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Chanakya National Law University Journal

CNLU Law Journal

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FROM THE EDITORIAL BOARD

"Law is experience developed by reason and applied continually to further experience."

—Roscoe Pound

The CNLU Law Journal has been a part of that experience for the seventh time. The Law Journal has served as a tool as well as a media to explore and answer a series of questions that are strongly intertwined with the contemporary legal issues and the society. The law journal is a source for the law students as well as professionals to appreciate how academic lawyers have devoted sufficient attention to the study and understanding of prevailing legal issues. The seventh edition of the CNLU Law Journal is a literary endeavour of the Chanakya National Law University, Patna. The initiative which was started almost 7 years ago has carved a niche for itself. Over the passage of time, we have set a remarkably high standard for ourselves and this edition is also an attempt, with sheer dedication and honesty, to achieve the set standards. The journal is a compilation of ideas and opinions expressed by academicians, professionals and students of the legal fraternity.

In the Article *'Dharmic Jurisprudence (Dharmoprudence?) and its Contemporary Relevance',* the authors Prof. Dr. A. Lakshminath and Prof. Dr. Mukund Sarda have extensively gone through the ancient Hindu jurisprudence and try to establish the present day concepts of law are not new and these were well introduced in the vedic jurisprudence. In the quest of the objective to establish the meaning, definition and objective of law the authors in depth referred very ancient literature. While signifying "democracy – enhancing jurisprudence for both law and social justice", the authors coined a new word for jurisprudence as 'DHARMOPRUDENCE'. They attempted to explore the possible relevance of *Dharma, Artha* (livelihood) and *Vyavahara* in the administration of justice in the present day Indian context and opined that DHARMOPRUDENCE (Knowledge of Dharma) will certainly help enhancement of deliberative democracy in administering justice in contemporary context. While looking at the history of thought, they analysed that "especially in the West, we can see that, when systematised into an *ism*, the various explanations of the human condition had fiercely rejected each other and the rationalism of eighteenth-century Enlightenment rejected faith and tradition, and therefore all religions, not just Christianity. Romanticism rejected the Enlightenment. Utilitarianism and psycho-analysis

rejected romanticism. Existentialism rejected them all, although there were two or three Christian existentialists, like Kierkegaard and Gabriel Marcel and Jaspers. Marxism, a child of the Enlightenment, rejected romanticism, liberal individualism, nationalism, and much of existentialism as well. There has been, in the history of Western philosophy, a continuing war between rationalism and empiricism, and between idealism and realism, other isms aligning themselves with the one or the other. Positivism rejected moral statements as subjectivism and also most of metaphysics as nonsense in a literal sense. Science rejected the mystical; and mysticism rejected science. Objectivism despises all forms of relativism; and relativism has tried to show that objectivism, especially in science, is an intellectual myth. Materialism rejected spiritualism as emotional froth; and spiritualism looked upon materialism as base and ignoble. The universal has been defined in such a way as to remove all particularities from it: there has been, therefore, a war between the assumed universalism of the Enlightenment idea of history and the visible particularities of human life. That soon gave rise to the claims of regionalism and of nationalism. And then, in turn, it became regionalism vs nationalism, and nationalism vs universalism. And Man has been set against Nature. But, although fiercely rejecting each other, all these *isms* have one thing in common—a logic which fragments human attributes into irreconcilable polarities, and then assumes that *either* the one or the other is the reality, and constructs its world view wholly on that, or the logic of *either/or"*.

In their opinion, Indian polity is one of kingship elected by popular will, and later acting in consultation with the priestly class; the ancient Indian, theory of kingship treated the kings as trustees of the State, put obedience to divine law above everything else, and required the king to take the oath that he would safeguard the moral, spiritual, and material well-being of the State entrusted to his care. Reiterated that 'Dharma' including 'Raja Dharma' was regarded as supreme and the King was only penultimate authority, 'Dharma' being the ultimate authority. Thus, from the commencement of the Constitution, its supremacy constituted an element of basic structure of the Constitution whose principle was reiterated by 13 judges Bench of the Supreme Court in the historic case of *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225 : AIR 1973 SC 1461. Authors also referred certain aspects viz., assistants of the king,_justicing process in the Dharmasthiya (civil) Courts and social justice, social choice and public good and concluded that the ancient India was led by the wise, not the wealthy. The wise guided the wealthy kshatriyas and protected them from the corruptive influence of wealth and power.

In the article titled *"The Paris Accord and Trump Withdrawal"*, the authors Prof. Komanduri S. Murty and Prof. A. Lakshminath have focussed in detail on the issue of climate change and recent withdrawal from Paris Agreement by United States of America and its impact on the environment in future. They have analysed the statement of the US President relating

to withdrawal and the reactions against the decision from various groups and individuals. In this interesting and informative article the authors have taken into consideration the reactions and views of Conservative Proponents, Liberal Opponents, Celebrities, Corporates and Public. Political or economic, whatever might be the reason behind Trump's stand, the dismay over the Big brother's decision worldwide is found by the authors in this article. Finally, it is concluded by the authors that "Time only decides how adverse the impact of Trump's withdrawal would be on the US and/or on other parts of the world……"

The article titled *'Intellectual Property in India: The Human Rights Dilemma'* at first considers briefly some of the international legal instruments that provide perspectives on the human rights framework relating to Intellectual Property in those instruments. The section highlights the prominence that IP has received vis-à-vis the international legal documents while establishing that public health concerns are of primary importance when questions on IP rights and their infringement arise. The second section deals with IP issues with respect to the Indian Constitution in light of various judicial pronouncements. The article in all deals with the relationship between the theory of Intellectual Property Rights most relevant in the context of human rights like access to medicines, right to education and right to public health and the relevant judicial responses.

In the article titled, "*Food Security And Public Distribution System: Response And Policy Initiative Against Hunger In India",* the authors have discussed the very contemporary issue of India's efforts in realisation of the right to food. The authors have given a backdrop as to how all is not well with the food security policy, particularly with reference to procurement, public distribution system and nutrition programmes. They have highlighted how functioning of the government PDS has suffered due to inefficient management and lack of proper targeting to improve the food security of the poor. Finally, they have concluded that innovative strategic interventions are the needs of the hour to ensure food availability, food access and utilization of food.

In the article titled *Lifting The Corporate Veil On Shell And Shadow Companies - An Indian Overview,* the authors have made a fine attempt to highlight the legal and administrative systems around the world and how they have developed two main ways of combating the problems caused by shell and shadow companies. One is the process of differentiation or isolation. Each country has developed its own grounds and parameters for differentiating between useful and malicious shell entities. Another way is by lifting the corporate veil to identify such companies. It has been concluded that the Indian judiciary and the regulatory mechanism has provided the strict response in terms of a shift in the legal perspective with regard to

lifting the corporate veil, as well as various changes in the regulations and legislations surrounding the creation and operation of such companies.

In the article titled "*Antidumping Investigation: A Weapon Of Choice Or A Shield Of Necessity*", the author highlighted the Anti-Dumping as a trade remedy measure. Further the way in which trade remedies are implemented has raised several concerns in the recent past as a result of which the remedies are perceived as barriers. There can be host of factors with subjectivity in decision making of designated authorities, being a major factor. Researcher has tried to analyze the way/s in which the provisions are put to practice with their advantages and disadvantages and how far Anti-Dumping duties favour a nation in the long run?

The article titled "*Surrogacy (Regulation) Bill 2016- Critical Analysis & Legitimacy and Rights of Unborn Child",* the authors have discussed the very contemporary issue of rights of the legal parents, rights of the surrogates, rights of the unborn child and the discriminatory stand of the Government with respect to LGBT. The authors have criticised how the government has failed to take note of the growing numbers of LGBT and their wish of having a child of their own. They have also given an insight into the rights of an unborn child, including its legal status as a person and the right to inherit the property as well as. The authors have concluded that though the Bill is reformative as far as it tries to prohibit the commercialization of surrogacy, the Bill does more harm as it is discriminatory on various counts and at the same time has raised several questions pertaining to the rights guaranteed to an individual under the Constitution of India.

The article titled, "E-Waste In India: Who Gets The Trash?" highlights one of the major issues that is the handling of electronic waste. The problem posed by the author is who is responsible for the management of electronic waste that is dumped in the developing countries by the developed countries because they find it very expensive to dispose of the same legally in their nations. The author has discussed various laws that exist in India for management of E waste but for some reason or the other, they are merely words on paper. The only viable way to reduce E-wastes is to produce less of it. Finally, it has been concluded that not only is e-waste illegally imported but it is also generated in India. Growing up to become one of the fastest waste streams today, it all ends up posing a huge challenge and threat to the environment clubbed with human life.

In the article named *"Changing Public Policy for Fostering Competitive Business*", it has been discussed how the government is trying to change its interaction with the corporate world, foster innovation and in the process increase transparency. The paper expands on how a holistic ecosystem is being cultivated to improve the prospect of doing business. It has discussed the new tax regime which is more precise and similarly has discussed the

Dispute Resolution Mechanism for tax related issues under the Finance Act of 2016. The author has elaborately discussed the Start Up India initiative of the Government and has linked it to the boost in start-ups and entrepreneur events in India. The author has given example of best practises in certain states and has concluded that the key drivers here are the government policy alterations and how the corporates react to the same changes.

The article titled *"Criminalisation of Politics: A Maturing Trend in India",* primarily deals with the current trend of convicted individuals being made part of the political system of the country. It first explains as to how criminalization of politics in India is getting matured and then it examines the vital factors that promote this trend. Furthermore, the author also elaborately discusses the ramifications which are being caused due to this trend. Finally, the author also concludes with some of the feasible remedies which can be undertaken in order to prevent for this political trend to further aggravate.

In the article, *"Medical 'Value' Tourism Industry in India: An Analysis Of The Sector",* the concept of medial tourism in India has been discussed. It primarily brings out the status quo in India with regard to medical tourism and the legislative measures that have been taken in that regard. The author also presents the status of medical tourism via various official statistics and enlists the benefits which can be availed under medical tourism. It further aims to bridge the gap between one face of India which is medically adept and professing zero waiting to foreigners and the other which is in the medial stone-age and is striving for grass-root healthcare necessities. In conclusion, the author presents the scope of medical tourism in India in the near future.

The article titled, *"National Health Policy- A step towards Right to Health",* focuses upon the various viewpoints regarding Right to Health being included within the ambit of the Fundamental Rights in the Constitution of India. The article highlights on the pros and cons of National Health Policy 2017 which has recently been launched by the Government of India. It also emphasizes upon the lacunas where the Government had failed to work upon in the previous National Health Policies as well as has also this time. Further, the article specifies the landmark cases concerning Right to Health and at the end, the lacunas and suggestions as to how the Government can improve upon the same in the coming years.

In *"Religious Intolerance and its Impact- a Sociological Study",* the author admits that there did exist a time, before the rise of monotheism, when people were respectful of the other religions despite the differences in their respective belief systems. However, at present, the author has pointed out that the problem of religious violence and intolerance is not limited to any one country or area, it is widespread. Instances of religious intolerance

witnessed in the various countries across the world have been highlighted. In the end, ways of combating the problem such as the idea of non-violence, meditation, prayer and the mythologies and their teachings have been said to be usually advised in order to calm not only the society, but also oneself. The declaration and implementation of universally applicable guidelines by the United Nations, among other things, has been recommended in order to put an end to the rising religious intolerance amongst the masses.

The article titled, "*Are IPR and Competition Law in Tussle?: an Interface between IPR and Competition Law",* an attempt to come to a conclusion as regards the unavoidable relation that exists between the laws governing intellectual property and competition in the market has been made. It has been advised that IP law can be considered to be a facet of competition law rather than its interests being in contradiction with the interests protected by competition law. Lastly, the author has concluded, inter alia, that the Competition Commission of India must be given sufficient jurisdiction to decide cases wherein competition is affected due to the involvement of IPR related issues. Furthermore, the developing countries, while framing their legal framework in respect of IPR and competition, should carefully analyse the jurisprudence in U.S. and the European Union countries as they are the only major jurisdictions which have addressed the issue in depth.

In the article titled, "*Preventing Further Normalisation Of "Extraordinary" Ordinance-Making Powers",* the growing concern in the form of utilizing the ordinance making power of the executive to pass laws that meet criticism by the opposition has been highlighted. The author is of the opinion that the ordinance making power is not a legislative power of the Executive but it is a power which is to be used only in extraordinary situations and to meet the need of the hour. The author has given an analysis of the Krishna Kumar Singh Case and the opinion of the Supreme Court in the same. The author has given finality to the article by proposing suggestions so as to preserve the extraordinary character of the ordinance making power.

In "*Global Jurisprudence: the Rise of a Persuasive Authority",* the concept of Judicial globalization has been discussed. It has been highlighted that there has been gradual construction of a new global legal system, which is composed of network of national and international judges who recognize each other as participants in a common judicial enterprise. Judges of the appellate courts are now engaging in a dialogue with their counterparts around the world on the issues that arise before them. The article concludes saying that cross-fertilization is well recognized among imperial powers and their colonies and also well established in commonwealth.

CASE COMMENTS

The journal provides a commentary on the judgment delivered in *Githa Hariharan* v. *RBI,* (1999) 2 SCC 228, inclusive of the impact that the judgment has on the Hindu guardianship law. The case primarily deals with section 6 of the Hindu Minority and Guardianship Act, 1956 and section 19 of the Guardians and Wards Act, 1890. The constitutional validity of the two sections was challenged before the Supreme Court on the grounds of them being in violation of Article 14 and Article 15 of the Constitution of India. The Supreme Court, through its verdict in this case with prospective effect, accorded legal recognition to the right of the mother to act as natural guardian of the minor child "in the absence of" the father as opposed to the earlier position of law which interpreted the term "after" under section 6(a) of the Hindu Minority and Guardianship Act to mean "after the lifetime of the father".

