Judicial Impact Assessment in US

California though became the first State in USA to initiate the process of Judicial Impact Assessment in 1970 the Judicial Impact assessment's evolution is normally credit to Warner Burger, former Chief Justice of US Supreme Court. The call given by Warren Burger, in 1972 in his lecture on the "State of Judiciary," JIA came to the forefront in the history of US as a tool to empower people to have more easy access to justice. Warren Burger in his address highlighted the significance of Judicial Impact Assessment and its implications in assisting the Federal and State Judiciary in "rational Planning for the future with regard to the burden of courts."

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[16] Supra note 3,

[17] Report of the Task Force on Judicial Impact Assessment, Vol 1, 91-93, 2008, available at http://lawmin.nic.in/doj/justice/judicialimpactassessmentreportvol1.pdf, (last visited on May 4, 2015)

The clarion call of Justice Berger led the congress to enact a Congressional Budget Act 1974, which established the Congressional Budget Office to access the budgetary impact of legislative proposals to access the workload that creates on the Federal Courts and State Courts. Apart from this, the National Science Academy established the National Research Council to study the legislative impact of the functioning judiciary and the monetary implications.[18] In the beginning, JIA remained as a scholarly debate and was active at the level of state judiciary. However, in early eighties a wave of interest had created due to the planning of legislative-judicial relations in the federal and state judiciaries, it became a most important topic at all levels of government and assumed national significance.

The Office of Judicial Impact Assessment was created in the judicial branch basing on the recommendations of the Federal Courts Study Committee created by Federal Courts Study Act, 1988. The Federal Judicial Centre conducted a conference in 1995 to work out the details and means of accessing the workload to evolve a methodology to collect data that typically creates workload especially that of the Federal legislations on the state judiciary. The American Bar Association in 1991 through a resolution, appealed to both Federal and State Legislatures to to access the costs factor of each legislation that it supposes to create workload on the judiciary, which needs to contain with respect to dockets, workload, efficiency, staff and personal requirements, operating costs, existing material recourses, appellate, trial and administrative law courts.[19] These systematic efforts thus had helped the judiciary to be more transparent and able to provide easy, quick, and increased judicial efficiency that helped to strengthen the democratic tenants of USA, which in turn planted belief in the market forces as one of the best destinations to make investments. At times, some of the lower court judges even sued the state and municipalities to seek higher allocation of funds shows clearly, that the judges too are more accountable to dispose of justice at the earliest to injured parties.

The Indian Scenario

The judiciary in India functions at various levels. The Supreme Court of India is the highest judicature of the country, which, is the final court of the country and disposes all types of cases as stipulated by the constitution. The High Courts in all most in every State acts as the highest courts of each state and looks after the administration of the lower courts within the state, District courts, Munsif-

[18] A. Fletcher Magnum (Ed.), Conference on Assess the Effects of Legislation On the Workload of the Courts: Papers and Proceedings, 12-15, 1995, full text available at https://bulk.resource.org/courts.gov/fjc/efflegis.pdf

[19] ABA's Report of 117 A, available at http://www.americanbar.org/content/dam/aba/migrated/jd/tribalcourts/pdf/OneHundredSeventeenA.authcheckdam.pdf (last updated 10, 2015)

Magistrates of First class and Second class deals with civil and criminal cases and functions as junior division courts at the lower level. Apart from the regular structure, over the years a number of special courts, fast track courts and other types of magistrate and civil judge's courts functions to dispense justice.

The judiciary in India administers mostly common law system. However, the judiciary as an independent organ is free to draw analogy from any legal system in exercise of its inherent powers. Accordingly, the judiciary in India, especially, the Supreme Court and High Courts on several occasions looks at many of their counter parts, especially, the Judicial pronouncements of the Supreme Court of USA, and injected a number of principles into Indian law. The autonomous character of judiciary and the historical verdicts propounded by the Supreme Court by drawing analogy from the judicial interpretations of the U.S. Supreme Court, largely injected confidence amongst the people India, and helped to strengthen democratic ideals of the polity, whenever the legislative and Executive organs exceed their limits of power. Due to this judicial activism, compare to yester years, the workload of the courts has drastically increased. However, the financial independence is limited to judiciary in India in comparison with its counter parts of various countries, and many a times they have to depend on the Legislature for financial allocation including their salaries and other perquisites.

According to Constitutional arrangement, establishment and maintenance of lower judiciary except Supreme Court and High Courts fall within the ambit of State Governments as per clause (3) entry 11 A of the concurrent list of the constitution. According to clause (3) Article 117 of the Constitution, a Bill, which if enacted and brought into operation, would involve expenditure from the Consolidate Fund of India shall not be passed by either House of Parliament, unless the President has recommended to that House the consideration of such Bill. According to this article, the President of India must be aware of the additional financial expenditure, which imposes burden on the exchequer by virtue of any proposed amendment to the fund. In addition to this constitutional safeguard, under the respective provisions of the Rules of Procedure and Practice of Business of each house of Parliament, every Bill requires to accompany by a Financial Memorandum, stating the recurring and non-recurring expenditure likely to spend from the Consolidated Fund of India, if a Bill takes the shape of law. If no expenditure is involved from the Consolidated Fund of India, there is no need for a Financial Memorandum to accompany a Bill. A number of legislations passed by Union of India without any specific memorandum of expenditure that needs to contribute to Consolidated Fund of India to meet increasing expenditure of Judiciary. In view of this provision, the State Governments and the Lower judiciary has to bear the burden many a times, due to enactment of new legislation by Parliament, including creation of special and fast track courts.

In a similar vein under clause (3) of Article 207, provisions are there for state Legislatures with respect to Bills introduced in the respective state Legislatures. The lawmakers hardly paid any attention on the burden that would cause by such new laws and the litigation that brings in burden on the substantive and procedural issues and the functioning of judiciary. The state governments too never made demands for extra expenditure that causes a brunt on the adoption of new laws by Union of India. This affects the functioning of judiciary, as an efficient tool in dispensing justice, especially lower judiciary without any assistance has to shoulder the burden along with their regular work. This is one of the important causative factors for the delay in disposal of disputes between litigant parties, which increases the pendency of litigation,[20] besides protection of the most important human right of Access to Justice.

In the above scenario, the former Law Secretary to Government of India, Mr. T. Viswanathan in article in Hindu initiated the significance of JIA basing on the American experiences, later received judicial recognition.[21] The Supreme Court in **Salem Advocate Bar Association's case** rejecting the challenge of constitutional validity of certain amendments made to the Civil Procedure Code 1908, (especially on the employment of alternative dispute resolution under the jurisdiction of courts), for the first time recognized the need for Judicial Impact Assessment of the legislations enacted every time by Legislature.[22]

The court in agreement with the views of the former Union Law Secretary recognised the significance of JIA and directed the Union Government to appoint a Committee to work out a detailed plan for its implementation. The government of India in accordance with the directions of the court, appointed a Task force under the Chairmanship of Justice Jagannadha Rao in 2007 along with leading members of the Bar of the court, (such as Sri Arun Jaitely, Sri Kapil Sibal, C.S. Vaidhyanathan and Sri D.V. Subbara Rao). The Committee after a detailed study, mostly drawing analogy from the US practice suggested to constitute a '*Judicial Impact Office*' both at the Union and State Levels on the models of US to assess the impact of extra workload and expenditure including the personnel required to dispose of cases. The committee too opined that since the country has no experience in assessing the work load of judiciary that arises out of the enactment of new legislation each

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[20] *Supra n*ote 14, at 10-13

[21] T.K. Viswanathan: Judicial Arrears, THE HINDU, (Nov 20, 2002), available at http://www.thehindu.com/thehindu/2002/11/20/stories/2002112001051000.htm (last visited on Apr. 4,2015)

[22] Salem Bar Association (II), Tamil Nadu V Union of India, 2005, 6 SCC 344, AIR 200 5 SC 3353

time, especially in accessing impact of Union Legislations on the lowers country of the country much has to learn from the experiences of U.S. It also recommended that the methods evolved in assessing the impact of Federal Legislation on State Judiciary in US needs a through observation to evolve models that suit the country.

The Committee during the course of its study, basing on the experiences of US and the International Committees and conferences, gave a clarion call for Planning and Budgeting for Courts in India. The committee after an extensive studies of vast American literature and significantly on the study of inherent powers of judiciary to seek financial resources to meet their requirements from the American experience, and suggested a scheme for planning and budgeting for courts in India.

While recommending the committee was of the view that the Executive need to take into consideration of the pendency of cases that are in the country from lower to higher courts and accordingly, take specific steps for the planning and allotment of budget to courts, which needs to include building, staff, number of judges, and other parameters. Further, the committee opined that the experiences of US and the execution needs to be closely examined, studied and research need to be encouraged in the area for the further augmentation of the concept of access to justice.

The Committee distinguishing the differences between financial provisions by such sponsoring Ministries and Financial memorandum opined that basing on the constitutional provisions of clause (3) of 117 and 207 both the Union and States need to prepare exclusive budgetary statements for legislations introduced, and forward to the President for recommendation to include such expenditure in the Consolidated Fund of India. In this regard, it opined that the High Courts' need to prepare their budgets and the lower courts budgets in the state and accordingly the Union and State governments need to allocate required funds for each legislation that the concerned legislature passes a legislation.

The Committee further endorsing the views of the National Commission to Review the Working of the Constitution that the judiciary must have financial independence to enhance the functioning as a fully independent organ than on the mercy of Executive, besides Judicial Impact Assessment. Accordingly, it recommended that as per the provisions of Constitution each ministry with the help of the proposed Judicial Impact Office has to attach such budget with every bill and need to obtain the permission of the President of India for such allocation to the Consolidated Fund of India to meet the expenditure of the High Courts and Supreme Court. In a similar manner, provisions has be made to meet the expenditure of lower judiciary basing on the calculations of proposed Judicial Impact Assessment

Offices in each state and allocate such funds to State Governments to meet the burden of litigation that every legislation enacted each time by the Union.

The Committee further expressed after an exhaustive study of various provisions of the constitution and List I and List III (respectively Union List and Concurrent List) and suggested that under these lists where in the Union of India passes legislations under its powers, the burden is increased on the lower courts. Accordingly, the Union needs to take into consideration the amount of workload that creates by each legislation and consequently make recommendations of financial expenditure with a statement of expenditure to be incorporated in the bill for approval of President of India to make specific grants to the consolidated Fund of India.

The Task force submitted its report in 2008 to the Union of India in turn for the approval of the Supreme Court of India. The Court accepted the recommendations made by the Committee and directed the Government to take action on the report for its implementation. In spite of senior then Ministers of Law and Justice were members of the Committee, the report is under consideration of the Government and yet to see the light of the day.

Conclusion

It is a welcoming fact that establishment and assessment of JIA is a significant factor to meet the realm of access to justice in a quick span of time to the litigant parties. The experiences of USA are highly useful in establishing assessing workload on the judiciary to make it financially independent. However, in the Indian context compare to US, a number of other steps are also required before establishing the mechanism of JIA. To pave the way for JIA, and to make it a finically viable institution to address the situation the following aspects needs meritorious consideration.

- The Indian Judiciary is a unitary form of judicial structure. It is not easy to adopt completely the American method. America being a perfect form of Federal government, calculating impact factor of such legislations of Federal government on the state courts is relatively easy than India. In the Indian context, as the Union has a number of powers compared to US and being a cooperative federation, all Legislations of Union have a bearing on the judiciary either directly or indirectly. The Union needs to agree to either share huge quantum of money or delegate most of its powers to the States and reduce its role to important legislations. For this, a wide-ranging political debate is necessary. Accordingly, all political parties must come forward without ego clashes in the welfare of the people, development of the country, to provide Socio-economic justice to all and to establish an egalitarian fraternity in its true spirit as advocated by Dr B.R. Ambedkar.

- While calculating the workload of the courts in all cases, as the Task force of the Committee suggested, the workload needs a careful consideration from different angles from the date of filing of case until the disposal of each case. In this regard, the 73rd and 74th amendments need strict enforcement without any inclination of one-up-man ship. The village level institutions are required to empower to deal with petty offences or implementation of ADR to address a number of disputes to lessen the burden of judiciary. In this regard, since the backlog is very heavy, to dispose of small and petty cases, Lawyers and Professors of Law need to be part of local village level institutions including, Lok Adalats etc., to clear the back log largely. This will certainly reduce the pendency to a maximum extent in the lower judiciary, besides the professors get a professional touch to impart legal knowledge to their future students with practical orientation.
- The Judicial Impact Offices at both the Union and State Levels should be independent bodies like the Controller and Auditor General of India instead of the present Department of Justice, which is functioning from 1971 under the Ministry of Law & Justice and controlled by the Home Ministry.
- The offices of JIA be independent authority be monitored by the Supreme Court and High Courts than the Executive control. The JIA office be composed with academic and research wings to involve academic experts from science and technology, Law, Social sciences, commerce and management.
- All the Judicial Academics of State and National Judicial Academy at Bhopal has to associate as coordinating agencies of the JIA Offices of the Union and States.
- The JIA offices be equipped with adequate resources and the budgets prepared by them basing on the workload of existing legislations, and future legislations needs serious consideration and implementation. The Union and State budgets must include compulsorily independent budgetary heads to these offices with sufficient funds at their disposal to carry out their task. The recommendations of theirs has to have priority without which, creating these offices are of no use.
- The Bar Council of India and State Bar Councils functioning and structure needs a complete reorientation on the lines of Bar Councils abroad, especially like USA to engage research and as a cooperative agency to work in tandem with the Offices of JIA, academic institutions. It needs a thorough overhaul to include academicians from different academic disciplines in its committees. Otherwise, it remains only as a supervising agency of admitting advocates and overseeing the legal education as a cognomen body.

- Allocation of huge grants for teaching and research to traditional University Departments of Law and National Universities to conduct exclusive research on Judicial Impact Assessment will help to evolve a prudent system.
- The Curriculum of Legal Education especially the five-year and three years courses needs a thorough overhaul. Like the American Legal education, the students should possess extensive technical and practical knowledge than the theoretical perceptions, which they learn at present. The non-law subjects' components in the five year law be drastically reduced and even the few needs to be intertwined with a legal orientation than their own subject perspective. Increase in research methodology and techniques of legal writing skills will definitely help the students to shape their legal careers as professionals than becoming as corporate lawyers.
- On the lines of USA, the Legal education needs orientation with applications that are more practical and the course content be restricted to four years. In the fifth year, the students need training as interns to work in the offices of JIA and in the lower courts to learn the techniques of profession.
- The Continues Legal Education imparted by the Bar Council's abroad to their young lawyers, the Indian Lawyers too need to undertake two to three weeks courses on various new areas and alternative disputes methodology every year to continue their licenses to practice from the respective departments of law in the country. The Bar Councils should not give a lifetime enrollment certificate at it is in practice at present. It needs a renewal for every five years basing on the performance appraisal and the training programmes that they attend. After a period of twenty years of Practice, they may be considered for permanent recognition.
- To make JIA work properly there needs an increase in the number of courts. At the same time, precautionary steps are required to fill the vacancies at quick span of time without filling them for years together as prevalent at present.
- India as a huge country, it is difficult for the Supreme Court of India with few judges to deal with all cases without arrears and to administer the offices of JIA. A number of suggestions have already been rendered to have benches of it's in the four metropolitan cities as proposed by various quarters. However, I have a different idea, which is workable and even may be acceptable to the Judiciary.
- The Supreme Court of India is facing a number of issues including volume of pendency of cases. Further, on one or other pretext at regular intervals often called to address some urgent matters, which may have political or national

interests, which also disrupt its functioning including clearing of backlog. India being a cooperative federation, and the Supreme Court has a number of jurisdictions to address the disputes of wide variety, it is becoming difficult to render justice to parties at the earliest. In this scenario, without affecting its powers, the main seat of it at Delhi be left to deal with important constitutional and legal matters, which have wide ramifications. In such case, the country needs to establish at least two divisons of the Supreme Court amending the constitution. One branch be left to deal with Civil Cases and one be made in charge of exclusively of criminal cases and may be named as Supreme Court of Civil Judicature and Supreme Court of Criminal Judicature. These courts will deal with the appeal cases that come from various High Courts in the country. These courts will be only courts of disposing cases without seizing the administrative powers of the Supreme Court's main seat at Delhi. The writ jurisdiction that may be necessary to deal with the civil and criminal cases may be delegated to these courts. The decisions made by them should be ordinarily binding on the lines of the present Supreme Court decisions. The Supreme Court at Delhi be designated as Supreme court of India and empowered to deal with original and advisory jurisdiction and constitutionally important cases including the administrative functions and monitoring the functioning of the offices of JIA. The above supreme courts need to function from other parts of the country than in Delhi itself.

- The above proposal needs a meritorious consideration taking into consideration of litigation, disposal and future of the country. All the three wings of the state Executive, Legislature, and Judiciary needs to come forward to support any radical suggestion. The judiciary especially take the lead that is going to strengthen its hands both economically and legally. By this division, the Supreme Court of India, especially the Chief Justice of India will have sufficient time to monitor the proper assessment and budgetary allocations of JIA in the country. It will further strengthen the collegium system, as the judges of the Supreme Court of the Country will have sufficient time to spend in the assessment of a candidature of a judge for the supreme court of the country besides the judges of the proposed supreme courts.

- The above suggestion may reduce the criticism of quality of judges. The Judges of the two Supreme Courts alone needs meritorious consideration for appointment as Judges of Supreme Court of India. The judges before occupying the highest seat of authority of justice and administration will have an ample experience in these courts. Further, it will enhance the opportunity of the judges of the High Courts to receive quick promotions than stagnation and

- In the Nidhi Ayoag, the Chief Justice of India needs to represent as an ex officio member to monitor the allocation of budgetary proposals to judiciary and the interests of judiciary. The allocated amount be kept at the hands of the CJI's disposal to meet the judicial expenditure, than at present running pillar to post to several ministries to get sanctions to spend the money. The same may be followed in the State JAC's making the Chief Justice of High Court as an ex officio member of the state planning commission and head in charge of the finances allocated to state judiciary and amount received from the Union for each state by the Union to the consolidated fund of India.
- The JIA at the State Level access the impact of Union Legislation on state judiciary accordingly forward a report to the National JAC for consideration. Apart from above, it will regularly monitor the impact of workload of state legislations and judicial interpretations of the Supreme Courts on lower courts. For the financial expenditure of the state part, it will submit its report to the state as in the manner of the National JAC for allocation funds by the State.
- If the respective governments of Union and State fail to accord such expenditure proposed by the Nation and State Level JAC's , the judiciary may take ***suo motto*** action to compel them to release such funds as is necessary for the workload management of judiciary. The ***suo motto*** power be entrusted at the national level to the Supreme court of India and to High Courts at the State level.

The above proposals may seem odd to many. However, without affective changes as suggested, it is not an easy task to clear the pendency of litigation accumulated in the country. Without drastic proposals and changes, establishing the offices of JIA on the lines of the US as suggested by the Committee may not yield results. With more than a billion population, and with huge amount of litigation pending from lower court to Supreme Court of India, we need to undertake changes including the amendment of constitution to meet the expectations of the concept of good governance. If we want to achieve the ideal of social justice and to promote human rights of citizens to the maximum extent as guaranteed by constitution, it is the minimum responsibility of the state and other stakeholders to come forward to undertake reforms to strengthen the concept of access to justice.

The present government of India voted to office on development agenda, especially the augmentation of the concept of good governance that there is every possibility the government at any time may implement the proposals of the committee to strengthen tenets of democracy especially, to provide speedy justice. Further, Mr. Arun Jaitely, Finance Minister of the country and as a senior Counsel of the Supreme Court of India as one of the members of the Committee need to initiate

steps for the implementation of JIA and the constitution of the JIA Offices. Well any delay may at any movement if an activist of democracy and justice or any non-governmental organisation files a public interest petition in the apex court, the Supreme Court may pass a verdict with directions for the implementation of the recommendations to introduce the concept of judicial impact assessment. Before such compulsions to meet the dead lines of judiciary in a hurried fashion, it is better the Executive, Legislature and Judiciary with an understanding need to initiate the steps suggested above promoting the constitutional mandate of easy and quick access to justice. Furthermore, as a fastest growing economy, it is nothing but inevitable for the state to implement the proposals to enhance capacity of judiciary as an easily accessible machinery to the people of the country and as well to create a conducive environment to attract more foreign investment into the country to develop a growth oriented competitive market environment.

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ANATOMIZING THE TRADEMARK PROTECTION ATTRIBUTED TO META TAGS IN INDIA

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INTRODUCTION

It can be posited without qualms and adduced from the rulings of various courts around the world that in the present day world 'Meta tags' have been accorded with trademark protection. The recent Order in *People Interactive (I) Pvt. Ltd.* v. *Gaurav Jerry*[1] pronounced by the Bombay high court, confirms this status in India too, thereby suggesting that the unauthorized use of a registered *trade mark* as Meta tags constitute *trade mark infringement* or passing off. Meta tagging *per se* is no doubt a legal process but on various occasions it is misused, to the extent that it violates the right of the trademark owner and invites actions against infringement of trademarks.

In the present day world, domain names have acquired a status of business identifiers and work as a tool of promotion in the era of digital marketing. The Meta tags are intrinsically connected with website's promotion. The business entities have all the right to increase their online customers by legal strategies like using of meta tags in the process of Search Engine Optimization but problem arises when they resort to practices such as, using another's well reputed trademark as Meta tag in one's own website, in an unauthorized manner, to gain online customers.[2] The courts have taken such acts very seriously and trademark protection has been accorded even to invisible Meta tags.

In USA, judicial pronouncements have diluted the 'burden of proof' required to establish trademark infringement through the use of Meta tags and rely upon 'Initial Interest Confusion', and this has received ample criticism.[3] But here arises

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[1] *People Interactive (I) Pvt. Ltd.* v. *Gaurav Jerry & Ors.*, NMS (L) NO. 1504 of 2014 in SUIT (L) NO. 622 OF 2014, available at spicy.com/2014/07/people-interactive-i-pvt-ltd-v-gaurav-jerry-ors.html.

[2] Kirby Drake, *Trademark Infringement by Meta tags*, Klemchuk-LLP, Oct. 16, 2015, available at http://www.klemchuk.com/30-Trademark-Infringement-By-Meta-Tags, (last visited on September 24, 2015)

a question that customers who use internet are Intelligent and reasonable enough that if directed to a different website because of initial confusion, once there and realizing it's not where they intended to be in the first place, they are merely a click away from the original website[4] and what would be termed as 'Fair use'[5] in such cases. Moving on further requires deciphering the concept behind Metatags and their functions.

1.1.1. THE CONCEPT OF META TAGS

Meta tags are HTML codes that are intended to describe the contents of a web page and help a web surfer to procure intended search results in the search engine. Meta tags are pieces of information in the source code of a website and are not displayed on the website, but can be viewed by selecting the 'source view'.[6] Meta tags are of great importance for the website owner as well as the web surfers since at the time when surfer knows domain name of the web site then he can directly reach the web site but when a user doesn't know the domain name then in the commercial search engine, the user needs to type the keywords such as

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[3] Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 Emory L. J., 507 (2005) available at http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi? article=1120 &context=facpubs, (last visited on Sep. 25, 2015); *cf:* Jennifer E. Rothman, *Initial Interest Confusion: Standing At The Crossroads Of Trademark Law*, 27 Cardozo Law Review 1, available at http://cardozolawreview.com/Joomla1.5/content/27-1/ROTHMAN.FINAL. VERSION.pdf, (last visited on Sep. 23, 2015); also see criticism in article of Jaclyn Coronado Sitjar, *The "Initial Interest Confusion" Test - Analysis and Proposal for a Sensible Formulation for Use on the Internet,* The National Law Review, available at http:// www.natlawreview.com/article/initial-interest-confusion-test-analysis-and-proposal-sensible-formulation-use-internet (last visited on Sep. 23, 2015) also see: Byrce J. Maynard, *The Initial Interest Confusion Doctrine and Trademark Infringement on the Internet*, 57 Washington and Lee Law Review 4, available at http://scholarlycommons.law.wlu.edu/cgi/ viewcontent.cgi?article=1333&context=wlulr (last visited on Sep. 24, 2015); also, INTA, The Online Use Subcommittee of the Internet Committee requests that the Board of Directors adopt the following resolution on initial interest confusion, recommending that courts consider initial interest confusion using the traditional likelihood of confusion factors, available at http://www.inta.org/Advocacy/Documents/INTA Initial Interest Confusion Resolution Report.pdf (last visited on Sep. 25, 2015)

[4] Zachary J. Zweihorn, *Searching For Confusion: The Initial Interest Confusion Doctrine And Its Misapplication To Search Engine Sponsored Links*, Cornell Law Review, available at http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=3041&context=clr, (last visited on Sep. 24, 2015)

[5] There are two kinds of use which can be termed under Fair use and does not lead to any kind of infringement, one is 'nominative fair use' and other is 'descriptive trademark use'. Under "Nominative fair use" means the use of another's trademark to refer to the genuine goods or services associated with the mark, whereas, descriptive use is when a descriptive mark is used in good faith for its primary, rather than secondary, meaning, and no consumer confusion is likely to result.

[6] Alan Davidson, *The Law Of Electronic Commerce*, Cambridge University Press, 2009, at 117

the trademark, trade name or guessable words related to the site he is looking for and the search engine shows a list of results related to the search, meta tags are inserted in the web page in such a way that these keyword are most closely related to the web site, so this makes it easy for the web surfer to find web site he is looking for.

The more often a term appears in a metatag, the more likely the web page associated with those metatags will appear as a search result, and the more likely it will appear higher on the list of hits. While Meta Tags are technically invisible, in that they run 'behind' the website, they can be viewed on any web page by clicking on 'view sources'.[7] The website designer inserts keywords into the Meta tag to indicate the purpose of the website and to assist search engines.[8]

This was a brief description of Metatags and now to understand the topic next step which is important is to analyze the related doctrine which has been put forth by the judiciary in the USA.

2. AN ANALYSIS OF 'INITIAL INTEREST CONFUSION' DOCTRINE IN CASE OF UNAUTHORIZED USE OF META TAGS.

Mention of this doctrine becomes pertinent for the reason that the trademark protection given to Meta tags in USA under various cases was by virtue of this doctrine. Usually the elements which constitute the crux of Trademark Infringement are 'Use', 'Use in Commerce' and 'likelihood of confusion'.[9] In addition to claims of trademark infringement, deceptive uses of Meta tags may result in claims of unfair competition[10] or trademark dilution[11]. But the precedent set by the Courts in

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[7] Rodney D Ryder, *Meta-tagging Along For The Ride, TATA-feature Stories*, available at http://www.tata.co.in/article/inside/WJz1!$$$!tJu!$$$$!44=/TLYVr3YPkMU=, (last visited on Sep. 24, 2015)

[8] Supra note at 6.

[9] Trademark infringement, Cornell University Law School-Legal Information Institute, http://www.law.cornell.edu/wex/trademark_infringement, last visited on September 25, 2015

[10] Kavita Mundkur Nigam, *A Free and Fair Economy – Unfair Competition In The Context Of Trade Marks In India, Asia IP Informed Analysis*, available at http://www.asiaiplaw.com/search/article/1090 (last visited on Sep. 24, 2015) the term 'unfair competition' in commercial law has evolved to include a whole spectrum of wrongs. Examples of unfair competition include infringement of a trademark or service mark, passing off, false representations, false advertising, dilution of goodwill in trademarks, derogatory comparative advertising, theft of trade secrets, etc, see for further information,

[11] § 29(4) of the Trademark Act, 1999:
A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which—
(a) is identical with or similar to the registered trade mark; and
(b) is used in relation to goods or services which are not similar to those for which the trade mark is registered; and

USA vividly show the use of 'initial interest confusion doctrine' to resolve Trademark issues that emerge due to Meta tags while using search engines.[12] Initial interest confusion is the temporary, pre-sale confusion that occurs when a consumer is drawn to a product believing it to be affiliated with another company because the product somehow evokes that company's trademark.[13] Trademark infringement that relies on Initial Interest Confusion does not require a 'likelihood of confusion' at the time of sale; the mark must only lure the consumer's initial attention. This is a widely accepted Doctrine to establish Trademark infringement in the cases involving use of Competitors trademark as Meta tags, by the infringer in his or her website. The Ninth Circuit in Brookfield set the widely clinched precedent that the use of another's trademark in the Metatags of a website is infringing.[14] Here in this case, the defendant, West Coast, used the term "moviebuff" in the description and keyword Meta tags for its video rental store's website.

Although there is no source confusion in the sense that consumers know they are patronizing West Coast rather than Brookfield, there is nevertheless initial interest confusion in the sense that, by using "moviebuff.com" or "MovieBuff" to divert people looking for "MovieBuff" to its web site, West Coast improperly benefits from the goodwill that Brookfield developed in its mark.[15]

But this particular judgment and doctrine have been a victim of great criticism[16] such as, this judgment has diluted the burden of proof required to establish trademark

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(c) The registered trade mark has a reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark.

[12] Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads Of Trademark Law*, 27 Cardozo Law Review, 1 at 173, available at http://cardozolawreview.com/Joomla1.5/content/27-1/ROTHMAN.FINAL.VERSION.pdf, (last visited on September 23, 2015)

[13] Jaclyn Coronado Sitjar, The "Initial Interest Confusion" Test - Analysis and Proposal for a Sensible Formulation for Use on the Internet, The National Law Review, http://www.natlawreview.com/article/initial-interest-confusion-test-analysis-and-proposal-sensible-formulation-use-internet, (last visited on Sep. 24, 2015)

[14] Brookfield Commc'ns, Inc. v. West Coast Entm't Corp., 174 Fed 1036, 1064 (9th Cir. 1999)

[15] Id.

[16] *Supra notes at* 12 where author explained that the court's analogy is wrong on many levels, first, the use of another's trademark in Meta tags is nothing like posting a competitor's trademarked name on a sign in front of one's store. Since the Meta tags are not visible therefore, cannot directly serve to pass off one person's good for those of another. Second, West Coast never suggested that it was Brookfield or that it sold Brookfield's MovieBuff database product; also see *supra note* 3; also see: Byrce J. Maynard, *The Initial Interest Confusion Doctrine and Trademark Infringement on the Internet*, 57 Washington and Lee Law Review Volume 4 available at http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1333&context=wlulr, (last visited on Sep. 24, 2015)

infringement.[17] One critique explains that 'the invocation of initial interest confusion doctrine in the above ruling reflects the judge's fundamental misunderstanding of the way internet search engines operate, since search engines do not take a surfer to any particular site rather returns a list of search results and the user chooses the desired site if found in the list'.[18] This doctrine was widely relied upon in various Judgments later and where placing a competitor's trademark in a Meta tag was considered creating a likelihood of confusion.[19]

But Unlike the Ninth Circuit in *Brookfield case*, the court in *Welles* did not end its analysis with the finding of initial interest confusion. The decision in *Playboy enterprises v. Welles*[20] adopted a more limited view of the initial interest concept, stating that while a finding of initial interest confusion can be a basis for finding a likelihood of confusion, initial interest confusion does not lead ipso facto to a finding of likelihood of confusion.[21] Here Court applied both the nominative and Descriptive fair use test to the defendant and concluded the Defendant's use of these trademarked items was permissible. In the case of *New York State Society of Certified Public Accountants v. Eric Louis Associate's* court expanded contours of initial interest confusion. This approach obviously is broader than that taken by the Ninth Circuit in *Brookfield Communications*.[22] Yet another application of Brookfield can be seen in *Playboy Enterprises, Inc. v. Netscape Communications Corp.*[23] In this decision Judge Berzon had serious reservations about Brookfield's correctness, although she agreed that the court's decision was consistent with Brookfield.[24] *Playboy Enterprises, Inc.v. Netscape Communications Corp., case*

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[17] Priya Anuragini, *India: Unauthorised Use Of Trademarks In Meta Tags: New Basis For Trademark Infringement In India,* available at http://www.lexorbis.com/india-unauthorised-use-of-trademarks-in-meta-tags-new-basis-for-trademark-infringement-in-india/, (last visited on Sep. 24, 2015)

[18] Farooq Ahmad, *Cyber Law In India: Law On Internet*, New Era Law Publications, (2011) at 154

[19] *Promatek Indus Ltd.* v. *Equitrac Corp.*, 300 Fed 808, 812 (7th Cir. 2002)

[20] *Playboy Enterprises, Inc.* v. *Terri Welles*, et al., 279 Fed 796 (9th Cir., Feb. 1, 2002)

[21] Byrce J. Maynard, *The Initial Interest Confusion Doctrine and Trademark Infringement on the Internet,* 57 Washington and Lee Law Review 4, available at http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1333&context=wlulr, (last visited on Sep. 24, 2015)

[22] Ibid, Judge Sands basically broadens the doctrine of initial interest confusion by devaluing traditional multi-factor likelihood-of-confusion tests by taking into consideration only the point whether the defendant has used the plaintiff's trademark in the defendant's domain name or Meta tags. If yes then, according to this court, there is trademark infringement, regardless of the other factors.

[23] Playboy Enterprises, Inc. v. Netscape Communications Corp., 354 Fed 1020 (9th Cir., Jan. 14, 2004)

[24] Joesph V. Marra, *Playboy Enterprises, Inc.* v. *Netscape Communications Corp.: Making*

did not primarily deal with Metatags but with 'keying banner Ads', but meta tags were also discussed in this case. According to Judge berzon, when trademarks are used solely in the Metatags of a competitor's website, the sites displayed on the search result page clearly demarcate the origin of the website hence there is no chance of confusion.

"Consumer is never confused as to source or affiliation, but instead knows, or should know, from the outset that a product or web link is not related to that of the trademark holder because the list produced by the search engine so informs him."[25]

But we must not be oblivious to the decisions where courts have also observed that there is a difference between inadvertently landing on a website and being confused. Courts must take into account that just because there may be some initial or momentary confusion on the part of Internet users, this does not automatically constitute a likelihood of confusion.[26] Also, by the International Trademark Association, a resolution was made on initial interest confusion, recommending that courts consider initial interest confusion using the traditional likelihood of confusion factors.[27]

The 'initial interest confusion' doctrine when applied to cases involving Meta tags, has received a mixed response. Its applicability in so many cases shows its substantial appraisal while its critique by various authors puts a question mark over its further use in such cases. But still this doctrine does find its applicability even today.[28] Moreover, India is at a nascent stage in respect to judicial experience of adjudging cases involving issues of Metatags, and till now, no court has used this doctrine in India in matter related to Metatags.[29]

Confusion a Requirement for Online Initial Interest Confusion, 20, Berkeley Technology Law Journal 1, at 215, http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi? article= 1512 &context=btlj, (last visited on Sep. 24, 2015)

[25] Playboy Enterprises, Inc. v. Netscape Communications Corp., 354 Fed 1020 (9th Cir., Jan. 14,2004)

[26] The Network Network v. CBS, Inc., No. CV 98-1349 NM, 2000 WL 362016, at 5 (CD. Cal. Jan. 19,2000)

[27] Request For Action By The INTA Board Of Directors On Initial Interest Confusion-September 18, 2006, available at http://www.inta.org/Advocacy/Documents/INTAInitialInterestConfusionResolutionReport.pdf, (last visited on Sep. 24, 2015)

[28] Lamparello v. Falwell, 420 F.3d 309, Google, Inc. v. American Blind and Wallpaper Factory, Inc.,(N.D. Cal. Apr. 18, 2007)

[29] *Consim Info Pvt. Ltd* v. *Google India Pvt. Ltd*, 2013(54) PTC578(Mad), the Madras High Court discussed the application of 'Initial Interest Confusion' Doctrine under various jurisdictions around the world.

2.1. JUDICIAL PRONOUNCEMENTS ON ISSUE OF META TAGS AND TRADEMARK IN INDIA

India has not had much cases decided over the issue of unauthorized use of Metatags leading to trademark infringement and the jurisprudence is yet in the process of evolving, but it is, even not oblivious to the repercussions of such unauthorized use and its impact on the trademark laws. We construe this from the few cases which have discussed the issues of use of Metatags. The first initial case in India where courts discussed Metatags was *mattel, inc and others v jayant agarwalla and othrs*[30]. There were broadly two issues demarcated by the court to be decided, of which one was, whether use of metatags and hyperlinks amount to trademark infringement and therefore should be afforded protection. Plaintiff contended that defendants infringed their mark by using metatags which clearly amounted to infringement and passing off, as the use of such metatags diverted internet traffic away from the plaintiffs' websites and misled the public that their (defendants') products are associated with the plaintiffs. The Delhi High Court restrained the defendants from using the name SCRABULOUS (also as Meta Tags), or any other mark deceptively or confusingly similar to SCRABBLE.[31] Another case, but meagerly referring about Metatags was *Consim Info Pvt. Ltd. V. Google India Pvt. Ltd. & Ors.,*[32] *in which* Madras high court had to largely and primarily deal with the issue relating to banner Ads/pop-up advertisements and advertisements which appear as sponsored links. In this case the Madras High court went on to discuss exhaustively the 'Initial Interest Confusion' Doctrine and its applicability within different jurisdictions around the world but did not penetrate it into the Indian Trademark Jurisprudence.

But the most recent Case, dealing exhaustively on subject of Metatags and defining it for the first time in Indian case, is *People Interactive (I) Pvt. Ltd. v. Gaurav Jerry & ors (Shaadi.com case)*[33]. In India even in absence of a legislation dealing specifically with the domain names, the jurisprudence in this regard has been led down by the judiciary and it has done an appreciable job. This order is pivotal and relevant since it was first time court has recognized and analyzed the use of meta-tags and its role in passing off. It also held that it is not necessary for the plaintiffs to seek leave under Clause XIV of the Letters Patent where the website is interactive in nature.[34] In the instant case, the Plaintiff belongs to the People Group of Companies. It owns several well-known domain names, websites,

[30] 2008 (153) DLT 548
[31] 2008 (38) PTC 416
[32] 2013(54)PTC578(Mad)
[33] NMS (L) NO. 1504 of 2014 in SUIT (L) NO. 622 OF 2014
[34] Id.

brands and trademarks. One of these is Shaadi.com. Defendant No. 1 seems to be providing a rival service under the domain name ShaadiHiShaadi.com. Defendants No. 2 and 3 provide domain name registration and web hosting services in the United States and India respectively.[35] The Court resisted the use 'Initial Interest Confusion' Doctrine to establish trademark Infringement, albeit the plaintiff had to establish the likelihood of Confusion. The Plaintiff established that the defendant succeeded in diverting as much as 10.33% and 4.67% of the Internet traffic away from the Plaintiffs to himself. The court reached conclusion by stating that there could be no better evidence of passing off, confusion and deception. This is, plainly, hijacking the Plaintiffs' reputation and goodwill and riding piggyback on the Plaintiffs' valuable intellectual property.[36]

Also Court in its Observation, labeled Defendants Act as a sheer case of online piracy.[37] Court disposed off the matter by granting ex- parte interim injunctions to the plaintiff stating that there was a strong prima facie case and ordered defendants to stop using the impugned mark and further to remove the registration and web hosting for the domain "shaddihishaadi.com".[38] The Bombay High Court implicitly ignored that the much invoked doctrine of 'initial interest confusion' in most of the cases around the world in matters relating to infringement of trademark through Meta tags and plaintiff had to prove that there was "sufficient likelihood of confusion"

2.2. CRITICAL ASSESSMENT AND IMPLICATIONS OF THE TRADEMARK PROTECTION GIVEN TO META TAGS

The *shaadi.com case* connotes that trademark Protection has been extended to Meta tags in India by virtue of the Trademark Laws, as prescribed under the statute and disregarding application of any doctrine which entails dilution of 'burden of proof' required to establish trademark infringement. Initial confusion must not be the deciding factor; rather it must be conclusive implication which can be drawn only when "sufficient likelihood of confusion" is established. In India, till date there is no binding precedent set, since the Supreme Court has never faced any such issue to adjudicate upon and hence different High courts have used their own wisdom to Pronounce Judgments. This, in a way leaves scope for application of 'Initial Interest Confusion' Doctrine in future, to resolve these matters involving

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[35] Id.
[36] Id.
[37] Id.
[38] Shaadi.com prevails over shaadi fakers, *SS Rana Co. Advocates- IP Connect E-News letter Vol VI 31*, available at http://ssrana.in/News/2014/31/Shaadi.com-prevails-over-shaadi-fakers!!.htm, (last visited on Sep. 24, 2015)

Trademark Infringement through Meta tags. While it is well established that trademark law is oriented towards the consumer of average intelligence, the initial interest confusion doctrine has been criticized by some for treating online consumers as having below average intelligence.[39] It is proposed that the Apex Court must take into consideration the wide criticism this Doctrine has faced and must adopt the approach the Bombay High court has taken, According to which trademark Infringement can be said to have happened only after "sufficient likelihood of confusion" is proved. The Indian Trademark Laws are potent enough to safeguard the right of Trademark Owners in such Issues and should be used to justify Trademark Infringement which would save from the odds of the initial interest confusion Doctrine, by retraining its applicability to sip into the Indian Jurisprudence. But as of now, it's a welcome move by the Bombay High court to extend the trademark protection to Metatags in Indian legal scenario.

It becomes even more pertinent not to dilute the 'burden of proof' because the use of Meta tags by the search engines have been an integral aspect for website owners due to the relevance of *Search Engine Optimizations*[40] and marketing strategies. Increasingly, in the present epoch, search engines rely less and less on metatags as a way of determining search results, and many search engines discount repeated uses of the same terms. Despite the fact that most search engines no longer use metatags, the bulk of cases involving initial interest confusion and the Internet consider the use of metatags.[41] Hence the questions which needs to be addressed is whether the Courts while deciding upon the cases involving such technical aspects fails to adjudge the real Impact of such Use and also, whether the Meta tags are really capable enough to cause trademark infringement. Thus the burden of proof must not be diluted. In some cases, decided by various courts held that 'use of another's Trademark in meta tags' were not found to be infringement. In United Kingdom, the court of Appeal in *Reed Executive plc and Another vs. Reed Business Information Ltd and Others,*[42] rejected the argument that invisible metatag use is capable of amounting to trade mark infringement. The court in its reason asserted that "*The web-using member of the public knows that all sorts of banners appear when he or she does a search and they are or*

[39] Supra note 24, at 223
[40] Search engine optimization (SEO) is the process of affecting the visibility of a website or a web page in a search engine's "natural" or un-paid ("organic") search results.
[41] Supra note 12 at 174
[42] Reed Executive plc & Another v Reed Business Information Ltd & Others, (2004) EWCA (Civ) 159

may be triggered by something in the search. He or she also knows that searches produce fuzzy results with much rubbish thrown in."[43]

Also in the 7th Circuit District Court ruling,[44] where The plaintiff, Standard Process, Inc. ("Standard Process"), filed its amended complaint on July 6, 2007, alleging that the defendant, Total Health Discount, Inc. ("Total Health"), engaged in trademark infringement, false advertising, unfair competition, intentional interference with contractual relations, and related claims, all arising from the advertising and sales of dietary supplements under Standard Process's trademarks. Several motions are before the court.[45] Judge found that *"today 'modern search engines make little if any use of metatags.....' As more and more webmasters 'manipulated their keyword metatags to provide suboptimal keyword associations, search engines progressively realized that keyword metatags were a poor indicator of relevancy.' Accordingly, search engines today primarily use algorithms that rank a website by the number of other sites that link or point to it."*[46]

Reading the aforementioned judgment along with one of the official declarations by Google that "Google does not use the keywords meta tag in web ranking",[47] directs us to the fact, whether the use of trademark in meta tags still holds any relevance, if the search engine can develop methods and ways to work properly and efficiently without using meta tags[48] for displaying the search results for the web search.

With this we can surely propose that one of the ways to revamp the problem caused by the use of others trademarks in website's Meta tags can be that the search engines starts use of page-rank search algorithms that ignored Meta tags.

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[43] Id.

[44] *Standard Process, Inc.* v. *Banks* , 2008 WL 1805374 (E.D. Wis. April 18, 2008)

[45] Id.

[46] *Id.* Moreover, on the question of initial-interest confusion through Banks' use of the Standard Process trademarks in his metatags, The court distinguished Banks' use from other initial-interest confusion cases because he actually sold the trademark holder's goods, as compared to retailers in other cases who used competitor's marks in meta tags to enhance sales of their own products.

[47] Google does not use the keywords meta tag in web ranking, GOOGLE WEBMASTER CENTRAL BLOG, available at http://googlewebmastercentral.blogspot.in/2009/09/google-does-not-use-keywords-meta-tag.html, (last visited on Sep. 25 2015)

[48] *Id.* Google does support several other Meta tags. This Meta tags page documents more info on several Meta tags that Google does use. For instance Google does sometimes use the "description" Meta tag as the text for our search results snippets, Even though Google sometimes use the description meta tag for the snippets it shows, it still doesn't use the description meta tag in its ranking.

If such a stand is maintained by all the search engines then it derails any debate over the unauthorized use of trademarks in meta tags since it does not in any way influence the search engine and does not cause any harm to the trademark owner by in any chance in "use of commerce" or otherwise. Also there are instances where any use of Meta tags has been tested in the light of 'fair use'[49] and if result is found otherwise, it has been considered Infringement.

Courts must move further to see impacts of these invisible Marks and the sufficient likelihood of consumer confusion they cause, subject to facts and circumstances and also understand and differentiate the technical working of various search engines.[50] Presently, the in India Meta tags have been give protection under trademark Laws and with changing technological sophistication, we can expect different judicial stance.