In the case comment of *Purushottam Dashrath Borate* v. *State of Maharashtra*, (2015) 6 SCC 652 the author has given an analysis of the very recent case of where the victim was raped and killed by the driver of a cab service. The case analysis restricts itself on the issue of sentencing and tries to analyse whether the death penalty was justified in the present matter or not. The author has acknowledged that the punishments can be for various reasons, like deterrence, rehabilitation, reformation, incapacitation and the likes. The author further claims that it is justified if the court takes into account the society that the crime was committed and how the offence committed impacts the society and other members of the society. The comment concludes with the idea that uniformity for the sake of objective justice will lead to injustice and in sentencing it is important the judge has the discretion to determine which principle to apply and to what proportion.

NOTE

In "*Haryana's drought of brides and saga of exploitation",* discuss in detail the well-known reality of import of women to Haryana for bride trafficking from far-off regions outside the State. The authors emphasize that Haryana, like other North Indian states, has a legacy of girl child neglect. It is an overall issue of very strong preference for a male child, discrimination against daughters, dowry and exclusion of females from production. The authors, after conducting a thorough case study and perusing relevant empirical information, conclude that to be able to bring transformation while dealing with a social evil which has society's approval seems to be a herculean task in the beginning. They believe that issue can only be handled by strict implementation of the PC and PNDT Act.

ACKNOWLEDGMENT

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

No good work is the result of an endeavour of a sole entity. Hard work of a lot of people has gone into the making of this illustrious journal. We extend our gratitude to our faculty advisors Dr. B.R.N. Sharma, Dr. P.P. Rao and Dr. Manoranjan Kumar for their invaluable insight and participation which made the making of this journal very smooth. We owe a lot to our Hon'ble Vice Chancellor, Prof. Dr. A. Lakshminath, for his indispensable guidance and encouragement.

We believe that the only purpose of this journal is to sow a seed of curiosity into the minds of our readers young and old, so that they exert themselves to discover some new facets of our legal culture and add to the legal comprehension of the society we live in. Happy Reading!

DHARMIC JURISPRUDENCE (DHARMOPRUDENCE?)[1] AND ITS CONTEMPORARY RELEVANCE

—Prof. Dr. A. Lakshminath[*] & Prof. Dr. Mukund Sarda[**]

I. INTRODUCTION

Philosophy has been a powerful instrument in the legal armoury and the times are ripe for restoring it to its old place therein. At least one may show what philosophy has done for some of the chief problems of the science of law, what stands before us to be done in some of the more conspicuous problems of that science today in which philosophy may help us, and how it is possible to look at these problems philosophically without treating them in terms of the eighteenth-century natural law or the nineteenth-century metaphysical jurisprudence or the 20th century social justice which stand for philosophy in the general understanding of lawyers.

For twenty-five hundred years—from the Greek thinkers of the fifth century B.C. who asked whether right was right by nature or only by enactment and convention, to the social philosophers of today, who seek the ends, the ethical basis and the enduring principles of social control—the philosophy of law has taken a leading role in all study of human institutions. (Pound: Philosophy)

Maitland has observed, that races and nations do not always travel by the same roads and at the same rate. Even so, a comparative study of

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[1] This is an attempt to coin a new word 'DHARMOPRUDENCE' signifying "democracy – enhancing jurisprudence for both law and social justice" with emphasis on Dharmic Philosophy. It denotes law making or legal practices that democracy – enhancing jurisprudence, practices that inform and informed by the ancient wisdom of the people (cf Prof. Guiner). An attempt is made to explore the possible relevance of *Dharma, Artha* (livelihood) and *Vyavahara* in the administration of justice in the present day Indian context. Thus DHARMOPRUDENCE (Knowledge of Dharma) will certainly help enhancement of deliberative democracy in administering justice in contemporary context.

ancient laws in the world has disclosed a number of remarkable affinities. According to Grote, 'Zeus or the human king on earth is no law-maker but a Judge', and his judgments, divinely inspired, constitute law. According to Maine, the earliest notions connected with the conception of law are those contained in the Homeric works 'Themis' and 'Themistes. It is rather a habit, Maine observed. Maine's theory is that in the East these aristocracies became religious, while in the West, they became civil or political. This era of aristocracies succeeding the era of the king may be regarded as a feature of the growth of law in the Indo-European family of nations. The study of Roman law shows that the period of customary law in due course led to the era of jurisprudence.

European scholars had claimed that the law of the *Dharmashastras* did not represent a fixed set of rules that were in fact administered in Bharat. Brahminical India (they said) had not passed beyond the stage which occurs in the history of all the families of mankind—the stage at which a rule of law is not yet discriminated from a rule of religion. This was the view expressed by Sir Henry Maine in his classic work *Ancient law*, first published in l861.[2] But in 1878, another Oriental scholar, John D. Mayne, called into question the correctness of Sir Henry Maine's thesis. John Mayne propounded the theory that the law of the *Dharmashastras* was based upon immemorial custom and had an existence prior to and independent of Brahminism, and that it only got modified and altered by Brahmin writers 'so as to further the special objects of religion or policy favoured by Brahminism'.

There is another feature of all ancient law which deserves to be noticed. Law does not make any distinction between religion, ethics, or morality, on the one hand, and the provisions of what may be called the positive law, on the other. Though in its progress, the legal order appears to have tried to meet the new demands arising out of a multitude of unsatisfied social desires, human agency did not claim the authorship of law. Its origin continued to be divine. The Mosaic Law or Hammurabi's Code or the *Manu Smriti,* one in its own way, claimed to be based upon divine inspiration. Demosthenes gave to the Athenian jury four reasons why men ought to obey the law. He said, 'Men ought to obey the law, because "laws are prescribed by God, because they were a tradition taught by wise men who knew the good old customs, because they were deductions from an eternal and immutable moral code, and because they were agreements of men with

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[2] "The Hindoo Code, called the Laws of Menuu, which is certainly a Brahmin compilation, undoubtedly enshrines many genuine observances of the Hindoo race, but the opinion of contemporary orientalists is, that it does not as a whole, represent a set of rules ever actually administered in Hindostan. It is, in great part, an ideal picture of that which, in the view of the Brahmins, ought to be the law.' Pp.16-17, Ancient Law by Henry Sumner Maine, 1861, Beacon Paperback Edition, 1963.

each other binding them because of a moral duty to keep their promises".' Similarly, it is recorded that Cicero believed that justice and the whole system of social life depended upon the gods and man's belief in them. The law, according to Roman ideas, rested upon the double foundation of divine regulation and human ordinances. It appears that in mediaeval Europe, the Church successfully claimed exemption from secular authority for the clergy, and also exercised jurisdiction over all people in respect of certain matters which would now be regarded as the subject-matter of civil jurisdiction. During this period, the State regarded itself as under a duty to enforce obedience to the laws of God, and ecclesiastical courts were the instruments through which the State acted. In this connection, it would be interesting to notice the effect of the sentence of ex-communication during this age. Ex-communication not merely involved imprisonment by the church till the Bishop withdrew the writ on submission by the excommunicate, it led to several temporal consequences as well. 'According to Bracton, the excommunicate cannot sue any one, though he may be sued. He cannot serve upon juries, cannot be a witness in any court, and worst of all, cannot bring any action, real or personal. It was only after the Renaissance that there set in a period of faith in reason, and the Protestant jurist-theologian developed a theory of law divorced from theology' and resting solely upon reason. That, however, is a much later development.

Sir Abdur Rahim expresses the opinion that Mohammedan law sought to supervise the whole life of its subjects, not merely the material or secular sides. According to Sir Abdur Rahim, law has two aspects, religious and secular, the end of law is to promote the welfare of man both individually and socially, not merely in respect of life on this earth but also of future life. It would thus appear that during the early stages of the development of law, what were regarded as rules of law were invariably assumed to have divine origin, and they purported to receive their sanction from the fact that they embodied the dictates of Providence. During this stage of the development of law, the main idea which, according to Pound, supplied the basis of the law was that 'law exists in order to keep the peace in a given society; to keep the peace at all events and at any price. This is the conception of what may be called the stage of primitive law.

According to Kant, law is a system of principles or universal rules to be applied to human action whereby the free will of the actor may co-exist along with the free will of every one else; whereas, according to Hegel, the law is a system of principles wherein and whereby the idea of liberty was realized in human experience. Bentham, however, rationalized law as a body of rules laid down and enforced by the State's authority, whereby the maximum of happiness conceived in terms of free self-assertion was secured to each individual. Lastly, Austin resolved every law into a

command of the lawgiver, an obligation imposed thereby on the citizen, and a sanction threatened in the event of disobedience.

II. DHARMA-CONCEPTUAL ANALYTIC

There is a verse in the *Rig-Veda* which suggests election of a king by the people or subjects themselves. Wilson has translated it thus: 'Like subjects choosing a king, they (the waters) smitten with fear, fled from Ṛta. A.C. Das also refers to a hymn in the *Rig-Veda* which indicates that the stability of a king on the throne was contingent on the goodwill of his subjects.

The Vedas are usually regarded by Hindu convention as a primary source of Hindu law. In fact, the Vedas do not contain any material which can be regarded as the lawyer's law in the modern sense of the term. The most ancient concept of law which is found in the *Rig-Veda* is represented by the word *Ṛta*. This word denotes the supreme transcendental law or the cosmic order which rules the universe, and to which even the gods owe allegiance. In the Vedic religion, ***Ṛta*** (Sanskrit ऋतम् ṛtaṃ "that which is properly/excellently joined; order, rule; truth") is the principle of natural order which regulates and coordinates the operation of the universe and everything within it.https://en.wikipedia.org/wiki/%E1%B9%9Ata - cite_note-1 In the hymns of the Vedas, *Ṛta* is described as that which is ultimately responsible for the proper functioning of the natural, moral and sacrificial orders. Conceptually, it is closely allied to the injunctions and ordinances thought to uphold it, collectively referred to as Dharma, and the action of the individual in relation to those ordinances, referred to as Karma – two terms which eventually eclipsed *Ṛta* in importance as signifying natural, religious and moral order in later Hinduism. Sanskrit scholar Maurice Bloomfield referred to *Ṛta* as "one of the most important religious conceptions of the Rig Veda", going on to note that, "from the point of view of the history of religious ideas we may, in fact we must, begin the history of Hindu religion at least with the history of this conception".

As Dr. Kane points out *vrata*, *dharma, dhaman*, and *suadha* represent special aspects of *Ṛta*. *Ṛta* is the organised principle of the universe and the divine ordering of the earthly life. Subsequently, the concept of *dharma* took the place of *Ṛta*. Dr. Kane has observed that the word *dharma* occurs at least fifty-six times in the *Rig-Veda*, The word is clearly derived from the root *dhr* (to uphold, to support, to nourish). In most of the cases, the meaning of *dharma* is religious ordinance or rites. In some passages, it appears to mean fixed principles or rules of conduct.

Even a cursory glance at the Smriti literature would show that the Smritis deal with numerous topics as falling under the title Dharma-sastra.

As Medhatithi points out, Manu, for instance, deals with *varna-dharma*, *asrama-dharma*, *varnasrama-dharma*, *naimittika-dharma* (prayascitta), and *guna-dharma* (the duty of a crowned king, whether Kshatriya or not, to protect). It is really the *vyavahara* part of the Smriti literature which deals with law, properly so called. Kumarila in his *Tantra-varttika* argues that the Smriti of Manu and others are dependent upon the memory of other authors, and memory depends for its authority on the truthfulness of its source. Consequently, the authority of not a single Smriti can be held to be self-sufficient like that of the Vedas; and yet, inasmuch as we find them accepted as authoritative by an unbroken line of respectable persons learned in the Vedas, we cannot reject them as absolutely untrustworthy.

Ancient Hindu jurists seem to recognize that if there is a conflict between the practice prevailing in the community and the letter of the law found in the Smriti or Srutis, it is generally the practice that would prevail. Manu says, *Acharas* (customs and usages) are transcendental law, and so are the practices declared in the Vedas and the Smriti. In due course of time, when the distance between the letter of the Smriti and the prevailing customs threatened to get wider, commentators appeared on the scene, and by adopting ingenious interpretations of the same ancient texts, they achieved the laudable object of bringing the provisions of the law into line with popular usages and customs. The part played by Vijnanesvara in this connection deserves special mention. The fiction of interpretation is seen in the three systems of jurisprudence known to us, the Roman, the English, and the Hindu system. But as Mr. Sankararama Sastri points out, there is an interesting distinction among the three systems on this point. Whereas the authority of the English case law is derived from the Bench, that of the Roman *Responsa Prudentium* and the Sanskrit commentary is derived from the Bar.

In this connection, it may be interesting to refer to the observations of Bentham that a legal fiction is a 'wilful falsehood having for its object the stealing of legislative power by and for hands which could not openly claim it—and but for the delusion thus produced could not exercise it'. Nevertheless, the legal fiction of interpretation has played a very progressive part in the development of Hindu law. It is because this process was arrested during the British rule in this country that Hindu law was fossilized, as judges relied mainly on the commentators without taking into account the changing customs and usages in the Hindu community.

Jayaswal has propounded the thesis that the ancient and primary source of Hindu law is *samayas*, that is to say, resolutions passed by popular bodies. *Apastamba* describes the *dharma* laws as those which regulate conduct, and which are based on resolutions or *samayas*. The word *samaya* may mean a resolution passed by corporate bodies. The *samayas* were originally

communal rules agreed upon in assemblies. That the conventions or resolutions of corporate bodies formed part of law is shown by an interesting inscription referred to by Dr. Mahalingam in his book *Administrative and Social Life under Vijayanagar*. The inscription in question records an agreement between the Brahmanas of the locality that they should perform marriages only in the *kanyadana* form, and that those who pay or receive money shall be excommunicated and punished by the king. It may be reasonable to assume that the primary and ancient source of Hindu law may have consisted of the resolutions or agreements reached by groups of people in their corporate assemblies. (Justice P.B. Gajendragadkar)

The term "*dharma*" is one of complex significance. It stands for all those ideals and purposes, influences and institutions that shape the character of man both as an individual and as a member of society. It is the law of right living, the observance of which secures the double object of happiness on earth and salvation. It is ethics and religion combined. The life of a Hindu is regulated in a very detailed manner by the laws of *dharma* and *Vyavahara*. His fasts and feasts, his social and family ties, his personal habits and tastes are all conditioned by it.

Hindu Jurisprudence may be regarded as Hindu Law viewed from the standpoint of Jurisprudence, or as Jurisprudence effected through the medium of Hindu Law. Hindu Law has the oldest pedigree of any known system of law. Hindu *Dharma sastras*, which are the principal sources of Hindu law, do not confine themselves to the enunciation of juristic rules for the guidance of human conduct; ceremonial rules, moral and religious injunctions, and strict legal precepts.

This life, by itself, has no meaning. It acquires meaning only when looked at as a link in a chain of births and rebirths, till one attains *moksha*. Birth in a human form is an opportunity for an individual to liberate himself from the bondage of birth and rebirth and thereby attain *moksha*. This fundamental idea has pervaded throughout the Hindu thought. We find the same idea lurking out in the *Vedas*, *Brahmanas*, and *Samhitas*. It is the same idea which finds expression in the *Sutras* and the *Upanisads*; it is the same idea which is carried forward in *Puranas*, legends, *gathas*, epics (like the Mahabharat and the Ramayana), the Nitis, the *Nibandhas* and the *Teekas*. The same idea is resurrected by the *Vedantist*, the Arya *Samajists* and other reformist movements of modern times; some emphasising one aspect and others emphasising other aspect. This idea finds manifestation in the literature, poetry, drama, fiction and folk lores. What is remarkable is that the basic postulates do not change, there is only shift in emphasis.

According to the Vedas, by proper worship and Yajna (sacrifice) one can emancipate one's soul from the pangs of birth and rebirth and may attain

the region of the deity whom one worships or one may achieve complete oneness with God, just as a river flows into the oceans, loses its name and form and becomes one with the ocean. On these premises, was developed the philosophy of *Karma*. Every being is acknowledged and awarded according to his *karmas*. One is liberated by knowledge (*jnana*). By knowledge one becomes eternal, imperceptible and undecaying.

Another way of attaining salvation is by following *svadharma*. The *karma* in accordance with *svadharma* does not pollute the creature. Those wise men who have made themselves happy and contended and who are indifferent to happiness as well as to misery are only really happy ones; the foolish are always discontented, the wise always feel contentment. To attain oneness with God, to achieve humility, to be one with *Brahma*, one must be able to recognise the self through the self in all created beings and be just and equal in one's behaviour towards all. This is the real *dharma* according to Manu.

The *Bhagwad Geeta* does not preach that any karma may be performed. In doing one's karmas one should follow one's *svadharma*, for the performance of which one has taken birth. It is better to follow one's *svadharma,* than follow *paradharma* (another's *dharma*).

श्रेयान स्वधर्मे निगुणः । पर धर्मोत्स्वनुश्ठितात
स्वधर्मे निधनंश्रेयः परधर्मो भयावह।।

Such a person is *karma-yogi* or *karma sanyasi*. Giving up of one's *karma* prescribed by the Shastra is not proper. Shri Krishna declared to Arjuna, 'Your duty relates to the performance of your *karmas* only, unmindful of the fruit of the *karmas*; in doing *karma*, you ought not to possess the motive of fruit, nor should you be inclined to inactivity". "Superior in the knowledge and all actions in their entirety culminate in knowledge. The most sinner among the sinners shall cross all sins by the raft of knowledge. As the blazing fire reduces fuel to ashes, so does the fire of knowledge reduces all actions to ashes. Verily, there is no purifier in this world like knowledge. The one who is perfected the *jnana yoga* finds it in the self in time.

Complete dedication and self-surrender to God is essential part of *bhakti yoga*. Such a Yogi considers spiritual and material world not as his own but of God's. The *Geeta* propounds the philosophy of synthesising *karma, jnana and bhakti*. The three ways of salvation are complementary to each other; a man of good action who has attained knowledge and is ever devoted to God will attain salvation. Beings are all busy either to gain something or to ward off something unwanted. In the absence of such a motive no action needs be

performed. Yes, herein lies the turning point in life from *Preyas* to *Sreyas*. Good accrues from detachment and never from attachment. The Bhagavad Geeta, therefore emphasises "*Duty*".

कर्मणयेवधिकारस्ते मा फलेषु कदाचन।
मा कर्मफलहेतुर्भूर्मा ते सङ्गोऽस्त्वकर्मणि।।

[Chapter 2: 47] Seek to perform your duty; but lay not claim to its fruits. Be you not the producer of the fruits of Karma; neither shall your lean towards inaction.

Medhatithi, one of the early commentators of Manu, says that the term *dharma* stands for duty. Thus we may say that from the point of view of binding character, the Hindu jurisprudence does not make any distinction between legal duties on the one side and moral and religious duties on the other. It is enjoined that all duties must be performed. The *Smriti* texts do not make any clear-cut distinction between rules of law and rules of morality or religion. The *shastras* lay down in meticulous details what are the paths toward *dharma* and that the paths of *dharma*, whether in matters essentially secular or in matters of morality and religion, have their rewards in the life here and in the lives hereafter.

III. HINDU JURISTIC THOUGHT:

Societies in ancient India were governed by 'moral law': it was not 'law' as we understand it today, since it did not owe its origin to the command of any sovereign, nor was there any habit of obedience to a determinate person.[3] There were a large number of smritis[4] (which also included commentaries and digests), but the principal smritis were three in number. First and foremost in rank of authority was the code or institutes of Manu – the *Manusmriti*, compiled somewhere between 200 BC and AD 100. Then came the code or institutes of Yajnavalkya (the *Yajnavalkya smritis*, compiled between AD 200 and AD 300), the *Mitakshara* being the leading commentary on this code. Next came the code or institutes of Narada (compiled around AD 200). If the smritis constituted the foundation of the written text

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[3] The nature of the concept of 'law' (in the most general sense of that word) is one of the central problems of legal theory. Numerous attempts have been made at verbal definition, the most striking by the English jurists William Blackstone (1723-80) and John Austin (1790-1859). Blackstone described law as a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong. Austin's definition of law was a command from a political sovereign that compelled superior obedience.

[4] In ancient works there are references to over 100 smritis; many of them are untraceable. In a verse of *Yajnavalkya*, there are set out twenty of the rishis to whom the authorship of the smritis is ascribed..

of the 'law', the 'sadachara' (or approved usage) supplied the unwritten customary practices of the people of Bharat.

Hindu law can justly claim the most ancient pedigree in the history of the world. The period of the Vedic Samhitas, Brahmanas, and Upanishads ranges between 4000 B.C. and 1000 B.C. The composition of the principal Srauta Sutras of Apastamba, Asvalayana, Baudhayana, Katyayana, and others and some of Gruhya-Sutras, such as those of Apastamba and Asvalayana, can be assigned to the period between 800 B.C. and 400 B.C. From 600 B.C. to 300 B.C. was the period of Dharma-Sutras of Gautama, Apastamba, Baudhayana, and Vasistha and the Gruhya-Sutras of Parasara and others. The *Arthasastra* of Kautilya may have been composed between 300 B.C. and A.D. 100, whereas the present *Manu Smriti* can claim to have been composed between 200 B.C. and A.D. 100. The Yajnavalkya Smriti followed between A. D. 100 and A.D. 300. The period of the *Katyayana Smriti* on vyavahara can be taken to be roughly between A.D. 400 and A.D. 600. Most of the other Smriti can be assigned to the period between A.D. 600 and A.D. 900. V*isvarupa* wrote his commentary on the *Yajnavalkya Smriti* between A.D. 800 and A.D. 850, whereas Medhatithi wrote his commentary on the Manu Smriti in A.D. 900. *Vijnanesvara's Mitakshara* must have been written between A.D. 1070 and A.D. 1100. Jimutavahana, the author of the Dayabhaga, flourished between A.D. 1100 and A.D. 1150. Raghunandana, the author of the Dayatattva lived between A.D. 1520 and A.D. 1575, whereas the period of Nanda Pandita, the author of the *Dattaka-Mimamsa*, is between A.D. 1590 and A.D. 1630. Kamalakara Bhatta, the author of the Nirnaya-sindhu, must have written his work between A.D. 1610 and A.D. 1640, and Nilakantha Bhatta, the author of the *Vyavahara-mayukha*, must have composed his work between A.D. 1615 and A.D. 1645. The *Viramitroday*a was composed during the same period, whereas Balam Bhatta wrote his commentary on the *Mitakshara* between A.D. 1750 and A.D. 1820, and the *dharma-sindhu* of Kasinatha was composed in A.D. 1790.

All the *Dharmashastras*, right down from the Rig Vedic age, copiously refer to the opinions of Manu – the primeval legislator. Later texts repeatedly affirm that the authority of the precepts contained in the *Manusmriti* is beyond dispute – a fact acknowledged in decisions of courts as well.[5] Manu's code is divided into twelve chapters, and in the eighth chapter there are stated rules on eighteen subjects of law, which include both civil and criminal law. Sir William Jones, who came to India in 1774 as one of the first judges of the Supreme Court of Judicature of Bengal, learnt Sanskrit

[5] For instance, Lord Hobhouse said as far back as in 1899 that 'the most revered of all the rishis or sages in Manu'.

and undertook an authoritative translation of the *Manusmriti*. In the preface to the translated work (published in 1794), he wrote:

> "The style of it (of the *Manusmriti*) has a certain austere majesty that sounds like the language of legislation and exhorts a respectful awe; the sentiments of independence on all beings but God, and the harsh admonitions even to kings are truly noble…."

The code of Yajnavalkya was founded on the *Manusmriti*, but the treatment was more logical and synthesized—particularly on the question of women—their right to inheritance, their right to hold property and the like. Yajnavalkya, though a follower of conventional conservatism, was decidedly more liberal than Manu: possibly because of the then-pervading influence of the teachings of the Buddha. There are a number of verses in the code of Yajnavalkya that bear testimony to the fact that the law of procedure and the law of evidence to be followed in civil disputes had made considerable progress. According to Yajnavalkya, the cause of a judicial proceeding arose when any right of a person was infringed, or any wrong was done to him by another in contravention of the smritis or customary law.

The Code of *Narada* (a compilation) has come down to us in its original pristine form—it begins with an introduction, and the treatment of the subject is in two parts: the first part deals with the judicature, and the second enumerates and discusses with clarity the eighteen titles of legal subjects contained in the *Manusmriti*. The merit of this smriti is that it states the law in a straightforward manner, in a logical sequence which is readily assimilated, and in a style which is both clear and attractive. Some of the topics of law dealt with by Narada are inheritance, ownership, property, gifts, and partnership. The *Naradasmriti* lays down a series of rules relating to pleading, evidence of witnesses and procedure. One of its most striking features is that it is the first of the *Dharmashastras* to accept and record the principle that king-made laws (legislation) override the rules of law laid down in the smritis.

The smritis (or *Dharmashastras*) did not visualize an ordered legal system, but they did conceptualize an aspiration—'nyaya'— which we now call 'justice'. Some commentators said that 'nyaya', literally meaning natural Equity or Reason, was recognized by the smritis as applicable to cases not covered by the written law, as well as where two smritis differed.[6] Yajnavalkya had a great sense of justice, and ordained that 'where two smritis disagree, that which follows equity guided by the people of old

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[6] Yajnavalkya II, 21. (See Sunderlal T. Desai's *Introduction to Mulla's Hindu Law*, 15th edn., p. 43.).

should prevail'. But others insisted upon Equity and Reason as the determining factor in *all* cases. In the smriti of Brihaspati, it was written that 'no decision should be made exclusively according to the letter of the *Dharmashastra* for, in a decision devoid of "yukti" (i.e., Reason or Equity), failure of justice occurs'.[7] It was Brihaspati who perfected the doctrine about invoking Equity even against written law. The concept of justice in the *Manusmriti* is stated in four or five stanzas, the sternest of which is the following:

The necessity of scrupulous practice of Dharma is forcefully expressed in Manu Smriti thus:—

धर्म एव हतो हन्ति रक्षति रक्षितः।
तस्माद्धर्मो न हन्तव्य मा नो धर्मो हतोवधीत्।।

Dharma protects those who protect it. Those who destroy Dharma destroyed. Therefore, Dharma should not be destroyed so that we may not be destroyed as a consequence thereof. [Manu VIII-15]. The principle laid down in this saying is of utmost importance and significance. In the above shortest saying, the entire concept of Rule of Law is incorporated. The meaning it conveys is that if people act according to Dharma and thereby protect it, such an orderly society, which would be an incarnation of Dharma, in turn, protects the rights individuals.