CONCLUSION

Use of Meta tag must be used judiciously and without infringing any other person's proprietary rights. In the era of increased commercialization on Internet, this area has seen a lot of cases where unauthorized users have faced legal consequences and courts have given judgments in favor of aggrieved parties. In India, approach of High Court seems to establish quite clearly that website owners must judiciously use Meta tags, considering rights of the other trademark owners and refraining themselves from infringing trademark laws so it is suggested that any idea of use of words in Meta tags which doesn't amount to 'fair use' must be abandoned. Still an Apex Court's Judgment is awaited or any particular amendment in the existing laws. In the end what could be suggested is that since the different search engines keep on changing their algorithms and ways of working, it is suggested that courts must take this into account while adjudging cases in future.

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[49] In *Tiffany Inc.* v. *eBay, Inc.*, 576 F. Supp. 2d 463 (S.D.N.Y. 2008), eBay's use of Tiffany's mark in an online advertisement was protected under the nominative fair use when 'new' and 'used' Tiffany products were in fact available for sale on eBay's site, also see *Designer Skin, LLC* v. *S & L Vitamins, Inc.*, 560 F. Supp. 2d 811 (D. Ariz. 2008)

[50] Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, Emory Law Journal, available at http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article =1120&context =facpubs, (last visited on Sep. 25, 2015)

POLICE IN INDIA: FROM ANCIENT TO THE PRESENT ERA

STHITA PRAJNA MOHANTY[1]

ABSTRACT

The idiom 'police' in general connote a decisive upholding of civic array and fortification of life and liberty of people to be protected from perils of public catastrophe and prohibited work done towards the general public. In this article an attempt is made to gauge the changes of the policing organization from Vedic to British era to today's world. . The existing problem of the police force has been multiplied its main objective in the nature of the crime were jurisdictional issue plays a great role in significance with the era of the globalization.

Key words: Police, Vedic, British, Policing, Jurisdictional, Globalization.

I. INTRODUCTION:

Police is considered to be the most essential and useful asset of the state for its regulation.[2] Its origin can be traced back both in ancient and modern era of India and its relation can be traced from ancient Vedic era to today's modern society. 'Police' in generally connotes a decisive upholding of civic array, and fortification of persons and property to be protected on or after the perils of civic catastrophe and illegitimate acts done towards the general public. It is an appropriate body of uniformed officers, civil and military, having stimulating power with an authority for safety and protection of the general public. Etymologically, the origin of the expression Police is also said to be derived from a Latin term Politia, which means "Civil Administration." The word Politia goes again some of its trace in Greek word Polis i.e. "city" and another Greek term Politeia which means 'government'.[3] As a result of which the police can be determined as those who are caught up in the running of a crime free city. Later, this term has been presage as Politia which became a French term of police. The English extended their thoughts

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[2] Mathur, K.M., *Police In India: Problems and Perspectives*, (1991), Gyan Publishing House, New Delhi.

[3] Martin, T. R with Smith, N and Struart J. F, in their Article *'Democracy in the politics of Aristotle'* (2009) described about the origin of the term Police in Greek word Politeia which means a agency of government. http://www.stoa.org/projects/demos/article_aristotle_democracy?page=all (last visited on Feb. 1, 2014, at 9:10 A. M.)

and used it as a mean of "civil administration."[4] So, from the origin of the terms the duty of the police is related as the part of the government, which help in the fortification of the life , preservation of public tranquillity and the most important part is the continuation of the law and order and deterrence and manage the crime in the state . As other parts and subordinate parts of the government, "Police" is the mainly noticeable and in lime light because of its community inspection and evaluation.[5]

The Police now a day's resolute to assess crime more proficiently and idealize on areas for the prevention of the crime which is considered to be much needed. Community policing is been a justified and necessary act by the Peelian Principles since 1829. Now days the police organizations are currently using the Peelian Principles as law enforcement and policing community. As per the principles the codes and ethics there are no official enforcement but have a ethical behaviour of the legal way of law enforcement were accountability plays a very important role for enforcement of the Peelian principles. Modern tech and the present media have increased the need of law enforcement to adhere these general principles.[6]

There is a common thought that the police system which evolved in India is of British origin, is an indigenous system with its evolutionary relation with its relation with Saxon England.[7] It is not untrue to say the term police is foreign or also can be said European thought or innovation.[8] There has been much allusion in the Indian mythology "The Ramayana" which talks about the thought of today's Police as the apparatus for security, peace and order.[9]

The beginning of police as a foreseeable human structure for the humanity can be placed in time in the early histories as the weak groups required the rally round of the strong and trustworthy people for protection and preventive point and

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[4]Dempsey, J. S and Forst, L. S., *An Introduction To Policing,* (6th ed.2011), Cengage Learning

[5] Bastiat, F, 2006, *The Law,* CONSTITUTION SOCIETY, (Oct.,18, 1998) (c. 1850, THE FOUNDATION FOR ECONOMIC EDUCATION, INC. IRVINGTON-ON-HUDSON, NEW YORK), [described about the basic moto and the function of the police] available at http://www.constitution.org/cmt/bastiat/the_law.html (last visited on Feb. 2, 2014 at 11:30 P. M.)

[6] Nazemi, S., *Sir Robert Peel's Nine Principles Of Policing*, (2009) LOS ANGELES COMMUNITY POLIICING, available at http://lacp.org/2009-Articles-Main/062609-Peels9Principals-SandyNazemi.htm. (last visited on Feb. 17, 2016 at 11:01 P. M.)

[7]Bhattacharya, A., *A Report On Indian Police Commission*, 1902-1903, REPORT ON HISTORY OF POLICE ORGANIZATION IN INDIA AND INDIAN VILLAGE POLICE (1913) (described some of the origin of Indian Police)

[8]Chatterjee, S.K, *The Police in Ancient India*, 11-12, The Indian Police Journal (1961) available at http://www.jstor.org/stable/41855800?seq=2 (last visited on Feb. 11, 2013, 12:02 P. M.)

[9] Id.

also guard the attack of wild and selfish creature. Such groups organized themselves into ethnic cluster and advanced into small sectors, they commence and progress rules and policies for the fortification of person's life liberty and also their property. And likewise the Agency for the enforcement of the tribal laws prevailed. Therefore, preliminary form of police was considered as of military police.[10]

Policemen existence since time immemorial can also be held to found traces almost everywhere in the world in different names, groups, clans and races. There are many pointers that the ancient civilization of Egypt and Syria has different methods of maintaining social order. Persian Empire under the monarchical ruler Cyrus and Darius, which is having details of its known information for its individual approach for administrative proposes, and also for its idea of having and enhance the laws through law possessor.[11] 2000 Year before the birth of the Christ at Babylon, effectual laws were sanction mostly by law givers of the state, Hammurabi, was also consider one of them which may not be of so proficient use without on part as efficient form of police system.[12]

Origin of its history has been an enduring professional assemblage contained by the establishments of the bureaucratic was providing its response to the civil disorder and the criminal disorder. This has resulted as an expansion in the 19th century and rejoinder to form a rapid social transformation of an industrial revolution and a speedy urbanized society. Proceeding to 1800, government preserved such an order by a variety of means which includes all the nearby states. Around 1800 a small group of police as an institution emerged. The French, under Napoleon, gave the idea for the formation of such a police institution which association of Gendarmerie, a state military police model. Its progress has been developed from the idea of "Marechaussee," which also performs as a dual military and also as a civil functional role since the 16th century. The model has been adopted from and across Europe by the Great Napoleon.

Again British adopted a new design of two models. The initial model was a set up to come back with parallel confront to the Gendarmerie formed in the country of France, which is also very well known as the Royal Irish Constabulary model was somehow same as the organ of the state that was having civil power and subordinate to the majesty. The Irish constabulary model was also adapted by British colonies and also come to be known as the basis of forces which ought to outcome as to the Indian Police Service.[13]

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[10]Chande, M.B, *The Police in India*, (1997) Atlantic Publishers, New Delhi; (c. Nair, G.S, 2005, *The Police In Ancient History*)

[11] Id.

[12] Id.

The Metropolitan Police considered as a special thought which was a local dynamism forced with a standardized and was intentionally dissimilar from the military and other forms of security organisations. This state civilian model of police has become the source of the forces on the principal influence on the development of policing in the 1840s. The idea of policing consists of may debates with different views and prospective. Nevertheless, in late 20th and early 21st centuries the police governances used specialised forces and management of then public disorder has been an area of question. So, It is some or the other way easiest way of systematise the object of policing, but it also shows out some difficulties in the crosscutting issues and various challenges.[14] The ancient Indian law founder, Manu, refers that the police always functions as and for the prevention and the detection of crime, it can also be found in the Code of Manu about the reference of police system.[15]

II. POLICE IN ANCIENT INDIA:

The Indian lawgiver, Manu, idealize the police function for the deterrence and the revealing of crime, it was also be mentioned in the Code of Manu about the existence of of new kind of system called as police system in his time.[16]

Manu open the idea of police into two purposeful kindling, firstly, the criminal investigation section dealing with enquiry and the investigations and Secondly, the law and order maintenance department. Manu as the founder of the law for the society also suggested the use of the secret agents in the society whose activities were secret and confidential in nature.[17]

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[13] Sheptycki, J.W.E., Police: Encyclopaedia Of Law And Society: America And Global Perceptive, (2nd ed. 2013), SAGE Publication

[14] Neyroud, P., *History Of Police: A Bibliography*, (2012), CBE QPM, Jerry Lee Centre for Experimental Criminology, Cambridge University available at http:// www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0145.xml (last visited on Dec. 27, 2013 at 10:29 A. M.)

[15] Gautam, D. N., *The Indian Police: A Study in Fundamentals*, (2009), Mittal Publication, N. Delhi(1993), (c. Curry, J.C., *The Indian Police*, (1932) Faber & Faber, London, available at http://books.google.co.in/books?id=c2bsGCA04IMC&pg=PA67& lpg=PA67&dq= J.C.+Curry,+The+Indian+Police&source=bl&ots=p2C4YaHlkx&sig=Zi8xLc o_E6TrewXDW2DIGzUupE&hl=en&sa=X&ei=NF3G Urr7HcmUrgedu 4DQDA& ved=0CDkQ6A EwAw#v=onepage&q=J.C.%20Curry %2C%20The%20Indian %20Police&f= false (last visited on Dec. 29, 2014 at 9:00 A. M.)

[16] Kumar, N. K. K., *Human Rights Violation In Police Custody* (2002) seminal presentation in Cochin University of Science and Technology upon the ideas of Manu - the Indian Law Giver, available at http://dyuthi.cusat.ac.in/xmlui/bitstream/handle/purl/927/dyuthi-t0127.pdf.txt?sequence=12 (last visited on Dec. 29, 2013 at 9:00 A. M.)

[17] Chande, M.B., *The Police In India*, 60 Atlantic publishers, New Delhi (1997) available at http://books.google.co.in/books?id=WIrLjQrgJGoC&pg =PR2&lpg=PR2&dq= POLICE+

There were evidences from remains of the Harappan civilization about the presence of the security organization, out of the remains in a Harappan seal there has was a representation of a figure that a man holding a stick which was said as 'Dandadhar' which was considered as the first representation of Police man.[18]

POLICE IN MAURYAN AND GUPTA PERIOD

The police system was well developed and established as a part of the state in the Maurya and Gupta era where it was considered to be a part or a department of the state.[19] During the Mauryan Era, Kautilya in Arthasastra prescribed some important characteristic of the police such as surveillance and vigilance. The idea of formation of an agency specialized as the specific clout of administration and providing and enforcing laws for the prevention of crimes and criminal activities and the prosecution of illicit goes to the philosopher Kautilya. He also represented the thought of Yajnavalkya i.e. the detention, arrest and prevention of illegal Acts.[20]

Kautilya, precisely was correct to be called as the father and profounder of the modern concept of police as he also propounded the system of policing and the idea of modern bureaucracy. Dandaniti put forward by Kautilya in Arthasastra was the discipline of dealing with crimes and punishments. Later, Danda became the real meaning of the Government. In the Mauryan period, the agrarian population was wandering towards urban areas. Some of these deracinated people joined in a wrong path, adopted the path of crime and threatened the city elite. In Arthasastra, courses are there to illustrate that in those period, administrators were strained to impose meticulous restriction. Since in that period there were professional thieves prevailing in the society. In such a crime like situation was essential to be tackled through the police officers, soldiers and security agents, who served as detectives.[21] The Mauryan Empire was considered to be a police state and its duties were performed by large number of individuals. The policing system by Kautilya was on

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IN+INDIA +1997,+M.B.+Chande &so urce=bl&ots =PTT80u7qOv&sig= ktoMGlLHCLv11 R2fTwMxBaaUZG0&hl=en& sa=X &ei=1OHEUuM3w7muB7 edgJgO&ved= 0CFMQ6AEwBw#v=o nepage&q= POLICE%20IN%20 INDIA%201997%2C%20M.B.%20 Chande&f=false (last visited on Feb. 1, 2014 at 9:17 A. M.)

[18] Das, S., CRIME AND PUNISHMENT IN ANCIENT INDIA, 83 Abhinav Publisher (1990)

[19] Saha, G., ENCYCLOPEDIA OF CRIME, POLICE AND JUDICIAL SYSTEM: HISTORY AND ORGANIZATION OF INDIAN POLICE, 7 Stanford Publication (1999)

[20] Chande, M. B. KAUTILYAN ARTHASASTRA, 13-14 Atlantic Publisher, New Delhi (2004) available at http://books.google.co.in/books?id=3UNaDop2QdsC&pg=PR8&dq=k autilya +artha +sastra+m+ chande&hl=en&sa=X&ei=BKDH UrfuF8jyrQfZmY HADw &ved=0CC8Q6 AEwAA#v=onepage &q= kautilya%20 artha%20sastra %20m%20 chande &f =false (last visited on Feb. 1, 2014 at 9:50 A. M.)

[21] Supra Note. 20

two distinct lines; resulted to the formation of civilian departments entrusted with police powers and a cadre of regular police officers.

Later, In the Gupta Empire there was a well organized police construction to preserve internal law and order prevailing in the state. It also includes intelligence and general police force. There were special officers trained in the art of catching thieves. They were called 'Choradharnikas'. The police chief was known as 'Dandapashika'. The police was so well-organized that a person could travel throughout the country without any fear of been harmed or been looted. During this era police officers was named as Dandika, Chauro, Dhanmika and Dandaparika. They were today's first phase police subordinating to the society for the maintenance of the peace and tranquillity in the society. Later, in the Gupta's period the Police were called as Chatas and Bhatas and simultaneously a new officer was called as Rabasika or Rahasaga were deployed with secret and confidential matters.[22]

III. POLICE IN MEDIEVAL INDIA

The police system during the Islamic rule consisted of large police force consisting of spices and detectives. The appointment of Faujdars was made by the sultans who carried the orders of the sultan an also maintained a control over the police. During that period the appointment of Muhtasib, a officer looks into the police duties performed in the cities and was deputed on a minor luminary known as Kotwal.[23] The edict framed by Abul Fazul, Minister of the Emperor Akbar, shows that the Mughal system of police followed closely on the lines of that indigenous to the country. The administration of the prefecture was taken under by the Subedar, and was assisted by Faujdars. The Mughal Faujdar was responsible for both collection revenue and police administration of his jurisdiction, and as such was the nearest parallel to the role of the present-day District Magistrate. Faujdar who was assisted by Thanedars, was charged through the police duties of maintenance of law and order.[24]

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[22] Srivastav, R., ROLE OF POLICE IN A CHANGING SOCIETY, 4-5 APH Publishing Corporation(1999), available at http://books.google.co.in/books?id=0qq WcC8ItJ4C& pg=PA3&lpg=PA 3&dq=aparna+srivastava+i ndian++police+history& source=bl& ots=USs2iRf5G5&sig=S VJVwDLredy p8fmaL_OlSNyKWkI&hl =en&sa=X &ei=37 LHUoGv ·BcGkrQeOp4CQAg& ved=0CCw Q6ĀEw AQ#v=onepage &q=aparna %20 srivastava%20indian%20%20 police%20history &f=false (last visited on Feb. 2, 2014 at 7:30 A. M.) [It deals with the emergence of the police system in the Gupta era]

[23] Tripathi, R.P., SOME ASPECTS OF MUSLIM ADMINISTRATION, Central Book Depot, New Delhi (1959) [A description on the police organization under the Islamic rule]

[24] Op.cit., Bhattacharya Atulchandra, A REPORT ON INDIAN POLICE COMMISSION, 1902-1903

Marathas developed an organized system of police organization which has certain influence from the Mughals. The urban police consisted of the foot police, mounted police, watchmen and trackers and spices that are from the criminal tribes who are efficient in their work. There was a doctrine set that 'setting a thief to catch a thief'.[25] The Marathas, evolution of police system was based on a amalgamation of the Mughal and the early Hindu models. It was up to the police department to device its own procedures of investigation of the accused in order to extract the truth from him.[26]

IV. POLICE IN POST INDEPENDENCE PERIOD OF INDIA

The British adopted various aboriginal police systems which was adopted by the Mughal and other contemporary antecedent and organized it and developed it in a standardized uniform pattern for administration of criminal justice throughout India. they tried different tactic and experimented different ways that the police system could suit them as per their purpose. In this period of British rule saw the growth and formation of a centralized police force based on prefectures and supported with the armed components of the same force. The police administration during the British period was seen between1757-1860.

The Colonial British government in India established the modern police system in India. It was obvious that the various police commissions established by the British and the police act of 1861 had important contributions in the development and organization of the of police system in India. However, the colonial interest of the British Empire had great imprint over the organization and structure of police system in India.[27]

Warren Hastings was considered to be first British statesman whose efforts resulted to formulate the system of police in India. For then containment of violent

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[25] Chaurasia, R.S., HISTORY OF THE MARATHAS, 205 Atlantic Publishers, New Delhi (2009) available at http://books.google.co.in/books?id=D_v3Y7hns8QC&pg=PA154&lpg=PA154&dq=police+during+marathas&source=bl&ots=Kdy4GcnwyX&sig=WAXKqynPyObet5Xkgt9e_-0RJuU&hl=en&sa=X&ei=l8fHUvKHMo-nrAf184HoBA&ved=0CEwQ6AEwBA#v=onepage&q=police&f=false (last visited on Dec. 12, 2013 at 4:30P. M.)

[26] Saini, K., POLICE INVESTIGATIONS: PROCEDURAL DIMENSIONS, LAW AND METHODS 180 Deep and Deep Publication Pvt Ltd. New Delhi (2000) http://books.google.co.in/books?id=Ijkkz55kKQUC&pg=PA440&lpg=PA440&dq=Kamal+Saini,police+investigations:+Procedures+dimensions.+Law+and+methods&source=bl&ots=UtS54ShVD5&sig=awa2q1mOxU16DwmPnL0142Mj1TQ&hl=en&sa=X&ei=IMvHUpaiLoXtrQfwh4CgDw&ved=0CCoQ6AEwAA#v=onepage&q=Kamal%20Saini%2Cpolice%20investigations%3A%20Procedures%20dimensions.%20Law%20and%20methods&f=false (last visited on Dec. 12, 2013 at 5:00 P. M.)

[27] *Supra note, 17*, at 143-144

crimes and communication of intelligence with the help of the Zamidars, Warren Hastings restored the department of the Faujdars.[28] Later on he formed a separate office to merge the das collected from those departments of Faujdars. This office was the basic origin that sprang the fully developed police system of modern India.

Again a body of Militia was created, which were deployed for night watch for the prevention of robbery. It also performed different duties which in now-a-days being performed by the civil police in the society. The police was also confined to district under the Collector and also does not have general supervision, whatsoever, it existed no frequent communication one district to another on several point of police business which so imperatively requires coordination of thought and action.[29] In the year of 1771, Bhandari Militia a system was again re organised and specifically deployed on the police duties. As in 1778, the conclusion was considered out not to be so satisfactory, the grand jury demanded the reform in the Police system. the first appointment in 1779, of the Chief of Police was also tilted as the "Lieutenant of Police" was formed it was also signified as the Superintendent of Police of Calcutta.[30] Regarding the pathway of Lord Cornwallis, whose ideas introduced to many judicial reforms set up many criminal courts, both Wellesley and Bentinck tried to cope with the flood of crime. Wellesley held an inquiry into police affairs in 1801, and in 1806 Bentinck resulted to appointment of a committee to consider the possibility of improving and managing the police system in Madras. In 1808, the post of Superintendent of Police, analogous to the later Inspector General of Police, was created there for monitoring the police institution.[31] In 1813 -1814 ideas of the English court of directors' results to orders, while condemning the darogah system, insisted on the maintenance of the old village police as the best means of ensuring internal peace and tranquillity. However in Bengal, the darogah system prevailed in an improved form.[32] The revolt of 1857 the British felt the need to develop a uniform police administration for the whole of British India. As a result to the revolt Police Commission was appointed in 1860. The motive of the commission was to examine all systems of police existing in India.

The police commission formed also was considered to form a Civil police force which was structured to form in each and every part of India and the model was considered to be British Constabulary forces and formed in a provincial structure. The police powers given to the commissioners should be abolished and for each province an Inspector - General of Police should be appointed to be

[28] Op. cit. Chande, M.B.,1997, at 63
[29] Op. cit. Chande, M.B., 1997, at 73-74
[30] Op. cit. Curry, J.C., 1960, at 108
[31] Op. cit. Chande, M.B., 1997, at 72- 73
[32] Op. cit. Curry, J. C., 1960, at 27-28

responsible to the provincial government to look into the control of law and order in the state . The primary duty of the police were primarily to maintain peace and security, which also includes prevention and detection of crime to guard prisoner and treasury. The police deployed in the Villages also supervised the public duties of the superintendents of the police appointed with a idea to make useful implementation of the regular constabulary forces.[33] The same police department which was taken over and transformed from the predecessor was modified changing circumstances but its importance gradually decreased. The British Government also developed a hierarchical structure for the police organisation and personnel management, it became the basis on which the police organisation in Independent India was built.[34]

V. POLICE IN PRE INDEPENDENCE PERIOD OF INDIA:

The regal supremacy in India had two powerful organized systems out of which one collected revenue and called as the Revenue department and other looked into the policing system also called as the Police administration. Both the department provided a solid and firm foundation to the British Empire and its structure in India and also stressed on the colonial development of the police in the prevailing era has seen a series of development. The arrangement of The Police Act, 1861 made a highlight development in formation of the police force. The police department was a product of the society for the society for the protection from external forces and acted as an apparatus of the state. The formation of the Police Commission in 1860 held to idealize the formation of an Organized Police which will be politically useful for the state.[35]

The need of police reforms in India is has got a land mark in the era of police as a result to which the NPC (national police commission) was set up for its recommendation and reports on policing. This committee formed many reports and also an recommendation to the Model Police Act which after a long battle the Police Act Drafting committee drafted a new police bill and replaced it with a new bill in 2006.[36]

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[33] Op. cit. Chande, M B., 1997, at 78-79

[34] Madan, J C,, INDIAN POLICE, ITS DEVELOPMENT UPTO 1905: AN HISTORICAL ANALYSIS, 114 (1999) Uppal, N. Delhi (1980): [It described about the role of police administration during 1861 -1902]

[35] Mane, S., *Indian Police System And Challenges Ahead*, Indian Police Journal (2006) available at http://www.newerajuris.com/pdf/police.pdf *(ý* last visited on Jan. 12, 2013 at 4:30 P. M.)

[36] POLICE ACT 1861 AND MODEL POLICE ACT 2006: AN ANALYSIS, Law of India a Layman's Guide, SS Global Law Firm's Initiative (2013) available at http:// lawsofindiaforcommanman.blogspot.in/2013/07/police-act-1861-and-model-police-act.html (last visited on Jan. 23, 2013, at 9:30 A. M.)

In 1902 saw the emergence of Indian Police Commission with the suggestion of Viceroy Curzon for India to make enquiries into malady of the police structure in India and also suggested appropriate method for its development.[37] As per the Indian police commission how far was the Indian police is capable to meet such stupendous challenges and various obstacles that police faces in discharging his function was the most imp factor of the Indian police commission, 1902. The Police commission formed a wide range of enquiry and investigation for the cultural and recruit-mental training and salary pay for efficient functioning of the police. One marked feature of the post independence period has been a vast expansion of armed police forces both at center and state level.[38] The above account of the growth of Indian Police in the post-Independence period thus makes impressive reading. It rightly gives one the feeling that the Forces are moving forward to new levels of efficiency. This does not affect in idealising the image of the body of police in the public eyes. Under the British, the Police had been regarded as an instrument of oppression and a tool to strike incalculable fear in the mind of the common man. Unfortunately, even after three decades of Independence, the Police has failed to live down this image. It is still looked upon as a body of men who are unsympathetic and unresponsive to the lowly placed and who use third degree methods in their day-to-day operations without any inhibition. That this is not a sweeping statement arising from bias could be gauged from many public opinion surveys.[39]

With the Independence in 1947 the people saw a new era of evolution of Police, Which was a transition with the Post Independence period where the police and public relation was far apart. The establishment of The National Police Academy in 1948 for the development of the police from the primary level and advanced training of Indian police officers (especially the I.P.S) was held to be striking development in the Indian Police since Independence (1947) is the rate at which State police forces have expanded. This is the result mainly of the need to cope with a rise in population and the consequent increase in workload such as crime control and investigation.[40]

During pre independence era military police and crown representative police were hardly ever used for normal police duties and occasions when they were deployed of law and other duties, were few and far between and their development

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[37] Op. cit. Chande, M.B 1997, p 80
[38] Op. cit. Chande, M.B 1997, p 100
[39] Raghavan, R. K., in *An Anatomy Of The Indian Police, The Indian Journal of Political Science*, 399-412, 47 (1986) 3 Indian Political Science Association Stable (July - September 1986) available at http://www.jstor.org/stable/41855254 (last visited on Nov. 05, 2013 at 04:00 P. M.)
[40] Dempsy, J.S, Frost,L.S, Carter,S., AN INTRODUCTION TO POLICING, 100 (8th ed. 2014), Cengage Learning Inc.

created a frightening impression about them in the mind of the general public and their sight has deterring effect on law breakers.[41] Since independence, the structure of the Indian police, particularly at the district level, has not under gone any radical change. The police station has remained the fundamental unit of administration. The three tier structure recommended by the 1902 Police Commission has been basically preserved. This comprises the constabulary; the supervisory ranks (Sub-Inspector and Inspector) and the superior officers (Deputy Superintendent and District Superintendent). There is a Deputy Inspector-General (D.I.G.) for each range which is a group of three or four districts. He supervises the work of District Superintendents of Police in his jurisdiction and thereby reduces the span of control of the Inspector-General (I.G.). A change of some significance ushered in during the recent past is that State forces are now headed by a Director-General (D.G.) instead of by an Inspector- General. He has two or three functional Inspectors-General reporting to him. In some States there are even two Directors-General looking after Law & Order and crime respectively.

Government policy was that unnecessarily interfere of police with the strikes of labours or employee class and other organised classes while fighting for their just rights should not happen. "More politeness and exercise of less force" should be the slogan of the police while dealing with the public. The job of police was considered to be for crime protection, enquiry and investigation. This new policy as introduced by A.K. Gopalan, the curtail Communist leader observes: "It was not easy to change the traditional colonial attitude of the police. The government of India has started to educate the police to have a fine relation to the public and perform a good police public relation. But the policy of the police made it clear that the police could not be sent to suppress workers in order to protect managements and to arrest agriculturalists in order to protect the wealth of the Zamindars. Similarly, it was decided that the police would not be indiscriminately used to suppress the popular movements".

In this pre independence era of India new-new changes were introduced in life of the general masses and Indian life was regulated by different laws, customs and conventions as established by the English people. And as a result, an antiquated legislation, The Police Act, 1861 lingered in manoeuvre like other laws prevailing in the country and remained enacted in the police force as a life line.[42] Changes that took place, is in 1948, a year after India gained independence, the name Imperial Police (IP) was modified to the very known the Indian Police Service (IPS). Indian Constitution in Article 246 [43] allocated to the police to be a subject to state which

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[41]Op. cit. Chande, M B., 1997,at Page. 100

[42] Police Act 1861 available at https://www.unodc.org/tldb/pdf/India_Police_Act_1861_full_text.pdf (last visited on Jan. 22, 2014, at 10.09 A. M.)

means the state has to frame the rules and regulation that governs each police force which is to be included in police manual of each state force. This resulted in the guidelines that the state is entrusted with the responsibilities of maintenance of law and order in the state.[44]

Another important part is the concept of community policing in Modern India which has engraved its roots from history. The concept and idea of community policing takes citizen as a lead were identifying the issues, enquiring and investigating the area to facilitate the police for enabling the community people to identify those issues. Being a philosophy it is an effective tool and is being tried by police all over the world. Fortunately for Indian police, it was an initiative to synchronies the people and police together to sort out the public and police problems prevailing in the society and is also consider being a most successful tool. [45]

VI. CONCLUSION:

Since independence in India there has been significant developments and revolution for idealizing the role and meaning of police. In the Pre Independence era the police functioned a s a de facto and de jure and consider as a ruthless support to the imperial regime and also cover up the basic idea of rule of law. But in the Pre Independence era the changing evolution of the state to compete with the rapid industrialization, urbanization and democratization to frame out the functioning of the police having a fundamental change was held to be a new startup for the modern society. The existing problem of the police force has been multiplied its main objective in the nature of the crime were jurisdictional issue plays a great role in significance with the era of the globalization. Worldwide new crimes, new modus operands and new criminal behavior have been evolved with a rapid economic development and globalization. The modern challenges before police force in India includes also with the use of the modern techniques use of machine and computers. So, modernization also includes update training and sensitization to modern challenges of police force are utmost essential. The modern police have to face newer challenges everyday where it is made conscientious to deliver a wide range of assistance to the people. The police are expected to deliver services ranging from detection of the highly sophisticated cyber crime to providing assistance to the elderly and the marginalized sections of the society.

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[43] Jain, M P, THE INDIAN CONSITUTION, (6th ed. 2010) Lexis Nexis India

[44] Supra Note 35

[45] Narayan, J.P, POLICING IN INDIA: CHALLENGES IN THE FUTURE, 1-8, (1988) Campaign Coordinator LokSatta available at http://ap.loksatta.org/documents/advocacy/policing.pdf (last visited on May.11, 2016 at 10:11A. M.)

AN ATTEMPT AT CRIMINAL ATTEMPTS: TESTS AND HISTORICAL ANALYSIS

Mr. Souvik Roy[1] & Prof. (Dr.) N.K. Chakrabarti[2]

The law relating to attempt is one of the most fascinating and enigmatic provision under the Indian Penal Code' 1860. The enigmatic characteristic of the law on attempt is mainly due to its ambiguous nature. The definition of attempt does not find a place within the Indian Penal Code despite the fact being it is one of the most fundamental stages in the process of commission of a crime. The researcher during the course of this paper shall try to look into the development of the law of attempt that has taken place over a period of time, the ambiguities that arise at the time of application of the law, analysis of the various tests relating to attempt with the aid of judicial pronouncements.

The four stages of crime as we know it are motive, intention, preparation and attempt. Thus attempt is the fourth or the final stage in commission of a crime and needless to say it is one of the most important stage as well. The corner stone of criminal jurisprudence whilst we are discussing substantive criminal law is *mens rea* or guilty mind.[3] As the age old yet fundamental maxim in criminal law goes, *actus non facit reum nisi mens sit rea* rightly observed by L. Kenyon,[4] it is understood no act is a crime unless it is done with a malafide or guilty intent. It is therefore the intention that renders an act its criminal attribute. The act as we call it which is the physical manifestation of the guilty mind is what we call as attempt in criminal law.

Officially, the first efforts made towards repression of attempt can be found out by measures adopted by Star Chamber to suppress the practice of duelling.[5] Although the decisions rendered were often times termed as arbitrary as the offences were targeted at its preparatory stage and punishment was subsequently given. Such decisions given were many a times a situation of several inchoate offence together, for instance attempt, conspiracy and incitement intermingled.[6] The measure of the gravamen in the commission of an attempted crime was basically the kind or

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[3] Syed Shamsul Huda, The Principles Of the Law of Crimes in British India, (Eastern Book Company) at 8
[4] Fowler v. Padget (1798) 7 Term Rep 509; 101 ER 1103
[5] J.W.Cecil Turner, *Kenny's Outlines of Criminal Law,* (Universal Law Publishing Co. Ltd), at 101
[6] *Id.* at 102

the nature of the crime intended. Basically in the cases of attempted crime, the *mens rea* takes precedence over the *actus reus* aspect. Since no crime is a crime without an act done in execution of the malafide intention, the relevance of the act cannot be underestimated as well even cases of incomplete crimes like attempt. Some of the first cases in Common Law where it was decided that even an attempt to commit a crime is a crime in itself was in *R v. Scofield* [7] and *R v. Higgins.* [8]

The inter-play of *mens rea* and *actus reus* in attempted crime is indeed intriguing. But in an inchoate offence like that of attempt, both the mental and physical element weighs a lot although purely based on intention, one cannot be judged guilty. There must be some overt act done towards the commission of the crime that leads to the attempt or which can be termed as attempt. It is very difficult to prove any crime without the requisite guilty intention. Similarly, in this case as well, mere intention won't suffice to constitute an offence of attempt.

In the case of *State of Punjab v. Major Singh*[9], it was observed that *mens rea* is a state of mind which is difficult to prove through direct evidence. As the saying goes that even a devil does not know a man's mind. So whether a person is attempting a crime or not, just by looking at him and second guessing or judging his mind is indeed not possible. Say for instance, a person who decides to commit suicide goes to the medical store to buy poison. While he is buying that poison, one of his old enemies who came to that same medical store, sees him and catches him red handed to take him to the police for committing the offence of attempted suicide. Now, analysing this instant situation, the person buying the poison can claim for any other reason for buying the poison. Just because someone is buying poison from a medicine shop, need not necessarily mean that the person is going to commit suicide. In the illustration given above by the author, it has been mentioned explicitly that, the person has decided to commit suicide. That is what is making the conclusion so easy towards making the person buying the medicine culpable for the aforementioned offence. The required intent to commit suicide is present and now in furtherance to that, he has acted to the extent of going to the medical shop to buy the medicine. Right now we are not getting into the test of proximity or locus penitentae. But the fact of the matter is, if in the proposition above, there was no explicit mention about the intent to commit suicide and instead the facts started with a person going to the medicine shop to buy poison, then it would not have been possible to charge that person for attempt to commit suicide.

[7] [1784] Caldecott's Rep. 397
[8] 102 E.R. 269 (1801)
[9] AIR 1967 SC 63

Thus, furthering our discussion on attempt, the requirement of physical manifestation in the form of actus reus takes equally immense significance as a guilty intention. Hence predominantly what the author is emphasizing upon is a step on the part of the accused towards the commission of a crime as was put forth in *R v. Roberts* [10] that guilt consists in the intent evidenced by the overt act.

While discussing the ambit of physical conduct and guilty mind another important aspect that comes into picture is the fact that more often than not it becomes difficult to distinguish between preparation and attempt. Preparation is the arranging and devising of the plan whereas attempt is the direct movement towards the commission of crime post the preparation stage. But therein sets in the point of overlap between the two phases of crime. To decipher when the preparation stage ends and the attempt stage begins is a task at the hand of judiciary and matter of interpretation which can well be corroborated through facts, circumstances and evidence. That is predominantly the reason why there exists problem with respect to interpretation of cases pertaining to the rule and fact situation. The disparity in decision basically lies with inconsistent rules being applied to similar fact situations and same rule applied to dissimilar fact situation.[11]

Lord Mansfield once famously observed in the case of *Rex v. Scofield* that, "so long as an act rests in bare intention, it is not punishable by our laws."[12] Further, Cockburn J observed that a successful attempt invariably leads to fulfilling the commission of the crime. Thus it clear that attempt is nothing but a direct step taken towards the commission of the crime after the conclusion of the preparatory stage. We find that an act done towards the commission of the crime is need not necessarily always be the last step in order to bring into play the law relating to attempt which was reiterated in *State Of Maharashtra v. Mohd. Yakub S/O Abdul Hamid & Ors.*[13] Crime is said to be something that affects the society at large and therefore the heinousness of it calls for severe punishment. Therefore, it is only understandable that framers of law, across various jurisdictions targeted that even an act towards the commission of the crime should be punished. But one point that needs to be taken into consideration is that whether, an attempt to commit a particular crime always has the same amount of effect in the society. Further, the certainty pertaining to the fact what is preparation and what amounts to actual act in sync with the crime that is to be committed is a mixed question of law and fact

[10] [1855]Dears. 539, 25 L. J. M. C. I7.
[11] T.W.Arnold, Criminal Attempts.The Rise and Fall of An Abstraction 40, Y. L. J. 1 (Nov., 1930) at.53
[12] *Supra* note 5
[13] AIR 1980 SC 1111

and very difficult to deduce at times. One can always hail the policy of legislature and the judiciary for making at attempt to nip a crime at its very bud.

The point the author is trying to make is the demarcating line between preparation and attempt is indeed blur. Although in the Penal Code of India, we find even preparations to commit crimes in certain cases have been made punishable. Before digging deep into the blurry line of difference between preparation and attempt, let us first look into the various modes in which attempted crimes have been made punishable under the Indian Penal Code'1860, which are as follows[14]:

Firstly, the actual commission of an offence and the attempt to commit it are dealt with in the same section and the quantum of punishment for both is the same such as:

- Offences against the State such as waging or attempting to wage war against the Government of India (s.121);
- Assaulting or attempting to assault the President of India, Governors of the State etc with the intent of restraining them from exercising just and lawfully designated power and functions (s.124);
- Other provisions pertaining to Offences against the State like Sedition (s.124A), waging or attempting to wage war against any Asiatic power in alliance with the Government (s.125), public servant taking gratification (s.161), dacoity (s.391) etc.

Secondly, attempted crimes and actual commission of the crimes are dealt with under separate provisions within the law and different quantum of punishments is prescribed such as attempt to commit murder (s. 302 and s.307), culpable homicide (s. 304 and s.308) and robbery (s.393 and s.393) say for instance.

Thirdly, the offence pertaining to attempt to commit suicide envisaged under s. 309 although the said provision has been put up for deletion from the statute book vide the 210th Law Commission Report ; and

Fourthly, the general provision relating to attempt not mentioned under the aforementioned three categories finds a mention in s.511 of the Indian Penal Code.

Thus, we have a brief idea about the various avatars in which we find the law punishing attempt to commit any crime has been incorporated into our substantive penal provision. Now, let us go back to the discussion, an intriguing one with respect to the difference between preparation and attempt and whether it is at all judicious

[14] K.D.Gaur, *Text Book on the Indian Penal Code* (4th ed., Universal Law Publishing Co.) at 843

to punish preparatory stage in an act considering, there is a long way to go to actual commission of the crime. Just like we have seen the various forms of attempted crimes, now let us have a brief look into hoe the Indian Penal Code punishes preparation to commit a crime. The following preparations to commit crimes find a mention in our substantive law statute book: [15]

Firstly, collecting arms and ammunitions with the *mens rea* to wage war against the Government of India (s.122);

Secondly, commission of ravaging, pillaging and destruction upon territories of power or at peace and good terms with the Government of India (s.126);

Thirdly, possession, sale or making of machineries to facilitate Government stamps or counterfeiting coins (s.223-235 and s.257);

Fourthly, possession of counterfeit coins, false weights and measures, Government stamps etc (s.242, s. 243, s.266, s.259); and

Fifthly, making preparations to commit robbery (s.399)

After looking into the aforementioned propositions of law, one may say somewhere even strict liability offences sans *mens rea* by imperative also finds a place in the Penal Code of India and therefore even mere possession of certain items may call for culpability. One can appreciate the gravity of the offences such as offence against the state, counterfeiting of currency, dacoity which are not only grave and violent crimes but also affects the sovereignty, security and economic balance of the State into jeopardy. But despite understanding the efficacy of the law punishing preparation stage of a crime which may or may not be committed, one can still question the point of *actus reus* in preparation which is basically harmless by nature. Therefore, is it correct to use preparation and attempt interchangeably? The answer to this question abstains to be in the affirmative since both are totally different stages in commission of the crime.

So somewhere the logic behind holding a person culpable for preparation on the premise and premise only that a commission of an offence might take place seems slightly absurd in certain contexts notwithstanding the fact that the author appreciates the gravity of the circumstances for which the preparatory acts have been termed as culpable under the Indian Penal Code. But a mere preparation does not in the ordinary course of nature affect the sense of safety and security of an individual. For instance, purchasing poison from a medical store to muder an individual is different from administering it after entering into the house of the

[15] *Id.*, at 842

supposed victim and mixing it with the food. The remoteness and lack of proximity between the purchase of the poison and the mode of ad mistering the same, there is huge gap. This proposition is something which may be looked into for consideration if we strictly stick to the criminal law jurisprudence and abide by the maxim *actus non facit reum nissi mens sit rea.*

Tests pertaining to attempt

Since we are now by and large aware of the problems that lie when it comes to the proper application of laws pertaining to criminal attempts, let us take a relook into the various tests that has evolved and some of them have even gone redundant failing to survive the test of time coupled with logical and judicious judicial reasoning or pronouncements.

Firstly, we look into the interesting yet outdated and outmoded ***Impossibility*** test. This is a form of test pertaining to attempt which has become redundant over a period of time and no longer finds a mention within the Indian Penal Code as well. For instance in a case where the pick-pocketeer with the intention to steal money puts his hand into the pocket of the victim and since there was a revolver placed inside the pocket, the trigger goes off and the victim dies. Now the point of contention is whether, the pick-pocketeer can be charged for attempt to theft or not. If we look into the earlier judicial pronouncements of the English Courts, the answer was in negative. The rationale behind not holding the accused guilty is because the subject of theft was not present inside the pocket, which is the money. So if the subject of criminal offence in itself is not present, there cannot be any crime since it is impossible to commit a crime in that case. But there is this element of falsity in such a case because the basic or fundamental premise of mens rea is negated. One cannot help but say that the element of guilty intention required for commission of the crime was very much present. Also had the money been there inside the pocket, the accused would have definitely picked it up. In furtherance to the entire fact, the accused also acted in furtherance to his intention to pickpocket. Of course the execution failed due to the absence of money inside the pocket.

Subsequently, these decisions and rulings were overturned. Now, as we see it in the actual application of the law substantiated by various judicial pronouncements, such impossible attempts are made equally punishable one of which is the landmark case of *Queen –Empress v. Mangesh Jivaji* [16]

Secondly, we look into this very important test pertaining to ***Proximity***. Now, by proximity we mean a close, direct and proximate nexus between the acts done

[16] [1887] ILR 11 Bom 376

in crime and final consequence. If we take the instance of *R v. Robinson,*[17] where the shop owner hid the jewels underneath the safe and then tied himself up to call the police and complain about a dacoity that has taken place and then claim insurance money from the company for the lost jewel, it was decided by the court of law that it was not a case of attempt. Apparently, the reason behind such a decision was that the accused was still in the preparation stage and attempt to commit the crime has not yet taken place. The court of law felt that the stage of attempt will set in the moment the insurance documents were to be filled up by the accused even if it is not dispatched. Now, in this case, the court of law looked into the proximity aspect of crime which one would feel is not quite the strict interpretation of the criminal law statute. What is proximity or establishment of direct nexus between the act and crime is a question of fact which differs from situation to situation.

In the same breath, if we look into the judgment of *State Of Maharashtra v. Mohd. Yakub S/O Abdul Hamid & Ors*[18] regarding smuggling of silver ingots out of the country, the reasoning given by Sarkaria J. and Chinappa Reddy J. is indeed contrast but at the same time, logically profound since they eventually came to the same decision that it was a case of attempt. In this case, the group of smugglers were caught just at the nick of time when the at the middle of the night, they drove to a lonely creek in a truck and a jeep and unloaded all the silver ingots to pass it onto the sea craft from where, it was to be smuggled across the border. At that point of time, they were caught hold of. Now finally, the apex court clearly held it as a case of attempt. The approach taken by the two judges is indeed praiseworthy. While Sarkaria J. looked into the proximity aspect in terms of time, place and distance or the physical nexus, Justice Reddy looked at the same from the point of view of proximity with respect to intention that can be established by the pure analysis of the facts of the case. Thus striking a balance between the two schools of thoughts and thereby deciphering the guilty mind from the distance and other matters closely associated with the facts and circumstances of the case to come to a logical end is of immense importance.

Further, in the case of *Sudhir Kumar Mukherjee v. State of West Bengal,*[19] the Hon'ble Apex Court of our country laid down that a person attempting to commit a particular offence, firstly, intends to commit the same; secondly, having made the necessary preparations, does an act towards the commission of the act which need not necessarily be the penultimate act towards the commission of the offence but an act in the course of commission of the what he intended to do.

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[17] [1915] 2 K.B. 342
[18] AIR 1980 SC 1111
[19] AIR 1973 SC 2655

Thirdly, we look into the doctrine of ***Locus Paenitentiae*** where, we look into the situation from the standpoint of benefit of doubt since the perpetrator had the opportunity to back out and or had reasonable time to withdraw him from the bargain before it has been constituted in totality. This rule is dangerous in a way because in most cases, where a person will be not in a position to complete his criminal conduct, he will take recourse to this doctrine to plea for his escapade from criminal liability. One classic case on this test is *Milkait Singh v. State of Punjab* [20] where despite the fact that the appellant truck driver who was carrying paddy out of the jurisdiction of the State of Punjab without the requisite license although stopped 14 miles from the border in contravention of the law in place namely, Punjab (Export) Control Order'1959. Yet they were acquitted by the court since the act done till then was completely harmless and also, there was a fair distance to travel within time one might have changed his plan. Thus it was not held to be case of criminal attempt.

This law can definitely be debated since it gives an easy escape route to many perpetrators. This is where probably, another very important test pertaining to criminal attempts come into the fray which is known as the ***Equivocality*** test. The fourth test was lucidly laid down by Turner with the aid of a cinematographic film. Suppose the film till now has depicted the act of the perpetrator without showing the exact intention with which the person has committed the act, suddenly stops. Now, under the given circumstance if there is one whole and sole inference can be drawn or laid out, then it leads to attempt of the crime but if there is more than one reasonably possible answers or conclusion to the film, then it can be safely stated that there is the element of doubt as a result of which, definitively, the conduct cannot be stated as attempted criminal conduct targeted towards a single end. Thus this test emphasizes upon the clear and unequivocal presumption beyond all reasonable doubts under the given circumstance so that a direct link between the acts committed and the ultimate object that is to be carried out can easily be related sans an iota of doubt.

Finally, the fifth test which is the ***Social Danger Test*** which predominantly emphasizes upon the immense apprehension of the social danger that particular act can entail upon the society. Thus social repercussions and it's relation to the heinousness of the crime and its impact on the society is the premise for the aforementioned test.

The test is very similar to the rule enunciated by Prof. Glanville Williams with the difference that here the consequences of circumstances and the gravity thereof

[20] AIR 1970 SC 713

are inferred from the totality of facts whereas in the latter case a mere fragment of an action, if it is a final link in the chain of penultimate acts, makes a person liable of criminal attempt.[21] For example, crimes against women and life or state have generally been looked into from the strictest viewpoint. It would be incorrect to say that the courts have decided cases with strict reference to one rule or the other.[22] Thus one point that needs mention is that, not every act in a series of acts committed in the direction of the contemplated offence amounts to an attempt.[23] The above mentioned tests have been engraved out of precedents pronounced in the common law jurisdiction.

Conclusion

Thus the mystic law of the law on attempt which still remains to be a mystery unresolved needs to be cleared from all the ambiguities, uncertainties and complexities although certain glitches cannot be wiped out totally. In cases of attempt the main difficulty arises in drawing a dividing line between the stages of preparation and attempt and it need be examined, if, any one or more of the above tests suggested can serve a useful guide in determining the above. But a measured logical analysis and adherence to minute details pertaining to facts and circumstances of the case can make the application and interpretation of the law a lot simpler.

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[21] S. Govindarajulu, *Essays on the Indian Penal Code* ; (Rev. by K.N. Chandrasekharan Pillai, Shabistan Aquil) (2005, Shivam Offset Press) at 234
[22] Id.
[23] PSA Pillai's Criminal Law By K.I. Vibhute (12th ed.., Lexis Nexis) at 180

ROLE OF GENDER IN SENTENCING: A STUDY ON WOMEN JUDGES OF TRIPURA AND ODISHA

Ms. Deblina Majumder[1]

Abstract

The stature of women in the society is undergoing rapid metamorphosis. Education and awareness is motivating women to be at par with men. It has been observed that in comparison to yesteryears more women are opting for legal profession, including legal scholars and researchers. But the debate is still on to know the impact of the "second fiddle" on the administration of justice. When two judges face a similar case then one could probably give an extremely strict verdict, whereas the other could give a much lesser sentence. Gender tends to play a crucial role in the art of decision making among judges. The field of this study has been Odisha and Tripura. The researcher has attempted to investigate into the disparity in sentencing owing to the gender of the judges. This study is also undertaken to assess the implications of inherited instincts, beliefs, convictions and sense of social needs of the judges in their judgments as well as the exercise of discretion.

***Keywords**: Gender, Sentencing, Socialization.*

I.I. PRELUDE

More than four decades have passed since feminism came into being. The stature of women in the society has undergone rapid metamorphosis. Unlike yesteryears, women in large number are entering different walks of life, they are no longer restricted to the four walls of the house performing domestic chores. Gone are those days when girl children were made to play with kitchen sets as if they were born to be queens of kitchen. Education and awareness has been motivating women to be at par with men. It has been observed that women are opting for legal profession, becoming legal scholars and researchers. But the debate is still on to know the impact of the "second fiddle" on the administration of justice. This dynamic change in the selection of career options by women is something that has happened gradually over the past couple of decades.

When two judges face a similar case then one could probably give an extremely strict verdict, whereas the other could give a much lesser sentence. In the process of developing the judgment the judges may add something here or subtract something

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there, even when they are following precedence of higher courts they tend to have their individual touch. This is why at times eye brows rise when the so called 'second fiddle' joins the bench. The most frequent question that arises in the minds is how and to what extent discretion is exercised and how much her gender has an impact on it. Disparity in sentencing has been a major problem which the people face. Disparity in sentencing can be defined as a form in which people are unequally treated and which is often due to unexplained cause.

University of Georgia had conducted a research in 2001. The study found that there are certain elements of disparity in the procedure of sentencing which men and women received. It concluded that a certain genre of people like the blacks, the males, and accused persons less educated and meagre income received prolonged sentence. Disparities take place when there is a departure from the guidelines. A study undertaken by University of Georgia in 2001 found that there were certain elements of disparity in the procedure of sentencing which men and women received "after controlling for extensive criminological, demographic, and socioeconomic variables". The study found that a certain genre of people like the blacks, the males, and accused persons less educated and meagre income received prolonged sentence. Disparities take place when there is a departure from the guidelines.[2]

Disparity can be on the ground gender, race, colour, ethnic groups, linguistic groups etc. The present research has been undertaken to find out the exercise of discretion and to what extent there has been sentencing disparity when a woman judge decides a case at hand and mostly when it is relating to a woman. The present study has been taken up to cater to those individuals who have a keen interest in ciphering sentencing disparity, especially the judges.

I.I.I. Conceptualizing Gender, Sentences and Sentencing

Gender: Gender and sex are two different concepts. Sex denotes the physical characteristics that distinguish between a men and women. Generally the term is used to the anatomical and physiological differences that define male and female bodies. On the contrary, gender concerns the psychological, cultural and social differences between males and females. Gender can be associated to social constructed notions of masculinity and femininity and it is not necessarily or inevitably a direct product of biological sex.[3]

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[2] David B. M. 2001. "*Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*" at 285, available at http://people.terry.uga.edu/mustard/sentencing.pdf (last visited on Dec. 23, 2014 at 15:50 IST).

[3] Giddens, A and Sutton, P.W, *Sociology* (2013), Wiley Publications, New Delhi at 636.

Sentence, sentencing and sentencing discretion: A sentence refers to the order that the judges pass when the accused person is convicted, beyond reasonable doubt, of his alleged offence. The process in which the judge passes the order of sentence is sentencing. Sentencing is that stage of criminal justice system where the actual punishment of the convict is decided by the judge. It follows the stage of conviction and the pronouncement of this penalty imposed on the convict is the ultimate goal of any justice delivery system. Sentencing discretion enumerates the power of the sentence offering authority or other official to make a choice of processes or out comes available.[4] It differs from a judge to another as to how best one should pursue those objectives, but is supposed to be legitimate ones. The formulation of a set of mandatory guidelines in sentencing would perhaps increase the instances of predictability in sentencing.

The very first few lines of the Nirbhaya's decision on reference on death sentence passed by the High Court of Delhi shows the extent of sensitization of judges towards social needs:

In an epoch when sexual assaults and ravishments are the order of day, when young men (and even old ones) revel in public declaration of their promiscuous pursuits, when not only the streets but schools.... but for fact that a public outraged at the manner in which the entrails of the ravished were culled out of her body,...., took to the streets in their quest for justice.[5]

Has not any other state in India ever witnessed a gang-rape of a hapless damsel with such brutality or was it the effect of mass-media or the male friend's interview which was being aired frequently when the matter was *sub-judice?*

I.II.SUMMARY OF RELEVANT LITERATURE

Women in Judiciary

With the evolution of time women have been portraying diverse roles in dispute resolution mechanism. Femininity was perhaps perceived to be too brittle before to adjudicate on matters before them. Why does it raise eyebrows when it comes to women as judges in a case? Does the sound of bangles or anything 'feminine' attract the people present in the court to ponder over the gender of the judge? There was gender stereotypes used to oppress women as judges. They were permitted to adjudicate on matters which only women were believed to be able to

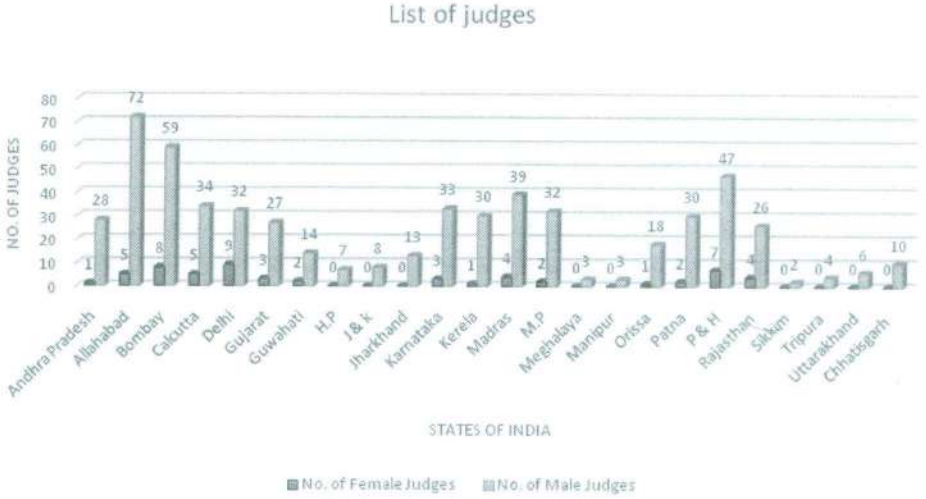
[4] Easton S. and Piper C., *Sentencing and Punishment*, (2012), Oxford University Press, California, at xiii.

[5] The judgment was given by two lady Judges: Justice Prativa Rani and Justice Reva Khetripal(Judges of High Court of Delhi).

deal with perfectly. The Indian scenario is such that the first woman to be appointed to the Supreme Court was Justice Fatima Beevi in 1987. She was later followed by the appointment of Justice Sujata Manohar in the year 1994 and Justice Ruma Pal year 2000. As of now, the Supreme Court of India has only one lady judge, i.e., Justice Bhanumathi.

The representation of women in higher judiciary is meagre as shown in the chart below.

Fig 1. Number of judges in the different High Courts across India (2015):



Why do women judges face so much of trouble? It is very difficult to find women judges in the courts of India, though the inclusion of women judges in the courts of first instance is accelerating but the representation of women judges in the higher courts of India is meagre. The meagre representation of women as judges may be due to fear of sexual harassment at work place by higher officials; inadequate provisions for maternity leave; lack of child care arrangements for the married lady officers; the question on their sincerity, credibility and reasonability while they exercise their discretion; frequent transfers inter states for High Courts judges, and inter districts for the lower court officers.

I.III. THEORETICAL FRAMEWORK OF THE STUDY

Amongst a bunch of theories which can be used for the study undertaken, the researcher has solely based her study on two theories: Cardozo and Holmes's

philosophy and the social construction of gender. Holmes explains the way in which judges begin with a decision first, and only after that decision is made do they choose the reasons to explain them. Cardozo's explanation of the judicial process begins with the law, but ends in the same place where Holmes begins—that is, with judges deciding difficult cases on the basis of considerations that reach well beyond the black letter of the law.

While making the choice in the course of decision, the judge is usually and necessarily influenced by the following: *inherited instincts, traditional beliefs, acquired convictions, and conceptions of social need.* This might be knowingly or unknowingly. Cardozo also believed that many social forces like *logic, history, custom, utility,* and *accepted standards of right and wrong* were instrumental in shaping the aggregate of norms called the law. It has become a tenet of the Realist School that the rule of law is a rule of conduct established as to justify the prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged.[6] "The life of law has not been logic: it has been experience" as urged by Oliver Wendell Holmes. The following have a good deal more to do in determining rules to govern men: felt necessities of time, the prevalent morals, political theories, institutions of public policy and avowed or unconscious prejudices which the judges share with the fellow men. Along with that the theory of social construction of gender, i.e. how the society, which primarily includes the family as the basic unit, has a role in determining the grooming of a person to act, think and behave in a masculine or feminine manner.

I.IV.METHODOLOGY

The area of research is Odisha and Tripura is the field of study. The universe of the study consists of two groups of female judges from Odisha and Tripura. This research is undertaken to explore the impact gender on the exercise of discretion in sentencing which gives rise to disparity at times, the sample size consists of five judges each from Odisha and Tripura. To undertake the said empirical research non-probability sampling technique was used to determine the respondents, especially judgmental or purposive sampling technique and snowballing. Non-probability sampling is a sampling technique where the samples are gathered in a process that does not give all the individuals in the population equal chances of being selected. Judgmental sampling or purposive sampling means where the researcher chooses the sample based on who they think would be appropriate for the study. This is

[6] Singh, A. and Kaur, H., *Introduction to Jurisprudence*, (2013), Lexis Nexis at 51.

used primarily when there are a limited number of people that have expertise in the area being researched. Such samples are biased because prominent experts may differ from other, equally expert, less prominent persons. A face to face interview was conducted to examine extent to which gender has a role to play in exercise of discretion in sentencing. It consisted of hard-copy questionnaires with primarily open ended as well as close-ended questions. Respondents were randomly identified. The primary mode of data collection is face to face interview and content analysis of two judgments of each judge, and the secondary mode of data collection includes books, journals, reports, important websites and internet resources. The research took five months.

I.V. OBJECTIVES OF THE STUDY

The present study explores on the following:

- Whether women judges deal with only women related issues or what are the matters they deal with and what are their views about it?
- Through two judgments analyse the relation between verdicts and the backgrounds, upbringing, traditional beliefs of the women judges etc. Do they have any influence on their judicial decisions?
- To explore their fondness towards any of their judgments.
- Whether they being a woman have any impact on their judgments.
- To assess the views of the judges about woman's contribution to judiciary.

I.VI. RATIONALE OF THE STUDY

It is observed that the advocates while putting up matters in the court try to predict beforehand which judge is lenient or which judge is renowned for convicting accused persons for most cases. Some are well known for granting bail at once whereas some are quite rigid with their principles. Is it that their internal factors: instincts, beliefs, convictions and social needs influence their judgment? This research work has been undertaken to know the same in connection with women as judges, whether their being a women has any implication on their judgments or are they misogynists?

I.VII.FINDINGS OF THE STUDY

I.VII.I. Demographic Profile

1. Age: 50 per cent of the respondents belong to the age group of 28 to 33. 30 per cent of them fall under the age group 34-39 and 20 per cent in the category 40-45. The percentage of new entrants and the experienced ones are same. The age at which any officer enters the office is usually 25 years. So the officers chosen as

respondents here, in this study, have at least 3 years of experience as a judge.

2. Income: Depending upon the years of service and the grade the officers belong to, 40 per cent of the respondents draw up to ₹ 65,000, 30 per cent of them receive ₹ 66,000 to 73000, 20 per cent of them draw ₹ 82,000 to 90,000, and 10 per cent receives above ₹ 91,000. Four of them belong to grade III, five of them belong to Grade II and one of them belongs of Grade I.

3. Marital Status: 80 per cent of the respondents are married whereas 20 per cent of them are unmarried.

4. Educational Qualification: 70 per cent of the respondents are Bachelor Degree holders. 30 per cent of them have completed their Masters. Amongst those who have done only Bachelor's degree 57.14 per cent have done their Bachelor's in Arts with Law, 14.28 per cent in Science with Law, Business Administration and Law and Commerce with law, each respectively.

While perusing through their judgments the researcher finds the implication of their background. Respondents who have completed their Masters write their judgments with greater analysis depicting the intent of the legislation on which they are supposed to deliver the order.

For instance: *The object of the enactment of the said Act (PWDV) is to provide justice to the destitute women from the torture that they are subjected to within the four walls of a house.*

This sort of analysis is hardly found in others' judgments. Moreover the respondents having a science background have a precise yet logical and support their reasons analytically, deductively, and inductively.

I.VII.II. GENDERING OF INSTINCTS AND BELIEFS IN DECISION MAKING: AN EMPIRICAL ANALYSIS

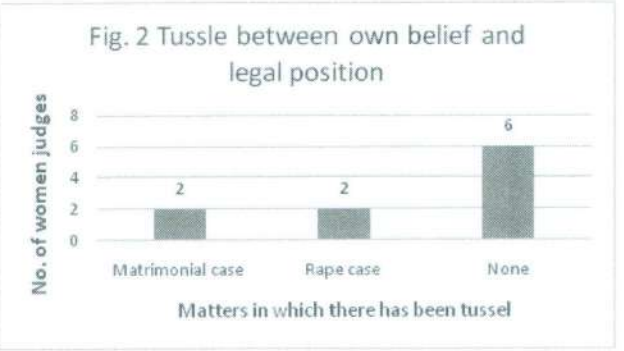
1. in decision making, while delivering a judgment whether the judges consider the accused as a male or female or as an individual?

Opinion of the Judges	No . of women judges	
	Tripura	**Odisha**
Gender	0	0
Individual	5	5

Table 1: Opinion of judges relating to considering the gender of the accused

100 per cent of the respondents believe that while delivering the judgment they do not take the individual as a male or female but as an individual. There is a little contradiction in the statement of one of the judges when on one hand she is treating the perpetrators as individuals but when she is addressing victims as "victim lady". For instance: *So there exists a clear corroboration of the version of PW3 by PW2 (informant) to the effect that PW2 was informed by PW3 about the incident of assault which took place on 05.01.08 upon the victim lady.* This shows that the majority of the judges believe that every perpetrator is an individual irrespective of the sex of that accused person but at the end of the day the instinct considers the victim to be a "lady". That could be with the flow while delivering judgment. This is only found in one of the judge's judgment.

2. The judges share situations when they had a conflict with a legal position that conflicted with their personal belief:



The role of a judge when those in power enact discriminatory and harsh laws is most difficult and inevitable. A judge has to administer the law as it is and even though he might despise it and consider it unfair and when tyrannical, he may find himself in a situation wherein consistently with his position he is left with no choice except to carry out the mandate of such law. A most conscientious judge can sometimes be faced with such dilemma. His role as a judge compels him to enforce the law he as he finds it.[7] At times there lies an agony and anguish of duty within the minds of the judicial officers.

In the study at hand, 20 per cent of the judges have said that in some matrimonial cases and another 20 per cent in rape cases there arose situations where she had to stick to the legal provisions despite her conscience revolting such a decision. 60

[7] Khanna, H.R, *Judiciary in India and Judicial Process,* (1985), Ajay Law House at 59.

per cent of the judges said that they have never faced such situations since they always abide by law. One of the judges of Odisha said that "*It is settled law that minor disputes or matrimonial quarrels cannot be defined as cruelty*" and in many occasions such cases arise where there many numerous disputes which appear to be trivial issues but these create some sort of mental set-backs and harassments but the court's hands are tied because of the legislation. Words like "*constrained to*", "*inclined to*" show some sort of coercion in them, that they cannot step beyond the black letters of law.

3. Whether the judges identify themselves with the woman in the cases they decide?

Opinion of the Judges	No . of women judges	
	Tripura	**Odisha**
Yes	0	3
No	5	2

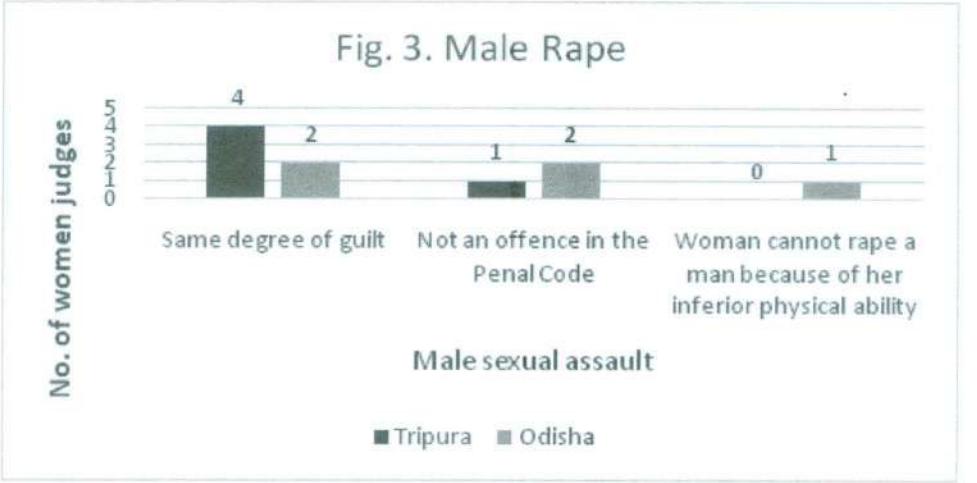
Table2.: Do they relate with the woman in the case?

70% of the respondents said that they do not relate to the woman in the cases they decide and 30% of the respondents said they usually relate to the woman in the case.

That understanding is there, one of the judges of Tripura has said in her judgment: *This instant case is a case where a woman getting married on the expectation of a peaceful happy married life left her matrimonial home alleging torture by her husband and her mother in law. The matrimonial offences are normally committed within 4 walls of the matrimonial home and hence, independent witnesses are not generally found.*

The word "expectations" shows how much the judge can understand the mind-set of the victim and how much she can relate to her. It is from reliable sources that one of the judges happens to have a bitter experience with her in-laws, this led to her unsuccessful married life. This implication is found in her judgment where she has been repeatedly denying orders of community sentences and has been time and again writing in her judgment that the institution of marriage respect to wife is very important and sentence for instance "*which shows that the accused did not have any minimum dignity and love for his wife.*" implies that she carries forward the trauma she has undergone and she can relate to the "victim-lady".

4. Opinion of the women judges on Male Rape



The common notion is woman cannot rape a man or we may say that a woman 'does not' rape a man. Rape is all about showing power and women are only subjects to be shown power on. Male rape is still seen as an under-recognised, under-researched, and hidden crime that males are reluctant to talk about. At the root of the male rape stereotypes and myths lies the social construction of masculinities and the gender role socialisation where males are socialised as being sexually powerful.[8]

60 per cent of the respondents believe that the degree of guilt in the offence of rape being committed on a man is same, 30 per cent believe that it is not an offence under the penal code so it is NOT an offence at all, 10 per cent of the respondents have said that since women are physically inferior to men so they cannot rape males. Male rape myths are stereotyped, prejudicial, and false beliefs about rape, offenders and victims of rape.[9] Rape is not a gender specific issue. Many victims are men and boys. Male rape in India is commonly reported; some claim that this prevalence means male rape cannot be an anomaly. The view is opposed by some

[8] Javaid, A. 2014. *Male Rape: The 'Invisible' Male* (2014), Internet Journal of Criminology, ISSN 2045 6743 (Online).Liecester, at 9: *cf:* Walklate, S., *Gender, Crime and Criminal Justice.* (2004), Willan Publishing, Devon.

[9] A. Javaid, *Male Rape in Law and the Courtroom*, 20(2), (2004), Web JCLI, available at http://webjcli.org/article/view/340/434 (last accessed on Feb, 12, 2015 at 12:10 IST)

Indian feminists such as Flavia Agnes who has stated that she opposes to the proposal of making rape laws gender neutral.[10]

5. Opinion of the judges on the statue of justice being a "lady"

30 per cent of the respondents said that the statue of Justice is a lady because she was a Greek Goddess and 70 per cent of the respondents feel that it symbolises "Mother", a mother can never differentiate between her children so does law. Everyone is equal in the eyes of law. Mothers symbolize[11]: dependence, regression, passivity, and lack of adaptation to reality. Whenever we think about women in judiciary the very first image that flashes in our eyes is the portrait of the blind-lady. Has anybody ever pondered over the origin of this thought? This dates back to the Greek and Roman mythology. Goddess Themis was one of the wives of Zeus. She was the Greek Goddess of Justice, she was considered the embodiment of divine order, law, and custom. *Justitia* or Lady Justice was the Roman Goddess of Justice.[12]

I.VII.III. GENDERING OF CONVICTIONS AND SOCIL NEEDS IN DECISION MAKING: AN EMPIRICAL ANALYSIS

1. Opinion of the judges on granting of bail:

40 per cent of the judges have granted 1 to 5 numbers of bail in the last fifteen days, 50 per cent of the judges have granted bail in 6 to 10 cases in the last fifteen days and only 10 per cent of the judges have granted 16 to 20 bail bonds in last fifteen days.

One of the judges was candid enough to say that she is "*quite lenient*". The fact that bail in bailable offence is a matter of right and no one should be deprived of it. The above figure shows that the highest number of bails that the majority of the judges grant ranges between 6 to 10 this when on one hand might be thought that the judges are lenient on the other hand we may say that the judges are aware of the social needs of the poor and are aware of the legal positions as far as bail is concerned. As it was held in Hussainara Khatoon's case that *the poor in their contact with the legal system have always been on the wrong side of the law. They have always come across "law for the poor" rather than "law of the poor*". So bail as a matter of right should never be denied.[13]

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[10]See http://en.wikipedia.org/wiki/Male_rape (last visted on May. 3, 2015 at 18:40 IST)
[11] Appelrouth, S. and Edles, L. D., *Sociological Theory in the Contemporary era*, (2011), Sage publication, at 353.
[12] Kohli, Justice H., *Women in the Indian Judiciary* available at http://sowlindia.com/upload/SpeechJusticeHimaKohli.pdf (last visited on Mar. 23, 2015 at 13:20 IST)
[13]Hussainara Khatoon & Ors v. Home Secretary, State of Bihar, 1979 AIR 1369.

2. Opinion on Sec. 498 A IPC (legal terrorism)

Opinion	No. of judges	
	Tripura	Odisha
Misused	4	4
Matter to be dealt with carefully	1	0
Women use it as a weapon	0	1

Table 3. Opinion of women judges on Sec. 498A of I.P.C.

80 per cent of the respondents believe that Sec. 498 A of I.P.C. has been in most of the occasions misused, 10 per cent of the respondents said that cases relating to Sec. 498A of I.P.C. must be handled carefully s that relationship does not get severed, 10 per cent of the respondents opined that Sec.498A was brought in as a defence which women could use against the cruelty done upon them, but now the scenario is such that women are using it as their weapon.

3.Do the judges believe that there should be a Male Commission as well?

60 per cent of the respondents have said that they do agree that there should be a Male commission in their states whereas 40 per cent do not agree on the said point.

Political parties are now faced with a unique demand - add "formation of a National Commission for Men in their manifestoes" or face the risk of yet another party, formed by men facing domestic violence, entering the fray.[14] Many of the respondents have opined that there were instances where men were being tortured by their wives. The judges believe that there should be a commission which would give a patient hearing to the woes of men. Laws should not be gender biased.

I.VIII. SUMMARY OF THE FINDINGS

- 40 per cent of the respondents said that the dignity of the profession has attracted them to join judiciary;
- For 70 per cent of the respondents the role of father in their lives have been the most crucial. They consider their fathers to be the source of inspiration for them;

[14] Sinha, A., 'Harassed' Men Demand National Commission, (Feb. 9, 2014), THE TIMES OF INDIA, published available at http://timesofindia.indiatimes.com/city/lucknow/Harassed-men-demand-National-Commission/articleshow/30075711.cms (last visited on Dec. 12, 2014 at 11:40 IST)

- 60 per cent of the respondents have often dealt with women related matters;
- 70 per cent of the respondents have a fondness for Criminal cases , 20 per cent of the respondents like civil cases and 10 per cent of the respondents have a fondness for Constitutional cases;
- 40 per cent of the respondents have opined that the sole object of punishment is to "deter" the society from committing like offences;
- 40 per cent of the respondents take into consideration the *facts and circumstances* of the case; 80 per cent of the respondents have said that they consider these facts and circumstances while deciding whether they should give the maximum or the minimum sentence;
- 20 per cent of the judges do not consider community sentencing as an alternative to punishments there is lack of awareness;
- 100 per cent of the respondents believe that while delivering the judgment they do not take the individual as a male or female but as an individual;
- 60 per cent of the judges said that they have never faced such situations where there was a tussle between legal position and personal belief since they always abide by law;
- 70% of the respondents said that they do not relate to the woman in the cases they decide and 30% of the respondents said they usually relate to the woman in the case;
- 100 per cent of the respondents believe that women's rights are human rights;
- 80 per cent of the respondents disagree that rights of women are adequately protected in India;
- 60 per cent of the respondents believe that the degree of guilt in the offence of rape being committed on a man is same, 30 per cent believe that it is not an offence under the penal code so it is NOT an offence at all, 10 per cent of the respondents have said that since women are physically inferior to men so they cannot rape males;
- 90 per cent of the respondents believe that no leniency must be shown while dealing with matters where women are accused persons;
- 70 per cent of the respondents opined that a woman understands a man more;
- All the respondents have the opinion that a man can have an emotional exalt.
- 70 per cent of the respondents feel that the statue of justice symbolises "Mother", a mother can never differentiate between her children so does law;
- 90 per cent think that women are not represented in Indian judiciary;

- Majority of the judges feel that the women judges have made fair contribution to judiciary.
- 70 per cent of the respondents read the cases beforehand;
- 90 per cent of the respondents keep notes while the hearing is on;
- 60 per cent of the respondents withheld their comments on Nirbhaya Case;
- 80 per cent of the respondents believe that Sec. 498 A of I.P.C. has been in most of the occasions misused;
- 60 per cent of the respondents have said that they do agree that there should be a Male commission in their states;
- 30 per cent of the respondents were reluctant to share any incident which has had a huge impact on them.

I.IX. CONCLUSION

Women have been playing a submissive role in the society since time immemorial, there has always been a predominance of patriarchal social conditions and discriminations on women. When a woman becomes a judge and is exercising her discretion many a times the tenderness, softness, lady like mannerisms and thought process which is a part of her socialization have any kind of impact on sentencing whereas a lot many times they act as misogynists.

The study shows a judge has no gender; whether it is a male or a female when he/she sits on the chair he/she acts like an individual. The impact of gender hardly empowers on the decision making capacity. Capabilities of women judges have been limited as they are directed to deal with women related cases only as opined by fast track court judges. It is true that for the convenience of the victim who is a lady in cases like rape, domestic violence, cruelty or where a mother is being separated from her child, she feels comfortable before a lady judge. Even it is observed that male advocates are inhibited from putting awkward questions to the prosecutrix when a female judge is presiding the court. But all these are for the betterment of the victims. But in such situations the capabilities of the judges are being nipped in the bud.

Women judges are usually indifferent towards issues regarding prosecution of men; the women judges in the said research reacted to the nuisance a section of women are creating by misutilizing the shield that the law provides them.

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LEGALITY & CONTRADICTIONS OF COMMERCIAL SURROGACY

By Priya Vijay[1]

Abstract

The paper evaluates the legality of commercial surrogacy. The objection is based on the differential treatment given to two diverse organs of the body and the difference between renting and selling of a womb. Commercial surrogacy has been misused against women leading to exploitation of the women and has also been misused by women guided by financial consideration. The contradiction of assisted reproductive technology and the new law (ART Bill 2014) also leaves several issues unresolved. The proposed law takes care of many issues but is ignorant of rights of the surrogate mother and the child born in several aspects. Indian Judiciary has always justified and validated commercial surrogacy. In this course the Indian court has delivered many paths breaking judgment which seeks to facilitate the cause of many childless parents.

Key Words - surrogacy, altruistic surrogacy, ART (Assisted reproductive Technology, IVF (Invitro Fertilisation), foetus reduction, Commercial surrogacy

A child is considered to be inseparable part of the family and therefore Infertility is a stigma on the couple even without a fault of their own. A woman unable to give birth to a child is subjected to torture by regular family dispute, threat of separation from the husband, alienated and of course always lives with the idea that her husband may remarry as she could not provide the so called "*Chiraag*[2]" of the family. Surrogacy has emerged as the solution of all these menaces and also ensures biological lineage to the parents. It enables the childless woman to regain her respect and status in the society. Surrogacy blesses her with motherhood, an experience that no words can explain and also she is bestowed with social identity, making her life complete socially and religiously also. Furthermore, we are not unaware of the fact that childless mother is prohibited from performing religious rites in several societies.

Thus, surrogacy has created an expectation for many childless couples and that beliëf has led to acceptance by law, its commercialisation as well. We are not

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[2] The Son or Successor who is considered to keep alive the name of family through generations.

challenging its utility, but we need to ponder over the social and ethical controversies it has brought.

Prima facie, surrogacy may appear advantageous to all the parties involved, poor surrogate fulfills her monetary needs, the childless couple gets their *chiraag* and the baby making clinics, flourishing in every corner of the cities produce huge amount of profit. However, the reality turns out to be otherwise.

In India Surrogacy is a $ 2.3 billion market[3] as there is huge difference in terms of cost that commissioning parents incur abroad and what they spend in India[4]. The obvious reason is cheap availability of labour and lack of norms. Prospective surrogate mothers are taken advantage of, to the maximum extent possible. The manifold increase in the numbers of these IVF clinics, the vacuum created by legal framework and huge number of women forced by their economic vulnerability ready to make available their womb for rich childless couple has presented India as best facility provider[5].

There are several issues regarding rights of each party involved in this surrogacy business specially the child, the surrogate mother, the rights and obligations of the commissioning parents and the dormant law governing all these aspects. For the poor and vulnerable in India surrogacy presents a good chance to earn their livelihood, but we cannot ignore the issues and impacts it creates on society. It creates a plethora of issues to deliberate upon by policy makers.

The legal system of Ukraine and California permits commercial surrogacy, whereas more mature legal systems such as England and US allow it with strict regulation. Australia recognises a new concept called altruistic surrogacy. As distinguished from previously mentioned states Germany, Sweden, Norway and Italy held as invalid any surrogacy agreement.[6] Infertility tourism is buzzing in India and the infertility clinics in India are attracting foreign consumers by offering nominal charges for the procedure as compared to applicable cost in their own country[7]. The attitude towards surrogacy is determined by societal norms therefore it causes many ethical and moral concerns and communities also react differently.

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[3] The Baby Business: A Study on Indian Market of Commercial Surrogacy and Its Implications available at paa2015.princeton.edu/uploads/152404, (last accessed on Apr. 20, /2016)

[4] infra note 5

[5] Shalini Nair, *The Issues Around Surrogacy*, (November 2, 2015), available at http://indianexpress.com/article/explained/the-issues-around-surrogacy/ (last accessed on Apr. 11,2016)

[6] *Surrogate babies: Where can you have them, and is it legal?* available at http://www.bbc.com/news/world-28679020 (last accessed on Apr. 20, 2016)

[7] Pikee Saxena, Archana Mishra, and Sonia Malik, *Surrogacy: Ethical and Legal Issues*, Indian J Community Med. 2012 Oct-Dec; 37(4): 212.

Some states have enacted rigid requirements of individual case appraisal regulated by independent ethics committees such as Argentina[8].

Baby Manjhi Case[9]

This case involved a doctor Japanese couple who hired a Gynaecologist in Anand, Gujarat and entered into an agreement with poor Gujarati women to act as surrogate for their child. Surprisingly, a clause in the contract contemplated that the husband would care for the child if the couple separated but this term failed to attract attention. Fact stated were, that the sperm was of orthopaedic surgeon Ikufumi Yamada, and an egg of anonymous donor women were collected. The embryo was injected into the womb of surrogate and she gave birth to a female baby. Meanwhile the couple was no longer a couple and had already separated. Baby Manji, the child born from surrogate, raised issues of parenthood, and citizenship giving rise to conflict between two legal systems.

It was found that surrogacy contract did not provided for obligation of parents, surrogate as well as unknown egg donor. The biological father expressed his willingness to keep the baby but could not get success caught up by a legal regime that did not contemplate the status of child resulting from surrogacy.

In the midst of long clash of jurisdictions, mother of Ikufumi Yamada had to visit India to look after her grandchild; she took the baby to Japan in spite of her act being challenged as trafficking. Even today this case has left many queries unresolved. India is still accused of permitting this bizarre practice of commercial surrogacy. In this case though the apex court validated[10] commercial surrogacy but it left many concerns unresolved. Indian law did not cater to the expectation of genetic father who was single at that time and Japanese system did not recognise surrogacy. After much chaos baby Majhi could leave the country with visa but this whole incidence brought to light, the essentiality of a well defined regulatory system to take care of anomalies of surrogacy. In the light of above only, Indian legislature responded by proposing the Assisted Reproductive Techniques (Regulation) Bill, 2013.

Assisted reproductive Technology in India

India is most preferred country for availing assisted reproductive technology and it has grown into a booming 25 billion annual industry[11]. India has emerged as

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[8] Sarkar Babu, *Commercial Surrogacy: Is It Morally And Ethically Acceptable In India?* (Dec. 2011) PL S11 http://www.supremecourtcases.com/index2.php?option=com_content &itemid=5&do_pdf=1&id=22512

[9] (2008) 13 SCC 518

[10] Ibid

favourite destination because of having system of low-cost surrogacy and its legal and social recognition. Another factor behind popularity of surrogacy in India is complex legal adoption procedures here.

The Indian Legislature and policy makers were well aware of all the deeds about surrogacy and this became the motivation behind draft of Assisted Reproductive Technology (Regulation) Bill, 2013, for regulation and recognition of surrogacy. This law was welcomed, it recognised commercial surrogacy, defined couple and also very surprisingly bestowed right on gay as well as singles to be surrogate parents. The law mandated the surrogate to be falling within the age group of 21-35 and were not allowed to deliver more than five times in their lifespan. The proposed law also made it mandatory to have an enforceable contract between parties to surrogacy[12].

To protect surrogate mother from exploitation by the fertility clinics, the ART Bill permitted an embryo transfer for a couple up to maximum of three times. A prospective surrogate if found to be married cannot proceed without the consent of her husband so as to save from any risk to her married life. It is to be ensured that surrogate is not suffering from any infectious diseases, which may pose a threat to her pregnancy. The Bill also includes the provision for meeting all cost resulting from pregnancy and has to be paid by the commissioning parents. By visualising the life insurance and payment to surrogate as financial compensation the Bill makes a drastic departure from many other jurisdictions.[13] The stakeholders in the surrogacy dealing have suggested that taking into account vulnerability of Indian surrogate mothers, law should be determining the remuneration to be paid to them. It is to be noticed here that law itself recognises the nexus of fertility clinics, still allows commercial surrogacy[14].

The Bill shows its farsightedness by contemplating the exigencies of death of commissioning couple, their divorce or separation or change in mind with regard to custody of child and provides monetary support and justice to the surrogate child after delivery in all possible cases. It is ironical that the Bill denies any right to surrogate over the child but it can be justified in the light of the fact to avoid any legal dilemma. But the law is kind enough to bestow legitimacy as well as all legal

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[11] *Need to Regulate Indian Surrogacy Industry,* Press Information Bureau, available at http://pib.nic.in/newsite/efeatures.aspx?relid=72127 (last accessed on April 22, 2016)
[12] Draft Assisted Reproductive Technology (Regulation) Bill 2014
[13] The law regulating surrogacy is not comprehensive in scope in many other jurisdictions. Adrienne Asch and Rebecca Marmor, Assisted Reproduction, http://www.thehastings center.org /Publications/BriefingBook/Detail.aspx?id=2210, (last accessed on Apr. 19, 2016)
[14] Because of which only the need for ART Bill was felt and it was so dynamic in scope.

rights on such child irrespective of marital status and sexual orientation of the parents[15][16].

The Bill regulates the mode of operation of ART clinics, prohibits advertising, and the interested parents are required to contact the clinics or banks. The parents after delivery cannot refuse the custody on the ground of any deformity in the child. The Bill seeks to ensure privacy of the donor and the surrogate. To avoid any further citizenship complication, it requires that the parents have permission from their government to confer citizenship on the child and a local person is obligated to provide care to surrogate till the child is born and send to his country. Though the bill intends to prohibit killing of female foetus in consonance with our law[17] but actually it cannot be denied that these fertility clinics cannot disregard the preferences of their client, after all they are guided by purely business motive. The law also recognises right to abortion when it poses potential medical threat to the mother[18].

Indian government released a guideline[19] according to which a medical visa is necessary for a couple who are visiting India for surrogacy and their marriage has to be at least two years old. Because the ART Bill is still to see light of the day, as per existing law, the guidelines of the government will operate and persons of foreign origin who are single, surrogacy cannot be allowed for them. Till date all these issues are addressed by administrative rules of Ministry of Health and family welfare[20].

It is not surprising that the profits earned by the industry are so high that they ignore the anomalies of the technology. The surrogates, the donor as well as the child are exposed to severe medical risks[21]. The success rates of assisted reproductive technology are not beyond failure. It may lead to complicated vital threats as well[22]. Apart from the medical issues related to physical health ,a

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[15] Even the non existence of marriage or the child born to surrogate mother for gay couple will also enjoy legal status

[16]Vandana Shukla, *Unregulated Surrogacy: Law Yet To Deliver*, THE TRIBUNE, (June 24 2015), available at http://www.tribuneindia.com/news/comment/unregulated-surrogacy-law-yet-to-deliver/97741.html, (last accessed on Apr. 20, 2016)

[17]Pre-Conception & Pre-Natal Diagnostic Techniques Act, 1994 available at http://www.ncpcr.gov.in/view_file.php?fid=434 (last Accessed On Feb. 14, 2016)

[18]Medical Termination Of Pregnancy Act 1971

[19] Guideline Issues By Ministry Of Home Affairs On July 9, 2012

[20] Ending Discrimination In Surrogacy Laws, THE HINDU (May 3. 2014) (last accessed on Feb. 10, 2016)

[21]Ghai A, Johri R., *Prenatal Diagnosis: Where Do We Draw The Line?* Indian Journal Of Gender Studies (May-Aug, 2008) 15(2): 291-316

[22] Hyperovulation Syndrome, Multiple Pregnancies And The Risks Of Techniques Such As Foetal Reduction

research conducted at the University of Cambridge, has found that children born with the help of a surrogate may have more adjustment problems till the age of 7 at least than those born to their mother via donated eggs and sperm[23].Slightly more than 4% of babies born via assisted reproductive technology such as in vitro fertilization (IVF) may have major birth defects, such as heart and urogenital tract malformations, according to a new study. All these facts are deliberately not published so as not to affect the profession adversely[24].

After the policy makers applied their mind and a lot of hue and cry was made, the ART Bill 2013 came with substantial amendments and the new ART Bill 2014 contemplates that, only Indian couples who are infertile can avail surrogacy, the Non resident Indian, Person of Indian origin and Overseas Citizens of India cannot benefit from this law unless they have Indian spouse. The pious objective behind these provisions seems to rule out all possibilities of economic exploitation of poor women in India for whom it has served as employment opportunity.

The ART regulation though seems to be dynamic in many aspects but has also lagged behind in many respects. Surrogate mother is a party to the contract but is denied any sensitivity and security. The proposed law here is absolutely ignorant of the recommendation[25] by law commission of India which emphasised upon regulation of this crucial aspect, the need for law, prohibition on commercial surrogacy, and vehemently suggested altruistic surrogacy as more acceptable solution.[26]

The Bill further fails in several other aspects as well .It allows a women capable of donating eggs to donate six times in her life with a time gap of three months[27] which may pose severe challenge to her health, therefore it is recommended to raise this three months to at least six months to enable her regain emotional as well as physical ability to donate, in her interest as well as in the interest of child. The ART Bill needs review in this respect. Another provision[28] in

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[23]Susan Golombok, Centre for Family Research, UNIVERSITY OF CAMBRIDGE, (Apr. 21, 2016) http://www.today.com/health/new-study-tracks-emotional-health-surrogate-kids-6C10366818.

[24]IVF Babies and Major Birth Defects Researchers Say Risk of Serious Birth Defects Is Similar to What Is Seen Among Natural Conceptions available at http://www.webmd.com/infertility-and- reproduction/news/20100614/ivf-babies-and-major-birth-defects (last accessed on Apr. 20, 2016)

[25]Law Commission Of India Report No. 228, ¶ 4.1, Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties To A Surrogacy, http://lawcommissionofindia.Nic.In/Reports/Report228.Pdf, (last accessed on 10/02/2016)

[26] Id.

[27] Supra note, 12, § 26 (8).

[28] Id., § 34 (5)

the proposed law, which seems indifferent towards health of surrogate mother contemplates that she is capable of serving as surrogate for three consecutive births of her life, which does not excludes three attempts of pregnancy for the same couple, it necessarily may compel her to undergo many IVF cycles thus making her to face medical complications, and compromising her health for the rest of life.

The other existing laws and the amendment to the Bill

The recent proposed amendment in the Bill which denies this facility of surrogacy to all non Indians and allowing surrogacy to be availed by only Indian infertile couples, has raised criticism as well. This amendment mandates, there should be no conflict between laws of commissioning parent and Indian law relating to adoption. Further contradiction arises from guideline regulating adoption between two countries and Juvenile Justice Law.[29] The Guardian and Wards Act and Hindu law on minority and guardianship also requires permission of court before guardian can be appointed and only if it appears to court to be in the interest of minor. It is very clear from above, that law does not prohibit a single parent from adopting a child but may be decided based upon particular facts. Thus not allowing single parent and non Indian becoming a parent through surrogacy will be against existing valid law itself.