Maine speaks very highly of the Twelve Tables, and observes that 'they were not entitled to say that if the Twelve Tables had not been published, the Romans would have been condemned to a civilization as feeble and perverted as that of the Hindus, but this much at least is certain that with their code they were exempt from the very chance of so unhappy a destiny. It must be stated in fairness to the great author that at the time when he wrote his book, Oriental scholars were not aware of the existence of Artha-sastra, and Kautilya's *Arthasastra* had not seen the light of day. The discovery of Kautilya's Arthasastra has administered a healthy shock to the accepted notion about the origin of Hindu law, and it would not be right to reject Jayaswal's theory substantially and principally on the ground that it does not fit in with the development of law in ancient times in other countries. Indeed, it may be legitimate to say that the very harsh criticism made by Maine against ancient Hindu law must now be regarded as unjustified.

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[7] The Smriti of Brihaspati is not available in its entirety, but such of it as is extant suggests that, compiled one or two centuries after Narada, the ancient law on diverse topics had made great strides. An English translation of some fragments of the Smriti of Brihaspati were published in Max Mueller's Sacred Books of the East vol. xxxiii).

Sir Henry Maine blazed a scientific trail into the field of law, a field hitherto dominated by philosophizing and speculative thought. Maine treated India as "the great repository of ancient juridical thought," insisting that it included "a whole world of Aryan institutions, Aryan customs, Aryan laws, Aryan ideas, in a far earlier stage of growth and development than any which survive beyond its borders". Insufficient research into these, as well as a failure to distinguish clearly between different stages in the development of early law and custom, led Maine into some intuitive generalisations, which though brilliantly formulated and expounded, find little support among present-day legal historians and anthropologists. This applies particularly to his notion of early law passing through three consecutive phases of royal judgments, aristocracies as repositories of custom, and finally an Age of Codes.

In what passed for law in pre-British India, there was an underlying concept of justice, but as to whether it supplemented the law, or could also supplant it, was a matter on which scholars differed.

Much of ancient Indian law is lost in the mists of antiquity. The chance discovery in 1909 of an authentic text of the Arthashastra of Kautilya emphasized the difficulty of stating anything with certainty about the distant past. Kautilya wrote this work somewhere around 300 BC. The *Arthashastra* thus predated the *Manusmriti*—it was written at the time of powerful warrior-emperors like Chandragupta Maurya. The accession of Chandragupta Maurya, reckoned anywhere between 325—321 BC, is a significant landmark in Indian history because it inaugurated the first Indian empire. The Maurya dynasty (which included Emperor Ashoka) was to rule the entire subcontinent, except the areas south of Mysore and substantial parts of present-day Afghanistan, under a centralized imperial system. After the death of Ashoka, political decline set in, and half a century later the empire was reduced to only a part of the Ganges valley.

In 185 BC, the last of the Mauryas was assassinated by his Brahmin commander-in-chief Pushyamitra, who founded the Sunga dynasty. The *Arthashastra*, in substance, embodies the imperial code of law of the Maurya kings (who reigned from 325—185 BC); the *Dharmashastras*, on the other hand, were based on the psyche of a Hindu nation established with the Brahmin Empire of the Sunga dynasty (founded in 185 BC). The difference between the *Arthashastra* and *Dharmashastras* has been explained on the theory that the *Arthashastra* was dealing with secular law and approached the consideration of relevant questions from a purely secular point of view, whereas the *Dharmashastras* considered the same problems from an ethical, religious, or moral point of view, and gave effect to the notions on which the Hindu social structure was based. It was widely believed that the *Arthashastra* had progressed independently of the

Dharmashastaras until the *Manusmriti* was composed, and that subsequent to the *Manusmriti*, the *Arthashastra* ceased to function separately: people (Hindus) in ancient India began to take the law from the smritis and the commentaries on them.

The *Arthashastra* was written when Bharat was politically and administratively unified, probably for the first, and definitely for the last time before the British conquest. There was a consolidation of power in the hands of the emperors, whose writ extended almost throughout the land. Kautilya gives a vivid description of the 'King's courts of justice'. There was a court for the 'sangraha', which was for a group of ten villages; there was a court for the 'dronamukha', which was for a group of four hundred villages; and there was a court for the 'sthaniya', which was for a group of eight hundred villages; and above them all was a court presided over by the 'King's judges'. (The 'King' was not the ruler of a large state, but only the head of an autonomous clan.) Though a network of 'King's courts' had been so established, the local jurisdiction had not disappeared. In ancient India, the bulk, if not the whole administration of justice, was carried out in popular assemblies known as the 'sabha' or 'samiti'. These were deliberative bodies assembled for discussing public business, and also served as a forum for the purpose of judging the cases which were brought before them. There is no reliable history of any territorial kingdoms which flourished before the establishment of the empire of the Mauryas, with its strong central government and duly constituted courts of 1aw.

Kautilya wrote *Arthasastra* between 300 B.C. and A.D. 100. This work is anterior to Manu, and the discussion contained in the 'Dharamasthiyam' part of the work is absolutely unique in legal history. It can legitimately claim to be one of the earliest secular codes of law in the world, and the high level at which legal and juridical principles are discussed, the precision with which statements are made, and the absolutely secular atmosphere which it breaches throughout, give it a place of pride in the history of legal literature. It throws a flood of light on the social, economic, and political conditions of the country at the time. This work shows a systematic arrangement of topics and a remarkable unity of design. There can be no doubt that it is the work of a brilliant author who approached his problem in a purely secular, legalistic, and objective manner.

According to Jayaswal, the *Arthasastra* in substance embodies the imperial code of law of the Mauryas, whereas the *Manava Dharmasastra* is based on the psychology of the Hindu nation of the Brahmana Empire of the Sungas. Yajnavalkya, on the other hand, who followed Manu, represents the view of Hindu law as it prevailed in the Satavahana regime. It is more liberal than Manu in its general aspects and less generous to the Brahmanas. In some important matters, it has more affinity with the

Arthasastra than with Manu. Unlike Manu, Yäjnavalkya devotes larger space to the consideration of the problems of civil law, properly so called.

According to Jayaswal's theory, after the *Manu Smriti* achieved eminence and authority, the independent existence of the *Arthasastra* came to an end, and *vyavahara* became merely part of the *Dharma-sastra*. The *Yajnavalkya Smriti* which virtually repealed the *Mamu Smriti* no doubt adopted a more liberal and less Brahmanical approach; but even Yãjnavalkya treated *vyavahara* as a part of *dharma*, and that settled the pattern and form of Hindu law for the future.

It would be interesting to notice a few of the points of difference between Kautilya and Manu, because these differences indicate a sharp and radical disparity of approach. Kautilya allows *niyoga* (levirate) in its ancient fullness to widows and to the wives of men afflicted with disease; Manu condemns it. Kautilya would recognize the existence of courtesans and would seek to organize them; whereas Manu would punish them as a public scourge. Kautilya would attempt to regulate gambling and drink; Manu condemns it as sin. Kautilya knows of remarried widows and unmarried mothers; Manu would forbid remarriages except in the case of widows who were virgins. Manu strongly disapproves of heresy, while Kautilya does not seem to share that view, because he would go no further than deprive apostates of the right of maintenance from the family estate, and even in respect of apostates, he would require the mother to be maintained by her offspring. Kautilya and Manu differ in regard to the shares to be allotted to sisters on inheritance. Kautilya forbids suicide, and disapproves of *sati*, whereas Manu does not seem to renounce *sati* expressly. Kautilya condemns addiction to astrology; Manu would only discourage the pursuit of astrology as a profession. There are also several differences in regard to the status, privileges, and concessions enjoyed by Brahmanas under Kautilya and Manu. These differences can be satisfactorily explained on the theory that the *Arthasastra* was dealing with secular law and approached the consideration of relevant questions from a purely secular point of view, whereas Dharma-sastra considered the same problems from an ethical, religious, or moral point of view, and gave effect to the notions on which the Hindu social structure was based.

There is another aspect of the matter which leads to the same conclusion. Kautilya holds that *dharma*, *vyavahara*, customs, and royal ordinance are the four legs of lawsuits, that the latter in each case supersedes the former. This clearly assigns a prominent position to royal ordinance. This position of royal ordinance is not recognized by *Dharma-sastra*. Then again, Kautilya refers to the *dharma* rule as distinguished from the rule of *vyavahara*, in dealing with the question of awarding interest. He says that interest allowed by the dharma—law is one and a quarter per cent per month; and

he adds that the rate allowed by *vyavahara* is five per cent per month. This clearly shows that the provisions of *vyavahara* according to the *Arthasastra* on the question of interest were distinct and separate from similar provisions in Dharma-sastra. On the whole, then, it appears to be reasonable and sound to assume the existence of Artha-sastra functioning independently of Dharma-sastra and dealing with secular or municipal law, not necessarily as a part of *dharma* or religion. The *artha*—law under *Arthasastra* recognized the authority of the king's laws, and treated the kingly enactments as of binding character.

It is true that the emergence and development of a purely secular body of .law at such an early date would be a very remarkable achievement, and it would seem to be somewhat inconsistent with the well-recognized theory of the evolution of laws in ancient societies. But the existence of a large body of legal literature passing under the name of *Arthasastra* poses a problem; and it cannot be resolved by merely treating *Arthasastra* as part of Dharma-sastra, because the scope of the inquiry in the two sets of works, their approach, their outlook, the nature and number of the topics taken for discussion by them, and the disparity in the specific provisions on material points do not easily admit of the said explanation. It may be that subsequent to Manu, Arthasastra ceased to exist or function separately, and the Hindus began to take their law from Smriti and commentaries on them.

From time immemorial, the great aims of human endeavour (the purusharthas) have been classified in India as being four: - *dharma, artha, kama and moksha*, roughly translated as moral behaviour, wealth, worldly pleasures and salvation. Of these, *moksha* has always been held, unanimously and unambiguously, to be the highest ideal for which a human being can aspire. It is not easy to define *moksha*; it is, basically, self-realization through liberation. It is the final beatific and timeless state of the enfranchised soul, and it is not possible to achieve it by mere mental processes or literary thought. However, the pursuit of the three objectives – *dharma, artha and kama* – can contribute to the attainment of *moksha*.

Of the three objectives capable of being studied and practised, dharma has always occupied the premier place. Dharma not only signifies an absolute and immutable concept of righteousness but also includes the idea of duty which every human being owes to oneself, to one's ancestors, to society as a whole and to universal order. *Dharma* is law in its widest sense – spiritual, moral, ethical and temporal. Every individual, whether the ruler or the ruled, is governed by his or her own *dharma*.

If we cast a quick look at the history of thought, especially in the West, we can see that, when systematised into an *ism*, the various explanations of the human condition had fiercely rejected each other. The rationalism of

eighteenth-century Enlightenment rejected faith and tradition, and therefore all religions, not just Christianity. Romanticism rejected the Enlightenment. Utilitarianism and psycho-analysis rejected romanticism. Existentialism rejected them all, although there were two or three Christian existentialists, like Kierkegaard and Gabriel Marcel and Jaspers. Marxism, a child of the Enlightenment, rejected romanticism, liberal individualism, nationalism, and much of existentialism as well. There has been, in the history of Western philosophy, a continuing war between rationalism and empiricism, and between idealism and realism, other isms aligning themselves with the one or the other. Positivism rejected moral statements as subjectivism and also most of metaphysics as nonsense in a literal sense. Science rejected the mystical; and mysticism rejected science. Objectivism despises all forms of relativism; and relativism has tried to show that objectivism, especially in science, is an intellectual myth. Materialism rejected spiritualism as emotional froth; and spiritualism looked upon materialism as base and ignoble. The universal has been defined in such a way as to remove all particularities from it: there has been, therefore, a war between the assumed universalism of the Enlightenment idea of history and the visible particularities of human life. That soon gave rise to the claims of regionalism and of nationalism. And then, in turn, it became regionalism vs nationalism, and nationalism vs universalism. And Man has been set against Nature.

But, although fiercely rejecting each other, all these *isms* have one thing in common—a logic which fragments human attributes into irreconcilable polarities, and then assumes that *either* the one or the other is the reality, and constructs its world view wholly on that, or the logic of *either/or.*

What distinguishes the *Mahabharata* is the method it follows in exploring these human questions. The answers to them in other traditions, religious or philosophical, come from either the divine revelation, or from the definitions that are set up, and from the presuppositions that surround them and are held true a *priori*. But that also means that if one's critical faculties remain unconvinced by what the divine revelation, different anyway in different religions, says about the human condition, then one has to seek answers to them somewhere else. And by now it is undeniable that the answers to them, when they came from the arbitrary definitions and presuppositions of philosophical systems, or from what is called scientific method, were so fragmented that, true in some measure, they falsified human reality in its totality. The definitions of *history*, and the presuppositions about it, offer one example. When human material would not respond to those definitions, then that material would either be dismissed, or would be forced somehow into the mould of those definitions, both leading to untruth. The utilitarian definitions of *pleasure* and *pain* offer yet another example, which, open always to serious questions as ethical or psychological theory, had very nearly devastated the lives of a great many people.

The *Upanishad*s had, in a most revolutionary shift, moved the human mind away from the fearful worship of many 'gods', which were the elements of Nature. The focus of their inquiry became, instead, that one reality, *Brahman*, which pervades the universe and is manifest also in one's self, the *atman*. The emphasis now was on what is within and its unity with the outside world. The *Mahabharata* took another great leap forward; it became an inquiry into the nature of 'self in relation with the *other*. Since life is evidently of relationships, personal and social, it became an inquiry into what sustains them, their order, or *dharma*, and what destroys them, their *a-dharma*, disorder. Human living, vastly varied and infinitely complex, was the natural material of that inquiry.