Contradictions behind Commercial Surrogacy-

After the thorough discussion on ART Bill and Baby Majhi[30] case which legalised commercial surrogacy it becomes incumbent to ponder over the contradictions it has brought. The Indian law on Organ Transplantation does not allow donation of body organ from an unrelated person for monetary consideration. Then by what reasoning a womb, also being a body part is treated differently and is allowed to be let out for a limited time and purpose. Our legal system welcomes monetary compensation to surrogate and our morality is not shaken by human sperms and eggs being treated as any other commodity easily available for price. Should we not either apply the same reasoning and disallow commercial surrogacy or allow free trading of other body organ as well. This is a serious debate with no conclusion from the law maker as yet[31].

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[29] Juvenile Justice (Care and Protection Of Children) Act, 2000 clearly provides that a Court may allow a child to be given in adoption to an individual, irrespective of his or her marital status.

[30](2008) 13 SCC 518

[31] Brend Simon, *Rent Vs. Buy: Compensation Related To Womb And Organ Donation,* Law & Science Blogs, (Dec. 29, 2009) https://Law.Stanford.Edu/2009/12/29/Rent-Vs-Buy-Compensation-Related-To-Womb-And-Organ-Donation

By what logic a technology of human organ donation and surrogacy has different definitions? The other body organs are so sacred not to be permitted for commercial transaction under the concerned law[32] whereas a renting of distinct vital organ of the same body is treated as second grade. This whole unequal treatment of different organ of the same body raises serious doubt over the value we attach to motherhood. How is it permissible that a body organ is classified as commodity being available for giving service to those who are able to pay for it? This further deteriorates the freedom and dignity of women as well. For a billion dollar medical industry[33], it is a venture where they are making huge profit by providing services of easily available surrogates to needy foreign parents. They hardly take the burden of indulging into morality of equating consumable commodities and a child. This apathy and insensitivity is rather justified by the argument, that they are bringing technological solution to infertility but ignoring its social consequences.[34]

Another issue arises that even if we are ready to accept surrogacy purely as a contractual subject how much freedom of contract can be guaranteed, ignoring the fact that the surrogates are economically vulnerable? How free is the consent in the surrogacy contract? These questions needs to be given due consideration. It is a harsh truth, that poor women facing challenges to earn livelihood are forced to enter into these agreement and their unequal bargaining power facilitates their exploitation[35].

The orthodox norm of patriarchy is reinforced by use of reproductive organ of poor healthy women for the elite and establishes monopoly of infertility clinics as centre of exploitation. The suitability of compensation given to them cannot be ensured by law. We are at the end, guilty of equating production and procreation, as human body product is weighted in term of money. Thus India will continue to be a destination of rest of the world for availing hassle free ART services.

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[32] Transplantation Of Human Organ Act, 1994, http://www.health.bih.nic.in/Rules/Thoa-1994.Pdf (last accessed on Feb,14, 2016)

[33] Joe Harkins, *India Surrogacy Boom Gives Birth to Parenthood for Foreign Couples*, (Apr. 21, 2016) https://www.globalhealthquest.ca/Articles/surrogacy.html.

[34] Imrana Qadeer, *Social And Ethical Basis Of Legislation On Surrogacy: Need For Debate*, 6 Indian Journal Of Medical Ethics, 1 (2009), http://www.ijme.In/Index.Php/Ijme/Article/View/418/758.

[35] Linnet Samantha, *The Capitalist Exploitation Of The Human Body: Surrogacy And Organ Transplantation* Topic Paper 3 Ant 185 (c. Van Hollen Ta: Sean Reid Section M003 at.7) available at https://samanthajolinnett.files.wordpress.com/2014/01/topic-paper-3.pdf (last accessed on Feb. 10, 2016)

Commercialisation of surrogacy has boosted Indian Medical tourism Industry as well at the cost of violation of economic, emotional and heath rights of Indian women[36]. Use of ART cannot avoid multiple foetus[37] and thereby foetus reduction motivated by killing of female foetus. This vicious cycle results in violation of the rights of women of different generation. Firstly, the surrogate women are compelled to face severe health hazards. Secondly, female foetus is deprived of her right to be born. If we extend and accept the same analogy, though organ donation is permitted between close relatives only, then we are denying the right to life of those who do not happen to have close relatives. The whole discussion comes to halt and highlights the need for equal approach towards organ donation as well as renting of womb.

The anomalies of the existing legal approach do not end here. In spite of the Delhi high court judgement on homosexuality[38] and rights of gay, the law on surrogacy does not recognises the right of gay parents to go for ART. Their right to have family does not gets ground here. This mindset is result of our double standard and inability to challenge outdated norms. If a law chooses to be dynamic that dynamism cannot be dogged by orthodox norms.

Commercial surrogacy has become a tool in the hands of the immature college students, who perceive it as a lucrative idea to fulfil their lavish demands. Thus resort to ART techniques in a professional manner has further frustrated the noble object behind allowing it. The young in metro cities do not find fault in the practice of selling off their egg to the ART clinics for twenty of thirty thousand bugs, which they consider as a body residue. Surrogacy has proved to be most effortlessly used option whereas it is hardly a recommended practice out of most IVF cases. One of the major factor behind these may be, reproductive tourism, where couples are travelling to India only to use this cheap facility. Another reason may be the financial vulnerability of poor Indian women. Third cause may be the greed of medical professional who do not find more profitable option than this. These factors have forced surrogacy and ART to be abused, practiced in its most illegitimate form and have facilitated economic misuse. In the highly regulated global environment and

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[36] Anu, Kumar P, Inder D, Sharma N., *Surrogacy And Women's Right To Health In India: Issues And Perspective*, Indian J Public Health (2013 online, Apr 21, 2016); 57:65-70. available at: http://www.ijph.in/text.asp?2013/57/2/65/114984

[37] The surrogate is asked as to which foetus she wants to keep thus killing of female foetus in most of the cases

[38] *Naz Foundation* v . *Govt. Of NCT Of Delhi*, 160 Delhi Law Times 277, (2009)

highly flexible Indian system ART is cost effective, hassle free opportunity in India[39]. These reasons very well justify the influx of foreign couples in search of a surrogate and flourishing medical industry in India.

This commercialisation has given birth to untold issues in society and hardly resolves a few. The women of lower class family are brought to this practice, to rent out their body part. Indian society even today projects women as marginalised in terms of economic and political status; therefore here as well they easily become target of exploitation. They are told to see surrogacy role as reason to bring their economic liberty. The data shows[40] that most of such women are from lower strata of society which makes their suppression further easy. The Commissioning parents as well as owner of these fertility clinics make their vulnerability, an opportunity to reap more and more profits. The Indian Government does not present very hopeful picture about this. They are fine with the idea that such women are able to make money which they otherwise may not be able to earn. Thus, it is clearly testimony to the fact that surrogacy is treated as means of livelihood and wages, ensuring them survival and better lifestyle[41].

There is no denial to the fact that from the point of view of childless parents, surrogacy has a sacred purpose which led to its legalisation and it is seen as socially accepted solution to a medical problem that brings happiness to a family by giving them a child of their genes. Gestational surrogacy[42] is preferred choice as child may have genes of both the parents and thus ensures blood relation and emphasises relevance of family. Surrogate mother may shape her feeling in the manner that the baby she is carrying is not her baby. But the feeling may not remain the same after the birth of the child in case of traditional surrogacy and gestational surrogacy where the baby is not having any connection with the surrogate.

In the light of the vacuum created by drought of Indian law on the subject and by virtue of judicial decision on surrogacy which permitted remuneration for it,

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[39]Paul R. Brezina and Zhao Yulian, *The Ethical, Legal, and Social Issues Impacted by Modern Assisted Reproductive Technologies,* 7 Obstetrics and Gynecology International Volume (2012), http://dx.doi.org/10.1155/2012/686253 (last accessed on Apr. 21, 2016)

[40]*Surrogate Motherhood: An Empirical Study* available at Sodhganga.Inflibnet.Ac.In/Bitstream/10603/57389/.../12_Chapter%206.P...(last accessed on Apr. 21, 2016)

[41]www.issuesinmedicalethics.org/index.php/ijme, Indian Journal Of Medical Ethics (Feb, 10, 2016), http://www.issuesinmedicalethics.org/index.php/ijme/Article/View/418/758.

[42] Here a surrogate is implanted with an embryo created by IVF, using intended mother's egg and donor sperm. The resulting child is genetically related to intended mother and genetically unrelated to the surrogate.

certain guidelines were released by Indian Council of Medical Research[43] to better control, regulate and supervise ART clinics but it has failed in its purpose completely.

In a government survey[44] as well, interesting and useful suggestions were made to improve the economic condition of the surrogate and recommended that money should not change hands leaving apart medical costs and other incidental expenses. The report further suggested that we should have a liberal attitude towards right to form family by persons irrespective of their sexual and marital status which the proposed ART Bill ignores completely.

The concerns are high as to its consequences on society. It cannot be allowed to prevail as income generating option by poor and illiterate where the middleman can exploit their economic position, creating threat to their well being and health. This practice has challenged the dignity of women and leaves several issues of rights of surrogate mother unanswered. Therefore it is urgent need of the hour that before the proposed Bill becomes an Act we take the opportunity to modify it in the light of social, legal and ethical concerns[45].

Legal regime favouring commercial surrogacy also has become a means to break law of the country, where Surrogacy due to its several in build ethical issues, is not permitted legally. Therefore to breach the law of their own country, which does not permits surrogacy for monetary consideration , the parents are moving towards countries such as India where it is legally permissible and the laws regulating surrogacy are flexible enough to suits their conveniences.

Commercialisation of surrogacy and rights of women

In the last few years of legal commercial surrogacy, the practice has been associated with misuse, abuse and exploitation. It has become a tool in the hands of the strong to aggravate the sufferings of weak. The idea of commercial surrogacy was conceived to complete somebody's family, but it has shattered the family of surrogates themselves. Women in Indian rural outskirts are sacrificing their freedom and dignity in return of money from foreign rich couples who consider it not a bad deal, at relatively much less cost. As the commissioning parents are also given

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[43] INDIAN COUNCL OF MEDICAL RESEARCH: NATIONAL GUIDELINES FOR ACCREDITATION, SUPERVISION & REGULATION OF ART CLINICS IN INDIA (2005), http://icmr.nic.in/art/art_clinics.htm (last accessed on Feb, 14, 2014)

[44] Sanjeev Sirohi, Surrogacy Laws In India, CENTRE FOR SOCIAL RESEARCH (2013), yojana.gov.in/(Feb, 9, 2016), http://yojana.gov.in/surrogacy-laws-in-india.asp.

[45] M.L.Dhar, *Need to regulate Indian Surrogacy Industry*, PRESS INFORMATION BUREAU, (2011), http://pib.nic.in/Newsite/Efeatures.Aspx?Relid=72127, (last accessed on Apr.19, 2016)

guarantee as to care and control over the surrogate, therefore she is kept under strict vigilance of clinics.

The Medical Risks and heath aspects of the surrogate are important, only so long as she is carrying the baby. Her exposure to pelvic infection and hyper stimulation of ovary is not a rare possibility. All the facts relating to her health are never disclosed to the surrogate and her family as it may spoil business prospects.

It was found in a Infertility clinic located in Delhi owned by an obstetrician and gynaecologist specialising in foetal medicine who himself confessed that they do not hesitate to act against the guideline by infusing twenty shots instead of ten to maximize the possibility of success in conception. They are running a business providing services to those in capacity to pay[46]. The surrogate mother obviously, does not get the right to be called as mother of the child born legally as well as emotionally. Though new ART Bill seeks to protect the surrogate mother in several possible ways such as providing Insurance and medical security but her human right to be a mother is lost.

The market dominated by infertility clinics[47] bring to light the non-natural dimension of the procreation. Few groups[48] have even equated surrogacy with sex work to further exaggerate their misery. They are made to be ashamed of their sacrifice and to maintain confidentiality as far as possible to avoid social confront and stigma. It all stems from societal norms where any procreation beyond marriage and family is unethical, a social taboo or lease of body part.[49] It may also advance the belief that womb of economically challenged women can be used as machine to deliver baby for the rich. The different roles performed by different women are fixed because of their traits. A poor may serve as a gestational surrogate on the other hand donors of the eggs have to be genetically strong enough to fetch good price. These are all business dynamics guided by profit motive.

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[46] Rekha Prasad, *The Fertility Tourists,* THE GUARDIAN, (July 30, 2008 at 00:01 BST), available at http://www.theguardian.com/lifeandstyle/2008/Jul/30/familyand relationships.healthandwellbeing.

[47]Sharma Chandra Neetu, *Most IVF Clinics Are Operating Without Any Registration*, MAIL ONLINE INDIA, (April 25, 2015, at 22:26 GMT) available at http://www.dailymail.co.uk/indiahome/indianews/article-3055546/IVF-clinics-operating-without-registration.html. (last accessed on Apr. 19, 2016)

[48] Amrita Pande, Wombs in Labor: Transnational Commercial Surrogacy in India, 15 Columbia University Press, 2014

[49]Sugato Mukherjee, *Legal And Ethical Issues Of Commercial Surrogacy In India: An Overview* (Apr. 21, 2016), http://www.academia.edu/1955503/LEGAL_AND_ETHICAL_ISSUES_OF_COMMERCIAL_SURROGACYIN_INDIAAN OVERVIEW.

Surrogacy and child rights-

The contradictions of surrogacy are not limited to bringing misery to surrogate but extend to numerous perils brought to the life of child as well. The law prohibits sale of children, trafficking of human being and transfer of human organ for monetary consideration[50]. Yet commercial surrogacy is being promoted. India's international treaty obligation mandates, protection of right of child in all possible ways. Yet the present legislation on surrogacy fails to ensure child rights completely. It is not only as regards the legal rights of the child but it also raises several psychological and physical issues for the child. Right to Information to the child is denied thoroughly. The child born out of surrogacy is denied right to information about the identity of their parents till he or she becomes an adult. The Indian law guarantees complete guarantee of confidentiality to donors[51]. In an important observation by Law Commission of India[52] it was said that biological relationship with any of the parents will form the natural bonding and affection, as well as negate the chances of various forms of child abuse and exploitation which may be witnessed in cases of adoptions. Further it may also avoid the situations where child may be abandoned if not related to any of the parents and have to lead all his life in an Orphanage.

Commercial Surrogacy: a boon for Infertility tourism

Commercialisation has given big boost to Infertility tourism. The Indian infertility clinics use innovative online mode to promote their services, making attractive offers to customers from western part of the world. It is a lucrative, $400 million-a-year business with over 3,000 fertility clinics across India that are employing and using services by illiterate women to give birth to child of others[53]. They have also put in place agents, who are expert in bringing poor women in dire need of money to engage them into profession of leasing out their womb. The agents retain the contact between these poor women and rich foreign couple.

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[50]It is regulated by the regime of law by Transplantation Of Human Organ Act and plethora of laws against trafficking of human being.

[51] Supra note, 12

[52]LAW COMMISSION OF INDIA 228TH REPORT (Aug., 2009), NEED FOR LEGISLATION TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS RIGHTS AND OBLIGATION OF PARTIES TO A SURROGACY, 26(Apr, 21, 2016), available at lawcommissionofindia.nic.in/reports/report228.pdf.

[53] Rina Chandran, *Maharashtra is first state to give surrogacy mothers maternity benefits*, (Jan 21, 2016), http://in.reuters.com/article/india-surrogacy-benefits-maharashtra-idINKCN0UZ1P5, (last accessed on Apr. 21, 2016)

The medical professional practising in the field of gynaecology have undertaken the role of convincing each possible couple coming to them with any minor fertility problem to chose the prospects of surrogacy. It also amounts to unethical practice derogatory to their Hippocratic Oath but is practices openly. The ethics and morality of the medical practitioner is also a serious concern. It is not a remote thought that there have also been reports of women being trafficked into the industry[54].

If our discussion concludes, and indicates that commercial surrogacy be banned then a question frequently raised is that, once commercial surrogacy is banned then what about right to reproduction of such women. It is submitted that rights are always subject to reasonable restriction so as to make the right more legitimate. Big players such as known branded hospitals and infertility IVF clinics in medical tourism industry[55] have evolved strategies to reap huge profits. They are employing refined techniques, to better market their services to the needy couples abroad. They are channelizing their efforts to narrow down the gaps between service provider and those desirous for the services. The buyers of the services are also smart enough to prefer better and cheap services in India with flexible law to keep the complications to the minimum.

The significance of expensive services in their home country and informal nature and availability of services in India make it possible for the fertility tourism to prosper and surrogacy to be multiplied in business terms. It is again to be stressed here that in such forced circumstances free consent is a myth. Noteworthy disparity in economic and social status between infertility patients on the one hand and surrogates and egg donors on the other brings into question whether such consent can truly be considered fully informed so as to make the contract, a valid and enforceable contract.

Regulation of ART Clinics-

India has emerged as booming leader in infertility market today. There are an estimated 200,000 clinics across the country offering artificial insemination, IVF and surrogacy[56]. In legal terms it is called as assisted reproductive technology as discussed earlier. These clinics are known as baby manufacturing unit who trade

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[54]Elise Hilton, *The Surrogacy Industry And Human Trafficking*, (Mar. 31, 2015), http://blog.acton.org/archives/77223-the-surrogacy-industry-and-human-trafficking.html. (last accessed on Apr. 21, 2016)

[55]Raelene Kambli, *IVF in India: The Story so Far...*, THE INDIAN EXPRESS, BDP (Dec. 2011), http://archivehealthcare.financialexpress.com/201112/market01.shtml.

[56]Anil K Dubey, *Infertility: Diagnosis, Management and IVF*,.385, Jaypee Brothers Medical Publishers Private Limited, (1st ed. 2012)

on the hope and disability of people. They show off, making real the dream of childless, to have child. The emotion and ethics hardly matters in their business set up. It was lack of legal control for these clinics that further allowed unwanted liberty of operation and abusive practice by these clinics. Baby Majhi[57] case brought to forefront the lacuna and insufficiency of control as well as inability of the ICMR guidelines to cater to the need of the hour.

Judicial Opinion and Surrogacy-

Indian judiciary has very well acknowledged the plight of childless couples and at many occasions have delivered the judgements favouring surrogacy. The courts have come upright to resolve citizenship[58] issues as well. They have also time and again realised the need for regulation of surrogacy and have even gone to the extent of validating commercial surrogacy. Some of the landmark ruling needs to be discussed here.

In the case of *Jan Balaz vs. Union of India*[59] The High Court of Gujarat delivered a decision, which was much awaited. The court agreed that citizenship issue of child born to an Indian surrogate with a foreign father has no legacy to refer, which the court can have a look to guide them. Whether he can be bestowed with citizenship by birth is an important legal question. The court being moved by the plight of child, bestowed Indian citizenship upon the two babies having biological father in Germany. Ultimately justice was done to child.

In another landmark case of *Stephanie Joan Becker v. State*[60] the court relaxed the rigidity of Central Adoption Resource Authority (CARA) and permitted a baby girl aged 10 to be taken in adoption by a 53 year old lady. The court was forced to take such stand in the light of the fact, that it was in the interest of child and it would promote acceptance of the child in United States. The court in the light of the welfare of child endorsed deviation from strict rules.

In Shabnam Hashmi v. *Union of India*[61] the court recognised right to adopt and be adopted as a fundamental right. It also upheld that whatever be the religion a person professes, he is endowed with the capacity to adopt.

In another latest verdict of the Supreme Court[62] on the subject, the court showing its awareness of the contemporary world, acknowledged transgender as

[57] Supra note 8 pg 3
[58] *Infra* note 55
[59] From L.P.A. No. 2151 Of 2009, High Court Of Gujarat
[60] (2013) 12 SCC 786
[61] (2014) 4 SCC 1
[62] National Legal Services Authority v. Union Of India (2014(5) Scale 1)

the third gender and said that any discrimination with transgender because of their sexual orientation is denial of right to equality, equality before law and equal protection of law which is the constitutional mandate. The court further observed that legal recognition means that they are entitled to rights of adoption, succession, inheritance and other privileges under law.

In the background of the discussion, the workable remedy may not be to thoroughly deny recognition to surrogacy which is an accepted societal practice in India and full-grown slowly over almost two decades. Advancement of medical science and scientific methods has brought hope to many childless couples. Therefore, the more realistic approach would be to make a law for surrogacy with inbuilt safeguards, checks and balances.

It is desirable to create a mechanism to judge the aptness of proposed parents of surrogate child, rather than to debar all single and foreign persons. The objective should be to avoid any conflict with existing laws of adoption, wherein foreign persons including single parents are made to follow a strict and comprehensive mechanism provided by Central Adoption Resource Authority (CARA) for adoption[63].

Denying surrogacy to foreigners and single parents may not be morally as well as ethically correct. Whether Indians or foreign nationals, law treats persons as individual parents when required. A narrow interpretation of the term "Person" cannot qualify or change the definition by restricting it to an Indian national only. The celebrated view of the apex court in widening the horizons to prevent discrimination on grounds of sex or gender identity is a new thought process based on international covenants of human rights[64].

In a landmark ruling the Delhi High Court ruled that even a mother of a surrogate is entitled for maternity leave in India. Justice Shakdher observed that "*there appears to be an inertia in recognizing that motherhood can be attained even via surrogacy" and reminded the government that "a commissioning mother needs to bond with the child and at times take over the role of a breast-feeding mother, immediately after the delivery of the child.* High Court agreed, and observed that the word "maternity" as appearing in government rules with advancement of science and technology should be given a meaning which includes within it, the concept of motherhood attained via the surrogacy route[65].

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[63]MINISTRY OF WOMEN & CHILD DEVELOPMENT, GOI, GUIDELINES GOVERNING ADOPTION OF CHILDREN, 2015, §§ 9 -23, available at http://www.cara.nic.in/innercontent.aspx?id=151# (last accessed on Feb. 14, 2016)

[64] Supra Note 7

Maternity was broadly interpreted. The court was of the view that maternity cannot be limited to a child born through physical birth but extends to even a child born through the process of surrogacy. Justice Rajiv Shakhdher, who wrote the judgement, said court is supposed to welcome the change brought by science and technology as well as shift in social norms and customs. If the letters of the laws are redundant then it is duty of courts to utilise its power to construe. The court said, the judgement refers to the biological mother as the "commissioning" and not "contracting" mother. Surrogacy contract are not recognised in India but is considered to be more egalitarian legal agreement between two contracting parties[66].

Surrogacy owes its allegiance to Indian constitution incorporating right to life. In the case of *B. K. Parthasarthi v. Government of Andhra Pradesh*[67], the Andhra Pradesh High Court held that reproductive autonomy is intrinsic part of right to privacy. The court refereed also to the decision of US Supreme Court in *Jack T. Skinner v. State of Oklahoma*[68] which characterised the right to reproduce as "one of the basic civil rights of man".

The surrogate after delivery is denied any relation or ownership with the child and her womb serves as a carrier to deliver the child. The birth of the child puts an end to all connection between surrogate and the child, as she has not contributed to genetic material. She is only a contractor who is willing to give the end product once the contract between her and the person is fulfilled.[69]

Through a notification the central government permitted import of human embryos to be used in the process of artificial reproduction, making it useful for foreign childless couples to enable them to bring in frozen embryos and find out an Indian surrogate[70].

At another occasion it was observed[71] by J R Gagoi and N V Ramana that surrogacy in India is unregulated area and it is necessary for the government to

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[65] *Rama Pandey* v. *Union Of India & Ors*. Del. H.C. (W. P. (C) No. 844/2014 decided on July. 17, 2015) available at http://indiankanoon.org/doc/125365715 (last accessed on Feb. 09, 2016)
[66] Id.
[67] (2000 (1) Ald. 199,
[68] 316 U.S. 535 (1942) (Feb. 14, 2016), http://law.justia.com/cases/oklahoma/supreme-court/1941/7973.html.
[69] Anita Rao, Surrogacy Arrangements: Legal And Social Issues,131, JOLT - I (1) (2010)
[70] Choudhary Anand Amit, *SC Suggests Ban On Commercial Surrogacy*, (THE TIMES OF INDIA, Oct 25, 2015 at 02:22 A.M. IST) http://timesofindia.indiatimes.com/india/sc-suggests-ban-on-commercialsurrogacy/articles how/49365734.cms (last accessed on Dec. 9, 2015)
[71] www.dnaindia.com/ SUPREME COURT HINTS AT BAN ON COMMERCIAL SURROGACY, (Oct 15, 2015) http://www.dnaindia.com/india/report-supreme-court-hints-at-ban-on-commercial-surrogacy-2135100 (last accessed Feb. 14, 2016)

take a comprehensive view and come out with legislation. They raised serious concerns about frequent instances of surrogacy being practised. The court compared this practice with trading of human embryo which is going on as a business and directed the government to review the guideline on import of human embryo. The court also showed its concern over surrogacy tourism.

In the light of the ethical and moral issues raised by commercial surrogacy, the Indian government recently showed the commitment for not permitting commercial surrogacy and not allowing any monetary compensation apart from the medical expenses involved. The government gave assurance to explore altruistic surrogacy. It means surrogacy without money changing hands and between close blood relatives only is permissible under law. The government through the affidavit before apex court promised to curb and penalise commercial surrogacy practices, to restore women dignity and to control practices such as trafficking, and sale of children[72]. It was the directive that only infertile Indian couple would be entitled to choose non commercial surrogacy. The reply was also backed by the concerns of health regarding the right of the child born out of surrogacy to be breast fed for a reasonable period, issues arising in the country to which the commissioning parents belong, if their laws do not permit surrogacy or if the child is left after being born with deformities. It is a grave apprehension that in India commercial surrogacy is still practised. The affidavit further promises to make provision for penalising abandonment of disabled child of surrogate mother. It is to be noted that these are only excerpts from affidavit and to what extent it will be brought into practice, is yet to be established. The actual steps towards materialising these promises are still to see light of the day.

Viability of altruistic surrogacy-

Many jurisdictions only permit altruistic surrogacy such as Australia, Canada, and U.K whereas many other allow only medical expenses to be paid. Foreigners in some countries are not allowed to access surrogacy and few others only allow it through strict regulation. Though all would agree that commercial surrogacy raises several moral and ethical issues but there is huge support in favour of altruistic surrogacy[73]. Altruistic surrogacy mandates a close or blood relative to act as surrogate for childless infertile couple out of affection and without being paid any

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[72]Shalini Nair, *The Issues Around Surrogacy*, (Nov. 2, 2015), THE INDIAN EXPRESS http://indianexpress.com/article/explained/the-issues-around-surrogacy/

[73]When a surrogate is given no financial gain for carrying a child only realistic out of pocket expenses are covered by the intended parents e..g., medical costs, travel, time off work, etc. Altruistic Surrogacy can use either a Traditional or Gestational Surrogate. Altruistic Surrogacy is permitted in both Australia and New Zealand.

compensation. In the end we are left with the dilllema that if we try to curb surrogacy absolutely, the practice will still continue in a clandestine manner on the other hand the legal recognition and social acceptance of commercial surrogacy will reduce the dignity attached to women and motherhood, thus altruistic surrogacy offers a prudent choice.

Conclusion-

Though the Law commission of India in its report[74] has supported surrogacy but has also brought to light the necessity of regulating aspects relating to rights and obligation of the parties and moreover the urgent need to control proliferating ART clinics. The commission said "It seems that wombs in India are on rent, which translates into babies for foreigners and dollars for Indian surrogate mothers"[75]

After deliberating circumspectly about the ethical and moral issues raised by commercial surrogacy in Indian society, the success of commercial surrogacy is highly doubtful. Altruistic surrogacy has to be allowed but in regulated environment after bearing in mind it's each aspect. The rights and obligation of the commissioning parents, the child and the surrogate mother, should be clearly defined so as to avoid injustice to the parties. The supervision and control of ART clinic should be of utmost priority in the light of unlawful practices adopted by them.

This discussion raises several social issues as well. However lacks of children are lying in orphanage, we are promoting surrogacy on the ground that the infertile childless couple should be allowed to have access to ART techniques, is it only the devout attitude that affirms the belief that surrogacy delivers their own child.

The deliberations leave many issues unresolved, Can a women's sacrifice can be equated in terms of monetary compensation. Can the rights of children and women be a commodity? What is fate of surrogacy contract if it is breached? And what is the scope of right of surrogate to abort her pregnancy in cases of medical risks? All these questions highlight the ethical and moral questions revolving around surrogacy which the future law needs to envisage.

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[74] Supra 53, at 11
[75] Id.

CASE COMMENT

Mohd. Ahmed Khan v. *Shah Bano Begum*

Srija Kumar*

Abstract

The emphasis of this paper is on the controversial 1985 case of Shah Bano Begum which sparked off a debate in the entire country regarding the implementation of the Uniform Civil Code, providing equal rights to the women of Islam religion and an appeal to bring women on the same pedestal as that of men atleast in the eyes of law.

Introduction

"The truth of the claim that common law theory or positivism is 'patriarchal' or supported by a masculinist ideology may not be immediately obvious.... Men have made the legal world[1]*."* These words of Margaret Davis clearly question the legal framework that distinguishes between the rights of a woman and those of a man. Law in general has been patriarchal since it's the men who have ruled the legal world[2]. The legal world at large has seen the utter dominance of men where women have always been subjected to differential treatment than men. There has always been over representation of one group in the decision making procedure of law. Even the value systems associated with law and culture reinforce the various ways in which the marginalized gender, race, class are oppressed and tormented. This sort of clear discrimination is also reflected in the personal laws of various religions, Islam in particular. According to Islam, women are not worthy of independence and the independence of women is alleged to be the fatal point in Islam leading to the degradation of women. Such kind of archaic and discriminatory beliefs are even incorporated in their Muslim personal laws. To analyse this distinction of rights further made the researcher choose the landmark case of *Mohd. Ahmed Khan Vs Shah Bano Begum.* This is a landmark case in the history of Muslim women rights and how before this judgment Muslim women were the pawns of their regressive and oppressive personal laws. Before the judgment was given, divorced Muslim women had to languish in poverty as their personal laws did not allow them any substantial recourse. Had this judgment not been out probably

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[1] Margaret Davis, *Asking The Question,* The Law Book Company Limited, Sweet & Maxwell, 1994, at 167-168

[2] Id.

even today Muslim women had been struggling for their rights in the same manner. In the light of the case apart from commenting on the judgment, the researcher would even try to flag off its enormous significance in the arena of women rights and the remarkable change it brought in the society.

Background

The appellant, a Muslim, Mohammed Ahmed Khan, was married in 1932 to Shah Bano Begum and had five children from their marriage. After 14 years of being married to her, he married another young girl and finally in 1975 he drove her out of the matrimonial home along with her five children[3]. In 1978 a petition was filed by the respondent against the appellant claiming maintenance at the rate of Rs 500 per month. The appellant gave divorce to the respondent by an irrevocable talaq in November, 1978[4]. His defense to the respondent's petition was that she was no longer his wife by the reason of the divorce granted by him, so he had no obligation to pay maintenance for her as he had already paid maintenance to her at the rate of Rs 200 per month for about two years and that a sum of Rs 3000 was already deposited by him in the court by way of dower during the period of iddat[5]. The question was whether the respondent was entitled to maintenance. In application for revision filed by the respondent to the High court enhanced he amount of Rs 25 as maintenance fixed by the magistrate to Rs 179.20 per month. The appellant then again filed a petition before the Supreme Court making the claim that Shah Bano was no longer his responsibility as he married another girl and his marriage vas valid under the Islamic Law[6].

Issues Involved

1. If section 125 of the Criminal Procedure Code applies to Muslims also

The court held " under section 125(1)(a), *a person who having sufficient means, neglects or refuses to maintain his wife who is unable to maintain herself, can be asked by the court to pay monthly maintenance to her at a rate not exceeding not more than Rs500.*" By clause (b) of the section states that "wife" would include a woman who has not remarried. Since this section does not really mention the religion of the spouses so it essentially applies to everyone irrespective of their religion. The reason behind this is that the section is a part of Cr. P. C. not any civil law which defines the rights and obligations of parties who

[3] Mohd. Ahmed Khan v. Shah Bano Begum (1985) 2SCC 556
[4] Id.
[5] Id.
[6] Id.

belong to particular religion. The court held that the religion of the neglected wife had no role to play in deciding the applicability of this section[7]. As long as the person is capable to maintain his wife and fails to do so, the section will be directly applied. The provisions of this section surpass the barriers of religion. The religion of the parties in a lawsuit matters only when within the framework of the Constitution it is explicitly mentioned that their application is confined to only certain specific religious groups of people. The conclusion that the right conferred by Section 125 is applicable irrespective of what is the personal law of the parties, is fortified especially, in regard to Muslims, by the provision present in the explanation to the second proviso of section 125(3) of the code. According to the explanation to the proviso:

"If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered a just ground for his wife's refusal to live with him[8]"

2. Is there any conflict between the Muslim Personal law and section 125 of CrPc?

The point of conflict basically here was that under the Muslim personal law the husband is supposed to maintain his wife only till the period of iddat. This has explicitly been mentioned in many of their religious texts but the court held that the textbook statements are insufficient for the Muslim husband to ward off his liability for his divorced wife. There should certainly be a sense of regard for the Muslim personal law's conspectus for determining the husband's liability for his divorced wife. But again there should not be any kind of injustice meted out to the Muslim women and the application of the religious textbook statements should be restricted to that class of cases where there is no destitution arising out of the husband not providing the wife proper maintenance. The court reiterated that the section 125 essentially is not concerned with the fact that whether the husband is responsible to maintain his wife under all circumstances or not rather it takes into account if the husband despite of having adequate means could maintain his wife or not who is helpless to maintain herself[9].The question of not providing maintenance comes into the picture when the wife is able to maintain herself. Hence the court reached at the conclusion that there was no conflict between the Muslim Personal Law and section 125.

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[7] Id.
[8] Supra note 3
[9] Id.

The Judgment

The judgment of the Supreme Court was very clear on this issue. It effectively interpreted the provisions of section 125 of Criminal Procedure code so that the deplorable economic plight of the divorced wives is taken into consideration while allowing them maintenance. Justice VK Krishna Iyer in his judgment reiterated "*Welfare laws must be so read as to the effective delivery system of the salutary objects sought to be served by the legislature and when the beneficiaries are weaker sections,* like *the destitute women, the spirit of article 15(3) of the Constitution must be light the section. The Constitution is a pervasive omnipresence brooding over the meaning and transforming the values of every measure*[10]."

Analysis of the case

The case of *Mohd. Ahmed Khan* v. *Shah Bano Begum* was a highly controversial yet a culturally and historically significant case since it brought a substantial change in the condition of Muslim women in the society who were earlier tied to the fetters of religious constraints and were being denied their rights.

There is hardly anything to critique about this judgment as I strongly felt that this judgment came as the need of the hour then, explicitly highlighting the rights of the divorced Muslim women. Before this judgment came, the Muslim women were perpetually exploited in the hands of their personal laws. There was vehement opposition faced by anyone who defied the stringent rules of the Muslim Personal law. But this verdict made it distinct and clear that if there is any clash between the provisions of the personal law and the Constitution, the Constitution will be placed above the personal law. The ultimate goal of law is to ensure justice hence any injustice should not happen to the weaker sections of the society merely on the grounds that it is permitted in the personal law. There is also a dire need of the implementation of the Uniform Civil Code in the country which was explicitly brought out in the judgment and is highly appreciated. It is also immensely remarkable that how the judgment did not refrain from reprimanding the government for not taking any significant steps to implement an operative uniform civil code in the entire country.

The judgment also clarified its stance by quoting the Holy Quran, The sacred book of Islam, stating that the verses 241 and 242 of the Quran say that according to the Prophet there is an obligation on the part of Muslim husbands to maintain

[10] Supra note 3

their wives. These aiyats(verses) do not leave any kind of doubt about the obligation of Musim husbands towards their divorced wives. This reference led to massive revolt by the Muslim community which felt that the Supreme Court lacked the appropriate authority to interpret the holy Quran as per a judicial stand taken by the court where it was held that the court was not competent to interpret religious scriptures or holy book.

The judgment also dismissed the argument of the appellant on the grounds of the provision contained in section 127(3)(b) that states that the Magistrate shall cancel the order of maintenance if the husband has divorced the wife and she has received " the whole of the sum which under any customary or personal law applicable to the parties, was payable on such divorce'[11]'. That put forward the question in front of the court if there was any amount payable to the wife in Muslim Personal Law on divorce. The argument that the court received on this issue was that 'mahr' is the amount payable by the husband to his wife on divorce. To resolve this issue the court took recourse to Mulla's principles of Mahomedan Law, mahr is defined as "a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage". Mulla's book has a further statement at page 308 that the word 'consideration' is not used in contractual sense and under the Mahomedan Law mahr is seen as a mark of respect and the court reiterated that the sum payable as a mark of respect to the wife is different from the sum payable on divorce because when a marries a woman it could be arising out of any reason like love, looks etc. but he does not divorce her out of respect. Hence the premise is highly faulty that mahr, an imposed obligation on the husband as a mark of respect, is same as the amount given to the wife on divorce.

Even it is imperative to appreciate the fact that the court did take into account what might be the implication on the Muslim's sentiments which was essential to establish in this case to show that justice is above everything. Though the judgment was later tried to be overruled by the government by passing the Muslim Women(Protection of Rights on Divorce) Act,1986 on the light of the electoral politics that might have had led to the defeat of the government in the upcoming elections and the vehement flak the judgment saw from the Muslim Personal Law's staunch supporters. This act entitled the divorced Muslim women to get maintenance from her husband only till the period of iddat. This act was fortunately nullified by the judgment in the *Danial Latifi and Anr* v. *UOI* case. The court cited, "Legislature does not intend to enact unconstitutional laws. While it accepts social reality of a male dominated society, it fails to take recognition of the fact that the Act is inherently

[11] Supra note 3

discriminatory. This can be very well proved by the fact that it brings within its purview only 'divorced woman' who has been married according to Muslim law and has been divorced by or has obtained divorce from her husband in accordance with the Muslim law. But the Act excludes from its purview a Muslim woman whose marriage is solemnized either under the Special Marriage Act, 1954 or a Muslim woman whose marriage was dissolved either under Indian Divorce Act, 1969 or the Special Marriage Act, 1954."

The court also did not refrain from chiding the government for its failure to implement a uniform civil code which is very essential to promote the goal of secularism in the country. Also it emphasized that the government should stop administering the religion based personal laws which lead to the suppression of the weaker section.

I strongly feel the judgment in itself is really comprehensive which can be established by the fact that it analysed what could be the probable misuse of the provision of the Muslim Personal Law that was frequently used to undermine the rights of the women.

It has given its interpretation of section 125 in a lucid manner leaving very little scope for any doubt so that later in the future women do not have to face deprivation and destitution guarding them and giving them an impetus to speak for their rights even if it means going against one's religion[12].

The only area where the judgment could have made a stronger impact was that along with making the interpretation of the section clear it should have awarded some exemplary compensation to the respondent on account of the vigorous struggle she did to get her voice heard. In the societal setup as that of India, that too back in 1985, it was not easier for a Muslim woman to come out of the closet and fight for her rights especially when your own personal law does not permit the same. Awarding exemplary compensation to Shah Bano would have sent a clear message across the society at large encouraging more women to speak up for their rights because we often see the women do not have the courage to go against their religion.

Conclusion

The case of *Shah Bano Begum* brought a revolutionary change in the segments of the society opening the eyes of millions of women to fight for their rights. We see how the society was stigmatized back then and the idea of women raising their

[12] Nawas B Modi, The Press in India: Shah Bano Judgment And Its Aftermath, 27, ASIAN SURVEY, at 935-953

voices for their rights was quite unusual so it received a huge backlash from the so called religious activists. These people went on emphasizing the fact that giving liberty to women would lead them astray and their personal law does not allow them to do so. The people had some perverse views like giving maintenance to the women would make them torture their husbands by not getting married again. More gross were the views of people who criticized the judgment by saying that allowing maintenance to divorced women would make them a burden on not only their families but even the society.

There were certain sects who even did not appreciate the idea of Uniform Civil Code emphasizing the fact that it would lead to the encroachment of the religion based Muslim Personal laws which would then wreak havoc on their cultural identity. For them their religion and the Personal Law is above everything even it means to subjugate women. This builds our understanding of the fact that how the concerns of women are trivialized and it is not justice that should prevail it is the patriarchy that should. Any interpretation of law questioning such a patriarchy is usually frowned upon by the patriarchal chunk of the society. The law might look differently to people who have been subjected to oppression and entirely different to those who have been favoured by it especially the 'male stream thinkers.'

We see how this judgment can be seen in the light of Critical Legal Theory that talks about the oppression of the marginalized sections and what difference it achieved bringing the women out in public to speak about their rights. All in all this judgment has everything that would make it a memorable judgment for generations to come.

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REASONED DECISION – A PRINCIPLE OF NATURAL JUSTICE

Anju*

"Justice must be rooted in confidence; and confidence is destroyed when right minded people go away thinking: 'The judge was biased'."

- Lord Denning

In India there is no statute laying down the minimum procedure which administrative agencies must follow while exercising decision-making powers. There is, therefore, a bewildering variety of administrative procedure. Sometimes the statue under which the administrative agency exercises power lays down the procedure which the administrative agency must follow but at time the administrative agency is left free to devise its own procedure. However, courts have always insisted that the administrative agencies must follow a minimum of fair procedure. This minimum fair procedure refers to the principles of natural justice[1].

The Earl of Selborne L.C. said in *Spackman v. Plumstead District Board of works*[2] :

"No doubt in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word, but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice."

The term Natural Justice in the past was used interchangeably with the expressions "natural law", "Natural equity", "eternal law", " the laws of God", " summum jus" and other similar expressions. It is still occasionally used as a synonym for "natural law".[3] This is known as different terms in different countries like in

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[1] I.P.Massey, ADMINISTRATIVE LAW 164 (2005)

[2] (1885) 10 App. Cas. 229, 240

[3] H.H.Marshal , NATURAL JUSTICE 6 (2008)

America it is known as due process of law, common law in England, Dharma in India, Proportionality in civil-law system[4].

Principle of natural justice is based on the principle that justice should not only be done but should also seen to be done. This forms the central feature of administration of Justice. Principles of natural justice not only guides the decision-making process but also gives many open justice rules of fair trial like proceeding to be conducted and decision pronounced in open court . These rules are not absolute in nature and can be deviated to avoid prejudice or harm to the parties in the administration of justice for example, undue distress or embarrassment to a victim of a sexual offence[5].

Indian Constitution does not use the term natural justice but the essence of justice can be felt in its articles. Rule of law forms the basis of the principles of natural justice. These principles yields from situation to situation and change with circumstances. There are three broad principles of natural justice which has been universally recognized. These principles are discussed in following paragraphs[6]. These principles are capable of applying in all types of cases whether its judicial, quasi-judicial or administrative[7].

PRINCIPLES OF NATURAL JUSTICE

Natural justice is also known as commonsense justice. Rules of natural justice are not codified but developed from case to case. These principles have been laid down by the courts time and again to protect the minimum rights of the individuals against arbitrariness in the administration of justice to make rights more effective. This makes the authority to work in transparent and accountable manner. It also prevents injustice to happen in society[8].

For some three or four hundred years, Anglo-American courts have actively applied two principles of natural justice. However, this reduction of the concept of natural justice to only two principles should not be allowed to obscure the fact that

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[4] Kuber Wagle , *Trace the development of natural justice, connect it with legal justice in the courts of law and administrative agencies*, 2 http://www.academia.edu/8782381/Trace_the_development_of_natural_justice_c onnect_it_with_legal_justice_in_the_courts_of_law_and_administrative_agencies (accessed on Feb. 12, 2015 at 4:41 pm)

[5] Jason Bosland and Jonathan Gill, *"The principle of open justice and the judicial duty to give reasons"* 2-3 http://www.law.unimelb.edu.au/files/dmfile/BoslandandGill382 Advance 4.pdf. (accessed on Nov. 3, 2015 at 5:45 pm)

[6] Mahendru Mayank , *Administrative Law*, LAW NOTES BLOG (Nov. 21, 2015, 1:46 PM), http://mayank-lawnotes.blogspot.in/2007/01/administrative-law.html,

[7] Tapash Gan Choudhary, PENUMBRA OF NATURAL JUSTICE, 41 (2001)

[8] Durga Das Basu, ADMINISTRATIVE LAW 253 (6th ed. 2005)

natural justice deals with very basis of the problem of administrative justice. The two principles are as follows:

1. *Nemo debet esse judex in propria causa* (No man can be a judge in his own cause)
2. *Audi alteram partem* (no person shall be condemned unheard)

Also, to these two principles now transparency and good-governance may be added as a new dimension which includes the duty to pass a speaking order[9].

NEMO DEBET ESSE JUDEX IN PROPRIA CAUSA

The principal requirement of this rule is that the person who judges- whether he is a judge or an administrative authority- should be impartial and free from any kind of bias. He cannot adjudicate a cause in which he himself has any kind of interest. It is only if he is neutral that he can decide the matter objectively. The object is to see that the scales of justice are even and not inclined[10].