There are certain questions that are universal, while some questions belong only to a particular history. For example, the question concerning the legitimate sources of power, the manner of its exercise, and the limits to which it must be subject, is a question that is universal. But the question as regards the relation between the state and the church in their competing claims over the allegiance of the individual person is a product only of western history which can be explained by the Doctrine of Two swords.

The doctrine of two swords evolved in the later mediaeval conception of State when two opposed influences meet: the vigorous Roman Empire of the Caesars, conserved in the Roman German Empire, as the bearer of the older culture through which the authority of the Pope was established, confronts the Catholic Church which had usurped control of all temporal power. The Church found its philosophic support in Augustine's doctrine of the "Civitas terrene ", while the Aristotelian philosophy favoured a more restricted conception of ecclesiastical rule. It was agreed that temporal and spiritual power are alike conferred by God, but there arose a violent conflict of opinion and doctrine as to whether the temporal sword is conferred upon the ruler directly by God or through the mediacy of the People. The doctrine of "two swords" typifies the most important political issue of mediaevalism. Upon it Grimm comments, "Christ bade his disciples to buy a sword, and when they brought two, he said "It is enough" who would have thought that the biased interpretation of these simple words should for centuries serve to justify the ruler claims of the two greatest of earthly powers. "— F. Berolzheimer, (The World's Legal Philosophies *(1968) 101-102).*

Such conflict never formed part of dharmic reflections on man and society. The issue between the sacred and the temporal power posed no challenge of the kind that it did for many centuries in the history of western societies, for dharma perceived no polarity between the two. Similarly, the question as to whether law is given as divine commands and is therefore immutable, or is a product of the material conditions of a society and must

keep changing with them, posed no theoretical problem in dharmic political thought. The idea of dharma cuts across this issue by showing that:

a. in its attributes of *prabhava* and *dharana* and *ahimsa*, *dharma* as the ordering reality of life is always and everywhere necessarily the basic condition of human living, and, in that sense, is not subject to the particularities of *desha* and *kala*.

b. But insofar as a particular time, a particular place, and a particular society are the determining factors of legislated law, no one set of laws can be called either universal or unchanging. And

c. The particularities of *desha* and *kala*, undoubtedly important in their own place, cannot be invoked as always decisive in going against the foundations of human living.

That is to say, no law, no custom, however old, will have any authority if it tends to debase and degrade human worth, if it creates separations, or if it does violence to human dignity. Even the changing laws, made in response to the changing times, must at all times be subject to the unchanging *dharma* as foundation. What the *Mahabharata* had suggested in saying this is clearly the position also of the modern philosophy of law.

The chief concern of dharmic political thought was power or *bala*: its sources; the purpose for which it is exercised; the limits to it; and the legitimacy of revolt against it when it becomes *adharma*, that is, when it creates conditions of oppression and violence. The *Mahabharata* enquires into all these in systematic detail. The question of power is naturally connected with the purpose for which a king, or, in the modern idiom, the state, exists. In all that follows, substitute the word ‘state’ for the word ‘king.’

Two Indian Philosophical schools viz. Mimamsa and the Vedanata are wholly Vedic, and originated from Vedas. The other four viz. Samkhya, Yoga, Vaisesika and Nyaya Schools have their seeds in Vedas. These six philosophical schools are classified as Vedic or Astika. The other two schools known as Buddhism and Jainism are distinguished from the above and are classified as Nastika since they do not accept Vedic authority. All the above eight schools are products of deep philosophical thought and are known as post-vedic age of thinkers of India.

Each of the above schools is known as *Darsana* and also called as Sastra. *Darsana* means view or a vision of the truth which may also be identified with Rita. Sastra denotes a systemised pattern of thought. Indian philosophy is not a mere exercise of thought or ratiocination but an intuition and formulation of truth which leads a way of meaningful life with the end of attaining *Moksha* (release) from mundane life limited by time and space

by relationships, chain of cause and effect and by recurring cycles of births and deaths. Pursuits of *Artha* (material gains) and *Kama* (pleasure) are not the only aims of life but *Dharma* (virtue and morality) spiritual enlightenment and *Moksha* (absolute freedom) are also the aspirations of life. *Moksha* is the greatest of the above four aims and aspirations that the Indian schools of philosophy addressed. The approach of the Indian Philosophy is an integrated one, and ethics, justice and religion are inextricably interwoven. The ultimate state is a realisation of the *Rita* (truth) and its direct *Anubhava* (experience).

Each of the above schools is associated with a Rishi (sage) as its first promulgator, Samkhya with Kapila, Yoga with Patanjali, Vaisesika with Kanada, Nyaya with Gautama, Mimamsa with Jaimini and Vedanta with Badarayana –Vyasa. The Vaisesika doctrines form the basis of Nyaya both being schools of realism and pluralism. The speciality of Nyaya lies in its further treatment of logic and the science of debate. The two, in fact, became later one eclectic school and put forth a fresh and rich development of formal and semantic logic. The Mimamsa and Vedanta go together because of their common Vedic basis but otherwise they differ fundamentally. The former is concerned with *Karma* and *Dharma*, the performance of ordained duty, but the latter to the opposite of *Karma*, namely, renunciation from activity; according to Vedanta, *Jnana* (knowledge) is the means of *Moksha* (Release). Mimamsa is thus related to the Karma-kanda (Samhita and the Brahmana portion of the Vedas), Vedanta to the Upanisads. The Mimamsa also made a valuable contribution to the science of interpreting texts; it came to be known therefore as Vakya Sastra (the science of sentence). Likewise, the Nyaya which taught the science of precise thinking, came to be known as Pramana Sastra and the two constituted the basic disciplines of all scholarship.

The majesty of law was never more eloquently described than by the *Brhadaranyaka Upanisad*. 'He was not yet developed; He created still further a better form, law (*dharma*). Rangaswami Aiyangar, in his *Ancient Indian Polity*, observes that 'it is necessary to sum up the several aims and features of our ancient polity in a single word, we shall have to find an equivalent for the French word "*etatisme*", so as to have it clear that the root principle of our ancient polity was that every function of the State had to be conditioned by and to be subordinated to the need to preserve both Society and the State.'

Indian polity which evolves from a careful and analytical study of ancient Sanskrit literature is one of kingship elected by popular will, and later acting in consultation with the priestly class; the ancient Indian, theory of kingship treated the kings as trustees of the State, put obedience to divine law above everything else, and required the king to take the oath that

he would safeguard the moral, spiritual, and material well-being of the State entrusted to his care.

Dr. Kane's conclusion is that the word *dharma* passed through several transitions of meaning, and ultimately, its most prominent significance came to be the privileges, duties, and obligations of a man, his standard of conduct as a member of the Aryan community, as a member of one of the castes, and as a person in a particular stage of life. Jaimini defines *dharma* as a desirable goal or result that is indicated by injunctive passages. The *Vaisesika-Sutra* defines *dharma* as that from which result happiness and final beatitude. In the Buddhist sacred books, the word dharma often means the whole teaching of the Buddha. In the *Smriti* literature, the word *dharma* was used in a comprehensive sense, and it included amongst many other topics what may be regarded as rules of secular law. This branch of *dharma* dealing with secular law known by the word *vyavahara* can be regarded as the most developed phase in the evolution of the concept of law, which corresponds with the modern sense of municipal or secular law. According to Katyayana, the etymological meaning of the word *vyavahara* indicates that it is that branch of law, which removes various doubts. *Vi* means various, *ava* means doubt, and *hara* means removal. The object of *vyavahara* on this interpretation would be the removal of doubts. The administration of justice undoubtedly aims at the discovery of truth; and since law helps to remove doubts, it does help the administration of justice in its quest for truth. The view that *vyavahara* refers to secular and municipal laws is supported by the statement in the *Mahabharata* that the authority of the *vyavahara* laws is as sacred and great as that of the *dharma* law. Whereas *dharma* law has its origin in Vedic law, the *vyavahara* law has its origin in political governance and the king; governance is a sacred act being ordained by the Creator, and so its laws are also sacred. Thus, it appears that whereas the concept of *dharma* treated law as a part of ethics, morality, and religion, the concept of *vyavahara* is a more developed concept, and it deals principally, if not exclusively, with matters which fall within the purview of municipal or secular 1aw. (cf H. Ross)

IV. DHARMA: JUSTICING PROCESS IN ANCIENT INDIA:

Chanakya was a rare amalgam of statesmanship and psycho-analytic positivist. He had his शिक्षा and दीक्षा in the ancient Takshshila Multiversity 2500 years ago and was acclaimed as a great teacher and a student. 'Chanakya' with his 500 disciples particularly the chosen disciple Chandragupta challenged the onslaught of mighty Greek invasion by conceiving and later implementing the ideas of sovereignty, unity and integrity of the Nation and a strong federation with strong units for India which are coincidentally the

present day constitutional goals too which are evident from our Preamble. He provided the framework for integrating निर्गुण निराकार representing Arthashastra – Rules for administration of Justice (Abstract concept of Law under Article 13) of the Constitution of India and सद्गुण साकार in the form of Emperor Chandragupta as an embodiment of Justice issuing commands in the Austinian sense (concretization of the concept of State under Article 12) synthesizing the '**RULE OF LAW'** in the Indian Constitution under Article 14. Rule of law represents the Upanishadic mandate that क्षत्रस्य क्षात्रः यद्धर्मः translated into one of the essential features or basic features under Article 14 of the Constitution of India.

A. Raja Dharma with Lessons on Raja Neeti:

Dharma as code of duties denotes

धारणाद् धर्म इत्याहुधर्मो धारयो प्रजा यत् स्याद् धारण संयुक्तं स
धर्म इति निश्चयः।।

Dharma sustains society, Dharma maintains social order, Dharma ensures well-being and progress of humanity, Dharma is surely that which fulfils these objectives (vide 58 Karna parva).

Raja Dharma, which laid down the Dharma of the King, was declared as paramount.

सर्वे धर्माः सोपधर्मास्त्रयाणां राज्ञो धर्मादिति वेदाच्छ्रूणोमि।
एवं धर्मान् राजधर्मेषु सर्वान् सर्वावस्थं संप्रलीनान् निबोध।।

"All Dharmas are merged in Rajadharma, and it is therefore the supreme Dharma". (*Mahabharata, Shanti Parva* 63, 24-25)

Brihadaranyaka Upanishad not only declared the supremacy of law [Dharma] but also gave an excellent definition of law thus:—

तदेतत् क्षत्रस्य क्षत्रं यद्धर्मः।
तस्माद्धर्मात्परं नास्ति।
अथो अबलीयान् बलीयांसमाश्ठांसते घर्मेण।
यथा राज्ञा एवम्।।

The law. (Dharma) is the king of kings. No one is superior to the law (Dharma); The law (Dharma) aided by the power of the king enables the weak to prevail over the strong.

Thus, emperor or kings were subordinate to Rule of Law. The western doctrine that 'king can do no wrong' was never accepted under *Rajadharma*. Thus, we have adopted the principle that 'Constitution of India' is supreme and neither Parliament, nor judiciary nor executive. Detailed provisions made regarding the constitution of council of ministers, duties and responsibilities of each of the ministers including the head of the departments were all clearly laid down in various Smritis including the celebrated '*Artha Shastra*' of Kautilya who was the Prime Minister of the most powerful Empire in the history of Bharat namely Magadh Empire, written around 300 BC.

Thus, 'Dharma' including 'Raja Dharma' was regarded as supreme and the King was only penultimate authority, 'Dharma' being the ultimate authority. Thus, from the commencement of the Constitution, its supremacy constituted an element of basic structure of the Constitution whose principle was reiterated by 13 judges Bench of the Supreme Court in the historic case of *Kesavananda Bharati*[8].

States were many under different Kings, 'Raja Dharma' or 'Constitutional Law' uniformly applied to all of them and regulated the Constitution and Organisation of all the Kingdoms as also civil and criminal law including procedural law. *Rajadharma* required the king to extend all the necessary assistance and encouragement to the people. He was specifically called upon to help orphans, aged people, widows, and those suffering from diseases, handicaps and calamities. He had to provide them with lodging, food, medical facilities and clothing. (M. B. shanti, 86-24). Ensuring education, training and employment, using the resources of the State, was made obligatory on the part of the king. According to historical evidences available, these policies were being implemented by every king. The great king Ashoka constructed hospitals not only for human beings but also for animals (*Second Rock Edict, Kalsi*, C 1.1. Vol. I, p-28, Q in H.D. Vol. III p. 60).

In Ancient India the republics had their own laws and the Hindu legal authority recognised the law of the *Kula* (states) as well as those of the *Ganas*. In a mixed constitution of aristocracy and democracy, we find the existence of *Kulika* court in the administration of justice. The republics or *Ganas* had their own system of law which have been highly praised in the Mahabharata. These courts were well organised. Amongst the *Vajjis*, there was a code of 8 *Kulikas* for the investigation of the criminal cases. Appeal proceeded from Kula courts to *Gana* courts. The Lichchhavis had a book of code, probably written legal precedent and their judicial administration has been rightly praised by the Greek observers.

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[8] *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225 : AIR 1973 SC 1461.

V. ARTHASHASTRA –KAUTILYA:

Significantly Kautilya preferred to title his work as *Arthashastra,* whereas all other earlier writers have chosen to title their works prefixing Dharma, emphasizing a more pragmatic approach giving the meaning – 'livelihood' (*vritta*) to Artha. If Dharma represents absolute values *a priori* Artha, meaning livelihood represents relative values or *a posteriori* principles and it includes *Vyavahara* i.e. positive law as viewed by positivists like Bentham, Austin *etal.* Thus Kautilya introduced relativist philosophy like *Dharma* with variable contents depending upon *Kala (time), Desha (country)* and *Kshetra (region).*

The glorious epics, the *Manusmriti*, Kautilya's *Artha Shastra* and other classics governed the ruler and the ruled. Indeed, the rules of Dharma govern every sphere of activity, every profession, every avocation. The doctrine of Trivarga is an enduring system of values holding good in the social, political, domestic and international planes of human business.