If an Hon'ble judge or adjudicating authority is biased either in favour of one party or against the other, he cannot be expected to do justice in the matter. Such a person is disqualified from adjudicating and since such proceedings stand vitiated, any decision taken by him is liable to be set aside. This maxim is based on three well-known principles, viz:

i. No man can be a judge and prosecutor at the same time
ii. It is not enough that justice is done; it is also necessary that it must be seen to be done
iii. Judges should always be above suspicion[11].

AUDI ALTERAM PARTEM

Audi alteram partem is one of the basic principle of natural justice. It means that both sides should be given opportunity of being heard before passing of any order. It signifies that no man can be condemned without a hearing. It forms a fundamental principle of natural justice that before an order is passed against a person, he should be heard in the matter. In administrative law, it protects the individual from arbitrariness whenever anyone right is jeopardised. The purpose is to see that no illegal action or decision is taken. If any illegal action is taken by authority concerned than it effects the person and his rights in question. Thus, opportunity should be provided before coming to a decision.

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[9] *Supra* 7, 4
[10] Id., at 5
[11] Id.

The corollary deduced from this principle is *qui aliquid statuerit parte inaudita altera, aequum licet dixerit, haud aequum facerit* which mean that "he who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right". As stated earlier, this principle is not of some importance but is of fundamental importance that justice should not only be done, but also undoubtedly seem to be done[12]. Practically speaking, this maxim covers two things:

i. Giving notice to the affected person

ii. Giving him a fair hearing

Even if the legislature specifically authorises an administrative action without hearing, then, except in cases of recognised exceptions, the law would be violative of the principles of fair hearing, now also read into the Articles 14 and 21 of the Indian Constitution[13].

REASONED DECISION

Reasoned decision is considered to be the third developing principle of natural justice after rule against bias and opportunity of being heard. To reach a decision, various facts and evidence is considered by the court of law but whether reason is given or not depends on case to case. The reason behind this is no universal rule of providing reasons. Though it is not mandatory to give reasons it is also necessary to disclose reasons to make decision fair, reasons should be provided. The reasons if provided should be simple and logical. It should not be vague and general. The law presumes that the decision- makers have reasons and would provide the same but it is not mandatory as per law. Judiciary had time and again laid importance on providing reasons as it is also the basis of the fair trial, transparency and accountability in the system[14]. A decision that affects the livelihood of persons is usually decisions which call out for reasons to be provided[15].

A good decision will always be given along with reasons which not only explain it but also justify it. In a good administration practice, people should be given reasons so that whenever they feel their right is violated they can approach the court in appeal if the reasons for the decision is not provided, many a times injustice is done by the authorities. So the key objective of public administration depends on the

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[12] Id., at 12

[13] Id.

[14] Matthew Groves, Before the High Court Reviewing Reasons for Administrative Decisions: Wingfoot Australia Partners Pty Ltd v Kocak, 627-628 Syd. L.R. 35(2013), http://sydney.edu.au/law/slr/slr_35/slr35_3/Groves.pdf.

[15] Eddy Ventose, COMMONWEALTH CARIBBEAN ADMINISTRATIVE LAW 343 (2013)

principle of reasoning. Some of the main objectives of a good decision are following:

1. Reasons bring fairness in the decision- making process. Individual comes to know the basis on which the decision is reached at.
2. Reasons also contribute to bring rationality in decision-making. Decision-maker look at the relevant criteria, conflicting arguments as well as all the information provided before reaching at a decision.
3. Transparency is also ensured if reasons are provided with the decision. People get confidence in the working and integrity of the government. It rules out the idea of biasness and suspicion.
4. Reasons also strengthen the consistency in decision- making process. If similar facts as earlier in some other case are brought to decide then the decisions can be reached at easily and compared too. Sometimes it also forms as a basis to decide other cases in question.
5. Accountability is also promoted along with transparency in government. it enables citizens to question or challenge the decision[16].

SIGNIFICANCE OF REASONED DECISION

The value of reasoned decisions as a check upon the arbitrary use of administration power is quite clear. A party has the right to know the result of inquiry as well as the reasons in support of the decision. But the requirement that reasons be given does more than merely vindicate the right of the individual to know why a decision injurious to him has been given. This is so because the obligation to give a reasoned decision is a substantial check upon the abuse of power. A decision supported by reasons is much less likely to rest on caprice or careless consideration. The giving of reasons serves both to convince those subject to the decision that they are not arbitrary and to ensure that they are not, in fact, arbitrary. The need publicly to articulate the reasoning process, upon which a decision is based, requires the administrative authority to work out all the factors which are present in a case[17]. Lord Denning rightly says, "The giving of reasons is one of the fundamentals of good administration"[18].

CASES WHERE RECORDING OF REASONS NOT NECESSARY

The rule regarding recording of reasons so vital to the passing of all orders, be that judicial or quasi-judicial or administrative, is, however, subject to certain

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[16] Clayton UTZ, *Good decision-making for government Reasons for decision*, 2 (2006), http://www.claytonutz.com/docs/GDMG_ReasDec.pdf (last accessed Feb. 3, 2016)
[17] Dr J.J.R Upadhyaya, ADMINISTRATIVE LAW 194 (8th ed. 2012)
[18] Breen v. Amalgamated Engineering Union (1971)1 All E.R. 1148

exception. In the following classes of cases and circumstances, giving of reasons cannot be compelled.

1. Arbitration award: what generally applies to settlement of disputes by authorities governed by public law was not necessarily extended to cases arising under the Arbitration Act 1940, which was intended for settlement of private disputes. Rules of natural justice could not be invoked to compel an arbitrator to give reasons.

   The scenario has, however, altogether changed with the coming into force of the arbitration & Conciliation Act 1996. It has now been made mandatory to state reasons upon which the arbitral award is based save and except in the circumstances where the parties have agreed that no reasons are to be given, or the award is an arbitral award on agreed terms.

2. Deciding representation on adverse report made against a Government Servant: In case adverse report is made against a Government servant the question is whether while considering and deciding representation against the adverse report, the administrative authorities are duty bound to record reasons. The legal position is that in the absence of statutory rule or instructions requiring the administrative authority to record reasons in rejecting a representation made by a Government servant against the adverse entries, the administrative authority is not under any obligation to record reasons. If the representation is rejected after its consideration in a fair and just manner, the order of rejection would not be rendered illegal merely on the ground of absence of reasons.

3. An order of concurrence by a disciplinary authority: A disciplinary authority issuing show cause against the proposed punishment of a Government servant is not obliged under Art. 311 (2) of the Constitution of India to record its provisional conclusions if it concurs with the findings of the enquiring officer.

4. It is not the practice of the Supreme Court to give reasons for the dismissal of an application for special leave to appeal under Art. 136 of the Constitution. It is not obligatory also for the Supreme Court to give reasons for dismissing the writ petition. The Supreme Court being the highest judicial forum, the need to record reasons is obviated since there is no further appeal against the order of the apex court.

5. The rule regarding recording of reasons as an essence of justice does not apply to decisions in connection with a scheme or order of a legislative and not an executive character.

6. Reasons may also be withheld or specification thereof restricted on grounds of national security.

7. It may be withheld too from a person not primarily concerned with the decision

where to furnish it to him would be contrary to the interests of any person primarily concerned and interested.

8. For convicted prisoners, reasons for refusal of prisoner's release on parole are not required.
9. Whenever a college or university does not give reason to the unsuccessful candidate in admission or awarding scholarships or a charity while making grants to the needy shall not act unfairly.
10. Judges do not act unfairly when, without an indication of their reasons decide questions of cost[19].

ROLE OF JUDICIARY

Judiciary has also played an important role in adopting the principles of natural justice. This is necessary in the absence of any universal rule to provide reason in order to check on the arbitrary exercise of power in the administration. A bald order which contain no reason to support it may be an arbitrary order and passed in an irresponsible manner. Providing reasons is a step in furtherance of achieving the end where society is governed by Rule of law[20].

Supreme Court in *Saroj Kumar* v. *Union of India and others*[21] observed that *wherein the Hon'ble Tribunal order on representation was not a reasoned order. Reconsideration of the representation is required in the light of law as laid down by this Hon'ble Court in Dev Dutt v. Union of India & Ors*[22] *in which W.P. 8357/2011 filed thereafter was dismissed by the Hon'ble High Court by order dated 21.2.2011 holding that the complaints which led to the downgrading of the ACRs of the petitioner and the reasons for relying on the complaints have not been recorded in the order rejecting the representation. It is strongly denied that the adverse entries remained uncommunicated because of active concealment by the respondents resulting in violation of fundamental rights of the petitioner and the principles of natural justice.*

In "*Siemens Engg. & Mfg. Co. of India Ltd.* v. *Union of India*"[23], reported in, the Hon'ble Supreme Court has held as under:

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[19] *Supra 7*, 360-365

[20] Justice Brijesh Kumar, *Principles of Natural Justice*, 3 JOURNAL OF JUDICIAL TRAINING & RESEARCH INSTITUTE (1995), http://ijtr.nic.in/articles/art36.pdf (accessed on Jan. 26, 2016)

[21] Civil Appeal No. 6081 of 2015 arising out of S.L.P. (Civil) No. 25572 of 2014, Decided by SC, Aug. 18, 2015, https://indiankanoon.org/doc/98286559/

[22] *(2008) 8 SCC 725*

[23] (1976) 2 SCC 981

"Before we part with this appeal, we must express our regret at the manner in which the Assistant Collector, the Collector and the Government of India disposed of the proceedings before them. It is incontrovertible that the proceedings before the Assistant Collector arising from the notices demanding differential duty were quasi-judicial proceedings and so also were the proceedings in revision before the Collector and the Government of India. Indeed, this was not disputed by the learned Counsel appearing on behalf of the respondents. It is now settled law that where an authority makes an order in exercise of a quasi-judicial function, it must record its reasons in support of the order it makes. Every quasi-judicial order must be supported by reasons. That has been laid down by a long line of decisions of this Court ending with *N.M. Desai* v. *Testeels Ltd.*[24] But, unfortunately, the Assistant Collector did not choose to give any reasons in support of the order made by him confirming the demand for differential duty. This was in plain disregard of the requirement of law".

In "*Narinder Mohan Arya* v. *United India Insurance Co. Ltd. & Ors*[25]." the Hon'ble Supreme Court has observed:

"An appellate order if it is in agreement with that of the disciplinary authority may not be a speaking order but the authority passing he sale must show that there had been proper application of mind on his part as regards the compliance with the requirement of law while exercising his jurisdiction under Rule 37 of the Rules".

In *Kranti Associates Pvt. Ltd. and Anr.* v. *Sh. Masood Ahmed Khan and Ors*[26], Supreme court referred to various case laws on the requirement to provide reasons for every decision and gave following observations:

a) "In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially".

b) "A quasi-judicial authority must record reasons in support of its conclusions".

c) "Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well".

d) "Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power".

e) "Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations".

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[24] AIR 1980 SC 2124
[25] (2006) 4 SCC 713
[26] (2010) 9 SCC496

f) "Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies".

g) "Reasons facilitate the process of judicial review by superior Courts"

h) "The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice".

i) "Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system".

j) "Insistence on reason is a requirement for both judicial accountability and transparency".

k) "If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism".

l) "Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or `rubber-stamp reasons' is not to be equated with a valid decision making process".

m) "It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny".

n) "Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights .Article 6 of European Convention of Human Rights requires, adequate and intelligent reasons must be given for judicial decisions".

o) "In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of Due Process".

From the aforesaid discussion, it is clear that the order passed by the authority who decides the claim, should contain reasons. However, whether an order is a reasoned order or not, would depend on the facts of the case and can be ascertained

upon construction of the order in question. How much reasoning is required and whether an order contains sufficient indication that materials on record have been examined and there is proper application of mind or not, are the issues which can be decided in the facts of each case.[27]

CONCLUSION

The giving of reasons while reaching at conclusions by judicial or quasi-judicial authorities in order to exercise initial jurisdiction is important for various reasons i.e.,

1. It prevents unfairness and arbitrariness while making decisions. If the authorities try and provide reasons in every case, it reduces the chance of personal bias or unfairness in conclusions. The authority will act in fair and legitimate manner towards a reasonable manner and will discard irrelevant factors.
2. To justify the principle that justice should not only be done but appear to be done, reasons should be provided. So that whosoever reads the order is satisfied that it has been reached after due consideration and is just.
3. Right to appeal would only be effective if the parties and court knows the reasons behind a decision otherwise an order would be of no use to the court. An unreasoned order becomes ineffective in exercise of application of right to appeal. It would unnecessary increase the burden of the court to go through the entire record again and to reach at a conclusion whether the order passed by lower court is just or unreasonable.[28]
4. Providing reasons saves the investment in time, burden of court as well as the multiplicity of suits. Many a times if the parties are satisfied with the order of the authority they don't file further suits to already passed-order in higher authorities/courts.

Thus for the above reasons, judicial or quasi-judicial or administrative authority should always provide for every order they pass or decision they take. There are acts passed by the legislature like right to information act, whistle blower protection act to ensure transparency and accountability in system which is also the basis of the reasoned decision. Article 310-311 of the constitution also requires to provide reason after due inquiry in case of dismissal or removal or reduction in rank of person employed in civil capacities under union or state.

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[27] *Shilendra Kumar* v. *Chief Secretary*, Jhar H. C. (in W. P. (S) No. 7522 of 2012 decided on July. 9, 2013)

[28] "Woolcombers of India Ltd. v. Workers Union", (1974) 3 SCC 318

"CHOICE TO COMBAT TERRORISM: *A perpetual motion machine?*

Mr. Anurag Singh*

ABSTRACT

Terrorism and corruption, the former being an external factor of menace to global and national security however the latter is impediment to the rate of development, to be achieved by several other nations including India. The research paper entails the conceptual elucidation of the situation posed before the choice to combat either terrorism or corruption per se, it shall also include the incidences from the recent past depicting the extent to which India has suffered in the presence of social evils such as corruption as well as terrorism. In addition to this, the possible reasons and consequences to these existent problems would be explored and relevant suggestions shall also be entailed. The objective of the research paper is to find out a conclusion adequate enough to figure out the possible solution to the problem of terrorism put forth for reconciliation.

"Corruption is only a few days older than terrorism"

- Auguste Comte

Terrorism and corruption, the former being an external factor of threat to global and national security however the latter is the obstacle to the rate of development, to be achieved by several other nations including India.[1]

Hence, there stands a conflict of choice for a state to combat the same, some of the believers share their stance that fighting against corruption make a state internally strong and will consequentially help to combat terrorism later, negating the same others have to say that wiping out the corruption only would not be a wise choice, fighting corruption is equally important as the same is the threat to national security as well.[2] The 26/11 attacks which took place in Mumbai in 2008, not only had put forth the weak internal mechanism on display because of which the terrorists, which were just a mere ten in number, had entered the Indian territory and caused a havoc and affected India emotionally, financially and posed several other problems as well which were left to dealt and deliberated about, post this attack.

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[1] Koschade. A social network analysis of Jemaah Islamiyah: the applications to counterterrorism and intelligence, (2006), Terrorism and Political Violence at 559-575.

[2] Chava Frankfort-Nachmias and David Nachmias, Research Methods in the Social Sciences, (5th ed. London: Arnold, 1996) at 427-428.

THE 26/11 TERROR ATTACKS

Terrorism poses a significant threat to a nation's internal security. India has been subjected to terrorist attacks on several occasions. Terrorism is not a new problem that has been faced by India. The problem of terrorist attacks has been faced by Indians since a very long time. The history of terrorist attack dates back to 20th century. There were many terrorist attacks in India which had shaken the conscience of the nation but the impact of the terrorist attack in Mumbai on the 26th November, 2008 was somewhat different.[3]

On Nov. 26, 2008, Mumbai was brought to a standstill in one of the deadliest terrorist attacks on Indian soil. 171 people died in a standoff between the police and 10 heavily armed Pakistani Islamic militants[4]. A group of 10 men, armed, with the intention of waging a war against the nation entered the Indian territories on the fateful night of 26th November, 2008.

They went into different directions to attack various places in Mumbai with an intention to create havoc. These men, lacking all human compassion, partly succeeded in their mission of creating havoc in India. They attacked various places in Mumbai. Their main intention to attack places which were crowded. Leopold Café, Chhatrapati Shivaji Terminus, Cama Hospital, Metro Cinema, the lane behind the building of *Times of India*, Oberoi Trident, the Taj Mahal Palace & Tower and the Nariman House[5][6]. The lone surviving terrorist Ajmal Kasab was arrested by the police and several charges were levied against him. Ajmal Kasab in his confession to the Additional Chief Metropolitan Magistrate Mrs. Sawant Wagule, confessed as to how he recruited into Lashkar- e- Toiba. He also confessed how he along with the other terrorists were trained by the important officials of the LeT.

This was not the first time our country had experienced a terrorist attack but as stated above the quantum of impact that this particular attack had on our country was totally different. No form of aggression is acceptable by any country and the way these attacks were carried on and on such a scale should have obviously prompted the government authorities to act. Act to protect the integrity of our

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[3] D. Woolman, Fighting Islam's fierce Moro warriors, Military History, 9/1 (2002) at.34-40.
[4] WSJ Staff, Mumbai 26/11 Six Things to Read, The Wall Street Journal, (Nov. 26, 2014), available at http://blogs.wsj.com/briefly/2014/11/26/mumbai-2611-six-things-to-read-at-aglance/.(last accessed on Apr. 23, 2015 at 12: 58 p.m.)
[5] Mohammed Ajmal Mohhamed Amir Kasab @ Abu Mujahid v. State of Maharashtra, (2012) 9 SCC 1.
[6] Onook O, Agrawal M and R. Rao., Information Control And Terrorism: Tracking The Mumbai Terrorist Attack Through Twitter, (2010), Information System Frontiers

nation. Act to take care of the security of the nation making sure there is no infringement due to any insurgency.[7]

The attacks of 26/11 had not only affected the people of Mumbai but it had shaken the entire nation. The attack on Mumbai was the attack on the "spirit of India". The scale of the attack, the orchestration made one thing very clear to the whole world: India is in war, war with terrorism and has deadly enemies in its midst.[8] People wanted the government authorities to take appropriate action to curb such an attack in the near future. The attacks exposed the vulnerability of India to such terrorist attacks.[9] People wanted action on the part of the government to take strict measures rather than showing a soft attitude towards the terrorist as was evident during the hijack of IC-814 Aircraft. It is also believed that if Indian government keeps capturing terrorists and keeping them inside our prison, it would not be late that the terrorists would attempt another hijack similar to the incidents in the past.

EFFECT OF THE ATTACKS ON INDIAN ECONOMY

Mumbai as we all know is considered to be the financial capital of India. Mumbai is the hub for various national and international financial activities. 26/11 attack had shook Mumbai completely affecting the economy as well. The Taj Mahal Palace Hotel and the Oberoi- Trident Hotel are the market leaders in the hotel industry in Mumbai and these were damaged severely during the attack[10].It was considered to be a deliberate plan to retard the economic progress of India[11].

The attacks had severe impact on the economy as well. The 60 hour siege of the two most important hotels, i.e., the Taj Mahal Palace Hotel and the Oberoi Hotel, had harsh effects on the economic front. These two hotels serve as the meeting place for the most of the important business groups. It is considered to be the watering hole for the India's business barons and the CEOs. The Belvedere at The Oberoi Hotel and The Chambers at the Taj Mahal Hotel are considered to be

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[7] Fenstermacher L., Kuznar T. Rieger, and Speckhard A., Protecting the Homeland from International and Domestic Terrorism Threats, (2010),, White Paper: Counter Terrorism, 178.

[8] Monica Czwarno, Misjudging Islamic Terrorism: The Academic Community's Failure To Predict 9/11, (2006), Studies in Conflict and Terrorism, 29/7, at.657-694

[9] Pooja Singh, Barriers to Development: Terrorism, Corruption and Social Violence, 1, IOSR Journal of Business and Management, 3 (May- June 2012), at 37-42.

[10] Akshay Sawant, The Impact of 26/11 Attack, available at https://www.academia.edu/6535081/The_impact_of_26/.,(last accessed on Apr. 26, 2015 at 7.27 p.m.)

[11] Siddharth Gandhi, 26/11, Mumbai Terror Attack : A Perspective Of Indian Economy, available at http://www.scribd.com/doc/34417621/26-11-mumbai-terrorattack-a-perspective-of-Indianeconomy#scribd/.(last accessed on Apr. 26, 2015 at 8:55 p.m.)

an important place where meetings are held. The Taj and the Oberoi are not only an important pace to strike important business deals but these are the important places which hosts the rich and the famous personalities in India routinely[12]. During the attack these two clubs were savagely mauled by the terrorists. The damage was so severe that these clubs remained shut for a very long time[13]. Apart from this a lot of money had to be spent on the restructuring the hotels and bringing it back to normal. Not only had the hotels to be restructured but also other sites of the terrorist attack. This resulted in a considerable drain of fund to the Indian economy.[14] The catastrophe which was aptly described as the 9/11 of India by Pakistan's former minister of foreign affairs, Shah Mahmood Qureshi, altered the lives of many Indians. Many believe that the synchronised audacious attacks — that paralysed the financial hub of India — changed the lifestyles and behaviour of many if not all[15].

CHANGE IN FOREIGN POLICY, A RESULT OF THE ATTACKS

India's ties and foreign policy with Pakistan have always been strained. The bilateral relations between the two nations have always been marred with violence and constant disbelief. After the Kargil war and the Parliament attack in 2001 had brought both the nations to a brink of nuclear war but slowly and steadily the relations had improved to some extent. Trade was resumed. There was a resolution to settle the Kashmir issue once and for all. Due to the 26/11 attack all the initiative to bring peace in the Indian subcontinent has gone in vain[1617].

The bilateral relation between both the countries changed from sweet to sour after the 26/11 attacks. Cross border terrorism has always been a concern for India. The fact that there are active terrorist groups in Pakistan occupied Kashmir

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[12] Terrorist Attacks Will Further Weaken a Slowing Indian Economy, Public Policy, (Dec. 11, 2008), available at http://knowledge.wharton.upenn.edu/article/terroristattacks-will-further-weaken-a-slowing-indian-economy/.,(last accessed on Apr. 23, 2015 at 12.16p.m.)

[13] Id.

[14] Aaker, D. A., Brand Portfolio Strategy: Creating Relevance, Differentiation, Energy, Leverage, and Clarity, (2004) Free Press, Glencoe, IL.

[15] Faiza Mirza, How 26/11 Changed Us, DAWN (Nov. 26, 2012), available at http://www.dawn.com/news/766878/how-2611-changed-us/ (last accessed on Apr. 24, 2015 at 8.45p.m.)

[16] M. Mandokhail, Research Proposal: The Impact of terrorism on Indo-Pak peace process, available at https://www.academia.edu/5803603/Research_Proposal_The_Impact_of_terrorism_on_IndoPak_peace_process/(last accessed on Apr. 26, 2015 at 17:42 p.m.)

[17] Change in India- Pakistan Relations Post Mumbai Attacks, Last accessed at 9.30pm on 24/04/2015, available at http://www.civilserviceindia.com/subject/Essay/change-in-india-pakistan-relations-post-mumbaiattacks1.html/.

has not helped in improving the situation. The Mumbai attack can be considered as the last nail on the coffin, there was no way India could leave Pak terror groups get away with gruesome and dastardly attack on the financial capital of our country. The attack had worsened the bilateral relations between the two countries. India on its part had made repetitive requests to shut down or ban all the terrorist organisations operating in Pakistan but Pakistan had always turned a deaf ear to this request. The Pakistani authorities haven't taken any proper action the terrorists even when concrete evidences have been provided by the Indian authorities.

There is no point in India continuing to maintain cordial bilateral relationship with a nation known for their terror links also which provides the sufficient terror infrastructure for its training and support. India has to act as a responsible democracy in putting adequate pressure on Pakistan by sharing all the evidence gathered against the terrorist with the world community. This will force the Pak government to act against terrorist in an effective manner.

The banning of JUD a terrorist organization linked with LeT by Pak government is a positive step but a long road is in front of them in gaining confidence of India and other nations of the world[18].

There are various literature reviews which bring out the fact that how these terrorist attacks will hamper the relations between both the nations and if such attacks continue then we are sure to believe that the relations between both the nations will be strained. "*Pakistan- India Peace Process: An Assessmen"t* is one such document. Its central theme is that the attacks like that on Mumbai on 26/11 will delay the peace process between both the nations[19]. Such cross border terrorism also hampers the dialogue between both the nations.

TIGHT SECURITY AFTER THE 26/11 ATTACKS

The attacks of 26/11 brought to light the loopholes of the Indian security system. Several suggestions were made to transform the Mumbai police force from a Third World constabulary to an elite one with capabilities to handle threats following 26/11. But very little has been done to strengthen policing[19]. From the facts of the case we're clear that how the group of terrorists entered the Indian territories. The Badhwar Park landing point in Mumbai has a strong security after the attacks.

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[18] Supra Note 10.

[19] Mateen Hafeez, Tighter security not in place even six years after 26/11 terror attacks in Mumbai, THE TIMES OF INDIA, (Nov. 26, 2014), available at http://timesofindia.indiatimes.com/india/Tighter-security-not-in-place-even-six-years-after-26/11-terror-attacksin-Mumbai/articleshow/45276962.cms/. (last accessed on Apr. 24, 2015 at 10.10 p.m.),

There are bulletproof speedboats deployed for the security. There were several other measures taken to tighten up the security of India. More ships, submarines and aircrafts of the Indian Navy, Air Force, Coast Guard and the State Agencies have been deployed off the west coast for the better security and protection. Joint Operations Centres (JOCs), set up by the Navy as command and control hubs for coastal security at Mumbai, Visakhapatnam, Kochi and Port Blair are fully operational[20].

Post the 26/11 attack, the Railway Protection Force (RPF) beefed up electronic surveillance at the Chhatrapati Shivaji Terminal.

There were also suggestions that the policemen should be equipped with proper weapons to handle crisis because we are aware that most of the policemen on duty during the attacks on the CST were poorly armed and some of them just had a lathi as their sole weapon. This obviously could not match the sophisticated weapons of the terrorists. So the policemen should be equipped with such weapons so as to take control of any critical situation.

EFFECT OF TERRORISM ON TOURISM

26/11 attacks had a severe impact on the tourism department as well. Mumbai is known for its tourism as well. Tourists in huge numbers arrive every year to visit Mumbai. The terrorist attack changed the scenario completely. There was a change in the scenario to such an extent that India was considered to be an unsafe place for the tourists. Tourism also adds to the national revenue. Fall in the tourism rates also affected the national economy indirectly[21].

Terrorist attacks create an atmosphere of fear. *Once bitten twice shy,* this proverb is apt in such a situation. It is pretty evident that once a person who is a tourist in another country and he becomes a victim of terrorist attack the he would think twice before again visiting the place again. This is what happened to many tourists who were terrorised after the brutal 26/11 attack in which the aim of the terrorists was also to attack the tourists as well.

CORRUPTION AND THE 26/11 ATTACKS

The attack of 26/11 has a lot to do with the corruption in our country. There

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[20] Six Years After 26/11 Attacks, Coastal Security 'Much Stronger,' Says Government, NDTV (TELECASTED on Nov. 26, 2014), available at http://www.ndtv.com/india-news/six-yearsafter-26-11-attacks-coastal-security-much-stronger-says-government-704051/.(last accessed on Apr. 24, 2015 at 10.20p.m.)

[21] Shweta Mishra, Impact of Terrorist Attack on Tourism in India, available at www.anvikshikijournal.com/download.ashx/.(last accessed on Apr. 26, 2015 at 8.30p.m.),

has been corruption at every level if we go on to analyse the situation. Intelligence agencies, local police, top officials and ministers of the government, all of them were considered to have been a bit corrupted in preventing such an attack.

It was alleged that the Indian Intelligence agencies, British Intelligence agencies as well as the US Intelligence agencies had prior information relating to the attacks. All the intelligence agencies of the three countries had gathered some information regarding the attacks but they failed to coordinate with each other properly and thus their collection of information failed to materialise in preventing one of the deadliest terrorist attacks in India[22].

Local police is also considered to be corrupted to a very large extent. There is not just one example but various examples which makes it evident that the police and its working is not upto the mark. One week after a blast ripped through the Delhi High Court premises killing 17 people, sleuths from the National Investigation Agency (NIA) and the National Security Guard took a very long time to decide on the type of explosive used. Forensic laboratories in Delhi, Chandigarh and Hyderabad gave three different reports on the bomb component. India's police force is in disarray. Years of accumulated neglect have resulted in a force barely able to respond to a 10.9 per cent increase in crime each decade. It is incapable of an effective response to threats like terrorism[23].

The Police force in India is never considered to be ready for a big attack. In most of the cases policemen take everything casually. This was pretty evident during the 26/11 attacks also. There was a sense of panic in the Mumbai Police Control Room (PCR) when the phones started ringing. Many witnesses called up the Police Control Room to inform the police of the latest happenings in the city.[24] The police largely failed in coordinating their actions. In fact initially they considered the firing by the terrorists to be some sort of local gang war or routine firing which would eventually come to an end[25].

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[22] Sandeep Unnithan and Bhavna Vij-Aurora, India Doesn't Learn, INDIA TODAY, (Nov.16, 2012 last accessed on Apr. 24, 2015 at 10.30 p.m.), available at http://indiatoday.intoday.in/story/four-years-after-26-11-indiais-not-ready-to-tackle-a-terror-attack/1/229460.html/.

[23] Seaton J., Understanding Not Empathy in Thussu DK and Freedman D (Ed) War and the Media Reporting Conflict 24/7, (2003), Vistaar Publication, at 45

[24] Smita Nair and Srinath Raghvendra Rao, Mumbai Police Control Room on 26/11 attack: Panicky, Confused, Rambling, THE INDIAN EXPRESS, (Dec. 24, 2014), (last accessed on Apr. 26, 2015 at 10.55p.m.), available at http://indianexpress.com/article/india/india-others/mumbai-pcr-panicky-confused rambling2/#sthash.TJ2f6ndS.dpuf/.

[25] Campbell C., Commodifying September 11: Advertising, Myth and Hegemony in Chermark et al (Ed), Representation of September 11, (2003), Praeger Publications, at 50

SUGGESTIONS

The dilemma pertaining to the combating of either the terrorism or the corruption has been very debatable. However, the following recommendations might help in order to make situation much easy:

1. Conflicts among administration: That the inner conflicts between the administrators and their power
2. Strict laws: Implementation of strict laws is needed, recent trends are to be observed and necessary changes are to be taken care of.
3. More improved mechanism to fight against the two so that another incident akin to 26/11 does not take place.
4. A balanced or harmonious way has to be opt for, in order to fight against the two.
5. Change in domestic and foreign policy- So that by changing the foreign policy, representatives of two or more countries can sit together and decide as to what exactly the changes are to be required in order to combat either or both of them. By changing the domestic policy, country would be able to have a swift governing system and shall not fall unto the dilemmas of combating either terrorism or corruption and end up having another disastrous event.

CONCLUSION

Corruption, in a contemporary scenario like ours has become more of a habit which nobody wants to get rid of! Not a single files or a document moves ahead unless the money fills the pockets. For ministers, it has become a source of earning, in urge of collecting more of money, ministers have foregone their responsibility of governing the country unto truth and faith. Hence leading such problems like terrorism for instance, is an additional trouble gifted by corruption. For many ministers, terrorism is the bigger threat than corruption but the actual story behind that is nothing but corruption itself. The involvement of high-profile ministers and companies with the terrorist groups has change the modern scenario and has left the country to fight against the muddles.[26]

It is very essential to understand the fact that the system of defence of a country is akin to that of a human body, that when the body is internally strong in

[26] Brown M., et al., Internet News representation of September 11: Archival impulse in the age of Information in Chermark et al (Ed), Representation of September 11 (2003), Praeger Publications, at 103

those instances the body can fight against the externalities, however if the body itself isn't strong enough to bear the external forces in that case, the body shall collapse and end.[27] Hence in a similar fashion, Indian system of governance has to strengthen itself in such a way that first it should try to eradicate the problem dwelling inside, within i.e. corruption at smaller and larger levels. Further, corruption is a way by which the country in itself gets attacked robbing it off its wealth so possessed by its own citizens which makes things way worse, hence dangerous than the terrorism. It is like when a person cannot be faithful to its own brethren who are the citizens of his own country, it should not be expected that the same person shall help us out in the times of need and shall be the one the harm us to the maximum extent.

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[27] Webstar F., Information Warfare In An Age Of Globalization in Thussu DK and Freedman D (Ed) War and the Media Reporting Conflict 24/7, (2003) Vistaar Publication, at 58.

RIGHT TO PRIVACY AND MEDIA INTRUSION

Dr. Prem Kumar Agarwal*

ABSTARCT

The right to privacy in India has failed to acquire the status of an absolute right. The right in comparison to other competing rights, like, the right to freedom of speech & expression, the right of the State to impose restrictions on account of safety and security of the State, and the right to information, is easily relinquished. The exceptions to the right to privacy, such as, overriding public interest, safety and security of the State, apply in most countries. Nonetheless, as the paper demonstrates, unwarranted invasion of privacy by the media is widespread. It also cannot be denied that the media's role, in a few cases, is apparently intrusive and far from ethical. But these debatable matters cannot be discussed and decided upon without taking into consideration the enormous positive contributions of the media in the course of its long existence. In so doing, we must try to achieve a fair balance between privacy right of an individual and the society's right to know.

Key Words: Privacy, Liberty, human rights, media, intrusion, regulation, right to life, right to know, Constitution, sting operation.

INTRODUCTION

Each individual is unique. For the sake of maintenance of this uniqueness, an individual needs a space of his own which no one should encroach upon. This space may be called 'privacy'. Human society has moved increasingly towards an individualistic approach moving away from whole existence in public. And it is no wonder that people are becoming more and more conscious of their individual spaces within the society. At the same time, emergence of a powerful media, especially the electronic media, in the last few decades has brought into limelight issues of privacy.

CONCEPT OF PRIVACY

The term 'privacy' derives its origin from the Latin word 'privatus'. The boundaries and content of what is to be considered as private differs amongst countries, cultures and individuals and varies with the waves of time. We can trace the historical origin of the concept of privacy in Aristotle's philosophical distinction between the public sphere of political activity and the private sphere of domestic

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and family life. 'Privacy' can be described as "the rightful claim of the individual to determine the extent to which he wishes to share himself with others and his control over the time, place and circumstances to communicate with others. It means his right to withdraw or to participate as he sees fit. It also means the individual's right to control dissemination of information about himself."[1]

Judge Cooley has considered privacy as synonymous with the right to be let alone.[2] Different authors and linguists have defined it in different ways. Edward Shils defines privacy as a "'zero relationship' between two or more persons in the sense that there is no interaction or communication between them if they so choose."[3] He also observes that the respect for privacy has its roots in the "values of modern liberalism".[4]

To put it simply and succinctly, privacy means the right of an individual or a body of individuals to protect his/their personal affairs and information from revelation to public and reveal it as per his/their wish. It is a capability that negotiates boundary conditions of social relations; reflects values of conventional morality and of inviolate personality, and has its foundation in the instincts of nature.[5] Privacy creeps in almost every avenue that an individual ventures into. Privacy may be physical, informational, medical, and financial and so on and so forth.

In Black's Law Dictionary, privacy has been divided into two types:

Autonomy Privacy: An individual's right to control his or her personal activities or intimate personal decisions without outside interference, observation, or intrusion.[6]

Informational Privacy: A private person's right to choose to determine whether, how, and to what extent information about oneself is communicated to others, especially sensitive and confidential information.[7]

James Cornford wrote on the July 1981 issue of The Political Quarterly:

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[1] ADAM CARLYLE BRECKENRIDGE, RIGHT TO PRIVACY 1 (1971).
[2] THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2nd ed. 1888).
[3] Edward Shils, "Privacy: Its Constitution and Vicissitudes", 31 Law and Contemporary Problems 31, no. 2, 281 (Spring 1966), available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3109&context=lcp (last visited July 1, 2013).
[4] Edward Shils, "Social Inquiry and the Autonomy of the Individual", in DANIEL LERNERED., THE HUMAN MEANING OF THE SOCIAL SCIENCES 120 (1959).
[5] RobanSamarajiva, Interactivity As Though Privacy Mattered, in Phillip E. Agre& Marc Rotenberg, Technology and Privacy: The New Landscape 277 (1997) and Jeffry H. Reiman, Privacy, Intimacy and Personhood, 8 Phil & Pub Aff, 26 (1976) cited in P. ISHWARABHAT, FUNDAMENTAL RIGHTS: A STUDY OF THEIR INTERRELATIONSHIP 324 (2004).
[6] GARNERET AL. (EDS.),BLACK'S LAW DICTIONARY1233 (8th ed.).
[7] *Id.*, at 1233.

[T]here is no agreed definition of 'privacy', and indeed most definitions turn out upon examinations to be definitions of 'right to privacy' rather than of privacy itself. Of these rights, there are roughly three kinds:

1. General or Constitutional rights, usually specified as protection from intrusion in domestic affairs and from surveillance, harassment, exposure or embarrassment.
2. Specific legal rights which touch on privacy, such as those protected by the laws of confidence, defamation, trespass or contract.
3. Procedural rights, such as the rules governing the use of personal information especially that required compulsorily by government. These rules sometimes extend also to the nature of the information required, but this aspect is less developed.[8]

Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops."[9] The concept of 'right to privacy' is used to describe not only rights purely in the private domain between individuals but also constitutional rights against the state. However, the former deals with the extent to which a private citizen (which includes the media and the general public) is entitled to procure personal information about another individual. But the latter is about the extent to which government authorities can intrude into the life of the private citizen to keep a watch over his movements through devices such as telephone-tapping or surveillance. As in today's world, technological revolution has posed great threat on this privacy aspect, need has been felt to formally protect it. A legally enforceable right of privacy is deemed to be a property protection against this type of encroachment upon the personality of the individual.[10] Another aspect which cannot be forgotten is that like any other rights, privacy right should not be deemed absolute. Limitations may also be liable to be imposed like public interest matters. Similarly, when a matter already appears in a public record or public disclosure has already been made or consent has been taken from that person, in such cases privacy no more subsists.

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[8] James Cornford, The Prospects for Privacy, The Political Quarterly, Vol. 52, Issue 3, 295 (July 1981).
[9] Warren and Brandeis, Right to Privacy, Harvard Law Review, Vol. IV, No. 5 (December 1890).
[10] Thomas E. Towe, Growing Awareness of Privacy in America, 37 Mont. L. Rev. 39 (Winter 1976).

It is hardly possible to specifically define the scope of privacy as a number of issues can fit within the broad contours of the concept of privacy. Several issues like home, family, conjugal rights, medical information and treatment, employment, financial information may well be included under this concept. Although it is concerned with the inner environs of human life and sanctuary for personal convulsions, due to a network of legal obligations it imposes on other persons in the society, its nexus with right to property, freedom of speech, expression and association and other rights is complex.[11] Mutuality of assistance and balancing amidst all these rights is a major factor in various spheres of privacy.[12] But the present discussion will be confined to 'privacy issue' only in the context of freedom of press vis-à-vis media.

RIGHT TO PRIVACY UNDER INTERNATIONAL INSTRUMENTS

Before going into the detailed discussion on the status of right to privacy in different jurisdictions, it is very much essential to discuss firstly its human right status at the international level.

Privacy is claimed to be one of the fundamental human rights available to all human beings. An eloquent proof of this is the Universal Declaration of Human Rights, 1948 which recognizes right to privacy as a human right. Article 12 of the Universal Declaration of Human Rights states:

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

The International Covenant on Civil and Political Rights, 1966 reiterated the same in its Article 17 and it is noteworthy to mention here that India has ratified this Covenant and thereby bound by its Articles.

The European Convention on Human Rights 1950 in its Article 8 deals with 'right to respect for private and family life'. It reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-

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[11]P. ISHWARA BHAT, FUNDAMENTAL RIGHTS: A STUDY OF THEIR INTERRELATIONSHIP 324 (2004).
[12]*Id.*, at 324.

being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

CONFLICT BETWEEN RIGHT TO PRIVACY AND FREEDOM OF PRESS

Before considering Indian law on privacy, it will be useful to look at the privacy laws of the United States and the United Kingdom for Indian privacy law is mainly based on case-laws of the United States which, in turn, has developed its own laws with the help of ideas contained in early English case-laws. However, it is noticeable that the rate of growth of privacy law in America was much faster than in England.

Right to Privacy under English Law

The formal recognition of right to privacy is a recent phenomenon in England. Before that we can trace enforcement of privacy right through other avenues of law, like breach of confidence, libel, trespass to person and property, malicious falsehood, etc. It was in 1888 when Judge Cooley for the first time defined privacy as a right to be let alone. But before that there was indirect recognition of privacy which we may trace in the earlier cases like *Prince Albert v. Strange*.[13] In this case, injunction was sought to restrain the publication and exhibition of unauthorized copies of etchings and lists of works by Queen Victoria and her husband, Prince Albert which were made for their private amusement. A workman of the authorized printer, while taking impressions for the private use of the Royal family, took impressions for himself also and sold them to the defendant. The Court of Chancery granted relief on the basis of property right and mainly for breach of confidence in employment. The Vice-Chancellor observed: "Upon the principle, therefore, of protecting property, it is that the common law, in cases not aided nor prejudiced by statute, shelters the privacy and seclusion of thoughts and sentiments committed to writing, and desired by the author to remain not generally known."[14] This case, though not expressly but implicitly, gave recognition to an individual's concern for retaining control over the private sphere of his/her life and access of information private in character. Before this case, there was another case which is relevant here is *Abernethy v. Hutchinson*[15]. Abernethy was a professor, whose lectures were very famous, sought relief against unauthorized publication of lectures delivered to students at a hospital. In the affidavit, he claimed that the lectures 'were in the nature of private lectures and were not attended by any persons unless by his permission, and were not in any way open or accessible to the public.'[16]

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[13](1849) 1 H & Tw 1; 47 ER 1302.
[14](1849) 2 De G &Sm 652; 64 E.R. 293 at 695.
[15](1825) 1 H& Tw 28; 47 ER 1313.

However, the language of 'privacy' was not used in Lord Eldon's judgment – although privacy was a well-known concept in 1825 it seemed to be little associated with the actions of public figures seeking to control their publicity.[17]

In 1970 the Justice Report on Privacy and the Law recommended that a legal right of privacy should be created enabling persons whose rights were infringed to sue in tort.[18] A draft bill was also prepared by the Justice Committee. The then M.P., Bryan Walden also prepared a Bill (commonly known as the 'Walden Bill') and placed it before the House of Commons. The Press Council raised voice against the bill contending possible threat to freedom of speech. Under this backdrop, the Younger Committee was appointed on May 13, 1970 to prepare a report on the issue. In the Younger Committee Report, two aspects of privacy were highlighted:

"The first of these is freedom from intrusion upon oneself, one's home, family and relationships. The second is privacy of information, that is the right to determine for oneself how and to what extent information about oneself is communicated to others."[19]

[S]ir Kenneth Younger, the Chairman and his colleagues rejected the argument for a general legal right of privacy, instead they recommended:

(1) That individuals should have a legally enforceable right of access to the information held about them by credit rating agencies (but not for data banks generally).

(2) That private detectives should be licensed, with criminal penalties for those working unlicensed.

(3) That the use of electronic or optical devices for surveillance or gaining information should be made unlawful.

(4) That it should become a civil wrong to disclose or use information obtained by illegal means.[20]

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[16] *Id.*, at 1315.

[17] MEGAN RICHARDSON ET. AL., BREACH OF CONFIDENCE: SOCIAL ORIGINS AND MODERN DEVELOPMENTS 35 (2012).

[18] Gerald Dworkin, The Younger Committee Report on Privacy, Mod. L. Rev., Vol. 36, No. 4, July 1973, pg. 399.

[19] Kenneth Younger, Report of the Committee on Privacy 10 (Cmnd. 5012, Her Majesty's Stationary Office, London 1972) as cited in ELENIKOSTA, CONSENT IN EUROPEAN DATA PROTECTION LAW 62 (2013).

[20] Rudolf Klein, The Report of the Committee on Privacy, The Political Quarterly, Volume 43, Issue 4, 499 (October1972).

The Younger Committee also made recommendations regarding the constitution and practice of the Press Council, BBC's Programmes Complaints System, etc. It also listed 10 guiding principles to protect personal data while handling computers. Younger was followed in 1975 by a White Paper entitled Computers and Privacy and its supplement Computers: Safeguards for Privacy.[21] In 1976, another Committee was set up and under the Chairmanship of Sir Norman Lindop, it submitted its Report in 1978. In the Report, the recommendation was made for establishment of a Data Protection Authority and Code of Practice for the business sectors. Lindop's report, presented to Parliament in December 1978, is the watershed between the attempt to develop a general English Law of privacy with a sub-set of informational privacy rules, and the creation of a data protection law directed exclusively to data relating to individuals proposed to be processed automatically and as a framework for balancing the interests of the individual, the data user and the community at large.[22]

In the meantime, there has been a significant development in the field of privacy as many countries like the United States of America, Canada, Sweden have enacted their own legislation on protection of data and privacy. Therefore, the United Kingdom, which was lagging far behind and felt the need for putting in place some sort of protection, ultimately enacted the Data Protection Act of 1984.

But till 1990, so far no significant step was taken to consider press intrusions on the private lives of individuals. At this juncture, the Calcutt Report, for the first time, considered the issue of press intrusion on privacy. The Committee recommended the introduction of the offences covering acts involving, inter alia, placing a surveillance device on private property without the consent of the lawful occupant with intent to obtain personal information with a view to its publication and taking a photograph or recording of a voice of an individual who is on private property without his consent with a view to its publication and with intent that the individual shall be identified.[23] The Committee also recommended that it should be a defence to any of these proposed offences that the act was done for the purpose of preventing, detecting or exposing the commission of any crime, or other seriously antisocial conduct or for the protection of public health or safety or under any lawful authority.[24]

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[21] John Cooper, Introduction to Data Protection and Privacy (18/8/2008) at 9, available at http://www.john-cooper.info/new_folder/Introduction%20to%20 Data%20Protection %20and%20Privacy.pdf (last visited June 23, 2013).
[22] *Id.*, at 9.
[23] *Id.*, at 16.
[24] *Id.*, at 16.

In the year of 1991, again the *Kaye v. Robertson*[25] case pointed towards the inadequacy of English Law to protect individual privacy. In this case, the plaintiff (Kaye) was a popular comedy series actor who met with an accident and suffered severe bodily injury. He was admitted in a hospital where a journalist and a photographer of Sunday Sport, a weekly publication entered into his cabin without permission of the hospital and interviewed Kaye and took his photographs. In absence of any privacy right, the plaintiff sought for interlocutory injunction to restrain the defendants from publishing those materials by alleging malicious falsehood, libel, passing off and trespasses to the person and claimed that when he was so interviewed, he was not in a fit condition to consent thereto. At the first instance, injunction was granted against which the defendants appealed. While hearing the appeal, Glidewell L.J. made the following observation:

[I]t is well-known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy. The facts of the present case are a graphic illustration of desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals.[26]

The appellate court partially allowed the defendants' appeal by granting injunction on certain terms. While delivering judgment, Bingham L.J. quoted Professor Markesinis[27]: "English law, on the whole, compares unfavourably with German law. True, many aspects of the human personality and privacy are protected by a multitude of existing torts but this means fitting the facts of each case in the pigeon-hole of an existing tort and this process may not only involve strained constructions; often it may also leave a deserving plaintiff without a remedy."[28]

One of the most glaring examples of media intrusion into the private lives of celebrities is the tragic death of the Princess of Wales, Diana. It is well-known that she had many a times complained against invasion by the media into her personal life and also her family and appealed to the media to respect her private life and allow her to lead a normal life. She was also compelled to seek legal remedies for alleged intrusion into her private life and obtained an injunction against a particular press photographer. Notwithstanding all her efforts, there was no respite for her and she was subjected to continuous media intrusions. She met with the fatal accident which took away her life, while she was pursued by a gang of so-called Paparazzi in France. At her funeral, her brother accused journalists of having her "blood in

[25][1991] F.S.R. 62.
[26]*Id.*, at 67.
[27] The German Law of Torts, (eds. 2nd 1990), at 316
[28]*Id.*, at 71.

their hands". It cannot be denied that the tragic death of Princess Diana in 1997 raised serious concerns about protection of privacy vis-à-vis press freedom in Britain.

In *Douglas v. Hello Ltd.*[29], which marked a significant breakthrough, one can notice a remarkable expansion of the doctrine of breach of confidence under Section 6 of the Human Rights Act, 1998 that requires the English courts should give effect to the rights under this Act in the European Convention on Human Rights. The facts of the case is that the popular film stars Michael Douglas and Catherine Zeta Zones had sold the exclusive photography right of their marriage ceremony to the OK! magazine. Under this contractual obligation, they restricted unauthorized photography of their wedding. Despite tight security arrangements, a photographer, without any permission, took photographs of the event which were bought by a rival magazine Hello!. The plaintiffs moved the court to prevent publication of those photographs. Though at the first instance, an injunction was granted in their favour, the Court of Appeal however lifted the injunction and held that they (the plaintiffs) were only entitled to claim damages. As a result, Hello! published those photographs. But when the matter came up before the High Court of Justice Chancery Division, Hello! was held liable for breach of confidence. Lord Justice Sedley (Court of Appeal) remarked:

[W]hat a concept of privacy does, however, is accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwanted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognize privacy itself as a legal principle drawn from the fundamental value of personal autonomy.[30]

Position in USA

American law on privacy based its foundation on British Common Law. Ironically, it was by borrowing from English case law and creatively interpreting it that the law in America developed.[31] In the year 1890, Samuel Warren and Louis Brandeis's article titled 'Right to Privacy'[32] well reflected the growing need to protect privacy. This article can be identified as the first step towards the development of American law on privacy. The need for formal protection of privacy and increasing instances of invasion of privacy in the hands of press were elaborately discussed by them. They rightly pointed out:

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[29][2003] EWHC 786 (Ch).
[30] Douglas v. Hello! Limited 2000 WL 1841643 at paragraph 126.
[31]MADHAVI GORADIA DIVAN, FACETS OF MEDIA LAW 116 (2006).
[32] Warren and Brandeis, supra note 10.

[T]he press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be the subjects of journalistic or other enterprise.[33]

The Warren and Brandeis article is oft-quoted (rather mostly quoted) by the judges all around the world where privacy related matters come in dispute. The popularity of sensational journalism (commonly known as 'yellow journalism') and technical inventions which make it easy to get access to the private sphere of the individuals made the necessity to have a privacy right more prominent. In their article, they advocated for creation of a new and separate right named right to privacy. They suggested that the existing causes of action under the common law did not adequately protect privacy but that the legal concepts in the common law could be modified to achieve the task.[34] When the New York Court of Appeal declined to recognize a common law tort of action in Robertson v. Rochester Folding Box Co.,[35] it faced severe criticism which led the legislature to enact the New York Civil Rights Act § 51 and give formal recognition to the tort action for invasion on privacy in the year 1903.In the *Pavesich v. New England Life Insurance Co.*,[36] for the first time tort action for invasion of privacy was given recognition by the Supreme Court of Georgia which observed that publication of plaintiff's photograph without consent is violation of right to privacy which is a legal right. In 1960, William Prosser in his article 'Privacy'[37] described the tort of "invasion of privacy" as a collection of four types of torts namely, (i) intrusion upon seclusion, (ii) public disclosure of private facts, (iii) false light, and (iv) appropriation.

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[33] Warren and Brandeis, *supra* note 10 , at 193.
[34]DANIEL J. SOLOVE AND PAUL M. SCHWARTZ, PRIVACY, INFORMATION AND TECHNOLOGY 25 (3rd ed. 2011).
[35]64 N.E. 442 (N.Y. 1902).
[36]50 S.E. 68 (Ga. 1905).
[37]48 Cal. L. Rev. 383 (1960).

Griswold v. Connecticut and *Roe v. Wade* are the two path-breaking judgments in the development of American privacy law. Though the right to privacy has not been explicitly mentioned in the Constitution of United States, the courts through their judgment and interpreting the Constitutional Amendments creatively have recognized right to privacy as constitutionally valid. In *Griswold v. Connecticut*[38], the defendants, a director of a media clinic and a doctor challenged their conviction under a state law which banned the use of contraceptives (birth control devices) before the Supreme Court of United States. The Supreme Court found that the ban on the use of contraceptives was unconstitutional as violating the right to marital privacy and held that the right to privacy is implicit in the Third Amendment, Fourth Amendment, Fifth Amendment and Ninth Amendment of the United States Constitution. In this case, Douglas, J. (representing five other judges) opined:

[T]he present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama,* 377 U.S. 288, 307 ... The very idea is repulsive to the notions of privacy surrounding the marriage relationship.[39]

In *Roe v. Wade*,[40] Roe, an unmarried pregnant woman, brought an action before the District Court (Northern District of Texas) challenging a Texas Law that banned all abortions except those necessary to save mother's life as unconstitutional. Later on, some similar cases were consolidated and heard by a three-judge court which held that the Texas statutes criminalizing abortion were constitutionally vague and over-broad and therefore, void. But the District Court denied the injunctive relief for which the parties moved to the Court of Appeals and finally the matter was decided by the United States Supreme Court. The Supreme Court speaking through Blackmun, J. held that the state may not interfere with the decision of termination of pregnancy taken by a woman until the end of first trimester of pregnancy and after that, the state may regulate the abortion procedure to preserve and protect maternal health. Blackmun, J. observed:

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[38](1965) 381 U.S. 479.
[39]*Id.*, at 485-486.
[40](1973) 410 U.S. 113.

[T]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.[41]

Now we may come to *Ayeni v. Mottola*[42] case. This case arose from a search conducted by armed Secret Service Agents in the home of a credit-card fraud suspect, Mr. Ayeni. The agents brought with them a crew of media personnel to record (audio and video) of the search. The plaintiffs brought an action challenging that such recording of searching activities in the private home was unconstitutional. The United States Court of Appeals for the Second Circuit observed that such recordings were not necessary for the conduct of the searches and held that it constituted unnecessary intrusion in the right to residential privacy and violated the Fourth Amendment of the Constitution of United States.

In another case *Wilson v. Layne*,[43] while executing a warrant to arrest the petitioner's son, a team of police officers from the United States Marshall Service and Maryland County invited media representatives to accompany them despite the fact that the warrant did not mention any such media ride-along. The petitioners brought an action for damages as they claimed that such attempted execution violated their Fourth Amendment rights. The defendants took the defence of qualified immunity. On certiorari, The United States Supreme Court did hold that such media ride-along attempted execution in question violated the Fourth Amendment but further held that the defendants were entitled to claim qualified immunity as the position of state law in this regard was not clear.

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[41] *Id.*, at 153.
[42] (1994) 35 F. 3d 680.
[43] (1999) 526 U.S. 603.

Dietemann v. Time, Inc.,[44] is a case of invasion of privacy while conducting investigative journalism. In this case, Life magazine was working upon a story for publication by conducting undercover investigations which were supposed to expose the quack doctors practicing medicine illegally. Cooperating with the Los Angeles District Attorney's Office, the Life magazine got entry into the home of Mr. Dietemann (a suspected quack), practicing from his home in the guise of a patient and took photographs and audio-recorded the conversation with him and transmitted the same to a police van outside the home and thus, revealed his illegal activities. Dietemann sued for invasion of privacy. The United States Court of Appeals for the Ninth Circuit observed that "newsgathering is an integral part of news dissemination … the hidden mechanical contrivances are "indispensible tools" for newsgathering. Investigative reporting is an ancient art; its successful practice long antecedes the invention of miniature cameras and electronic devices."[45], but also held that:

[T]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.[46]

Another example of invasion of privacy is *Galella v. Onassis*.[47] Ronald Galella was a freelance photographer and a paparazzo specializing in taking and selling photographers of well-known people. Jacqueline Onassis, the widow of President John F. Kennedy and wife of multimillionaire Aristotle Onassis, was one of his (Galella's) special targets. To take photographs, Galella several times interrupted Mrs. Onassis while she was playing games or chased her with a boat while she was swimming and invaded her children's' school. In the zeal to take a snap, Galella once jumped in front of her son while he was riding a bicycle and on this occasion to protect the boy, Secret Service agents in charge of the boy, arrested and detained Galella. On acquittal, Galella filed suit against Mrs. Onassis and the agents for false arrest and malicious prosecution and complained for unlawful interference with his trade. Circuit Judge Smith held that the Secret Service agents were justified in their action as they reasonably foresaw that Galella's conduct could place the boy in danger and thereby they acted in the scope of their duties. The United States Court of Appeals for the Second Circuit held that:

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[44](1971) 449 F.2d 245.
[45]*Id.*, at 249.
[46]*Id.*, at 249.
[47](1973) 487 F. 2d 986.

[G]alella's action went far beyond the reasonable bounds of news gathering. When weighed against the *de minimis* public importance of the daily activities of the defendant, Galella's constant surveillance, his obtrusive and intruding presence, was unwarranted and unreasonable. If there were any doubt in our minds, Galella's inexcusable conduct toward defendant's minor children would resolve it.[48]

In *Shulman v. Group W. Productions*,[49] the plaintiffs, automobile accident victims brought action against the defendant, the television producers for videotaping and broadcasting a documentary showing their rescue and transportation to a hospital by a medical helicopter and also broadcast was made of a conversation (audio-taped within the helicopter) about how the victim was feeling then, etc. The plaintiffs alleged that such broadcast constituted invasion of privacy. When the case came up before the Supreme Court of California, Werdegar, J. held that:

"The broadcast details of Ruth's rescue of which she complains were, as a matter of law, of legitimate public concern because they were substantially relevant to the newsworthy subject of the piece and their intrusiveness was not greatly disproportionate to their relevance."[50]

In his dissenting opinion, Brown, J. observed:

[T]he private facts broadcast had little, if any, social value. The public has no legitimate interest in witnessing Ruth's disorientation and despair. Nor does it have any legitimate interest in knowing Ruth's personal and innermost thoughts immediately after sustaining injuries that rendered her a paraplegic and left her hospitalized for months—"I just want to die. I don't want to go through this."[51]

INDIAN SCENARIO

The Constitution of India does not explicitly mention any right to privacy. But the Supreme Court of India has inferred the right to privacy from Part III (Fundamental Rights) of the Constitution especially Article 21 i.e. right to life. In *Kharak Singh v. State of Uttar Pradesh*,[52] the Supreme considered the question whether Regulation 236 under Chapter XX of the U.P. Police Regulations (which conferred the power of surveillance upon the police) constituted any infringement of any fundamental rights under Part III of the Constitution. The petitioner contended that the said Regulation violated Article 19(1)(d) and Article 21. Examining the issue, the Court held that Clause (b) of Regulation 236 (which permitted domiciliary

[48] *Id.*, at 995.
[49] (1998) 955 P.2d 469.
[50] *Id.*, at 497.
[51] *Id.*, at 503.
[52] AIR 1963 SC 1295.

visits at night) was unconstitutional and therefore liable to be struck down as an abridgment of Article 21. Though the Court (the majority view)opined that Article 21 of the Constitution is comprehensive enough to accommodate various kinds of rights concerning personal liberty of an individual other than those already contained in Article 19(1)(d), it held that "the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III."[53] But Justice Subba Rao expressed his minority view in the following words:

[I]t is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his "castle": it is his rampart against encroachment on his personal liberty.[54]

Govind v. State of Madhya Pradesh[55] is also a case where police surveillance under Regulation 855 and 856 of the Madhya Pradesh Police Regulations was challenged as unconstitutional. In this case, the Court inferred the right to privacy from both Articles 19(1)(d) and Article 21 by holding that:

[T]he relevant Articles of the Constitution, we have adverted to earlier, behave us therefore to narrow down the scope for play of the two Regulations ... Depending on the character and antecedents of the person subjected to surveillance as also the objects and the limitation under which surveillance is made, it cannot be said surveillance by domiciliary visits would always be unreasonable restriction upon the right to privacy. Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest.[56]

Justice Mathew further observed that "The right to privacy in any event will necessarily have to go through a process of case-by-case development."[57]

According to Govind Mishra, while totality of scheme of Part III bestows general right to privacy, it is particularly traceable in the concept of 'life' under

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[53]*Id.*, at paragraph 21.
[54]*Id.*, at paragraph 38.
[55]AIR 1975 SC 1378.
[56]*Id.*, at paragraph 30, 31.
[57]*Id.*, at paragraph 28.

Article 21.[58] In *Malak Singh v. State of Punjab and Haryana*,[59] the Apex Court held that police surveillance and maintenance of history sheets are justified as only to the extent necessary for prevention of crime, but also observed that arbitrary interference with the fundamental freedoms guaranteed under the Constitution will attract protection of the court. An important point that strikes from the above discussion is that domestic and physical privacy gather support from procedural due process as well as substantive rights under both Article 19 and 21.[60]

In three landmark cases – *SheelaBarse v. State of Maharashtra*, *PrabhaDutt V. Union of India* and *State v. Charulata Joshi*, the Supreme Court examined the freedom of press in the context of prisoner's right to privacy vis-à-vis the right of the press to interview a prisoner. In *Sheela Barse v. State of Maharashtra*,[61] the Court held that pressmen as friends of the society should be allowed to interview the prisoners in accordance with the jail manual concerned because it is the legitimate right of the citizens to know whether the prison administration is running their affairs properly. It was held that:

[W]e have already pointed out that the citizen does not have any right either under Article 19(1)(a) or 21 to enter into the jails for collection of information but in order that the guarantee of the fundamental right under Article 21 may be available to the citizens detained in the jails, it becomes necessary to permit citizen's access to information as also interviews with prisoners. Interviews become necessary as otherwise the correct information may not be collected but such access has got to be controlled and regulated.[62]

The Court further observed that the right of the press to interview a prisoner should always be subjected to the willingness and consent of the prisoner. In this case, the Supreme Court referred one of its previous judgment in *PrabhaDutt v. Union of India*[63] where it stressed upon the voluntary consent of the prisoner whom the press wants to interview by holding that: "The existence of a free Press does not imply or spell out any legal obligation on the citizens to supply information to the Press ..."[64] The same principles was again reiterated in *State v. Charulata Joshi*.[65]

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[58]Govind Mishra, Privacy: A Fundamental Right in the Indian Constitution 8 and 9 Delhi Law Review (1979-80) at pp. 159-160 as cited in P. ISHWARA BHAT, *supra* note 12, at 326.
[59]AIR 1981 SC 760.
[60] P. ISHWARABHAT, *supra* note 12, at 326.
[61](1987) 4 SCC 373.
[62]*Id.*, paragraph 14.
[63]AIR 1982 SC 6.
[64]*Id.*, at paragraph 2.
[65]AIR 1999 SC 1379.

R. Rajagopal v. State of Tamil Nadu[66] is a very significant case in which the Supreme Court, for the first time, directly dealt with the freedom of press vis-à-vis the right to privacy of citizens in a detailed manner. This judgment is regarded as a turning point in the development of Indian privacy law in the context of freedom of press. This case came up before the Supreme Court through a writ petition filed by a Tamil magazine Nakkheeran seeking the publishing right of a material that they were claiming to be an autobiography of a condemned prisoner (convicted for six murders), Auto Shankar whose mercy petition for commutation of death sentence was then pending before the President of India. The intended publication contained certain matters, publication of which might expose his nexus with some high-level public officials. The petitioners challenged the restraint imposed on the publication and contended that in order to suppress these exposures, the public authorities restrained the publication as defamatory and questioned the authorship of Auto Shankar. As Auto Shankar and his family had not been made parties in this case, the Apex Court did not resolve the issue whether the material was written by Auto Shankar himself or not and presumed that it was not written by him. The Court recognized two aspects of right to privacy – (1) the general law of privacy which attracts tortuous liability for unlawful invasion and (2) the constitutional right to privacy. It was held that:

[T]he right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Art. 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages.[67]

The Court further went on to observe that if such matters already appear in public records (even in court records) its privacy no more subsists and the press/ media are free to comment upon those matters. But the position of public officials was held to be different from the other citizens if publication of matters concerns about the discharge of their official duties as in these cases, the press/media are free to publish such matters after a reasonable verification. No prior restraint can be imposed on press for apprehended defamation. In case of reckless disregard of truth, remedy is available only after the publication has been made.

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[66]AIR 1995 SC 264.
[67]*Id.*, at paragraph 28.

In this case, the Court allowed the magazine to publish matters, which the plaintiffs claimed to be the life-story of Auto Shankar, so far it appeared from the public records. But if such publication went beyond the public records, it would amount to invasion of privacy.

In *People's Union for Civil Liberties (PUCL) v. Union of India*,[68] The Supreme Court held that the people have the right to know about the criminal antecedents, assets and liabilities, educational qualifications of the electoral candidates and it is covered under Article 19(1)(a). The people's right to obtain information about these matters is of legitimate interest as these electoral candidates will represent them in the Parliament or State Legislature and when disclosure of the same are made, they become matters of public record. And it is well-established that once a matter becomes a part of public record, publishing those matters cannot be said to be an invasion of privacy.

RECENT INSTANCES OF INVASION OF PRIVACY BY MEDIA

One of the glaring instances of media's invasion into the privacy of a celebrity is that of former matinee-idol and heart-throb Mrs. Suchitra Sen. Mrs. Sen, on her own, has since long decided to live in seclusion shunning any public appearance. She expected that her desire to lead a very personal life would be respected by all. Unfortunately, one of the leading newspaper houses of Kolkata got her photographed without her permission and knowledge, and published her photograph (obtained in a clandestine manner) published in their two newspapers – Ananda Bazar Patrika and The Telegraph on 18/01/2009. This action of the renowned newspaper house was designed only to capitalize the popular craze for her and thereby increase their circulation. One should not lose sight of the fact that in the name of freedom of press, these newspapers tried to further their own financial interests and also indulged in sensationalizing the issue since Mrs. Sen has long been staying away from the public in seclusion. The action of the press needs condemnation by all individuals having minimum reasonableness for not only encroaching upon the private domain of a celebrity but bringing disrepute to the media as a whole.

Another instance of invasion of privacy is the instance of famous Sri Lankan cricketers Tillekarante Dilshan and Jay Surya. A photographer of The Telegraph (renowned English newspaper) tried to invade their privacy in a pub and took photographs in spite of repeated requests from the players not to disturb them. As a result, a scuffle ensued. The photograph of the players with the company of an unknown lady was published in the newspaper on 24/12/2009. This case is a clear case of invasion of privacy by the press.

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[68] AIR 2003 SC 2363.

STING OPERATIONS

Now-a-days sting operation has become an important instrument in the hands of the media to explore and expose corruptions in high places. Dubbed as the fourth estate or the fourth pillar of democracy, media has taken upon itself the responsibility to bring transparency in various organs of the state and other public interest related matters by conducting sting operations.

What is sting operation?

Sting operations are a kind of undercover operations which are used as an instrument to obtain evidence of suspected wrongdoing. So, one can use the two expressions "undercover investigation" and "sting operation" alternatively as they can be said more or less synonymous. In both the cases, the person who is the subject and being filmed is not aware of the presence of a hidden camera and recorder and this means that these are done without his/her consent. The subjects of sting operations are generally apprehended defaulters and some kinds of trap are laid down to encourage them to indulge in the default and catch hold of them red-handed. The public too, deprived of transparency about the working of public servants in office, save the lone RTI Act, are ever willing to gobble up the news they are fed. There are many instances where the media has used sting operations to unearth corruption, cash for votes, etc. and catch the defaulter red-handed. Many-a-times, sting operations are used by the police department but with the evolution and popularity of electronic media, the media houses are increasingly using it (sting operations) as a tool to collect information. However in the hands of media, this power raises serious questions of privacy.

Legality of Sting Operations

In *AniruddhaBahal v. State*,[69] the Delhi High Court recognized the right to conduct sting operation by the citizens (obviously inclusive of press/media) for exposing corruption. In this case, the petitioners conducted a sting operation to expose the unscrupulous practice of taking money for asking questions in the Parliament by some of the Members of Parliament (hereinafter MPs). The said sting operation was broadcasted on TV channels in 2005. But on the basis of such broadcast, no police action was taken against those corrupt MPs, although the Lok Sabha and the Rajya Sabha constituted committees to enquire into the matter. Surprisingly, after one and half year, an FIR was lodged against the petitioners who themselves conducted the sting operation. When the petitioners filed a petition before the Delhi High Court for quashing the FIR for the first time, the Court did

[69](2010) 172 DLT 268.

not quash the same and took cognizance of the matter. The Court ordered the police to book the faulty MPs also. Thereafter, summons was issued against the petitioners. Then the petitioners appealed before the Delhi High Court for quashing the charge-sheet and the order for issuance of summons against them. In the appeal, the petitioners contended that they had conducted the sting operation not to commit crime but to expose corruption and therefore, they were not offenders. Against this contention, the State argued that rather than conducting the operation themselves the petitioners should have informed the matter to the CBI. Dismissing this contention of the State counsel, the learned Court remarked that the people were aware of the sad predicament of the whistleblowers of our country and therefore, there was no doubt that if the petitioners had passed on the information to the CBI, the concerned MPs would have been cautioned well before the conduction of the sting operation. In this case, the Court held that to expose corruption at higher levels of State machinery, "acting as agent provocateurs does not amount to committing a crime."[70] The Court further observed that the Fundamental Duties (Article 51A) of the Constitution of India empowers the citizens the right to "act as agent provocateurs to bring out and expose and uproot the corruption."[71] Finally, the charge-sheet and order of taking cognizance and issuing summons against the petitioners were quashed.

The most important part of the judgment on which the foundation of legality of conducting sting operation rests is as follows:

[I] consider that one of the noble ideals of our national struggle for freedom was to have an independent and corruption free India. The other duties assigned to the citizen by the Constitution is to uphold and protect the sovereignty, unity and integrity of India and I consider that sovereignty, unity and integrity of this country cannot be protected and safeguarded if the corruption is not removed from this country. ... The country is to be defended day in and day out by being vigil and alert to the needs and requirements of the country and to bring forth the corruption at higher level. The duty under Article 51A(h) is to develop a spirit of inquiry and reforms. The duty of a citizen under Article 51A(j) is to strive towards excellence in all spheres so that the nation constantly rises to higher level of endeavour and achievements I consider that it is built-in duty that every citizen must strive for a corruption free society and must expose the corruption whenever it comes to his or her knowledge and try to remove corruption at all levels more so at higher levels of management of the State.[72]

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[70] *Id.*, at paragraph 12.
[71] *Id.*, at paragraph 13.
[72] *Id.*, at paragraph 7.

In *R.K. Anand v. Registrar, Delhi High Court*,[73] the Supreme Court rejected the idea mooted by the respondent in the course of hearing that a TV channel should obtain prior approval of the court for conducting a sting operation and submit all the materials pertaining to the operation before telecast observing that such an action would tantamount to turning the media into a kind of vigilance wing of the court. The Court also remarked that it would be a matter of sorrow for the court to use the media to cleanse its own house and the media on the other hand would also not enjoy their role as the detective agency of the court. More pertinently, the court observed that obtaining prior approval of the court for conducting and telecasting a sting operation would, in effect, mean putting in place a kind of pre-censorship on publication/telecast of court proceedings which would certainly be an infringement of the right of the freedom of press guaranteed under Article 19(1)(a) of the Constitution. The Court, however, observed that this does not mean that the media has the license to publish any kind of report relating to an ongoing trial or conduct sting operation pertaining to a pending trial as per their sweet will. The Court also maintained that carrying out of a sting operation was far more risky and hazardous than an ordinary report and since it is based on trickery it is likely to invite very severe legal constraints and induce harsher penalty.

As we all know that for conducting sting operations traps are laid to gather evidence and catch the offender red-handed. Those traps can be classified into – 'legitimate traps' and 'illegitimate traps' as per *In Re: M. S. Mohiddin*.[74]In this case, the Madras High Court opined that where an offender is already in the process of committing an offence (viz. demanding bribe), entrapping him with the help of the police at the time of committing the offence is acceptable. But where the trap is laid on the basis of suspicion only to find that the person, in fact, succumbs to the temptation or not, may be termed as 'illegitimate traps'. Following this Madras High court judgment, in such cases, if the operation is not authorized by any Act of Parliament, then the persons engaged in the act of entrapping will be 'accomplices' and their evidence will be required to be verified by untainted evidence before conviction.

In *State v. P.K. Jain*,[75] Justice Shiv Narayan Dhingra, however, looked at the persons setting a trap to catch a corrupt person in a different perspective and derided the idea to brand them as 'accomplices' or interested parties and therefore, untrustworthy witnesses whose testimony would require corroboration by independent witnesses. In this backdrop, he rightly observed:

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[73] 2009 (10) SCALE 164.
[74] AIR 1952 Mad 561.
[75] 2007 CriLJ 4137.

[T]he rule of corroboration is not a rule of law. It is only a rule of prudence and the sole purpose of this rule is to see that innocent persons are not unnecessarily made victim. The rule cannot be allowed to be a shield for corrupt....In our judicial system complainant sometime faces more harassment than accused by repeatedly calling to police stations and then to court and when he stands in the witness box all kinds of allegations are made against him and the most unfortunate is that he is termed as an accomplice or an interested witness not worthy of trust. I fail to understand why a witness should not be interested in seeing that the criminal should be punished and the crime of corruption must be curbed. If the witness is interested in seeing that there should be corruption free society, why Court should disbelieve and discourage him.[76]

Speech bringing into question the probity or competence of public officials, and some public figures, is covered by a free expression clause, because it cannot be disentangled from criticism of government.[77] Thus, it is quite clear that if sting operations are conducted to reveal crimes that are adversely affecting the development of our nation, they are justified keeping in view its public interest aspect.

Sting Operations – Negative Criticism

Sting operations can be classified into positive and negative sting operations based on their purpose.[78] Positive sting operation takes place in the interest of the society.[79] On the other hand, negative sting operation harms the society and its individuals.[80] It unnecessarily violates the privacy of the citizens without any benefit to the society.[81]

The debatable nature of sting operations is very well reflected in the aftermath of the sting operation conducted by India TV on Shakti Kapoor. The video of the sting operation showed that Shakti Kapoor, a veteran Bollywood actor known for his roles as villains, demanding sexual favour from an aspiring new comer lady in the film industry (who was in reality a female journalist from the channel in disguise) using casting couch tactic. The editor-in-chief of the India TV contended that they had conducted the sting operation to expose the reality and also alert aspiring lady new-comers in the film industry of the attending dangers. But this action of India

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[76] *Id.*, at paragraph 10.
[77] ERIC BARENDT, FREEDOM OF SPEECH 231 (2nd ed. 2006).
[78] Roshan John, Legality of Sting Operations (May. 18, 2013),available at http://lawinfowire.com/articleinfo/legality-sting-operations[last visited 20/06/2013].
[79] *Id.*
[80] *Id.*
[81] *Id.*

TV attracted severe criticisms from different quarters. Many dubbed it as a glaring example of media's invasion into privacy right of Shakti Kapoor. It was argued that Shakti Kapoor had never claimed himself to be a very moral person and thus, there was no real necessity to expose his sexual promiscuity before the public. Even some important personalities attached to the film industry questioned the very motive of the TV channel arguing that Shakti Kapoor was neither a producer nor a director, so the operation was of no use in exposing the industry's casting couch syndrome. A section of people were of the opinion that increasing TRP rating of the channel was the sole motive behind the sting operation.

But the case, which caused flutter around the country, was the sting operation conducted by a news channel named 'Live India' in August 2007. The telecast of the sting operation showed that one Ms. Uma Khurana, a government school teacher of Delhi compelling one of her girl students into prostitution. As an immediate reaction to the coverage, a crowd gathered at the gate of the school to which Ms. Khurana was attached, demonstrated and even physically assaulted her. Thereafter, she was put under suspension and then was dismissed from service by the Delhi Education Department.

But the police investigation revealed that the student who was being allegedly forced into the black profession by Ms. Khurana was, in fact, a young girl very keen to make a mark as a journalist. Moreover, no evidence was found by the police about the involvement of Ms. Khurana in a prostitution racket.

In December 2007, Delhi High Court took up the matter suomoto. In the course of adjudication, the Court examined various ways and means of minimizing, if not stopping altogether, repetition of such incidents that victimize innocent people and cause irreparable damages to their personal dignity and position. As a matter of fact, the Court advised the Ministry of Information and Broadcasting to consider a few suggestions put forth by the amicus curiae for inclusion in a statute or code of conduct to prevent recurrence of such untoward experience in future. And fortunately, the Press Council of India has included some of those suggestions in the Guidelines for the Press.

GUIDELINES PROVIDED BY PRESS COUNCIL OF INDIA

➢ Right to Privacy

Norm 6 and 7 of the Norms of Journalistic Conduct provided by the Press Council of India deal with Right to Privacy and Privacy of Public figures. Norm 6 forbids the press to invade an individual's privacy simply out of 'prurient and morbid curiosity' and they shall do so only on overriding public interest. It urges the press to exercise utmost caution in publishing news items that may stigmatize women. In

the Explanation part, it is stated that home, family, religion, health, sexuality, personal life and private life affairs of an individual fall within the ambit of privacy save and except matters that influence public or public interest. The said Norm also cautions the press not to divulge name and identification of victims of rape, abduction, kidnapping, or child victims of sexual assault, or pass any comment on their chastity, personal characters, etc. It also advises the press to avoid publication of photographs showing moments of personal grief.

Norm 7 regards the right to privacy as absolute but concedes that the degree of privacy is variable depending upon the person and situation. Accordingly, it is maintained that a public persons cannot be expected to enjoy the degree of privacy that is enjoyable by a private individual. Therefore, his activities and conduct are matters of public scrutiny by the press. The press, however, should ensure the information about a public figure are obtained in a fair manner and published accurately after necessary verification of the reports. While it has cautioned the press not to pester public persons, at the same, it has desired that the public persons should try to be transparent in their activities and extend necessary cooperation to the press in discharging their duties to public. While maintaining that the press is allowed 'latitude' in criticizing public persons, it also should not be done with the motive to gratify malice of the competitors of public personalities.

In Norm 8, it has also advised the press to undertake tape-recording of one's conversation only with his permission except in cases where the same is required for the protection of the journalists in a legal action or they are required for some compelling eventuality. The press should, before publication, also take pains to delete derogatory labels used during conversation.

- **Sting Operations**

Norm 41 clause (B) lays down 'Guidelines on Sting Operations'. It is advised that a newspaper, intending to report a sting operation, is required to obtain a certificate of genuineness from the recorder or producer of the operation. It is further instructed to maintain simultaneous written records of every stage of such sting operation. Responsibility has been bestowed upon the editor to satisfy himself about the public interest aspect of such operation and adhere to all legal requirements. While planning to report a sting operation in the print media, the newspaperman concerned should take into account the consciousness of its probable readership and exercise sufficient caution and sensitivity so that it does not shock or upset the reader.

In the context of conducting sting operations as most of them are conducted by taking photographs or recording videos, the norms laid down for photo journalism

in Norm 42 are relevant to be mentioned. It maintains that unlike written words, a picture or visual display of a news item is capable of leaving a deeper and durable impression on the minds of the readers and therefore, the photo journalists and other visual news-gatherers should have in a more responsible and decent manner to uphold the lofty ideals of journalism. The norm also emphasizes on maintaining accuracy and comprehension and insists upon presenting subjects in proper contexts.

CONCLUSION

Though the right to privacy is arguably, one of most treasured rights, yet our present experiences show that it is often coming into conflict with the freedom of press in various forums. It also cannot be denied that the media's role, in a few cases, is apparently intrusive and far from ethical. But these debatable matters cannot be discussed and decided upon without taking into consideration the enormous positive contributions of the media in the course of its long existence. In so doing, we must try to achieve a fair balance between privacy right of an individual and the society's right to know.

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Transplantation of Human Organ and Tissues Act, 1994: A Case Comment

Mr. Suprya Basu[1]
Prof. N.K. Chakrabarti[2]

The Transplantation of Human Organ and Tissues Act, 1994 which makes an effort to elaborate the provisions dealing with the transplantation of organs thereby defining the terms such as "Appropriate Authority", "brain-stem death", "donor', "near relative", "registered medical practitioner" and others, but then also the State High courts had time to time pronounce judgments to eradicate certain confusions regarding the technical terms, some which has been aforementioned. To make my view understandable, I would comment on the case of ***Dr. Ajay Tejraj Oswal v Joint Director of health Services, Maharashtra State Government Dental College Building and Ors,.***[3] The case broadens the definition of the 'registered medical practioners' which according to the Act refers to 'a medical practitioner who possesses any recognized medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956, and who is enrolled on a State Medical Register as defined in clause (k) of that section'.[4]

This definition fails to specify the qualifications required for a person to be considered as a registered medical practitioner but only states that he should be duly qualified as per the norms of the Indian Medical Council Act and enrolled in a State Medical Register. It is the duty of the hospital at the time of their registration under this Act to lay down name and qualifications of the experts they would engage for transplantation operations in their hospitals.
However, it was decided in the afore mentioned case that despite the amount of experience a person gathers in this field, if he fails to be part of the team of experts provided by the registered hospitals as being capable of performing operations related to the transplantation of organs and tissues, he would be denied of all the rights to perform transplantation in any other registered hospital.

As the Act set out the rules identifying the registered medical practioners, it was necessary to let out rules regarding the unauthorized medical practioners to be strictly followed by the concerned authorities. But the judiciary in the case of ***Rajesh Kumar Srivastava v A.P. Verma and others,*** identified a large gap between the unauthorized practioners so far and the prosecutions launched against them.[5]

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[3] 2012 (1) Mh.L.J.835
[4] Id.,

Section 3 of the Act empowers the donor in such manner and subject to certain condition, authorizes the removal of any human organ from his body for therapeutic purpose. The procedure for making such donations has been vividly described subsequently in the sections however problem arises when the donor dies without making such declaration and the power lies with the person in lawful possession of the body to authorize such removal. The concerned person has to be rest assured that the deceased had not expressed any objection to the use of his human organs for therapeutic purpose and that his near relatives would further create no objection to the donation of the organs for therapeutic purpose.

The term "near relative" has to be ascertained on the basis of facts of proof. This particular point has been further elaborated in the case of Balbir ***Singh v The Authorisation Committee***[6].

The facts of the case are as follows:

Balbir Singh, the 57 years old, petitioner suffering from Hepatitis-C related Cirrhosis of liver end stage disease with portal hypertension, filed this writ petition as his brother Baljit Singh was denied permission for donation of his liver to Balbir Singh. The doctors had advised a transplantation of liver to heal his disease. His brother Baljit Singh offered to donate part of his liver for transplantation. The Authorization Committee-respondent No. 1 of the Indraprastha Apollo Hospital-respondent No. 2 declined to permit transplantation. The reason for such denial was the failure of the HLA Typing Test conducted on the donee, in establishing his near relationship with the petitioner. The Authorization Committee intimated the petitioner that if he still wanted to proceed with the transplantation, a detailed study of other family members' HLA typing was required.

The court however held that since there was documentary evidence establishing the fact that they were real brothers, further medical evidence is not required for establishing the fact of "near relative". As the fact can be established from other credible evidences, hence the donor and donee could be saved from avoidable delay, expenses and agony. It further reiterated that donors either , "near relatives" or "outsiders" deserves protection and priority in treatment when the need arises for them and suggested for formation of a committee to review the provisions of the Act and the Rules in the light of observations made in the judgment.

The court also stated that such case need not required to be sent to Authorization Committee for prior approval of transplantation.

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[5] 2004 (2) AWC 967:2005 (2) ESC 857
[6] AIR 2004 Del 413

Again in a situation where the Authorisation committee had denied donation of kidney as there was a visible economic disparity between recipient and proposed donor, the Court in ***Rajinder Kumar v State of Punjab***[7], held that such a refusal was improper. It held that such disparity cannot be a conclusive proof of the fact that the recipient was receiving the donated organs on money considerations. Its judgment is based on the various investigations done through the affidavits, various medical reports and enquiry conducted by the police. The Authorisation Committee was directed to grant necessary approval.

Further in the case of ***Santosh K.A v State of Kerala,***[8] the petitioner asked the second respondent to convene the meeting of the committee and expeditiously approve the kidney transplantation in its writ petition before the learned Court. The learned petitioner further reiterated the fact that he had already submitted an application to the fourth respondent hospital in accordance to the provisions of the Transplantation of Human Organs Act, 1994 and requested the kind perusal of the second respondent hospital as early as possible. However the fourth respondent replied stating that they had received such applications with certain defects in the attached documents and hence was referred back to the petitioner for correction and resubmission. They further stated that no such corrected documents had been received by them yet. The court permitted the petitioner to file afresh application under Rule 6-B of the transplantation of Human organs Act, 1994 t6o the fourth respondent within a week from the date of this judgment. The hospital on receiving the application and on being sure that there are no more discrepancies with regard to the application, forward it to the second respondent within three days of such receipt of the application. It directed the second respondent hospital for speed y disposal of the orders so much as within 7.12.2009.

Hence the abovementioned two cases bring forth the urge of the judiciary in expeditious disposal of the cases relating to the transplantation of organs thereby establishing a norm of the courts of causing less harassment to the persons or more precisely the patients in need of the transplantation.

Section 9 of the act brings forward the restrictions imposed on removal and transplantation of human organs or tissues or both. It permits only a near relative to be donor of organs or tissues of the recipient. The Act already defines the concept of near relative and we have discussed the issue in details in the beginning of this chapter.

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[7] AIR 2005 P&H 172

[8] W.P. (C) No. 480 of 2009 (F)

Apart from being a near relative, a person may donate his organs or tissues out of affection or attachment towards the recipient or for any other special reasons; however in such a case prior approval of the Authorisation Committee is required. The composition of the Authorisation Committee would depend on the Central Government. The State Government and the Union Territories can constitute by notification more than one Authorization Committee and in many States Administrative officials are nominated as the members of the Authorisation Committee.

The role of the Authorisation committee becomes of umpteen importances when the donor is not the near relative of the recipient and the donation is made out of affection or attachment. We would now study the case of ***Parveen Begum and Anr v Appellate Authority and Anr***[9]. The case was actually a writ of certiorari filed against the Authorisation Committee who had refused to grant permission to the petitioner from donating organ to the first petitioner. But before we analyze the judgment of the Court we will look into the facts of the case.

The case is that Petitioner No. 1 is a home maker , aged 58, permanent resident of Darya Ganja, Delhi and the Petitioner No.2 , a home maker of 38 years , resident of Meerut, UP and also the grand-daughter of the brother of the Petitioner No. 1's father. They claim that Petitioner No. 2 is not only a regular visitor of the Petitioner No. 1 but also have nursed her during her period of illness. The later petitioner being ill, the visit have become quiet frequent in number and they have gradually developed a bond similar to that of mother and daughter. The medical history of the first petitioner depicts a case of high blood pressure since 1995, an angioplasty in the year 2008 when "failing condition of her kidney was diagnosed. It is stated that she has been receiving treatment from Dr. A.K. Bhalla, Sir Ganga Ram Hospital, New Delhi since the year 2008." The condition of the petitioner deteriorated eventually of much as that she was put on dialysis by her treating doctor since 2011 and kidney transplantation seemed to be a possible solution to save her life.

the Petitioner No. 2 when came to know about such transplantation wished to donate one of her kidney to the Petitioner No.1 and accordingly the petitioners submitted their application to the "to the concerned department at Sir Ganga Ram Hospital, New Delhi requesting them to conduct the necessary tests for determining the medical compatibility of the two petitioners, so that petitioner No.2 may be able to donate one of her kidneys to petitioner No. 1." On 16.08.2011 the Transplant Coordinator at Sir Ganga Ram Hospital, New Delhi stated that they require a "No Objection Certificate from the State Authorisation Committee for Organ Transplant, Meerut, and U.P. in compliance to the Act.

[9] W.P. (C) 2574 of 2012

The said Committee comprising of the seven members including the District Magistrate, U.P. The State Authorisation Committee of U.P. after holding a meeting on 21.01.2012 approved the said transplantation by reviewing all the documents submitted by the petitioners on 08.02.2012.

However the Authorisation Committee for Human Organ Transplant at Sir Ganga ram Hospital, New Delhi after investigating the proposed transplant on 17.02.2012 , directed production of documents and other relatives of the Petitioner No.1 .It held a meeting on 21.03.2012 and on 05.04 2012 it rejected the petitioners case on the following grounds:

(a) There is no substantial proof of association between donor and recipient

(b) Husband and close relatives not willing for donation

(c) There is income disparity between donor and recipient

The court was the view that it is nota n appellate forum to reassess the cases on merit when a statutory authority has already formulated its views after examining the merits of the case. However "it is primarily concerned with the compliance of the procedural aspects and application of the correct principles laid down statutorily or otherwise in the decision-making process of the concerned authority."[10]

The Court was of the view that " The role of the Authorisation Committee comes into play primarily in cases where the donor and the recipient are not near relatives, and it is the function of the Authorisation Committee to ascertain and evaluate, by applying the guidelines/yardsticks and tests provided in Rule 4A(4) and 6F(d) of the Rules, whether there is a commercial transaction between the recipient and the donor, and to ensure that no payment of money or monies worth has been made to the donor, or promised to be made to the donor or any other person on account of the fact that the donor has agreed to donate an organ or tissue to the recipient." "The law mandates that the approach of the Authorisation Committee in such matters has to be pragmatic and its discretion has to be used judiciously particularly cases requiring immediate transplantation."

The Court held that it was needless of the Authorisation Committee to enquire into the question of unwillingness of the near relative of the recipient of donating the organ. Their unwillingness fails to raise an assumption of commercial transaction. Moreover no evidence can be found where it can be said undoubtedly that the Authorisation Committee had asked the petitioners or their family members even on question as to whether there was any financial dealing or transaction between

[10] Comptroller and Auditor General of India, Gian Prakash, New Delhi and another v K.S.Jagannathan and another, (1986) 2 SCC 679,para 20

the recipient and the donor, underlying the offer made by the donor to donate one of her kidneys to the recipient. Though the petitioners have agreed to the fact that the Petitioner No. 2 had been time and often helped financially by the Petitioner No. 1 yet these cannot firmly establish the fact of commercial transaction in such donation.

The parties had shown to the Authorisation Committee their long period of acquaintance and degree of association as they are distantly related. "They have both shown the reciprocity of feelings amongst themselves, inasmuch, as, petitioner no.2 had been residing, since the demise of her husband about 18 years ago, on and off, with petitioner no.1 and her family members, and was receiving support from petitioner no.1. Petitioner no.2 clearly expressed her gratitude for all that petitioner no.1 and her family members have done for her over the years, and states that she would like to help petitioner no.1/her Mousi in time of her need."