Acharya Somadeva in his *Nitivakyamrita*, written around 1000 AD stresses the importance of enforcement of Trivarga by the State in the following words:

धर्मार्थ काम फलाय राज्याय नमः।

> **"My salutation of the State, which ensures acquiring of wealth and fulfilment of desires without violating Dharma".**

In this single sentence, Somadeva brings forth the object and purpose of the State namely that it is the State which maintains law and order and enable the people to fulfil their desires to earn money and secure other requirements of life. Whether this concept of justice was applied when administering the law is uncertain.

In Kautilya's own words that *artha* is the most important of the three, the other two being dependent on it: अर्थ एव प्रधान इति कौटिल्य। अर्थमूलौ हि धर्मकामाविति। ज्ञ।, 1.7.6-7.

"*Artha* is the sustenance or livelihood (*vrttih*) of men; in other words, it means 'the earth inhabited by men.' Arthasastra is the science which is the means of the acquisition and protection of the earth." In the same manner, the first sutra of the work refers to "Arthasastras composed by earlier teachers for the acquisition and protection of the earth."

Trivarga was not any mystery inside an enigma. It was basic to social order with worldwide validity. "TRIVARGA" comprising of three inseparable ideals namely Dharma (Righteous Code of Conduct), Artha (every type of wealth) and Kama (every type of desire of human beings) as a permanent and effective solution for all human problems was put in the form of an injunction to all human beings in one line:

> 'The trinity of fundamentals — Dharma, Artha, Kama — which constitutes the constellation is collectively expressed as Trivarga."

Since very early times *artha* has been regarded as one of the *trivarga* or three goals of human existence, the other two being dharma and *kama*. In this connection, *artha* is understood to stand for material well-being as well as the means of securing such well-being, particularly, wealth. Like the other two goals, *artha* also has primarily the individual in view. It is the individual who is to pursue *artha* as one of the goals of his life. Now, an essential condition of a man's material well-being is security of livelihood. That is probably the reason why *artha* is, in the text, defined as *vrtti* or livelihood.

An important group of officials called *dharmastha*, translated as Justice, was in charge of dispute resolution. The entire book 3 of *Arthasastra* (A.S.) is devoted to this topic and to their duties. They also probably worked under the Collector and, perhaps, under the City Manager, and paralleled the institution of Magistrate. In fact, jails attached to each officer are mentioned together at 2.5.5 of *Arthasastra* of Kautilya. The role of the Justices, however, was much broader than dispute resolution and functioning as judges in courts of law. They resided in population centers and were entrusted with broad authority regarding the proper observance of duties and laws, and their permission was needed for a variety of activities.

The fact that a judge is called a '*dharmastha*' – upholder of *dharma* – indicates that the ultimate source of all law is *dharma*. So long as every Arya follows his *svadharma* having due regard to his *varna* and *ashrama* and the king follows his *rajadharma*, social order will be maintained. Kautilya, however, recognizes that the customary law of the people of a region or a group is also relevant. In addition, there is law as promulgated by the king. 'When all traditional codes of conduct cease to operate due to disuse or disobedience, the king can promulgate written laws through his edicts, because he alone is the guardian of the right conduct of this world'.

Pradeshtr, usually translated as magistrates, were another class of judicial officers. The distinction between judges and magistrates seems to be that, while the former dealt with all cases concerning transactions between

two parties, the latter were concerned with crimes against society in general. The prevention of crime is an aspect of maintenance of law and order which is not separately spelt out but is referred to in a number of places in the text. Clandestine agents working under the Chancellor were responsible for collecting information about various crimes. They kept a look-out for treacherous activities, cheating on taxes, fraud by merchants, dishonesty of officials and movement of thieves. Doctors were obliged to report cases of secretly treating wounded persons; dead bodies could be taken out of the city only through designated gates. All this points to an elaborate system of crime prevention.

A ruler's duties in the internal administration of the country are threefold: *raksha* or protection of the state from external aggression, *palana* or maintenance of law and order within the state, and *yoga-kshema* or safeguarding the welfare of the people. An integral part of *Arthashastra* is *dandaniti*, the enforcement of laws by a voluminous and comprehensive set of fines and punishments. An essential duty of government is maintaining order; Kautilya defines this broadly to include both maintenance of social order as well as order in the sense of preventing and punishing criminal activity. Thus the subject covers civil law (including family law, law of contracts and law of labour) and criminal law (including the Penal Code). A broad distinction is maintained between the two in the Arthashastra by placing most aspects of civil law in Book 3 and criminal law in Book 4. The titles indicate this: Book 3 is called 'Concerning upholders of *dharma*' and Book 4, 'The removal of thorns', i.e., elimination of anti-social activities. A description of the legal system has also to mention procedures, the law of evidence in civil cases and, for criminal activities, investigation and forensic science.

According to Kautilya, a republican chief in his state has the beneficial propensity of justice. In the constitution of Lichchhavis of Vaishali, the president was also the highest judicial authority. There was a judicial minister who could even be an outsider or a paid officer. The Lichchhavis were fully conscious for safeguarding the liberty of the citizen. A citizen could not be held guilty unless he was considered so by a regularly constituted tribunal and that also unanimously. A careful record of the decisions of the court (*Paveni Pustaka*) and the proceedings were maintained on the rolls of particulars of crime and punishment were entered.

Primary enquiry into the case was held in the court of justice presided by (*Viniaccaya Mahamattas*). There were regular courts for the civil cases and ordinary offences. The court of appeal was presided over by *Voharikas* (lawyer-judges). The high court judges were known as *Shutradharas*. There was yet a council of final appeal called the court of eight or *Ashtakulaka*. Any of these courts could pronounce a citizen innocent and acquit him and

if all the courts held him guilty, the matter was still subject to the decision of the members of the executive cabinet. The *Ashtakulika* signified a judicial council of eight members and the principles of criminal administration were keeping with the general procedure of the republican tradition.

The judicial administration of the republican states offers the most striking example of the special care that was taken to safeguard the individual liberty of the people. But above all, according to Rhys Davids, the judicial work was actually in the hands of the people of *Kapilavastu Samgah*. According to Panini, the new conception of law in the city state was inspired by respect for *dharma* and marked by moral grandeur, considered to be of divine origin. It was almost identical with the new interpretation of Dharma given to it in the Mahabharata.

According to Panini, Dharma denoted oath, justice, and virtue. The ideal of the *Janapada* state was the highest development of virtue and its object was to produce the perfect citizen. This ideal of *Janapada*- state is embodied in the famous words of king *Ashwapati* of *Kekaya* which uttered in the presence of such citizens who were householders, processing magnificent mansions enjoyed all the luxuries that Janapada life would provide but who still chose the path of virtue and learning (*Mahasrotriya*). The sum total of the virtues and of legal, social and moral ordinances which governed the life of the citizens and the *Janapada* polity was called *Vinayikato* which both Panini and the *Shanti-Parva* referred.

i. The king as the final arbiter:

The municipal laws and the judiciary were the jurisdiction of the king. Justice was delivered by hierarchy of courts having different original and appellate jurisdiction. The king's court and the court at village level were at the apex and at the bottom respectively. The administration of justice was collectively done and not individually by the king. The requisites of *Sabha*, the *Sabhasads*, the Dharmaand the truth are summarised in the *Mahabharata*. It was within the prerogative of the king to delegate his power to others in matters of justice. The decree given by any court of the realm was deemed to be a royal decree and the executions of other courts also amounted to royal execution though they were done by subordinate officers of the judiciary. In fact the king was the head of all men. In times of peace, the principal work of the king seems to be to take part in the administration of justice, he also used to give his decisions in law suits. It is clearly meant that the final administration of law rested with the king that the final suits as well as the final word regarding the punishment for breaking the law remained with him. We find a detailed account about the manner of administration of justice from *Pali* texts. According to the account given in the commentary on the *Mahaparinirvan Sutta* concerning

the administration of justice in Vaishali, the chief town of the Lichchhavis the process of law from the institution of a suit to its final decisions was a considerably complicated affair.

Criminal jurisdiction, according to the *Jatakas*, appears to have been exclusively exercised by the king. That any Person other than the king can pronounce a sentence of death seems to be nowhere mentioned in the *Jatakas*. Serious crimes such as theft, adultery, bodily injury, etc. were punished by the *Rajan* (king). We find mainly the reference of two officers, the *Senapati* and the *Voharika- Mahamatyas* as judicial officers. Descriptions in the *Jatakas* of the criminal being brought direct before the king and generally sentenced by him without previous consultation of the ministers may be taken as referring to primitive conditions of earlier age when the legal apparatus would have been simple. We also find the reference of this example in the *Vattaka Jataka* and in the *Avariya Jataka* that the king alone pronounced the judgment.

ii. Assistants of the king:

Though the king was the fountain head of the administration of justice, yet he was also assisted by his ministers on certain occasions. *Purohit* and *Senapati* also took part in the administration of justice and advised the king in some cases. Thus, the entire administration of justice did not lie in the hands of the king. The legal life of the smaller towns and the villages did not come under the sphere of action of the king and remained under the jurisdiction of his representatives as long as no appeal was made against the judgment given by them to the king, who was the highest authority. The exact nature of the judicial work of *senapati* is not known from the *Jatakas*. But it must have differed from that of the minister of justice (*viniccaymatya*) whose proper province as his name applies was the administration of justice.

According to the statement made in the commentary on the *Mahaparinirvan Sutta*, the '*Viniccaya Mahamattas'* represented the first and the lowest stage of judicial work, their judgment only final in the case of acquittal, in other cases the matter was referred to the *Voharikas*. We also find a reference that the minister of justice not only gave judicial decisions but also advised on the matters of law and morality. Much emphasis was given on legal regulations and legislations in the smaller republics of the sixth century BC. The role of *Sakshi* or witness was considered to be extremely important during this period. Panini defines *Sakshi* as the eye-witness, but he seems to offer the literal meaning of the word. The advanced judicial system of the *Janapada* age could not ignore, the hearsay evidence, where the circumstances lacked eye-witnesses. The practice of administering oath to the witness was prevalent as was evidenced by Panini.

iii. Justicing Process in the Dharmasthiya (civil) Courts:

The plaintiff filed his suit and the clerk of the court registered the case, recording the time, place, date, month and year of the filing together with the particulars of the plaintiff and the defendant. The judge scrutinised the records. The case began. The defendants and the plaintiffs gave their statements. And also answered the questions put to them by the court. The clerk of the court made the full record of the proceedings, later to be approved by the judges. Both the plaintiffs and the defendants deposited money in the court to show their earnestness of their appearance in the court. The plaintiff or defendant lost his case if he changed grounds of dispute. Besides losing the suit, the losing party also had to pay a fine equal to one fifth of the amount in dispute. The losing party had to pay for the allowances to the court peons who also received one-eighth ($1/8^{th}$) of a *Pana* daily for doing messenger's work in a case.

Disputes regarding the immovable property were to be decided on the testimony of neighbours, (as witnesses). Boundary disputes between villages were decided by a group of persons of neighbouring five villages. While discussing the position of Gupta judiciary, the later *dharmashastras* must be considered, which Narada and Brihaspati smritis are the most important ones being composed during the reign of Gupta emperors. It is remarkable that the high sounding imperial or feudatory titles which came into vogue during the Gupta period and lasted for several centuries are not mentioned in Narada or any other dharmashastras. These adhere to the time honoured expressions, *raja*, *nripati* etc. and so that the pompous style had not originated by the *Dharmashastras* first chalked out. Narada places the kin and the brahmanas among the eight sacred objects. The law of Narada pertains to the whole human life.

Brihaspati, may be taken as the typical brahmanical exponent of law and procedure of ancient period. He informs us that in the hall of justice in the fort facing the east, the court should be held all through the morning hours till noon, every day except the holidays. Brihaspati divides the court into the four following classes:

1. Stationary
2. The moving about
3. Those presided over by the chief justice
4. Those directed by the king

As in Manu, the kings would be assisted by three assessors. But the popular elements enter into the administration of justice in a much pronounced manner than in Manu. Cultivators, artisans, trade guilds, money lenders,

artists, dancers, religious mendicants and even robbers were told to administer their disputes according to the rule of their own profession. Families, craft guilds and local assemblies were authorised by the king to dispose of the law suits among their members except such as concern violent crimes. Brihaspati also provides for appeal from meetings of kindred or companies to assemblies and finally to the royal judges on the ground that the lower courts had not duly investigated or deliberated on the cause. The laws which the royal courts are told to administer take account of sacred injunctions, customs and equity. Thus, the king in the court was exhorted to listen to the *Puranas,* codes of law and rules of polity, to act on the principle of equity and abide by the opinion of the judges and the doctrine of sacred law. Brihaspati expressly lays down that no sentence should be passed merely according to the letter of the law, but the circumstances of the cases must be closely examined. Local customs, however, could be overruled by royal edicts. *Sententia legis* was preferred to *litera legis*.

The constitution of the court of justice (*Dharmadhikarana*) laid down by Katyayana is of additional *Smriti* type but he adds some new features. During Gupta era, we find certain new changes in the sphere of judicial procedure. The rules in this regard as laid down by Katyayana, marks the climax of Hindu jurisprudence. He reproduces to the Narada's dictum relating to four modes of decision-making viz. by moral law (dharma), by judicial (*Vyavahara*), by popular usages (*Charita*) and by royal edict.

So far as the decision by *Vyavahara* is concerned, Katyayana repeats, the formula of court fee and stages of legal proceedings known as *Brihaspati*. These are called by him *Purva Paksha* (plaint), *Uttara* (reply), *Pratyakalita* (deliberation as to burden of proof), *Kriyapada* (adducing of proof). Beginning with the plaint, Katyayana says that the plaintiff is first to be interrogated by the judge, assessors and the Brahmanas. If the judge is satisfied that the cause is reasonable, he is to make over the court seal to the plaintiff or send a court official for summoning the defendant.

The laws of partition and inheritance in Katyayana contain a number of important clauses. The father and the sons, says he, have equal ownership in ancestral property, while the son has no ownership over the father's self-acquired property. The order of heirs of a sonless man is the widow (if chaste), the daughters – unmarried daughters getting the preference – the father, the mother, the brother and the brother's son. The codified Hindu Law also follows the same principles.

iv. The plaintiff and the defendant:

If several persons come simultaneously with complaints or plaints, then the order of taking up the cases is regulated by the Varna of the plaintiff,

that is, the suit of the *Brahmana* is first taken up. Dealing with the order in which the suitors are to be heard Katyayana says that whoever suffers greater loss of wealth or greater bodily injury shall be given the position of the plaintiff and not he who first informs the court.

The plaints shall be firstly written down as draft on the ground or on a board and after amendments if any, the final plaint is to be written down on a leaf of paper. The plaint have the availabilities of precision, consistency and so forth, while one which is opposed to public policy or contains a mixture of several titles of law or is indefinite is to be rejected. After the plaint has been received, the defendant has to submit his reply. Unlike the plaintiff who usually gets no time for filling his plaint, the defendant was granted adjournments proportionate to the time of the transaction in dispute, the capacities of the parties to the suit and the gravity of the cause. Elaborate rules were laid down about the contents of the plaint. Katyayana requires that in suits about immovable property ten details should be recorded in the plaint viz. the location, names of parties including their parents, their caste etc. What constituted defects in plaints were also mentioned.

The plaint which follows was subjected to a preliminary examination by the judge. If the complainant was half-witted, drunk, a woman or a minor, the plaint may be summarily dismissed. If the plaint was accepted, the judge should summon the accused by a sealed warrant (*mudra*) or by a court messenger (*Purusa*). *Narada* and *Sukra* very elaborately prescribed rules about the summoning of the defendant. The first person to be summoned is the one against whom a complaint based on suspicion or truth is made by the plaintiff or complainant. But other persons may be called as defendants either when the person proceeded against by the plaintiff puts forward another as liable to plaintiff's claim or makes another liable along with himself or when another person is accepted by the plaintiff or another person himself comes forward as defendant. Brihaspati says that if a witness being summoned does not make his appearance, without being ill, he should be made to pay the debt and a fine, after the lapse of three fortnights. The defendant was required to submit his answer in writing if he appeared in the court personally. Such written statement of the defendant, when filed, was recorded. It was as a matter of fact an answer to the plaint.

Brihaspati has given a ruling that delay in the proceedings was to be granted to the defendant if he asked for it under conditions (1) Timidity, (2) Error, (3) If his memory was deranged.

v. Evidence:

Evidence in ancient India was declared to be twofold, human (*Manusi*) and divine (*Daivika*). According to Katyayana, the evidence was of three

kinds, namely, witness (Sakshi), possession (*Bhukti*) and documents (*Likhita*). Other means of proof consisted of reasoning (*Yukti*) and ordeals (*Divyas*). The document, witnesses and possessions come under the head of human proof, while ordeals are included under the head of divine proof. When both the parties had submitted their evidence, the court was to deliver its judgment. Human evidence consisted of witnesses, writings and inferences. Consciousness of guilt could also be manifested from the conduct of the parties at court, as in the case of false evidence. The words which the parties let slip when in passion shall be carefully recorded. Witnesses were to be superior to inference (circumstantial evidence), a document was superior to witness, undisturbed possession for three generations was superior to all these. For the murder of women, minors and Brahmanas, the extreme penalty of death was prescribed. If the debtor or any witness cannot put his signature should be made by another in the presence of all witnesses. Narada has laid down the following situations in which witnesses are unnecessary. Somehow, other indications of the crime committed are to be looked at.

1. A man carrying a firebrand in his hand is incendiary.
2. On taken with a weapon in his hand is a murderer.
3. Where a man and the wife of another man seize one another by the hair, the former is held to be an adulterer.

Vishnu and Brihaspati emphasize that a single witness alone cannot be examined for deciding a matter. But Yajnavalkya, Vishnu and Narada state that one man alone may be a witness in a cause if he is endowed with the regular performance of his religious duties and is accepted as a witness by both sides. Katyayana prescribes that when it is impossible to bring witnesses because they reside in a foreign land, evidence taken in writing before a man learned in the three Vedas and sent by him should be read in deciding the cause. Vishnu talks about the examination of witnesses by the king in order of their castes. Besides religious sanctions, there was also a social punishment for providing false evidence- the false witness became an object of contempt in society and sometimes became an outcast. Manu says that a man who without being ill, withholds giving evidence in cases of loans and the like within three fortnights shall become responsible for the whole debt and shall further pay a fine to the extent of the tenth part of the whole claim.

vi. Trial and Decision:

Brihaspati has prescribed oaths in cases of trifling nature. Narada opines: ‘where a heavy crime is committed, one of the ordeals is to be administered. In light cases, a virtuous king shall swear a man with his various

oaths.' Brihaspati prescribes to swear by venerable Gods or Brahmanas. The general procedure of giving oral evidence, according to him, was to put off shoes, turban, stretch out the right hand and then speak, having gold, cow dung or grass in hands. The last stage of a judicial proceeding according to Yajnavalkya is called *siddhi*. When the evidence has been led, the king or chief justice should with the help of *Sabhyas* decide upon the success or failure of the plaintiff.

VI. DHARMA AND VYAVAHARA

The entire law of adoption as laid down by the Privy Council is mainly on the basis of (i) Dattaka Mimamasa written by Nanda Pandita, and (ii) Dattaka Chandrika written by Devanna Bhatta, author of Smritichandrika. Both these works specially deal with the law of adoption and are regarded as authoritative work on the subject throughout India. Dattaka Chandrika is preferred in Bengal and Dattaka Mimamsa is preferred in the Mithila and Banaras.

The Code of Yajnavalkya to a great extent is based on Manu Smriti. Yajnavalkya is more liberal on certain matters than Manu. Yajnavalkya although a follower of conservatism is decidedly more liberal than Manu. His Code can rightly be regarded as the foundation of the law of inheritance: He first recognised 'cognates' as heirs. The Code is indeed a Code of duties comprehensive and secular in nature which attempted to enthuse all people to subordinate prayers to strays – of material earthly possession to moral values called Dharma. He was more liberal than Manu on a number of matters and particularly on the questions of status of *Sudras*, women's rights of property and inheritance and criminal penalty.

The Yajnavalkya Smriti consists of 1010 verses divided into three chapters: Achara or ecclesiastical law; Vyavahara or civil and criminal law; and Prayaschitta or atonement for sins committed. He deals exhaustively on subjects like creation of valid documents, law of mortgages and hypothecation as also on partnership, associations, of persons interested in joint business ventures. He does not confine the litigations of 18 titles of law as indicated in Manu Smriti. With the progress of the society different types of rights must have come to be recognised. Therefore, he provided that a cause or Vyavahara arises if any right of any person is infringed or any other injury is caused. The prestige and authority of Yajnavalkya Smriti have been greatly advanced by the celebrated commentary of Vijnaneswara under the famous title Mitakshara. The commentary of Yajnavalkya has been accepted as the paramount authority on Hindu Law in the whole of India including Kashmir, except the province of Bengal. It still forms the basis for the personal law of the Hindus such as inheritance, Stridhana, doctrine

of pious obligation etc., to the extent they are not modified by legislation. He endorsed the rule of pleading which inserted upon all material facts on which party relied being set out in his statement of claim or defence.

Narada was the first to give a legal Code free from a crowding of religious and moral principles. He proclaimed that the laws and ordinances passed by princes and rulers could override even the Smritis. He thus thought of the doctrine of civil law. Narada Smriti was compiled somewhere about 200 A.D. He was fully conscious of the social, economic and political changes taking place in the social set up in his treatment of law. He was well alive to the realities of life. His Smriti is remarkable for its progressive views on various matters. Narada Smriti affords an important basis for the study of ancient Hindu legal system.

The Smriti of Brihaspati is unfortunately not available in its entirety. It was compiled somewhere between 300 and 400 A.D. Brihaspati was the first jurist who made clear distinction between civil and criminal justice. Brihaspati deals with some of the important branches of substantive law such as rules of partnership, agency and civil wrongs. The element of mutual agency, right of indemnification for wrongs committed by a partner were some of the important rules advocated by him which find a place in the modern law of partnership also. He was a strong advocate of women's rights and asked for a fair treatment of women. He declared that the mother, the daughter and the widow of the deceased Hindu should be regarded as his heirs.

i. Nyaya

The *Nyayasutras*, the basis of the six systems of Indian philosophy, have been attributed to Aksapada Gautama. About the origin of the Logical science, which is called Anviksiki the *Mahabharata* says that Brahma wrote a work consisting of one lakh chapters in which the Vedas, Anviksiki VaṚta (commercial and economic sciences), Dandaniti (administrative and judicial science) were included. Manu also recommends these found Sastras as indispensable for a prince. The followers of Manu report Kautilya included Anviksiki in the Vedas while Kautilya himself accepts the four traditional vidyas as independent ones. The *Gautama dharmasastra*, the Ramayana and the *Mahabharata* also use the term in the sense of Logical science.

The term Nyaya means a syllogistic reasoning, the end of which is the attainment of the desired conclusion with the help of the four means of knowledge and the hetu qualified by the requisite attributes. The syllogistic reasoning forms the central point of the Sastra. The sources of knowledge, according to Aksapada, are four viz. perception (pratyaksa), inference (anumana), analogy (upamana) and verbal testimony (sabda). Perception is

a knowledge, uncontradicted and determinate in character, not associated with names and arising out of contact of the sense-organ with its object. Inference presupposes perception and is of three kinds – from cause to effect (purvayat), from effect to cause (sesavat) and from general characteristics (samanya) to drsta. Analogy leads to the knowledge of the unknown from similarity with the known. Sabda leads to knowledge from the testimony of reliable authority. It is of two kinds – commonly experienced and outside the scope of common experience. In its later history, the Nyaya took more interest in the study of the *pramanas* (proofs), *anumana* (inference) receiving more prominence.

Pratijna (thesis), *hetu* (reason), *udaharana* (example), *upanaya* (analogue), and *nigamana* (conclusion) are the members (avayava) of a syllogism. The statement of what is to be proved is called *pratijna*. A *hetu* proves the thesis on the basis of similarity or dissimilarity with the example An example may be positive or negative A positive one is an illustrative instance (drstanta) having the characteristics of the major term. A negative example is an illustrative instance having the opposite characteristics of the major term. An *upanaya* (analogue) is guided by the example and shows a connection between the major and minor terms. It is prefixed by the expressions 'like that' or 'unlike that' according to the positive or negative character of the hetu. The *nigamana* (conclusion) is the repetition of the thesis after a statement of the '*hetu*'.

The syllogism of Aksapada consisting of five members has the advantage of combining together induction and deduction while the Aristotelian syllogism gives deduction alone. This disproves the supposition of Aristotle's influence on Aksapada's nyaya-vakya.

A *tarka* (argumentation) is a conjecture (uha) for the attainment of true knowledge on the basis of the plausibility of either of the two contradictory reasons in a case where the essence is not known. Nirnaya is the ascertainment of truth (in a case of tarka) with the help of the thesis and anti-thesis after doubt. Debate and disputation are intimately connected in Aksapada's treatise. His point of view is that not only a truth is to be discovered but it should also be demonstrated adequately to convince others. It is here that epistemology and logic join hands with debate. Of the three kinds of philosophical discussions a debate (vada) is a syllogistic discourse between two contending parties who do not transgress the limits of their own accepted tenets, having the means of knowledge and argumentation for support and refutation. The same becomes a *jalpa* (disputation) when quibble (chala), futile rejoinder (jati) and points of defeat (nigrahasthana) also serve as the means of refutation. A *jalpa* becomes *vitanda* (destructive criticism) where the thesis of the opponent is not explicitly stated. The Nyaya has constructed a terminology of precise connotation which came to be the

property of all the Sastras. The antagonists of the Nyaya also had to use the Nyaya method and the Nyaya terms to refute its position.

The Buddhists had their Vada treatises which followed the general scheme of Aksapada and had hardly any difference in counting the categories and their definitions. Gradually they assumed the role of the chief antagonists of the Nyaya realism and Dignaga and his followers ceased to be influenced by Aksapada's treatise. The rivalry between the Brahmanical and Buddhist logic spread over a long period contributed much to the growth of both of them. Each scholar refuted the position of his opponent in the rival school just to be refuted by another who followed his adversary. This process went on till the Muslim invasion of eastern India.

The Jainas continued to derive inspiration from the system of Aksapada in the development of their own logic. The Vaisesikas are close associates of the Nyayikas. The Vaisesika epistemology was much improved on the basis of that of the Nyaya. The acceptance of *abhava* as a separate category in the Vaisesika School is due to the Nyaya influence.