The Division Bench in para 11 observed:

"In the present case, there is no material on record to disprove the relationship between the donor & the recipient. Therefore, the necessary approval cannot be denied on the ground of a mere suspicion. The question that the applicants have not produced relevant documents, establishing their relationship, as stated by the Committee, also does not arise when Mrs. Ramadei Singh, Sarpanch of Kuamara Grama Panchayat has certified the relationship between the donor & the recipient as per the Rules, 1995. After all, law is not cast in stone, nor is it that judicial interpretation remains unchanged over time."

The court held that sufficient proof of association was provided and the economic disparity cannot be the sole ground for rejecting the transplantation and hence the Court impugned the decision of the Authorisation Committee as well as the Appellate Authority as wholly unsustainable. However the court reiterated the fact that a formal permission of the Authorisation Committee is essential and in case they fail to provide so within 2 days failing which the said formal approval would stand granted.

Concluding Remarks

One of the important area of debate and discuss in the Organ Transplantation Act is the relationship between the donor and the recipient. Whether one stands in relationship with other is a matter of fact analysis. Therefore the Division bench's observation is absolutely correct that it depend and varies from context of each case as because 'law is not cast in stone'.

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CHILD PROSTITUTION IN INDIA

Ms Suryasnata Mohanty[1]
Prof (Dr.) N. K. Chakrabarti[2]

"The ritual sacrifice of children has been taboo for thousands of years. Yet tragically it is practiced everyday across our world. We sacrifice children on the altars of our most destructive sins. When the sickness of pornography has run to its most evil and destructive end, it takes the form of child pornography. When prostitution reaches it sickest, most depraved form, it becomes child prostitution."

- Wess Stafford

Have we ever wondered who a child prostitute is? How does it feel when he sees children of his age playing whereas he, from the balcony of a brothel, watches them and compares his life to that of theirs? Where his day starts not with the caress of his mother but the scream of the madam because he is late and has to get ready to serve the customers waiting desperately with hunger in their eyes to have a taste of his body and to quench their thirst by having sex with him. We, the proud Indians, have entered into an entirely different world today where a child is no more treated as tender and innocent but rather as a commodity to satisfy our physical needs. The cry of a child prostitute creates a din for us and we behave in a very normal way as if we know nothing. On the one hand we say a child can commit no crime but on the other we treat these kids as criminals carrying a bad character. Aren't we being double standards?

What does a child in prostitution mean? Does it mean soliciting customers with innocent and scary eyes and waiting to be raped again and again? Does it mean soliciting people to have sex to get paid for their survival each day? Does it mean seeing one's life not in toffees, toys, friends, playgrounds but in customers?

The truth is this: we don't know or more specifically don't want to know.

Prostitution is defined under the Immoral Traffic (Prevention) Act, 1956, as sexual exploitation or abuse of persons for commercial purposes. Convention on the Rights of the Child 1989, 'a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier'. Child prostitution is a practice where a child is used for the purposes of prostitution. In other words, when a child is used mostly for sexual activities in

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return for remuneration or any other form of consideration that practice is known as child prostitution. It refers to the sexual exploitation of a child for remuneration in cash or in kind, usually but not organised by an intermediary (parent, family members, procurer, etc.). A child prostitute is the child being forced into detrimental sexual activities either by a middleman (pimp) or by the abuser directly. In the first case, the intermediary pimp usually sells the child to the brothel. However, in the second case, there is a direct exchange between the abuser and the child whereby the former seeks the favors directly for his gratification. Millions of children especially girls are trapped in this vicious cycle. Studies have shown that Indians have the highest population of child prostitutes as compared to the other continents all over the world.

Child prostitution has always been there in our society since time immemorial, be it through the excuses of culture or tradition, or through any other forms. Child prostitution as a commercial enterprise is a relatively new phenomenon even if the case of prostituted children is not new to India.[3] The society knows a very little about the problem of child prostitution. Though this problem is existing in our society since time immemorial still people are not very much aware of this menace. Child prostitution is another form of child abuse where the children have been victims long before they enter to the world of flesh trade in which they are further victimized. As the concept of "Child Prostitution" sounds a bit complicated it is pertinent to go through and understand the meaning of the two words i.e 'child' and 'prostitution' and also to have an idea on its types.

Child

Child is a person who, because of his immaturity thought process is unable to comprehend his or her own action or inaction. Under the Indian law they are termed as minors. The United Nations Convention on the Rights of the Child defines a child as "every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier."[4] Since the UNCRC was introduced the International Labour Organisation's Convention Number 182 on the Worst Forms of Child Labour has come into force which states that all those persons who are aged below 18years should be regarded as children. Within the international child rights community, the age of 18 years is generally accepted as the appropriate age for the determination of adulthood.

The expression.child may be used in the following manner:

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[3] Documents of UN World Conference on Human Rights, Vienna, 1993

[4] *Convention on the Rights of Child. Office of the United Nations High Commissioner for Human Rights. http://www.unhchr.ch/html/menu3/b/k2crc.htm. Ratified by 192 of 194 member countries.*

- As a term denoting relationship as between the parties and their progeny.
- As a term indicating relative capacity to do something e.g. saying that a child cannot move a big boulder
- As a term of special protection under welfare legislation like those prohibiting child labour and prostitution.[5]

Interestingly the definition of child varies from legislation to legislation as with regard to the legal age there is no uniformity. A child, as per the Indian Penal Code, 1960 is a person who is below 12yrs of age. As per Child Marriage Restraint Act, 1992 for a male child it is 21 yrs and for a female child it is someone who is under 18yrs of age. As per Factories Act, 1958 and Apprentices Act, 1957 a child refers to a person who has not completed 14yrs of age. Likewise, the Juvenile Justice Act, 2000 defines "juvenile" or "child" as a person who has not completed eighteenth year of age. The Child Labour (Prohibition and Regulation) Act, 1986 says a child is a person who is below 14yrs of age. From the paragraph mentioned above it is clearly evident that different laws interpret the definition and age of child differently. But the Immoral Traffic Prevention Act, 1986 applies to all as per which a child is a person below 18 yrs of age.

Prostitution

The word 'prostitute' has been derived from the Latin word 'prostibula' or 'proseda'. Prostitution in other words means giving sexual favour in exchange of a sum of money. Prostitution is one of the oldest professions in the world and it dates back to antiquity. The Immoral Traffic Prevention Act, 1986 defines prostitution as the sexual exploitation or abuse of persons for commercial purposes or for consideration in money or in any other kind. Oxford Dictionary defines prostitutes as "person who offers himself/herself for sexual intercourse for money".

According to Weaver the concept of prostitution is different from the broader concept of sexual immorality due to the presence of commercial nature of the relationship. It is also not same as illegitimacy, which invariably involves an illicit sex relationship but refers particularly to the production of a child outside the social approval. Prostitution involves promiscuity, barter and emotional indifference. He says these ingredients are important to the concept of prostitution.[6]

Children turn to prostitution for various reasons. One thing which is common though is the absence of their consent and willingness in joining this profession.

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[5] Joseph Gathia, *Child Prostitution in India,* (1999, Ashok Kumar Mittal, Mohan Garden, New Delhi).

[6] Supra note 3

The question has often been raised regarding the very inherent factors that have nurtured and raised this social evil of child prostitution. While some of these factors have been stayed as parasites in the society since time immemorial, the others have gradually contributed their lot to the problem under various social conditions.

At the outset it can be said that prostitution is caused due to the demands for sex by men and child prostitution also is prevalent as there is a demand for the same. For this reason, women and children are actively trafficked and are sold to pimps or brothel owners for the purposes of prostitution. Other people associated in this organised crime are well organized crime members and corrupt officials. Apart from this the Government and society at large play a vital role in the continuance of the practice of child prostitution in India. Due to a constellation of various interconnected reasons the practice of child prostitution has become rampant in our society.

A very shocking factor which contributes to this heinous crime being committed against these innocent kids is our culture and tradition. This Devadasi system is banned as per the Devadasi Security Act, 1934 which was reinforced once again in the year 1980 but it is not being implemented properly as it is not adhered to and is broken every day. Various factors contribute to the persistence of this terrible practice out of which poverty and untouchability plays the prime role. Under the garb of religious practices, girls are till date dedicated to Gods/Goddesses in various parts of the country. This so called practice is the Devadasi system which, despite several legislations advocating against, is still practiced in certain villages in India. Prevention of Devdasis Act has been passed in the year 1935 and has been amended recently but the tradition still continues even today despite the governmental ban. This piece of legislation is given no importance to in the places where people still believe that it is in their tradition and culture and therefore till date they dedicate the girls to the Goddess where they are made to enter into prostitution and entertain the priests and landlord to invoke the blessings of the deity. Girls, at a very tender age also are dedicated to Goddess Yellamma and are married to the Goddess. After attaining puberty, they are supposed to serve the Goddess and are not allowed to marry a mortal anymore. As a devadasi is married to a god she, at all times, is considered blessed. Poverty has been a major factor behind child prostitution. In some of the poor families girls are expected to feed their families and are trained accordingly. After puberty they are pushed into this flesh trade by their families so that they can be fed by these kids. In most of the cases, unfortunately, the mothers force their daughters to join this profession and earn their livelihood. Poverty, greed, illiteracy make them helpless. For the sake of money, the parents sell their daughters and hope to protect themselves from sickness by getting their daughters married to Gods and forcing them to become Devadasis for life. Due to lack of education and

awareness they often send their daughters ultimately to this flesh trade. It is also seen that the traditional families feel proud of getting their daughters married to God and thereby making them Devadasis. In some cases, unwillingly, some parents accept this tradition and follow them due to community pressure.

Girl child has always been considered as a liability. In some villages of Karnataka people still consider male child as liberators of their souls. When a girl child is born in these families the parents think how they can turn these liabilities into assets. Getting them married to God or Goddesses is a coping strategy where they feel it is alright on their part to dedicate their child to God or Goddesses. The system of traditional ritual prostitution hence continues till date.

In different states the Devadasis are known by different names. Girls are dedicated to the Monkey God (Hanuman) in the Vijapur district of Karnataka and are known as Basvi. In Goa, they are known as Bhavin (the one with devotion), Girls are handed over to the goddess Renuka Devi in the Shimoga District of Karnataka and in Hospet, they are married to the goddess Hulganga Devi. The tradition is mostly prevalent in states in South India and finally these girls land up in the brothels of Bombay and Pune as prostitutes. The Bedia and Banchara peoples of Madhya Pradesh are also known to practice their "traditional" prostitution. [7]

In Saudatti village in Karnataka this ceremony takes place twice a year where girls are brought and made to wear green saree, green bangles, toerings and waistband. There would be a bowl in which they keep a coconut and a facemask. The girl is made to sit next to the bowl. Five senior Devadasis would tie a necklace around her neck. This is the necklace which is specifically designed for the Devadasis, known as Muthu. This is followed by the Devadasis whispering sacred rules of being a Devadasis in the ears of the girl. After that she is considered to be married and joins the league of Devadasis. Then she returns to her hometown where she stays till she attains puberty. On attaining puberty her parents inform the other Devadasis to find a man for her who would pay an initial fee for her virginity and purchase her. After that the plight of the Devadasis begin where, in reality, they are made to sleep with men for a mere sum of money and for their and their families' survival.

Apart from devdasi system practiced in India other factors also play an important role in the continuance of child prostitution as it is a part of their culture. For instance, there are some societies where prostitution is accepted traditionally as one of their professions. For instance Rajnat tribe from Rajasthan. The system of

[7] Farida Lambey, vice-principal of the Nirmala Niketan College of Social Work, "Devadasi System Continues to Legitimise Prostitution: The Devadasi Tradition and Prostitution," *TOI*, 4 December 1997

prostitution practiced by this tribe is basically child prostitution, as the girls enter into prostitution soon after the puberty. Earlier patronized by Rajput monarchs this tribe has now settled themselves on highways and practice prostitution there. The tribe's survival is essentially dependant on the eldest daughter who, being fully aware of her job shares her labor as a prostitute with her family for their survival. When the Rajnat girl reaches puberty, she is auctioned in which the highest bidder purchases the right to her virginity.[8]

There are many stories available on internet, newspapers and books where the girls have narrated their journey to prostitution and we find poverty being the major factor behind their parents' helplessness in sending these girls to this field. As stated earlier, under the pretext of religious practices the poor parents get rid of their girl children who are considered to be liabilities. Poverty and illiteracy compel people to become helpless, as a result of which, for their survival they do not hesitate to send their children to join this flesh trade. There are numerous instances where poverty stricken young girls are lured with promises of attractive jobs and marriage.. Many children are lured away from their villages by vice rings, often with the connivance of poor parents. Finally, these children end up in prostitution because they are sold off to the brothel owners by the pimps. They are also taken to the beach resorts of Goa and Kerala, to the south to provide an added attraction to foreigners. The tourist pedophiles in Goa are always in search of these young boys and girls whom they can lure with a small sum of money and use their body to gratify their sexual needs. Studies have shown men are kept as animals by the local Rajputs, who sexually exploit their wives, sisters and daughters. After being exploited these victims are sold to the brothels in Delhi and Agra.

From June to September every year Arabs come to a Tehsil of Sangli district in South Maharashtra where they are served teenagers and women to satisfy their sexual needs. They pay these victims a hefty amount which is helpful to these women and children for their survival. The flesh trade continues for four months every year which makes all the people connected with it happy.

A study conducted by Women's Rehabilitation Centre of Kathmandu on girls from Nepal, who are now in the brothels of Bombay, showed that more than half them have entered prostitution because of poverty. The girls stated that they have been many times deceived by the village men and relatives, who, informally them and bring them to the cities under the pretext of getting them ultimately sell them in brothels. These victims also said that some have direct links with the brothels in Bombay.[9]

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[8] R.K Tandon and K.N Sudarshan, *Child Prostitution*, Efficient Offset Printers

Human trafficking is one of the major causes behind child prostitution. Being an offence against humanity human trafficking for the purposes of commercial sexual exploitation of children degrades the position of the children to a mere commodity and makes a mockery of their human rights. Trafficking has become one of the most lucrative opportunities for the perpetrators of this heinous crime against children. Almost every country in the world is under the tentacles of trafficking for sexual exploitation where women and children are commodified. Poverty and illiteracy also make the poor people sell their children to traffickers in order to pay off debts or gain income. In many cases they are deceived by the traffickers and they send their children concerning the prospects of a better life for them. Over the few years trafficking has spread its tentacles to cover the unlawful transport of human beings, especially women and children, for the purpose of selling them or exploiting their labour. During the Saundatti festival traffickers from various places come and buy the girls who become Devadasis.

One of the major reasons behind human trafficking is the existence of porous borders between India and Bangladesh and India and Nepal. Studies have shown that between 5,000 and 7,000 girls from Nepal are trafficked across the border to India every year. Most of them land up in the brothels in Bombay and New Delhi and end up becoming prostitutes. It was found out that 66% of them belong to very poor families where due to poverty they are sold by their parents. They are also deceived by the middlemen with assurance of marriage or a lucrative job. At times they are also kidnapped and sold to brothel owners. It is believed that between 40 - 50% are under 18 years of age and some are as young as 9 or 10 years old. An estimated 200,000 Nepali women, most of them girls under 18, work in Indian cities.[10]

Since the last two decades there has been an enormous growth in the rate of children and women being trafficked. Human trafficking is a highly organised crime which has been defined by the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, as any activity leading to recruitment, transportation, harbouring or receipt of persons, by means of threat or use of force or a position of vulnerability. Organised trafficking involves a range of players and at times it is played alone by a single individual. When many people are involved players, traffickers and recruiters come into the picture. Traffickers operate as a part of the gang of organised crime groups or in gangs or at times alone.

[9] http://www.globalpost.com/dispatch/news/regions/asia-pacific/india/140121/India-sex-worker-children-education: last visited on 22 July 2016

[10] Estimates by Maiti Nepal, Child workers in Nepal and National Commission for Women in India

United Nations Convention on Organised Crime defines organised crime as a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention in order to obtain directly or indirectly a financial or other material benefit. Anyone can be a recruited by the trafficker to achieve the target. Friends, relatives, relatives of friends, neighbours, persons who are already trafficked earlier, fathers, boyfriends, husbands etc. can be recruiters and work for the traffickers. The network of trafficking involves, at times, railway or bus authorities, passport officials, taxi drivers, police, politicians etc. The trend of trafficking has grown with globalisation and modernisation where people migrate to various parts of the globe in search of a better life. As children belonging to indigenous community and ethnic minorities do not share a common language which is used by the majority of population and as they are backward having no proper educational access they lag behind in having good economic opportunities, they are the most vulnerable group when it comes to trafficking. They lack the economic strength and proper knowledge about the world. They are also not aware of their rights which could help protect them from the traffickers and pimps. Taking the advantage of this situation traffickers often deceive the poor and innocent children by giving them false promises of a job or marriage and finally sell them off in brothels or to persons who act as middlemen. The socio economic constraints make the children and women more vulnerable where they fall into the trap of flesh trade. Children are smuggled across borders and are treated as commodities as human trafficking has become one of the largest sources of making huge amount of profit in one night. There are two types of traffickers who operate in the market. Those who operate openly in the market are primary traffickers. For instance, pimps are primary traffickers. Those who operate behind the scenes are secondary traffickers. They are the people who have high level connections in the government circle which protects them from trafficking trade. The secondary traffickers never come to the limelight and it has been almost impossible till date to find out the real face behind this crime.

Trafficking routes are categorised into three types eg. origin, transit and destination points. There are countries who fall into more than one category and India is one of them. India is a point of origin, transit as well as destination as far as trafficking of women and children are concerned.

One of the most important things to understand is that had there been no demand for children then child prostitution would not have existed. There is a great demand for children and people prefer to have sex with virgin young girls. Demand for sexual tourism has been rampant these days where a person goes to a child prostitute for services in a foreign country. Goa off late has become a destination

for the pedophiles. Tourism saw a very rapid growth during the 1970s and 1980s which provided impetus in the growth of child sex industry too. This has been one of the leading causes behind child prostitution in India because in order to satisfy their physical needs lakhs of tourists visit Goa and other tourist places in India and target the innocent kids. Tourists take advantage of the poor economic condition of the children and their families and offer a hefty amount to tempt them to offer sexual services. In most of the cases young girls are supplied by middlemen who take money from the tourists and pays the family of the children some part of his commission to convince them that he is helping the family to escape economic hardship. As it is very cheap and affordable for the foreigners to have sex in India, every year foreigners flock to these tourist destinations to get sexual services from children. Technology has become cheaper. Hence it has become more easy to photograph or video graph children for pornographic scenes.

There is one interesting factor behind the demand for children as prostitutes. It is believed that a person can get rid of sexually transmitted diseases if he sleeps with a virgin. In Kamatipura, a woman running a brothel stated that the average age of girls who are supplied to the brothels in the last two years has decreased from 14 and 16 years to 10 and 14 years. A girl between 10 and 12 years fetches the highest price. According to sources, in Bombay, children as young as nine years of age are purchased for up to 60,000 rupees, or US$2,000, at auctions where Arabs bid against Indian men who believe sleeping with a virgin cures gonorrhea and syphilis.[11]

People still get their daughters married at a very early age without proper verification of the bridegroom's background which often leads to divorce or separation. Many a time this type of situation force these girls to enter into prostitution. In many instances girls who are unable to cope with their husbands run away and, finding no other way, end up as prostitutes.

Socio economic reasons include widespread unemployment especially in remote areas, urbanization and industrialization, craze to follow western culture, migration to cities for better job prospects, breaking up of joint family system etc. which are also responsible for the prevalence and perpetuation of the child prostitution.

1. REVIEW OF LITERATURE

The literature available on trafficking comprises reports of studies, conferences and workshops conducted by international and domestic non-governmental organisations (NGOs). National and regional level studies are fewer in number compared to the literature available at the state level. The recent importance

[11] http://www.childlineindia.org.in/child-trafficking-india.htm: last visited on 3 July 2016

accorded to trafficking on the international agenda is responsible for the rise in the number of ongoing research studies on trafficking in India.[12]

NGOs and government agencies often cite contradictory figures, but both are agreed that a child goes missing roughly every eight minutes in the country. It is estimated that half of the children trafficked within India are between the ages of 11 and 14. Some 32.3 percent of trafficked girls suffer from diseases such as HIV/AIDS, sexually transmitted infections (STIs) and other gynaecological problems, according to a 2006 report by ECPAT International.[13]

Independent India has taken large strides in addressing issues like child education, health and development. However, child protection has remained largely unaddressed. There is now a realization that if issues of child abuse and neglect like female foeticide and infanticide, girl child discrimination, child marriage, trafficking of children and so on are not addressed, it will affect the overall progress of the country. [14]

In India, the average age of a girl being pulled into prostitution is between nine and 13, and there are roughly three million prostituted women and girls in India, of which 1.4 million are children. [15]

Studies show some eye- opening facts in this regard:

- The average age of girls supplied to the brothels in the last two years has decreased from 14 and 16 years to 10 and 14 years. A girl between 10 and 12 years fetches the highest price.
- There is the myth that a man can rid himself of sexually transmitted diseases if he sleeps with a virgin hence the fear of HIV/AIDS has increased the demand for virgins and **child**ren.
- Trafficking is another problem which India faces- About 7,000 sex workers cross over from Nepal into India every year. 66% of the girls are from families where the annual income is about Rs.5000. They may be sold by their parents, deceived with promises of marriage or a lucrative job or kidnapped and sold to brothel owners. Between 40 – 50% are believed to be under 18 years which

[12] http://nhrc.nic.in/Documents/ReportonTrafficking.pdf: last visited on 6 Dec 2015
[13] http://www.ipsnews.net/2014/09/child-trafficking-rampant-in-underdeveloped-indian-villages/: last visited on 23 August 2016
[14] Study on Child Abuse in India 2007 by the Ministry of Women and Child Development, Govt. of India in a report prepared by Dr. Loveleen Kacker, Srinivas Varadan, Pravesh Kumar and supported by Dr. Nadeem Mohsin, Anu Dixit. Available on http://wcd.nic.in/childabuse.pdf : last visited on 24 November 2015
[15] http://nytlive.nytimes.com/womenintheworld/2015/07/14/whos-sari-now-taking-on-prostitution-and-sex-trafficking-in-an-enterprising-new-way/: last visited on 5 Dec 2015

is the age of consent in India, some are as young as 9 or 10 years old.

- **Child** sex workers are not confined to big cities. A survey in Bihar revealed that roadside brothels for truck drivers in the Aurangabad and Sasaram districts offered sex workers aged between 6 and 18 years.
- Everyday about 200 girls and **women** in India enter prostitution and 80% of them against their will. At the current rate of growth by 2025, one out of every five Indian girl **child**ren will be a **child** prostitute.[16]

India, along with Thailand and the Philippines, has 1.3 million children in its sex-trade centers. The children come from relatively poorer areas and are trafficked to relatively richer ones. India and Pakistan are the main destinations for children under 16 who are trafficked in south Asia. Districts bordering Maharashtra and Karnataka, known as the "devadasi belt," have trafficking structures operating at various levels.[17]

India ranks high on the list of countries where commercial sexual exploitation of underage girls occurs. With the extreme poverty, religious traditions and societal prejudice toward women, thousands of girls are bought and sold in every state of India. The lenient law enforcement system has allowed for the flourishing trade. Once the girl is sold to a brothel keeper, she becomes a virtual slave of the industry. She is beaten, threatened, verbally abused and forced to have sex with many men every day. Although there are no accurate statistics of child prostitutes, experts on child trafficking agree the numbers lie between 400,000 and 500,000 children. [18]

India probably has more modern slaves than any country in the world. It has millions of women and girls in its brothels, often held captive for their first few years until they grow resigned to their fate. India's brothels are unusually violent, with ferocious beatings common and pimps sometimes even killing girls who are uncooperative.[19]

LOVE146 — an international charity that provides aftercare and rehabilitation for children rescued from sexual slavery — has collaborated with Nashville-based

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[16] http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=724a3993-625e-4aa7-9c56-3b2554410642&txtsearch=Subject:%20Women%20And%20Child%20Rights: last visited on 4 February 2015

[17] http://www.helsingborgsdialogen.se/globalt/indien/facts%20on%20prostitution.pdf : last visited on 5 February 2015

[18] http://www.lausanneworldpulse.com/perspectives-php/162/01-2006 : last visited on 4 February 2015

[19] http://www.nytimes.com/2011/05/26/opinion/26kristof.html?_r=0 : last visited on 5 February 2015

rock group Band of Love on a new video to increase public awareness on this issue. The video reveals a number of surprising facts about the child sex trade, including the following:

- In some cases, children as young as eight years old are forced to work as prostitutes.
- An enslaved child may be raped between five and ten times per night.
- The transaction may be for as little as $5 each time. However, the first time a child is sold, the price may rise as high as $200.
- When a child is forced into a brothel, her name is typically replaced with a number — further stripping her of her humanity.
- Child brothels will sometimes print up a menu for men to look at, complete with pictures and prices — as if each child were a piece of meat.
- On average, two children are sold every minute.[20]

One of the countries where internal trafficking is said to surpass cross-border trafficking is India. There are very few studies on child trafficking in India. Sexual exploitation is a well-documented form of trafficking. At least 25,000 children are said to be engaged in prostitution in six major metropolitan cities of India—Bangalore, Chennai, Delhi, Kolkata, Hyderabad, and Mumbai (Mukherjee & Das, 1996). Another report says that in Mumbai alone, 40,000 girls ages ten to sixteen are undergoing commercial sexual exploitation (Terre des Hommes, 2001). According to one study by an NGO, 30 percent of sex workers in India, which would mean 270,000 to 400,000 people, are minors (Centre of Concern for Child Labor, 1998). While statistics provide specific information, it is clear that the scope of this exploitation is vast, and that it demands serious attention. [21]

The **Constitution of India** forbids trafficking in persons. Article 23 of the Constitution specifically prohibits "traffic in human beings and begar and other similar forms of forced labour". Article 24 further prohibits employment of children below 14 years of age in factories, mines or other hazardous employment. Other fundamental rights enshrined in the Constitution relevant to trafficking are Article 14 relating to equality before law, Article 15 that deals with prohibition of discrimination on grounds of religion, race, caste, sex or place of birth, Article 21 pertaining to protection of life and personal liberty and Article 22 concerning protection from arrest and detention except under certain conditions. The Directive

[20]http://www.huffingtonpost.com/nathan-harden/eight-facts-you-didn know_b_4221632.html?ir=India : last visited on 5 February 2015
[21]http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1005&context=humtrafcon5 : last visited on 1 February 2015

Principles of State Policy articulated in the Constitution are also significant, particularly Article 39 which categorically states that men and women should have the right to an adequate means of livelihood and equal pay for equal work; that men, women and children should not be forced by economic necessity to enter unsuitable avocations; and that children and youth should be protected against exploitation. Further, Article 39A directs that the legal system should ensure that opportunities for securing justice are not denied to any citizen because of economic or other disabilities. In addition to this, Article 43 states that all workers should have a living wage and there should be appropriate conditions of work so as to ensure a decent standard of life.

The **Indian Penal Code, 1860** contains more than 20 provisions that are relevant to trafficking and impose criminal penalties for offences like kidnapping, abduction, buying or selling a person for slavery/labour, buying or selling a minor for prostitution, importing/procuring a minor girl, rape, etc.

The **Immoral Traffic (Prevention) Act, 1956 (ITPA)** is the main legislation for preventing and combating trafficking in human beings in India. The other relevant Acts which address the issue of trafficking in India are the Karnataka *Devdasi* (Prohibition of Dedication) Act, 1982; Child Labour (Prohibition and Regulation) Act, 1986; Andhra Pradesh *Devdasi* (Prohibiting Dedication) Act, 1989; Information Technology Act, 2000; the Goa Children's Act, 2003; and the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006. Beside these, there are also certain other collateral laws having relevance to trafficking. These are the Indian Evidence Act, 1872; Child Marriage Restraint Act, 1929; Young Persons (Harmful Publications) Act, 1956; Probation of Offenders Act, 1958; Criminal Procedure Code, 1973; Bonded Labour System (Abolition) Act, 1976; Indecent Representation of Women (Prohibition) Act, 1986; and the Transplantation of Human Organs Act, 1994.

The Supreme Court of India, in ***Vishal Jeet V. Union of India***[22] **and** ***Gaurav Jain V. Union of India***[23] has passed two important judgments on the subject of sexual exploitation of children & women & their rescue and rehabilitation. The Supreme Court of India in the former case passed an order stating that the Central and State governments should set up Advisory Committees to suggest measures to be taken in eradicating child prostitution.

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[22] (1997) 8 SCC 114
[23] AIR 1997 SC 3021

CIVIL NUCLEAR LIABILITY IN INDIA: AN ASSESSMENT OF THE JUDICIAL INTERVENTION

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Sustaining growth model in the era of liberalized economy has motivated developing nations across the globe to undergo the capital formation to enhance the per capita growth. The growing demand of Energy in India in consonance with the increasing population has prompted to determine to augment the Nuclear Power Plants to fulfil the aspirations of the mass-myriad of the State as well as the beneficial scales of sustainable development model. As of now India has the potential to generate 4780 MW electricity through nuclear energy[3].

The Indo-U.S. Nuclear agreement on the nuclear development programme for peaceful purposes has appreciated the aspirations about such contribution on two counts: a) considerable supply-chain of electrical energy to mitigate the growing needs of the country from the cost-benefit analysis; and b) pro-active role in curbing down the global warming. However, Chernobyl Incidents provides the reminder the amount of care, maintenance and protective measures to be undertaken for the availability of such smokeless electrical energy because slightest negligence in maintaining the radio activity and the disposal of nuclear wastes as well as the cost of constant vigilance and maintenance of such plants may appear to be unthinkably disastrous both to the nation as well as to the global climate. 'Energy' is listed in the Union List hence, the establishment, maintenance, and liability in the event of any casualty of such Nuclear Plants would involve State's Negligence. Thus, Civil Nuclear Deal necessitates the formulation of specific legislative framework and vigilant implementation of safeguards before such nuclear installation considering the public interests, in particular in Post-Bhopal Tragedy era.

The Civil Liability for Nuclear Damage Bill, 2010 was introduced in Parliament to accommodate and prioritize the Indo-U.S. Nuclear Bill however considering the liability clause in regards of compensation in pursuant to the Price Anderson Act of

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[3] The aspiration of the State to achieve the electricity production through Nuclear power 20,000 MW by 2020, 63,000 MW by 2032 and at about 23% of its total electrical energy by 2050 and Government has considered to facilitate the foreign investment for the Nuclear Reactors and other accessories to achieve such height; available at http://in.reuters.com/Articles/idiNIndia (retrieved on Feb, 11, 2015)

U.S.[4] the strong objection was surfaced from the perspective of Articles 14 & 21 of the Constitution. It gained the ground in the discussion of such Civil Nuclear Liability Bill that liability laws especially relating to nuclear accidents are to be reviewed. Pertinent to mention here that as of now neither the Indian Atomic Energy Act nor Environment Protection Act or Public Liability Insurance Act has had any jurisdiction to try over the accidents caused due to radioactivity. Hence India's stance regarding the nuclear technology in pursuant to global Convention on Supplementary Compensation for Nuclear damage once the Central legislation comes into being[5]. The Bill however, got the assent of the President on Sept. 21, 2010, i.e., the Indo-U.S. Civilian Nuclear Agreement has technically becomes operational.

The Act has appreciated imbalanced protection of Indian populace in the event of nuclear accident. The post-Bhopal Tragedy experiences regarding the flaws relating to the recompense process and remedies have not been compensated within the legal framework of the Civil Nuclear Liability Act, 2010 nor even the global experience for instance, BP Gulf of Mexico Spill has been contemplated before passing such legal instruments. The objective of the Act of 2010 is to address the civil liability for nuclear damage, selection of Claims Commissioner, and founding of Nuclear Damage Claims Commission and for matters coupled therewith or accompanying thereof.

The precise contents of the Act, *inter alia,* have provided in Section 3 that empowers to the Atomic Regulatory Board[6] to notify within 15 days time-period on the nuclear incident from the date of occurrence. However, exceptions in cases of where it is satisfied that the threat and risk involved is insignificant. Reasonable explanation to hide the small-scale incident is not clear for, the damages would not be negligible. Therefore some provisions must have been for compulsory notification of every nuclear incident to make awareness among the general public regarding the consequences of it. Section 4 states that the operator of the nuclear installation shall be liable for nuclear damage caused in the nuclear installation or involving nuclear installation. For causing nuclear damage by more than one Operator the liability of the operators has been provided as joint and several. Absence of any

[4] As under Price Anderson Act of U.S. the liability to the tune of Compensation is 12.5 billion USD which is corresponding to Indian Currency 50,000 Crore INR whereas in India this appears to be 2,142 Crore INR, that means the liability appears to be 23 times higher than for an Indian Operation. In other words, as per the Liability Cluase the life of U.S. citizen is valued 23 times more than that of an Indian. The Government would bear the liability of 1642 Crore INR out of total 2142 Crore INR while the rest by the Nuclear Operator.
[5] 'Nuke Establishments Backs Nuclear Liability Bill India', OUTLOOK, India, July, 2010
[6] Atomic Energy Act, 1962

expert authority for the purpose of regular inspection to examine the safety standards for the prevention of any untoward nuclear disaster is one of the flaws in such legislation. The Claims Commissioner in this regard perhaps would be a mere onlooker. The progressive move of participatory governance pattern may enable considering the cost-benefit analysis to some corporate entities to come up with the Civil Liability Deal, and which would require great need of inspection of safety standards with the sole view to prevent such entities from abusing and encashing the process of legal provisions. Such absence appears to be quite significant for the mass-myriad have to pay the cost like Bhopal Gas tragedy.

Section 5 has exempted the liability of the operators for the nuclear damages if caused due to natural disaster of an exceptional character, or an act of armed conflict, hostility, civil war, mutiny or terrorism. Such exemptions come to the way of the basic principle evolved by the Indian Supreme Court i.e. principle of absolute liability.

Section 6 the liability clause of the Act appears to be most controversial provision because the maximum financial liability of each nuclear incident is in Indian Currency as equivalent to 300million Special Drawing Rights (SDR). One incentive to set the amount of financial liability at the minimum is because any insurance premium paid by the supplier or the operator will add to the overall cost of business. This in turn means that it will cost the government more money to set up the plant as well as cost the public more to buy the electricity[7]. A second incentive is that following the Convention on Supplementary Compensation (CSC) for Nuclear Damage a country is eligible for international funding in the case of an accident – but only if its cap sits at 300 million SDR and costs of an accident end up exceeding that amount. This cap is inadequate for a nuclear disaster. Beyond this amount the victims will receive no compensation. The Indian Government being the operator in India will be liable for damages exceeding Rs. 500 Crore according to the provision of Section 7 of the Act, because liability lies with the operator according to the UN-adopted Convention on Supplementary Compensation. It makes the operator of the nuclear installation – and not the suppliers – liable in the event of accident. This clause is a prerequisite for India to become a part of CSC. As the operator is government owned facility, all payments will come entirely from the government means such liability will ultimately be compensated by Indian taxpayers. Arrangements for additional resources for total compensation beyond the maximum liability are not covered in the Act. The formulation of the Act is viewed from the

[7] Pilid Lao,"The Civil Nuclear Liability Bill: Its Rationale and Related issues", On Centre Right India, July 2010.

perspective of new entrants of private entities into such category of energy market but at the cost of commoners' lives. In the era of globalized free market economy and liberalization of trade such deterrence from entering the Indian nuclear market over the possibility that in the event of an accident, liquidation of all assets would not only palpably clarifies the value of the lives of the citizens rather insufficiency at covering of liability as required for compensation.

Section 14 provides for *locus standi,* for the injured person or the person whose property has been damaged or even their legal representatives or their duly authorized agent for making an application and not by the People's Government to make *suo moto* application on behalf of the victims. Section 15 has provided that the procedural limitation period of three years of discovering the damage so cause for making such application but subject to the fulfillment of the limitation under Section 18 as well. Section 31 of the Act has another procedural requirement to be complied before the Nuclear Damage Claims Commissioner. Section 16(5) has provided for finality of the orders of the Claim Commissioner while Section 17 enlarges only the operator to sue the manufacturers and suppliers for negligence in case of nuclear incident[8]. Victims can only sue the operator, and not the manufacturers and suppliers. In India as the operator shall be government owned facility hence, victims' compensation will come from fellow taxpayers. In Russian Federal Act on Atomic Energy it does not entail a perimeter upon the operator's right of remedy while in Germany allows persons other than the operator shall be liable for the damage, and allows victims to sue suppliers for fault-liability and receive compensation beyond what the operator pays. A clause needs to be added in the Act detailing suppliers' liability, or victims should be allowed to sue both suppliers and operators depending on where the issue of negligence lies.

Section 18 limits the right to claim compensation for nuclear damage at 10 years from the date the accident is notified which is too limited to assess the full extent of damages from a nuclear accident for long term health effects of such an accident may be known long after 10 years. Other nuclear conventions, like, the Vienna and Paris conventions allow for a 30-year claim period which more adequate time frame. The legislative intent of 10 year limit is the immediate effect upon the people and far-reaching effect has not given the opportunity to ask for compensation.

According to Section 35, specific Tribunal called Nuclear Damage Claims Commissions shall have the power to entertain such compensation claims of the victims to be adjudicated by the Claims Commissioner appointed to each prescribed 'zone'. The provisions to prefer to an Appeal against the award passed by the

[8] "Nuclear Liability Bill: DAE views ignored?" NDTV, July 2010

Claim Commissioner on compensation are prohibited. Only provisions are available to the victims are under Art. 226 and 227 of the Constitution before the High Court or Supreme Court of India. Tibunalization has restricted the Judiciary in these cases in India while in U.S. the Price Anderson Act allows lawsuits and criminal proceedings to go under the U.S. Civil Courts. The U.S. system even allows tortuous claims in addition to an unconstrained right of remedy for the operator, giving the operator a chance to sue the supplier for the mishap.

A more comprehensive system for victim-compensation and the right of recourse should have been promoted. Considering the constraints of the victims of their geographical locations and illiteracy due regard should have been had to allow the victims to sue in civil courts, rather than make claims to a commission, which under Section 38 is permitted to be dissolved even in the event that there exist pending cases. The remarkable point as enumerated in Section 38 is to empower the Government to dissolve the Claim Commission in the event that if the Govt. is satisfied that the purpose for which the Commission established has been fulfilled, or where the number of cases pending is so less that it would not justify the cost of its continued function, or where it considers necessary or expedient so to do. Cost-benefit analysis has been accounted in such cases while it has not been made in case of enlargement of opportunities to the victims for the justified compensations for the injuries sustained.

Section 45 empowers the Central Government to exempt any nuclear installation from the application of this Act, if the quality of the nuclear material the risk of what appears to be insignificant. According to a meticulous revise on the human race's nuclear commerce conducted in recent times by distinguished intercontinental organization 'Worldwatch Institute', nuclear industry is a staid decline as a good number of countries have realized that it is both unprofitable and treacherous.

The present Act appears to be a mockery in view of the Principle of 'Absolute Liability' and 'Polluter Pays' principle[9]. Appreciating the legitimacy of escalation of liability in Oleum case the Supreme Court has strictly followed the principle of strict liability[10] to formulate the Absolute liability so that the drawbacks of the strict liability rule could be avoided and superior responsibility may be imposed, thus the strict liability principle was made more unyielding. The Apex Court[11] apprehended that any endeavor engages in intrinsically perilous and unsafe bustle and if some

[9] The Hon'ble Apex Court of India while interpreting Article 21 of the Constitution has laid down in *M.C.Mehta v UOI (Oleum Gas leak case)*
[10] Rylands v Fletcher
[11] (1987) 1 SCC 395.

impairment is caused then the liability is absolute and not subjected to any exceptions as avowed in *Rylands v Fletcher.* The raison d'être for impending was for the purpose of revolutionisation in industrial culture, precisely sophisticated and consisted of loads of unsafe industries. It is further held that solitary the industry had the wherewithal to ascertain, sentinel and presage aligned with the hazards and dangers. The piece of information need to be agreed that the diligence is in best position to soak up the outlay of the catastrophe and in court's judgment the industry should swallow the expenditure of the after effects of calamity irrespective of what the foundation of the accident was. As far as the purveyor is concerned, the Act goes even further and grants chock-full imperviousness. The Civil Nuclear Liability Act has accommodated enormous jeopardy to Indian populace in the guise of safe practices for untoward nuclear incidents and appears to be violative of Article 21 of the Constitution of India.

The Supreme Court in *A.P.Pollution Control Board vs M.V.Nayudu*[12] has applied the precautionary principle and clarified that new technology or process that may cause serious and irreversible harm to human health and the environment precautionary measures should be taken even if causal relationships are not fully established. Pertinent to mention the burden of proof in Civil Nuclear Liability Act has been shifted to the victim instead of the proponent of the uncertain activity. Again, in *Vellore Citizens' Welfare Forum v. UOI*[13] the Supreme Court has concluded that "precautionary principle", "polluter pays principle", "shift of burden of proof", are part of the law of the land derived from Article 21, 47, 48A and 51A(g) of the Constitution of India and customary international law.

Section 46 of the Act however, has provided some reliefs with the direction that the provisions of this Act are in addition to and not in derogation of any other law for the time being in force, nothing would exempt under this Act the operator from liability which may arise from the provisions of any other law in force. Ironically other reliefs would generally be either Civil or Criminal but the Act has prevented the interference of Civil Court for passing award for tortuous liability for negligence and also the abuse of the process of law by the operators or the like to follow dilatory practices as under C.P.C. would ultimately frustrate the victims about compensations.

India is having 17 nuclear reactors without any Nuclear Safety Commission with inherent competency to enforce information disclosure, frame safety rules, risk assessment, methodologies and protocols, issue periodic risk assessment reports

[12] (1999) 2 SCC 718
[13] (1996) 5 SCC 647

and conduct safety audits and put it all in public domain. Such progressive move through legislation necessitates the constitution of a Nuclear Safety Commission comprised of credible independent experts and scientists as well as Industry professionals in addition to the elected representative of workers and to be empowered to give safety directives, including shutdown of plants. Issuance of licence without having such strong framework to ascertain and determine the accountability and liability would invite more legal complicacies to both the Government as well as the citizens.

Therefore a re-visit to the Act and necessary amendments is a must for its efficient and effective performance. The liability of the operator(s) and the amount of liability should be balanced with the injuries experienced across the globe in such type of incidents. Alike the Ministry of Environment a statutory authority should be there to examine and certify that all compulsory security measures in such nuclear installation have been duly complied.

Only the aspect of civil liability is provided by the 'Civil Liability for Nuclear Damage Act 2010' and there is no clarity regarding the approach towards criminal liability of the operators and suppliers in case of their negligence. This becomes extremely relevant in the light of the treatment of the criminal charges for causing gas leak at the Union Carbide factory at Bhopal. Moreover in cases of multinational companies due to the lack of clear approach regarding the jurisdiction as well as liability of the parent company in India and internationally the lack of legislative approach is detrimental to the interest of India.

It can be concluded that by passing the Nuclear Liability Act, the Indian government had failed to utilize the golden opportunity for acknowledging the aspects of transparency, regulatory independence and also developing a liability principle suited for India in case of a Nuclear incident.

CIVIL LIABILITY FOR NUCLEAR DAMAGE IN INDIA

In January, 2016, India and the United States had shorted the differences and reached to a mutual acceptance on the trade liability of suppliers for nuclear industrial accidents in India. Now the operators of nuclear installations in India will persist to go on with the principal liability for a nuclear unpleasant incident and additional enduring liability of suppliers for injure resultant from a nuclear accident will be taken care of by an insurance pool, co-funded by Indian insurers and the Government of India.[14]

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[14]Available at http://www.newindianexpress.com/nation/Nuclear-Insurance-Pool-Dilutes-Risk-for-Indian-US-Suppliers/2015/02/09/article2660017.ece.

The Civil Liability for Nuclear Damage Act, 2010 (the **"Act")** has predominantly confined for recompense fatalities from injury caused by a nuclear incident, analyzed accountability and provided measures for damages while U.S. operators necessitated the Act to be conditioned in such fashion so that they can be insurable at their domestic front. The Indo-US Civilian Nuclear Agreement, **2008** has become ineffective in its implementation through this Act due to lack of pre-determined limit of recourse against suppliers and unknown liabilities. As a result the suppliers have lost interest due to their incapability to insure against the jeopardy and thus, are not curious to venture into Indian market.

The Act suffers from the ambiguity in addressing the provisions of accountability for nuclear damage whereas the operator enjoys the universal principle of strict liability for nuclear damage resulting out of a nuclear incident[15] in conformity with the exception of force majeure incident. In such cases the central government, as under the present Act shall have to take the responsibility of the peril with respect to the compensation.[16]

The restrictive liability[17] of the operator has bestowed huge liability upon the Government as under the democratic principle of governance, for example, as under the present Act the operator shall be strictly liable for a sum up to USD 238 million while the central government shall be liable for a sum beyond this but falling lower than USD 415 million. The government of late declared to set up a Rs. 15 billion insurance pool equivalent top USD 238 million to be financed by Indian insurers and the government is projected to take the edge off the liability of the operator. The operator in India is the Nuclear Power Corporation of India Limited (**NPCIL**), which is state-owned, so the whole liability of the operator is in actual fact a public liability and will be borne by the Indian taxpayer in actual practice.

Section 17 has facilitated the operator that after paying recompense it shall have the right of recourse against a supplier if such right is contracted and if the nuclear incident transpires as a outcome of the operation of a supplier including that of his workers, together with the contribution of paraphernalia or bits and pieces with patent or latent flaws, or the prerequisite of services which are below par. On shelling out that liability, in case that the accident was rooted by a latent or patent defect, designed or constructed by the supplier or the slack act of services,

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[15] § 4 of the Act

[16] § 5 of the Act.

[17] The liability of the operator is to all intents and purposes capped at Rs. 15 billion (USD 238 million) and the by and large liability of the central government with respect to any nuclear incident is capped at an equivalent of 300 million Special Drawing Rights which is equivalent to roughly USD 415 million as of January 2016.

then the supplier would be contractually indebted to indemnify the operator for his damages.

Rule 24 of the Act states that such 'recourse clause' in the contract between an operator and the supplier as referred to in Section 17 shall be not less than the amount of the operator's liability under the Act, or the value of the contract, whichever is take away. The 'liability clause' in such contract so that the supplier be made answerable, and that shall be capped at USD 238 million.

Section 46 of the Act has let off the operator from any legal proceedings other than compensations and the protection for suppliers in the Act is that it shields them from liability in tort before the Indian courts. It is viewed behind the insertion of Section 46 of the Act that the victims' claims are against the operator and hence inevitably rules out the capacity of an action in tort against a supplier. Interestingly the Act does not explicitly bar an action against a supplier in tort, in cases of negligence resulting death, personal injury or damage to property. It is the cardinal rule of law that all statutes are to be construe in harmony with the object of the legislature; the constitutionality of Section 46 has not been tested.

As under Article XIII of the Convention on Supplementary Compensation for Nuclear Damage (CSCND) states that jurisdiction over claims as to nuclear damage arising from a nuclear incident shall lie only with the courts of the contracting party within which the nuclear incident occurs. Therefore, it is likely that a foreign court will rule that an action in tort by an Indian victim in the courts of the jurisdiction of the supplier will probably be inadmissible on the basis of Article XIII of the CSCND.

CONSTITUTION OF INDIA AND PRINCIPLES OF ENVIRONMENT PROTECTION

The Constitution of India is both rigid and flexible, not a static but a living document which widens its extent and grows with the requirement of era. This embryonic nature and the urge for impending development is the basis of a sturdy protection of environment under of the Constitution of India. Right to life with human dignity and pollution free environment is inherent principle of the Constitution. The Environment (Protection) Act, 1986 defines environment as "environment includes water, air and land and the interrelationship which exists among and between air, water and land and human beings, other living creatures, plants, micro-organism and property".

The chapter on fundamental duties of the Indian Constitution enforces obligation on all citizens to protect environment. Article 51-A (g) states, "It shall be duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures."

The Directive principles under the Indian constitution intended for the philosophy of the structure of a welfare state. Article 47 endow with the development of public health, which includes the safety and development of environment.

The Constitution of India under Part III guarantees fundamental rights, which are indispensable for the progress of every individual and to which a person is intrinsically at liberty by virtue of being human alone. Right to environment is also a fundamental right. Rights conferred under Articles 21, 14 and 19 of this part have been used for environmental protection in numerous court cases and writ petitions in High Courts and Supreme Court of India. Article 21 of the Constitution states, "no person shall be deprived of his life or personal liberty except according to procedure established by law". The Supreme Court in Maneka Gandhi vs. Union of India[18] has liberally interpreted Article 21, which guarantees fundamental right to life. In this case the Apex Court of India stated that right to healthy environment is inherent in it and is a significant characteristic of right to live with human dignity. The right to live in a healthy environment as a fundamental part of Article 21 of the Constitution was primary accepted in the case of Dehradun Quarrying Case[19]. In M.C. Mehta v. Union of India,[20] the Supreme Court interpreted the right to live in pollution free environment as an ingredient of fundamental right to life in libretto under Article 21 of the Constitution.

Under Article 19 (1) (g) of the Indian constitution every citizen of India has the fundamental right to practice any profession or to carry on any occupation, trade or business, subject to reasonable precincts. Safeguards for environment protection are inherent under Article 19(1) so if a trade is having health risks beyond certain limits and are a peril for the masses then such trade activities are restricted. The Supreme Court in Cooverjee B. Bharucha v Excise Commissioner, Ajmer [21] observed that, if there is disagreement between environmental protection and right to freedom of trade and occupation, then the courts have to decide on a reasonable equilibrium of environmental wellbeing with the fundamental rights conferred under the Indian Constitution.

The principles of 'the Precautionary Principle', 'the Polluter Pays Principle' and 'Absolute Liability' are fundamental characteristics of 'Sustainable Development', which evolved through numerous decisions by the Indian judiciary in Public Interest Litigations under Article 32 and 226 of the Indian Constitution.

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[18] AIR 1978 SC 597
[19] Rural Litigation and Entitlement Kendra v. State, AIR 1988 SC 2187.
[20] AIR 1987 SC 1086
[21] 1954, SC 220

JUDICIAL RESPONSES PRIOR TO CIVIL LIABILITY REGIME FOR INDIA

The Indian Constitution through the directive principles of state policy and the fundamental duties chapters explicitly articulate the State's pledge to protect and progress the environment. Judicial elucidation has toughened this constitutional directive. The Supreme Court of India has develop an extensive environmental jurisprudence, amongst the fundamental norms recognized by the court are:

- Government agencies may not supplicate non-availability of funds, scantiness of staff or other insufficiencies to justify the non-performance of their obligations under the environmental laws. [22]
- Enforcement agencies are under a commitment to strictly enforce environmental laws. [23]
- Every person enjoys the right to a wholesome environment, which is an aspect of the right to life guaranteed under Article 12 of the Constitution of India.[24]
- The 'polluter pays' principle which is a part of the basic environmental law of the land requires that a polluter bear the remedial or clean up costs as well as the amounts payable to compensate the victims of pollution. [25]
- Stringent action ought to be taken against contumacious defaulters and persons who carry on industrial or development activity for profit without regard to environmental laws. [26]
- The 'precautionary principle' requires the government authorities to anticipate, prevent and attack the cause of environmental pollution. This principle also imposes the onus of proof on the developer or industrialist to show that his or her action is environmentally benign[27].
- The power conferred under an environmental statute may be exercised only to advance environmental protection and not for a purpose that would defect the object of the law. [28]
- The State is the trustee of all natural recourses which are by nature meant for public use and enjoyment. The public at large is the beneficiary of the sea-

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[22] Delhi Garbage Case, AIR 1996 SC 2969, 2976.
[23] CRZ Notification Case, 1996(5) SCC 281, 294,301.
[24] AIR
[25] Bichhri Case, AIR 1996 SC 2715, 2721
[26] AIR 1991 SC 1453.
[27] Shrimp Culturre Case, AIR 1997 SC 811.
[28] CRZ Noification Case, 1996(5) SCC 281, 299, 302.

shore, running waters, air, forests and ecologically fragile lands. These resources cannot be converted into private ownership. [29]

- Government development agencies charged with decision making ought to give due regard to ecological factors including (a) the environmental policy of the Central and the State Government; (b) the sustainable development and utilization of natural recourses and pass on to future generations an environment as intact as the one we inherited from the previous generation.[30]

In *M.C.Mehta v Union of India*[31] the Supreme Court implicitly observed that Article 21 of the Constitution of India guarantees the fundamental right to life and personal liberty to include the right to a wholesome environment. Article 21 of the Constitution provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law.

In *Rural Litigation and Entitlement Kendra v. State of U.P.*[32] the Supreme Court ordered for closure of certain lime stone quarries being worked out in Dehradun on the ground that there were serious deficiencies regarding safety about hazards in them and the work to as likely to affect the ecology of the area. Large scale pollution was found to have been caused by the quarries adversely affecting the safety and health of the people in the region.

In *M.C.Mehta v. Union of India*[33] the Supreme Court directed the company to take all necessary safety measures before starting the operation as the company was using hadrons and lethal chemicals and gases which were posing danger to the health and life of workmen and the people living in its neighbourhood. The court also directed the management to deposit a sum of Rs. 20 lakhs by way of security for payment of compensation claims of the victims of oleum gas leak and a sum of Rs. 15 lakhs as bank guarantee to ensure compliance of the order of the court. Hon'ble Bhagwati P.N., C.J., clarified the position of damages when harm results from the hazardous or inherently dangerous nature of the activity. In such cases, the Court held that "compensation must be correlated to the magnitude and capacity of the enterprise because such compensation must have a different effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it"

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[29] Span Motels Case, 1997(1) SCC 388.
[30] M.I.Builders v Rdhey Shyam Sahu AIR 1999 SC 2468, 2505.
[31] AIR 1987 SC 1086
[32] AIR 1985 S.C. 652
[33] (1988) 1 SCC 471

The Court laid down other principles as follows:

i. For progress and development, setting up of chemical and hazardous industries is essential.

ii. In order to minimise hazards such industries be located in such areas where population is search and steps be taken to prevent the growth of population in such areas.

iii. A green belt of 1 to 5 km width around such industries be provided.

iv. In order to assess environmental pollution an Ecological Sciences Research Group (ESRG) consisting of independent professionally competent experts in different branches of Science and Technology be set up who would act as an information bank.

v. An Environmental Court be set up on regional basis with one professional Judge and two experts drawn from ESRG to assist the Judge to decide the cases relating to environmental pollution. This recommendation has been accepted by the Government of India, and the National Environmental Tribunal Act, 1995 has been enacted to deal with the cases of environmental pollution.

In another case filed by M.C.Mehta against the Union of India, the Supreme Court ordered for the closure of the tanneries of Jajman near Kanpur polluting the Ganga. In *Bangalore Medical Trust v. B.S.Mudappa*[34] the Supreme Court held that a park is necessity and is not a mere amenity. For maintaining ecology in urban areas open space and park is necessary.

An action under the law of Tort to abate nuisances is the oldest remedy. Most of the cases relating to pollution are covered by the heads of nuisance, negligence or strict liability. The remedy is available either as damages or injunction. In the law of Tort primary remedy is a claim for unliquidated damages. However, where it is not appropriate remedy the prevention of the portions act is essential for which remedy of injunction with or without damages may be granted.

Strict liability arises where the person who brings and keeps a dangerous thing on his property, he is held to be answerable for damage done by not keeping it secure subject to the extent to the exception of Act of God; or *Vis major* or the plaintiff's own default. *Rylands v. Fletcher* is a leading case on this theory. It was taken support of in the Bhopal gas Leak case. Absolute liability arises without any exception for any defence. The owner of the dangerous thing is held absolutely liable for the consequences of the hazards he keeps.

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[34] (1994) 4 SCC 54

In *Ratlam Municipality v. Virdhi Chand*,[35] the Supreme Court has evolved the principle of judicial dynamism in matters of environmental pollution. The Apex Court held that the order of the Magistrate and issued supplementary directions. "Specially enjoying upon the Municipal Authority and the State Government to carry out certain directions which included that the Municipal Council and the State Government shall take steps to stop the pollution caused by the alcohol plant," and the Sub-Divisional Magistrate will use his power under Section 133 of the Criminal Procedure Code to abate the nuisance so caused.

PUBLIC INTEREST LITIGATION: AN ANALYSIS ON THE CIVIL NUCLEAR LIABILITY.

A. In the matter of Centre for Public Interest Litigation & Ors v. Union of India[36]

In this case the *vires* of the Civil Liability for Nuclear Damages Act 2010 (CLNDA) has been challenged while CPIL filed a writ in the Supreme Court prayed for the subjection of the suppliers at Kudankulam nuclear plant in Tamil Nadu under the purview of the 'Polluter Pays' and the 'Absolute Liability' principles. It was further urged to provide the competency to the victim to ask for compensation from the suppliers of nuclear reactor if an unfortunate industrial accident ever occurs even if the Government and the plant operator choose not to sue. It was further prayed that the suppliers be bound by CLNDA, irrespective of any mutual agreement opposing such an act and prays that the rule codified by the Government to level down the liability of nuclear suppliers be set aside as unconstitutional and ultra *vires* the CLNDA.

Remarking the lacunae of the State administration in the Court criticized the Tamil Nadu administration for taking nuclear safety lightly and suggested that failing to take effectual actions to put into practice the pertinent disaster management guiding principles. The Hon'ble Court has also enquired the Atomic Energy Regulatory Board and the plant operator on the steps they have taken to put into operation the prescribed safety measures, the Court point out that the Government could be directed to abide by the Convention on Nuclear Safety, which commands an independent safety regulator. The Court has reserved its judgment and the case is pending as on 27th February, 2016.

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[35] AIR 1980, S.C. 1622

[36] Also known as Kudankulam Case *vide* Writ Petition (Civil) No. 407 of 2012: The case is connected to W.P. (Civil) 464 of 2011, Supreme Court of India.

B. In the matter of Common Cause and Ors. v. Union of India[37] again the constitutional validity of the Civil Liability for Nuclear Damage Act, 2010 has been challenged, seeking thereof the safety re-evaluation of all nuclear facilities all over in India. The petitioners had sought relief in the interest of right to life, right to clean environment and right to healthy & safe enjoyment of life guaranteed under the provisions of fundamental rights conferred in the Indian Constitution. It has also been brought to the notice of the Court that a nuclear incident or seep out of radiation can be root of devastating effects on human life and environment in India. This petitioners' had alleged that under the demands of overseas nuclear industries and foreign governments, the Central Government is determined to operate a pricey and hazardous nuclear power installations without necessary safety measures. It is also alleged that the nuclear reactor and the paraphernalia traded in are of tremendously doubtful reputation and of poor safety standards. This petitioner uses the projected Jaitapur nuclear power plant as a case study to underline the superfluous assessments in recent times. The case lies pending before the Apex Court of India.

CONCLUSION

India's voracious demand for development means that it has to look at unconventional ways of producing vast quantity of energy that the nation will necessitate all through this century and also after that if possible. On the other hand, the penalty of a nuclear accident cannot be cleanly brushed off. The recent Fukushima nuclear disaster in Japan has made apparent, that the expenditure is definitely mammoth. India has its own experience of industrial adversity on a hefty extent. The Bhopal disaster in 1984 resulted in more than 15,000 deaths and multifarious legal complexities for compensation and jurisdictions of filling claims that followed are still spanking new in memory. And its effects are still felt both in respect of personal injuries and financial debacle.

Eventually, warranting an outline to uphold nuclear energy production and wider public policy objectives simultaneously is a very vigorous. Only time and experience can tell whether the Act and the Rules codified can have an even-handed framework, heartening suppliers to venture into the Indian nuclear energy market, nevertheless shielding the justifiable safety and security apprehensions of the public and compensating them in the event of a nuclear accident.

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[37] Writ Petition (Civil) No. 464 of 2011, Supreme Court of India

BOOK REVIEW

Prof (Dr.) N.K. Chakrabarti*

Ahmad Siddique's *Criminology, Penology and Victimology,* 7th Edition by Prof. (Dr.) Syed Mohammad Afzal Qadri (Eastern Book Company, Lucknow, India. 2016, XLVIII+ 655PP, Softcover: Rs.695.00).

I first encountered Ahmad Siddique's *Criminology: Problems and Perspectives* (1983,2nd Edn.) as a student of LL.M. (1982-84) in the University of Calcutta when I was fascinated with specialization 'Tort and Crime'. In fact my understanding of criminology and criminal justice administration in Indian perspectives was shaped with Siddique's *Criminology* . His writings on criminology and criminal justice administration depicted the complexities, anomalies and aberrations of criminal justice system as well as criminal laws in India. But the book provided a comprehensive range of introductory texts on the various aspects of criminology in Indian perspectives.

The aforesaid book is in its 7th Edition. This fact itself proves the value of Siddiques's book on Criminology. The present book has been edited by Prof. (Dr.) Syed Mohammad Afzal Qadri, a vast experienced and well known teacher on the subject. The book endeavors to present a broad, comprehensive view of the subject, rather than dealing intensively with a segment of it and this is especially true of the chapters relating to criminological theories. The book contained 18 chapters.

In the first and introductory chapter on Crime and Criminology the author attempted to give an overview of the subject. In dealing with schools of criminology (p.14-15)the author have not provided us a complete idea of the topic. On the other hand he has discussed separately cartographic school, typological school and radical criminology and conflict theory. All those schools along heading with remaining criminological schools of thought may be brought under the heading 'schools of criminology'. In the introductory chapter there is a need to restructure the contents to have a coherent development of thought.

In **chapter 2 and 3** the author has presented all the **criminological theories** broadly divided into two approaches- Individual and environmental. In both the chapters the author has discussed almost all the thinkers very simple and concise manner and written for the Indian reader. He has discussed even the modern crimino-biological school as post-Lombrosian development(p.34). It would have

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been better if the 'chromosomal factor' be added at page 34 instead of again described at page 47 under separate heading. Among the followers of Lombroso the author observed that Ferri took "into account geographical, psychological and economic factors"(p.31) which is not correct. The author rightly pointed out that Ferri classified criminals into five categories: insane criminals, born criminals, habitual criminals, criminal by passion and occasional criminals." Therefore Ferri not at all focused on geographical and economic factor and the sentence is appearing as misleading.

Chapter 4 to 9 the author described **typology of crime**. He has discussed white-collar crime, organized crime, sex offences, prostitution, euthanasia, female criminality, alcoholism, drug abuse and violent crime. In these chapters the author has presented a broad and comprehensive view of the subject in Indian context. In addition to provide fundamentals of the subject he has raised pertinent issues to present an overall picture emerging out of these issues and attempted to give possible answers. In those chapters the author highlighted legal control in India and gave readers a solid foundation on crime typology. The author passionately describes the issue of sex offences, homosexuality, prostitution, abortion, euthanasia. But why cyber crime has been included in the chapter of White Collar crime is not understandable. The offence of terrorism has been discussed in one page(p.193) only which deserved to be dealt with more details. The author has rightly referred some landmark decisions of the Supreme Court of India like *Allauddin Mian v. State of Bihar(1989, 3SCC 5) Aruna Ramachandra Shanbaug v. Union of India(2011, 4SCC 454), Bachan Singh v. State of Punjab(1980,2SCC 684), Centre for Public Interest Litigation v. Union of India(2012, 3SCC 1), D.K. Basu v. State of W.B.(1997, 1SCC 416), Suresh Kumar Koushal v. Naz foundation(2013, 1SCC 1) etc.* Reading these chapters one is struck by how legal control mechanisms as well as the law enforcement authorities are ineffective and inadequate to restrain the rising trends of various offences in India. The author has also emphasized the need of various legal and administrative reforms in those aspects.

From **chapter 10 to 17** the author discussed various aspects of **Penology** and divided the areas into broad two divisions- punitive approach and therapeutic approach. Under punitive approaches he has discussed various theories of punishment, kinds of punishment, debate on capital punishment and preventive measures in India. On the other hand on therapeutic approaches the author discussed comprehensively

Prison system, probation and parole, juvenile justice, and sentencing process and practices in India. The author has discussed the role of Police and criminal

justice administration. The author's analyses of the penological thoughts and development, especially chapter on Prison Reform, are extremely thoughtful and give readers a solid foundation. The analyses of sentencing and disparity in sentencing in India also very much thought provoking. Reader may be more benefitted if the reformation through parole system could have been discussed more details and section 12 of the Probation of Offenders Act, 1958 on removal of disqualification attaching to conviction also focused in the appraisal of probation system (p.365) particularly impact of the Supreme Court decision in *Trikkha Ram v. V.K. Seth and another*((AIR 1988 Cri SC 285) .

In this seventh edition the author has added one chapter on Victimology(last chapter,18). It is an emerging area in Indian criminal justice administration but the materials are incomplete. All the sections added in Criminal Procedure Amendment 2008 are not mentioned in the chapter particularly section 357A while discussed state compensation programmes. Each state now requires to declare its Victim Compensation Scheme under section 357A (already 18 stated notified). Moreover the notification of the Government of India on victim compensation Government of India, Ministry of Home Affairs circulated to all State Governments and UT Administrations on 14th October, 2015 the Central Victim Compensation Fund Scheme (CVCF) Guidelines to remove disparities among states.

Ahmed Siddique's text book on Criminology has already been proved as extremely important foundational book in Indian literature on criminology. The book is a significant contribution to the field, brings order to the multitude of information and knowledge, and a familiar accounts of crime and criminal justice administration in India. The book will be easily comprehended by the students of criminology. It should by a compulsory reading for any student in the field of criminology as well as to any person interested in the field of criminology, penology and victimology.

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BOOK REVIEW

Talat Fatima's *Cyber Crime*, 2nd Edition, Eastern Book Company, Lucknow, India, 2016, pp. LXIV + 688, Soft Cover, Price Rs. 675

Ms. Parimita Dash[1]

The book under review is a significant outcome of the author's extensive research on the cyberspace in general and the issues involved in the management of cyberspace with special focus on laws relating to cyber crimes and determination of liability for acts committed involving cyberspace in particular. This book very coherently highlights the author's perspective towards evolution of concept of cyberspace in the light of advent of computers & internet, nature and vulnerability of cyberspace, reasons behind emergence of crimes in cyberspace termed as cyber crimes, taxonomy of cyber crimes, legal issues involved in such cybercrimes, role of law in combating cyber crimes, prevention and enforcement strategies pertaining to cyber crimes and the scenario in India dealing with cyber crimes with a special reference on the Indian legislation on cyber crimes i.e. Information Technology Act 2000. The author, in this book has discussed all these aspects of cybercrimes elaborately and in most comprehensible manner by drawing attention of the readers towards the basic features and judicial trends of U.S.A and U.K. with regard to cyber crimes and thereby helping the readers appreciate the jurisprudential justifications adopted by other jurisdictions while dealing with cyber crimes. In this context, one of the major highlights of this book is the author's meticulous study of various kinds of cyber crimes and the laws (existing/ proposed/ justifying need) combating such cyber crime across various jurisdictions and bringing out a clear comparison with the Indian scenario, thereby suggesting the need for changes to make the legal framework combating cyber crimes in India more effective. Comparative study is an inherent feature of almost every chapter of this book depending upon the contents of individual chapter.

The book has 12 chapters in total dedicated to various relevant aspects of cyber crimes starting with the history of emergence of information communication technology system in the world and that giving rise to the concept of cyberspace as the introductory chapter, then gradually covering various other topics relating to cyberspace like cyber crimes, taxonomy of cyber crimes, cloud computing, internet banking, intellectual property protection in the digital world, determination of liability in cyberspace, electronic signatures and crimes, legal issues involved in countering

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cyber crimes, prevention and enforcement measures pertaining to cyber crimes and finally focusing on the Indian legislation to combat cyber crimes and extend protection to both person and property of individuals in cyberspace i.e. the Information Technology Act 2000.

Chapter one titled "*The communication story*" introduces the readers to the book by focusing on the evolution of communication technology system including computer and internet in the first half of the chapter and throwing light on effect of technology on law with a detailed discussion on the legal implication of internet in the other half of the chapter respectively. This chapter very clearly provides an overview of the issues for discussions of the subsequent chapters. The author wonderfully explains the evolution of cyberspace or the digital world by tracing it back to the evolutionary phase of telegraph to telephone to computers and then the revolutionary phase of ARPANET to the omnipresent internet system and the various access providing systems connecting with the so called virtual world i.e. dial up to broadband to 3G/ 4G. The first part of this chapter deals with all these technical aspects of the digital world including its various instruments computers[2], internet (World Wide Web) and the access providing systems. The other part of this chapter identifies the various legal implication of the internet like implications on intellectual property rights in terms of computer software, copyright in information society, trademarks, domain names systems etc, implications on commercial transactions involving online contracts, on the world of crimes, on jurisdictional regime in terms of various theories governing determination of jurisdiction of the territory less cyberspace i.e. personal jurisdiction theory, choice of law theory, country of origin theory, minimum contacts theory, forum selection theory, effects theory etc with a detailed analysis in the light of relevant case laws which make the entire chapter very interesting for the readers.

The second chapter of this book holds special importance as this contains the author's analysis of nature of cyber crimes. Cyber crime is the most debated and discussed issue pertaining to cyberspace, hence understanding the jurisprudential evolution of cyber crimes and the justification behind emphasizing on a sui-generis system of legal frame work to deal with issues relating to cyber crimes is very important. Realizing this concern, author in the second chapter presents sincere efforts in explaining the historical perspective of crimes and establishing a nexus

[2] Author discusses computers as an instrument of the cyberspace both in terms of its constituents i.e. hardware and software as both of these are instrumental behind running of a computer which in turn is very important for entire functioning of the digital world as it serves the purpose if being that entity which helps individuals connect to the world wide web through various modes of access like that of broadband, 3G/ 4G etc. (pp. 15-20)

between traditional/ conventional crime and the cyber crimes based on the two most important elements of crime i.e. Mens Rea and Actus Reus and thereby drawing a comparison between the two. This chapter also reflects a comparative study of the scenario of cyber crimes in U.S.A, U.K. and India. As an extension of the discussions of chapter 2, author gives an overview of the various classification of cyber crime, after defining and conceptualizing cyber crimes in detailed manner in chapter Three. The broad classifications that author has come up with related to cyber crimes in this chapter are, traditional cyber crimes committed by using only a computer system either as a tool or as a target, economic related crime involving the World Wide Web, content related crimes which again involves the digital world. The kinds of cyber crimes which have found an elaborate place in this chapter with a comparative analysis of laws against these types of cyber crimes in U.S.A, U.K. & India are cyber pornography with special emphasis on child pornography, cyber defamation, cyber bullying,[3] cyber stalking,[4] cyber squatting, etc. Analysis of relevant case laws relating to each of these cyber crimes makes it easier for the readers to understand the concepts in a better manner. Another form of cyber crime which the authors names as pure cyber crimes[5] is the subject matter of the fourth chapter of the book. A great emphasis has been laid down on hacking and various legal issues involved in hacking analyzing in great detail the scenario relating to hacking in India, bringing out a comparison with the situation that of in U.S.A & U.K. on the basis of decided case laws pertaining to hacking in those jurisdictions. This chapter also highlights the potential threats to individual privacy and nation's security in cyberspace and in this context provides a good insight to the issue of cyber terrorism and the approaches that various nations have adopted towards dealing with cyber terrorism.

With increasing dependence of human race on the Internet technology and the digital world becoming an answer to almost everything in day to day life, World Wide Web becoming the biggest resource and hence attempts are being made globally to enhance the potential of this resource. One of such efforts which have

[3] Cyber bullying has been discussed by the author in the light of Section 66 A, Information Technology (Amendment) Act 2008, which is considered as an attack on the freedom of speech. (pp. 162-163)

[4] Cyber stalking has also found a place in the new list of crimes against women in India in section 354-D, Indian Penal Code 1860 and this has been explained in detail in chapter 3. (p. 167)

[5] Author classifies the pure cyber crime in to two broad classifications i.e. vandalizing the digital information either by internal means (by hacking or Denial of service attacks) or by external means (infecting computer systems with viruses, worms. Trojans etc.) and security related pure cyber crimes pertaining either to individual privacy or national security, threats to which come in the form of cyber terrorism, information warfare etc. (p. 179)

been translated successfully is the formulation of concept cloud and the advent of cloud computing phenomenon. Cloud computing is all about hassle free resource sharing and free & easy accessibility to electronic data stored and saved in the virtual space in the form of cloud. Emergence of this new concept pertaining to cyberspace has exposed the cyberspace to newer threats and challenges that requires attention from the legal system in combating issues involving legal implication of this technology. Realizing its importance as an emerging and less explored area of cyber law, author has dedicated an entire chapter in the form of fifth chapter of this book entirely to cloud computing as a concept or phenomenon and the various legal implications arising out of such issue.

Sixth chapter is a reflection of the author's clear understanding of Internet Banking and Cyber Infractions.[6] Author not only explains the meaning of internet banking in very simple terms but also emphasizes on the role of internet banking in accelerating the pace with which country's banking and financial institutions perform and making the banking services delivery easy on the part of these institutions and also for the people at the receiving end of these banking services. Author has elaborately analyzed the Indian legal regime governing internet banking and has thereby studied Internet banking vis-à-vis Indian Penal Code, Prevention of Money Laundering Act, 2002, Internet Banking and the payment and Settlement Act, 2007, Information Technology (Amendment) Act, 2008 and has provided the readers with a great insight in to the Internet Banking system in India.

One of the most difficult task with regard to management and regulation of cyberspace is to ensure the protection to Intellectual Property Rights in cyberspace. With the issue of anonymity so prevalent in cyberspace, protecting intellectual property rights in terms of copyright, patents more specifically software patents, trademarks, domain names etc. become a huge challenge. Understanding this serious concern, author has very meticulously dedicated the seventh chapter of the book to the protection of intellectual property from a technological perspective. A major highlight of this chapter is the extensive discussions on the potential threats that exist for copyright infringements in cyberspace where the author shows his disappointment on the unavailability of an exhaustive framework in Indian which can specifically deal with the copyright infringements that take place in cyberspace as the current law on copyright in India does not sufficiently and aptly addresses this issue. Implications of Plagiarism and technology have been very aptly addressed by the author in this chapter as a separate segment of discussion.

[6] The various violations and vandalism of the valuable data in Internet banking has been termed as "cyber infraction" by the author as few of them may lead to serious cyber crimes whereas few might result in common violations. (p.313)

The author has very beautifully and exclusively dealt with the criminal liability of invisible of players online while addressing the legal liability of infringers and criminals in cyber space in the eighth chapter of the book. This chapter opens up addressing the issue of anonymity as the major setback in the determination of liability in case of cyber offences. Another major highlight of the chapter is the in depth analysis of the liability of intermediaries i.e. ISPs and NSPs under the secondary liability concept for indirect infringement leading to cyber offences with a special mention on the Indian perspective on liability of Internet service providers/ Network service providers (ISPs/ NSPs).[7] This chapter also witness a wonderful comparison of the laws determining the liability of various players online by analyzing the legal regime of U.S.A, U.K., India in this context. Chapter nine covers the varied issues involved in issuing, management and regulation of electronic signatures and the various legal implications arises out of use and misuse of electronic signatures which often leads to defined cyber offences under the IT Act, 2000. This chapter is a strong indication of the author's extensive research on the area of electronic signature and crime, which can be sensed by the reader upon the reading contents if the chapter which includes the origin of electronic signature, a brief discussion on the Model law on Electronic Signature, 2001, differentiating between the digital signature and electronic signature, concept of cryptography involving public key and private key, system of public key infrastructure (PKI), certification procedure for the digital signatures etc. The chapter ends with the author's strong recommendation upon his intensive study on the subject matter regarding formulating an Electronic signature legislation incorporating certain provisions from the UNCITRAL model law and some changes to the provisions of the existing IT Act 2000.

Chapter Tenth and Eleventh of the book focuses on the legal issues involved in countering cyber crimes and prevention and enforcement strategies pertaining to cyber crimes respectively. While the former covers extensively issues of concern relating to cyber crimes like the issue complexity of jurisdiction and the different takes adopted by various jurisdiction like that of U.S.A, U.K. and India in the light of decided case laws on determination of jurisdiction in case of cyber offence, issue of extra territorial jurisdiction, role of private international law in case of internet jurisdiction, difficulty in the collection of internet evidence and treating them admissible in the court of law etc., the later chapter is a crisp answer given by the author in terms of formulating strategies for prevention of cyber crimes and

[7] While discussing the secondary liability concept in case of intermediary, the author has extensively researched on the legal regime governing such liability in India in the light of section 79 of IT Act 2000, with its limitations and exceptions. (pp. 408-410)

enforcement of laws against cyber offences in the light of role of private international law in the formulation of these preventive and enforcement strategies. This chapter also contains an interesting criticism of the author on the Convention on Cyber Crime. And finally the last chapter i.e. the twelfth chapter of the book provides the readers with a detailed outline of the Information Technology Act, 2000 in terms of carving out the salient features of the Act, the hierarchy of the regulatory authorities under the Act, role of Cyber Appellate Tribunal (CAT), Information Technology (Amendment) Act. 2008. This chapter is an apt way of finishing the book as it provides a great insight of the Indian legal regime on cyber crimes which makes the whole book worth reading by the student community, academicians, and researchers in India and abroad.

The book is an excellent work by the author in terms of the vast literature review that it contains in each chapter on different subject matters pertaining to cyberspace and cyber crimes and hence can be considered as a good research tool for all those intending to take up advanced research on cyber laws. The entire arrangement of the contents like the way the book provides a meticulously drafted list of cases, statutes, abbreviations at the outset of the book, the unique feature of case pilot inserted at various places of the different chapters of the of the book indicating specific case law/ study on the concerned subject matter and a detailed E- Glossary at the end of the book are very impressive and hence make the reading interesting and breaks the monotony. However the author could have worked upon certain areas like discussing the concept of Vulnerability as a reason of crime and discussing that in the light cyber crime and its reason in the second chapter covering cyber crimes in terms of nature and scope, establishing a nexus between the concept of Sovereignty and Cyberspace Regulation while discussing about determination of liability for cyber offences in the eighth chapter, concept of idea of commons vis-à-vis software patent & copy left vis-à-vis protecting copyright in the digital world in the chapter dedicated to intellectual property protection in cyberspace, a strong differentiation between the concept of primary liability and secondary liability arising out of the acts committed in cyberspace while discussing legal liability in cyberspace in eighth chapter etc. which are inherently essential concepts of cyber crimes and cyberspace regulation. This book can be regarded as a significant contribution to the existing literature on cyber laws in India.

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Book Review

Uniform Civil Code for India:Proposed Blueprint for Scholarly Discourse, Simon Shetreet, Hiram E Chodosh, Oxford University Press, 2015

Mr. Abhik Majumdar[1]

The idea of a single personal law code applying across religious affiliations, popularly referred to as UCC or 'Uniform Civil Code', is arguably the single most acrimoniously disputed issue relating to Indian personal laws. Given this, Shetreet and Chodosh's 'Proposed Blueprint for Scholarly Discourse' regarding UCC in India comes across as an ambitious undertaking. And all the more so because the authors endorse an inclusive and mediated approach that breaks sharply with the top-down, one-size-fits-all perspective conventionally associated with UCC in India. The book is divided into two parts: the first, and clearly the more extensive, examines UCC from a comparative perspective; while the second addresses possible mediation strategies which could be used to resolve conflicts associated the issue.

At two separate points in the introduction (p 2-3, and in greater length at p 33-34) the authors set out certain guidelines designed to make UCC more acceptable across religious communities: These include (a) implementing UCC through legislative and not judicial intervention; (b) parallel application of civil and religious law; (c) gradual application of UCC over a period of time; and (d) introduction of UCC through process of mediation, across communities as well as between individuals. The first is self-explanatory. The second envisages according some limited legal recognition to the laws and practices of religious communities; marriage ceremonies comprise a prime example. The third is considered expedient because the social upheavals brought about by any drastic change carry the potential of effecting more harm than good. The last point, *viz*. mediated settlement, forms the cornerstone of the authors' thesis. It entails the view that bringing about UCC through a process of dialogue between religious communities is essential to alleviate suspicions of minorities such as Muslims as well as the Hindu majority that UCC threatens their traditions (p. 34). These guidelines are presented as conclusions arrived at from the authors' researches. Presenting conclusions right in the introduction does appear unconventional, but perhaps it is necessary; giving readers some idea what to expect serves to lend a cohesion across the different themes that comprise the volume. The stress laid on mediation is particularly significant. It

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enables us to appreciate its appropriateness in resolving the five specific conflicts identified as consequent to making laws uniform (p 3-4): (a) the conflict over competing ideals of authority; (b) conflict over which law to retain; (c) a subset of the second, *viz.* conflicts caused through interpreting ambiguously drafted provisions intended to paper over differences; (d) conflicts between competing reforms; and (e) social and political conflicts between and within groups.

Part One follows the lengthy introduction and comprises three chapters. The first involves a comparative analysis of law, religion, and culture. It discusses different models of church-state relations; models of state recognition of minority cultures; and theories of multiculturalism extending to practical issues associated with it. The chapter then moves on to the secularism-*versus*-identity-and-autonomy issue, and various models intended to resolve it. Lastly, it examines models of applying Islamic law to (secular, presumably) personal law. Here it draws (p. 79-81) extensively from the work of Horowitz,[2] who identifies four models. The evolutionist model is a macro-level model which makes legal change dependent upon long-term socio-economic forces (thereby rendering human intervention somewhat difficult). The utilitarian model predicates legal change not upon socio-economic change but societal efficiencies. This implies that legal change occurs through legal means but is impelled by non-legal considerations. The societal change model treats legal change as a natural reflection of changes in society and social organization. And the intentionalist model sees legal change as brought about intentionally by 'certain leaders'. The authors identify the last two models as the 'most useful' for understanding how Islamic law principles are incorporated within personal law (p. 81). They then briefly examine the experiences of Indonesia, and former British colonies including India, Kenya, and South Africa as examples of the societal change model and the intentionalist model respectively.

The second chapter devotes itself to country-specific studies of law and legal change. It begins with Nepal's and Turkey's transformation into secular states, and the constitutional and personal law changes these transformations entailed; and then examines Israel's confronting challenges of a different kind and relating more to balancing the interests of different communities. The authors' emphasis here tends towards the principles and conceptual frameworks adopted in respect of each of the foregoing instances.

The third chapter, arguably of the most interest to us, deals with the Indian legal system or, to be precise, 'Comparative Lessons and the Case of India.' It

[2] Donald Horowitz, 'The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change' (1994) 42 American Journal of Comparative Law 233.

begins with an overview of India's personal laws and their role in society, then proceeds towards constitutional provisions on freedom of religion and UCC; the specific problems associated with the introduction of UCC; and the viewpoints of various scholars about whether UCC should be introduced and, if so, what ought to be the modalities for its introduction. It also dwells on how courts have perceived UCC and the need for its introduction, particularly how they have interpreted Art 44 of the Constitution. Lastly, it examines what it describes as 'The possible models and the preferred model'. Here various models of introducing UCC are examined briefly. The authors once again reiterate (p 158-67) some of the guidelines we saw earlier at p 2-3, including a preference for legislative intervention, gradual implementation of UCC, and parallel application of civil and secular law. They also discuss the possibilities of the Goa Civil Code serving as a model or basis for UCC.

Part Two is entitled 'Mediating the Uniform Civil Code'. It begins with a discussion of various conflicts associated with personal laws: these include conflicting ideals of authority, conflicts of law, and social and political conflicts. Parallely, it also suggests strategies through which these conflicts may be mediated to the mutual satisfaction of all parties concerned. Much of this pertains to mediation in general and not UCC specifically. Only in p. 235-39 do we find some discussion on mediation in connection with personal laws, including a few case-studies from India. But even these studies concern personal law conflicts between individuals, and that too individuals governed by the same set of laws. While it is always possible that the same strategies may be applied to conflicts between different communities and different legal codes, the rather brief exegesis found here does not clarify how this can be undertaken. For these reasons, I feel this Part be of interest to Indian readers only up to a certain extent.

Certainly Part One engages with Indian law much more extensively (as one might expect from a book on UCC in India). Moreover, the mediated approach it endorses certainly marks a fresh and, in my opinion, entirely desirable break with how the issue has been perceived so far. However, it falters on several counts, largely related to its treatment of Indian law. For example, the authors' familiarity with the character of Part IV, and its position in the discourse of Indian constitutional law, tends to vary over different points in the book. At p 28 it summarizes Part IV much more accurately while at the same time finding it 'odd to completely remove an entire section of a nation's highest law from the nation's highest court's review.' And then, just two pages later at p 30 it makes the claim that because Art 37 makes Part IV unforceable, attempts to implement UCC through the judicial process would be 'unconstitutional'! At p 139-39 the authors contend that the debate on Art 44 'included a minority view which recommended that Article 44 should be

moved to Part I [*sic* Part III?] and changed to become binding in ten years (like Article 45 on education which had to be implemented in ten years).' In point of fact, Article 45 did not provide for compulsory implementation in ten years: the provision as it originally stood stated, 'The State shall *endeavour to provide*, within a period of ten years . . ..' (emphasis added). Moreover, it has remained within Part IV throughout. Even when the 86th Amendment of 2002 made enforceable a substantial portion of it, those aspects were moved to a new Article 21-A, while the residual parts remained in Article 45, and hence Part IV.

Then comes the claim (p 145-46) that 'endeavour' in Art 44 implies courts may not adjudicate on the implementation of UCC, but are free to review the 'seriousness of the state' in its (the state's) attempts to introduce UCC. It even identifies as an example of this approach the remarks of Singh, J. in *Sarla Mudgal*[3] about the desirability of UCC: 'When the court says that "it is a matter of regret" that no steps have been taken towards a uniform civil code, the court is completely within the scope of its authority – it is *passing judgment* on the way the state is endeavouring to secufre a uniform civil code, that is to day – not endeavouring at all.' (emphasis added) This is followed (p 146-48) by a discussion on decisions like *Sarla Mudgal*, *Shah Bano*[4] and *Jorden Diengdeh*[5] under the heading 'Judicial Interpretation and Declaratory Remedies'. It characterises 'declaratory remedy' (p 146) in terms of 'making very clear judicial pronouncements that the Government of India should take necessary steps to enact a uniform civil code under Article 44.' But as even first-year law students would be expected to point out, these declarations are in the nature of *obiter dicta* and hence not binding on anyone. Pages 149-150 even acknowledges the *obiter* character of the *Sarla Mudgal* and *Shah Bano* pronouncements on UCC. But if so, why do they still call them 'remedies'?

The book's treatment of Indian personal law is even more surprising. For one, it does not really engage with the specifics of what impedes UCC: it treats at best perfunctorily issues such as polygamy, maintenance, adoption, triple-*talaq*, and others perceived as obstacles to UCC. Even its exegeses of judgments like *Sarla Mudgal* and *Shah Bano* are mostly confined to their pronouncements on UCC. It also eschews in similar manner discussion on the perceptions and expectations of different religious communities and their representatives. Admittedly the book intends to showcase implementation strategies rather than intensive research on issues

[3] *Sarla Mudgal v. Union of India* AIR 1995 SC 1531, para 1.
[4] *Mohd Ahmed Khan v. Shah Bano Begum* AIR 1985 SC 945.
[5] *Jorden Diengdeh v. SS Chopra* AIR 1985 SC 935.

affecting Indian personal law. But unless these strategies stem from a rigorous understanding of ground realities, can they carry much value to us? And similarly, what chance of success can mediation strategies have unless the opinions of communities and their representatives are factored in?

On the occasions the authors do engage with Indian law, the outcomes are not always satisfactory. Page 128 carries the argument that Hindu law reforms cannot be considered an imposition on Hindus because the majority of parliamentarians who voted for reforms were themselves Hindus. Hence to all purposes and intents the reforms were engendered by Hindus themselves. While if UCC is introduced in the face of opposition from Muslims or Christians or other minorities, it cannot amount to these communities reforming their own personal laws, since in such a hypothetical case inevitably the majority of legislators voting in favour of UCC will not be from these communities. While the second limb of the argument (*i.e.* imposition on minorities) may independently carry some merit, the first limb, on which it places so much reliance, is suspect on several counts. First, it presumes a connection between the legislators' voting choices and their Hindu identity. That is, they voted for reform in recognition of their Hindu identity, and not out of a sense of detachment to it and other extraneous considerations. Secondly, it presumes that merely because the legislators were Hindus, they represented the voice of the Hindu community, that is, the electorate voted for them in recognition of their Hindu identity. Page 163 carries a similarly extraordinary argument that an sudden implementation of UCC will disrupt arrangements based on existing law (such as a commitment to contract a polygamous marriage given at a time when such marriages were legal) and thereby erode the credibility of the people involved.

At a more general level, one may question the work's methodological premises. Chapter 2 compares legal developments in Nepal, Turkey, and Israel. But Nepal and Turkey were theocratic states transitioned into secular democratic ones, while India's transition was from colonial subjugation, not theocracy. Israel was a *de novo* creation, while India not only existed prior to its transition but also chose to retain many of its colonial-era laws, including many personal laws. It is entirely possible that the comparisons remain meaningful notwithstanding these differences, and the tenuous similarities these legal systems share. But then surely the authors need to clarify just why they chose them specifically, and to the exclusion of other similarly situated legal systems? Substantiation comprises another shortcoming of the book. For example, its claims about Article 44 and 45 in the Constituent Assembly Debates refer not to the proceedings of the Debates directly, but only to secondary sources. Page 144 mentions that a 1977 book by Prof Tahir Mahmood (quoted with approval in *Shah Bano*) favours UCC but in a later work dated 1995, he

changes his mind. It then references the 1995 book but not the 1977 one. In the same page it claims Prof Mahmood's changed led to criticism, to which he had to respond. No references are provided to either the criticisms or the responses.

This book, then, has much to be said for it. It marks a new approach to UCC and associated problems, an approach distinctive for according priority to the need to resolve conflicts and not exacerbate them. At the same time, it suffers from several shortcomings, including those of structure and substantiation, omission to engage with vital issues, and on several counts a discomfiture with the specifics of Indian law. These shortcomings serve to significantly erode the work's authoritativeness.

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