The epistemology and logic of the Mimamsa, Samkhya and Yoga also show direct or indirect influence of the Nyaya. Akasapada Gautama came at a time when the Nyaya speculations attained comparative maturity. But the case is otherwise in the Vaisesika system as the pre-kanada Vaisesika speculations are very meagre. Again, the Vaisesika system shows several breaks in its history while the Nyaya presents an unbroken tradition. Scholars from different parts of the country studied it and contributed to its development. But Mithila surpasses the rest in its continued devotion and volume of contribution to the Sastra throughout its history.

The Nyayasastra reached beyond the borders of India. We hear of a reference to Gautama, the debator, in the *Khorda Avesta*. Again, manuscripts of new logic in Arakanese characters are extant. Buddhist logic, which is nothing but a branch of the Brahmanic stream, crossed the northern borders of India and reached Tibet and China to be preserved, studied and commented upon by numerous scholars. In the modern times, Indian logic has become a subject of interest among European and American scholars also. Induction was invented and logic came to be treated as the science of sciences and art of arts in quite recent times in the West. As a result all the sciences began to thrive by leaps and bounds. Induction in India, however, though known from the early times, failed to exert similar influence on the positive sciences in spite of Kautilya's awareness of its comprehensive character.

VII. MIMAMSA

The Mimamsa, the science of interpretation with the use of Tarkashastra (logic) explained the conflicting provisions contained in Smritis and ambiguity of Sutras. Jaimini was the greatest exponent of Mimamsa. The *Mimamsasutra* appears to touch the *Nirukta* at three different places. The definitions of *nama* (name) and *akhyata* (verb) in both are almost identical. Similarly the discussion regarding the *arthavattva* (meaningfulness) or otherwise of the mantras in both runs on quite parallel lines, agreeing almost fully in the *prima facie* arguments, their refutation and the final view. The views regarding the devatas are also parallel in both. But neither can be said to be the borrower. This would show that both the works must have taken these ideas from some common source. These facts, coupled with a few more circumstances, mainly negative, can be said to lead to the conclusion that Jaimini must be assigned to a date not later than at least 500 B.C., and very probably must have flourished quite earlier in the period of the *Kalpasutras* with which the *Mimamsasutra* shows great affinity.

It is the philosophy of *Karman* that forms the main interest of the Mimamsa system. In course of time, however, the philosophy of *jnana* (Vedanta) appears to have gained ground; and owing to its inherent defects, the sacrificial cult appears to have dwindled into insignificance, leading this philosophy of *karman* to the verge of oblivion. This setback of the mimamsa appears to have been accelerated by the circumstance that in his work Jaimini has confined himself strictly to the interpretation of Brahmana texts and avoided expressing any view concerning the usual philosophical problems such as Man, God, World, and their mutual relation.

In its aspect as a science of interpretation (vakyasastra), the Mimamsa has exercised the utmost influence in every field where interpretation has scope. Jaimini refutes the view that *sabda* or word is *karya* (created) and hence *anitya* (non-eternal). He further declares that the relation between *sabda* and *artha* (meaning) also is eternal (autpattikanitya). Similarly he holds that *vakyartha* is nothing but a sum total of the *padarthas*, so much so that the *Vaidika vakya* is above all human contact, and hence above invalidity (apramanya). A *vakya* (sentence) is a group of words which taken together yield one complete sense, but taken separately are incapable of conveying it. It is on the basis of this principle of *ekavakyata* (syntactic unity) that a sentence laying down the main act (*mukhya or utpatti-vidhi*) combines with an arthavada or with a sentence laying down a subsidiary (gunavidhi) to form what is called a mahavakya. The verb is the principal part of a sentence.

It may not be out of place to point out that how literature of those times was influenced by the principle of Mimamsa of Jaimini viz. - एकमेवा द्वि

तीयं exemplified by great poet Kalidasa in his magnificent work रघुवंशम (Raghuvansham):

वागिर्धाविव सम्पृक्तौ वागर्धः प्रतिपत्तये
जगतः पितरौ वंदे पार्वती परमेश्वरौ।। रघुवंशम, कालिदासद्ध

That which cannot be articulated viz. प्रकृति (material cause of universe) if manifested in पुरूष (manifests in – Man), निर्गुण becomes सगुण, पार्वति becomes परमेश्वर and वाक (word) becomes अर्थ (meaning). Then it becomes Mahavakya. When *Dvaita* (two) unify into **v}Sr** (one) becomes the Mahavakya resulting into real meaning and this union is a perfect union of Lord Shiva, also known as *Ardhanareeswara,* with Parvati. This is how Kalidasa synthesized the शब्द with अर्थ giving a robust meaning which is another facet of principle of Mimamsa.

On the whole, it is laid down that words in an injunction (vidhivakya) must be interpreted literally and not metaphorically; while *laksana* (metaphorical or secondary interpretation) may be resorted to in the case of *arthavada* and subsidiary statements. The various senses conveyed by this *laksana* have been set forth. That an unqualified plural stands for number three only (kapinjala nyaya) is determined; and also points like singular includes plural and masculine includes feminine in some statements, but singular stands for singular and masculine stands for masculine in other statements. Rules have also been formulated for interpreting negative sentences by a proper construct on the negative particle (nan) and thus taking the sentence as a *pratisedha*, or a *vikalpa*, or an *arthavada*.

The *Mimamsa* rules also lay down that where individual interpretation is not fettered by mandatory rule, the judge has the freedom to accept that construction which is supportable solely by the reason of law. Colebrooke very pertinently said, "the logic of the *Mimamsa* is the logic of the law." The fact of the matter is that the *Mimamsa* contains many rules of interpretation which are common to most systems of law, such as that a special rule prevails over the general, that where there is an exception to a general rule, the exception should be confined within the strict limits, that the masculine includes the feminine, that the greater includes the lesser, and the singular includes plural. The *Mimamsa* contains some special rules of interpretation which are peculiar to it, with the result that by applying the same rules of interpretation the Commentators have come to opposite conclusions. For instance, on the question whether property is temporal or spiritual, Vijnaneshwara came to the conclusion that it is by popular recognition, while Jimutavahana reached the opposite conclusion.

Factum valet: The doctrine, 'factum valet quod fieri non *debet factum valet'*, which means "what ought not to be done is valid when done" is ascribed to Jaimini. Jimutavahana has given expression to this doctrine in the following words, "a fact cannot be altered by hundred texts." In the administration of Hindu law, this doctrine has been applied by the courts both to textual law and customary law, and recently a view has been expressed that it was applied to statutory law as well.

Jimutavahana applied this doctrine to the *Smriti* rules which prohibit a father from alienating his self-acquired immovable property without the consent of his sons by saying that though such an alienation is prohibited but if made it will be valid, as hundred texts cannot alter a fact. The Indian courts applied the doctrine to the following two cases

(1) when the objection to an act or transaction is merely on moral or religious grounds, and

(2) to those acts and transactions which are though prohibited by texts are not rendered invalid.

The doctrine does not apply to an act which is void in law as an act or transaction which is void in law cannot be rendered valid by the application of the doctrine. It is submitted that the doctrine of *factum valet* has no application to the statutory law. A marriage of a boy below 21 or of a girl below 18 is valid under the Hindu Marriage Act, not because the doctrine applies, but because under sections 11 and 12 such a marriage is neither void nor voidable.

Purva Mimamsa is often called 'Mimamsa'. It is to be distinguished from Uttar Mimamsa which is also called 'Vedanta'. The word 'Mimamsa means enquiry or investigation. The two Mimamsa systems do rely on the authority of the Veda, the Purva Mimamsa laying emphasis on the Brahmana part of the Shruti, while the Uttar Mimamsa laying emphasis on the Upanishad part of the Shruti. But knowledge of Panini's Sanskrit will not enable one to understand the Rigveda, as the Rigveda is in ancient Sanskrit. In fact the Mimamsa rules of interpretation existed even before Jaimini, since Jaimini himself has referred to 8 Acharyas on the topic in his 'purvapaksha'.

In his book on the Mimamsa Principles. K.L. Sarkar mentions 6 axioms of interpretation. They are:

(1) The sarthakyata axiom, which means that every word and sentence must have some meaning.

(2) The laghava axiom (Gauravah doshah), which states that the construction which makes the meaning simpler and shorter is to be preferred.

(3) The asthaikatva axiom, which states that a double meaning should not be attached to a word or sentence occurring at one and the same place. Such a double meaning is known as a Vakyabheda, and is a fault (dosh).

(4) The gunapradhana axiom, which states that if a word or sentence purporting to express a subordinate idea clashes with the principal idea the former must be adjusted to the latter, or must be disregarded altogether.

(5) The Sarnanjasya axiom which states that all attempts should be made at reconciliation of apparently conflicting texts. Jimutvahana has utilized this principle for reconciling conflicting texts of Manu and Yajnavalkya on the right of succession.

(6) The Vikalpa axiom, which states that if there is a real and irreconcilable contradiction between two legal rules having equal force, the rule more in accordance with equity and usage can be adopted at one's option (It must be clarified here that where one of the rules is a higher legal norm as compared to the other, e.g. a shruti is a higher norm than a smriti, then by the Badha principle the former will prevail).

It may be mentioned here that the Mimamsaks were great reconcilers. They made every effort to reconcile conflicts, and held that vikalpa was to be resorted to only if all other means of reconciliation failed, for vikalpa had 8 faults (dosh).

Apart from the abovementioned axioms of interpretation there are the 4 well known general principles of interpretation in Mimamsa, viz:

(1) The Shruti principle, or the literal rule. This is illustrated by the well-known Garhapatya maxim. There is the vedic verse 'Aindra garhapatyam upatishthate' (with the Indra verse one should worship Garhapatya). Now this vidhi can have several meanings : e.g., (1) One should worship Garhapatya, the household fire, with a verse addressed to Indra (2) One should worship both Indra as well as Garhapatya, (3) One should worship either of the two. The correct interpretation, according to the shruti principle, is the first interpretation since the word 'Garhapatya' is in the objective case.

(2) The Linga principle (also called Lakshana artha) or the suggestive power of words or expressions. This principle can be illustrated by the decision of the Supreme Court in *U.P. Bhoodan Yagna Samiti* v. *Braj Kishore*[9], where the words 'landless persons' were held to refer to landless peasants only and not to landless businessmen. In the

[9] (1988) 4 SCC 274.

Mimamsa, it is illustrated by the 'barhi nyaya' (for details see K.L. Sarkar's book).

(3) The Vakya principle, or syntactical arrangement. Mimamsaks illustrate it by the 'Aruni nyaya' (see K.L. Sarkar's book).

(4) Prakarana, which permits construction by referring to some other text in order to make the meaning clear.

The above are only some of the broad principles of interpretation created by the Mimamsaks. The question arises, why did they fall into disuse, particularly when they are so rational and logical? The only answer can be is that when the British came to India they wanted to demoralize the Indians and paint them as a race of savages and fools, with no intellectual achievements to their credit. Hence they introduced Maxwell's Principles of interpretation (given in his book 'Interpretation of Statutes') in our law Courts, and these are still being followed today. There is nothing wrong in using Maxwell's Principles where they are appropriate to the context, but why the allergy to the Mimamsa Principles? In certain contexts Maxwell's principles may not resolve the difficulty and here Mimamsa principles may be of help. Hence we should use both Maxwell's and Mimamsa Principles in our law Courts.

Mimamsa principles sometimes lead to different results. For example there is a text of Vasishta which says "a woman should not give or take a son in adoption except with the assent of her husband". This has been interpreted in 4 different ways by our commentators : (1) The Dattak Mimamsa holds that no widow can adopt a son because the assent required is assent at the time of adoption, and the husband being dead no assent of his can be had at the time of adoption. Vachaspati Mishra of the Mithila School of Mitakshara, is of the same opinion, but for a different reason. According to him, adoption can only be done after performing the homa and since a woman cannot perform the homa with Vedic mantras, she cannot adopt. (2) The Dayabhaga view is that the husband's assent is not required at the time of actual adoption, and hence if the husband had given assent in his lifetime his widow can adopt after his death. (3) The view of the *Dravida* School of *Mitakshara* is that the words 'except with the assent of the husband' are only illustrative, and hence assent of her husband's agnates or father-in-law's agnates is sufficient (4) The *Vyavaharmayukha* and *nirnayasindhu* hold that assent is required only for the woman whose husband is living, and hence a widow can freely adopt unless she had been expressly forbidden by her late husband. To give another example, the *Mitakshara* and *Dayabhaga* both use *Mimamsa* principles in interpreting the smritis but lead to different results. For example, the word *'sapinda'* has been interpreted differently in *Dayabhaga* and *Mitakshara*. Both these systems lay down that the nearest *sapinda* has the right to inherit, but according to *Dayabhaga*

Sapinda means the person who has the right to offer the *pinda* (rice balls) in the *shraddha* ceremony to the deceased, while the *Mitakshara* interprets the word '*Pinda* to mean particles of the body, and not rice balls, and hence *sapinda* means one having the same particles as the deceased (i.e., nearer in blood). Thus *Dayabhaga* is a more religious system, while *Mitakshara* is more secular. The fact, however, that Mimamsa principles sometimes lead to different results does not detract from their utility. Maxwell's principles can also lead to different results. This only shows that principles of interpretation should be applied appropriately, and not out of context or in a bookish way. They are, after all, not rules of law but a methodology for resolving certain difficulties.

VIII. RESEARCH METHODS : ANCIENT INDIA

The research has its functions and uses. We conduct research either to enhance the efficiency of our system, increase the volume and quality of information to add on to what already exists or for creating material conditions of comfort. This also makes us become a class apart. In other words research has got to be meaningful. We do not conduct research only to while away our time. Research is purposive and it has definite goals. It is either basic (also called pure) or instrumental or applied. Most of the basic research is serendipity. The fundamental or basic research is not very common. It is also time consuming and very expensive. Examples in question are researches in the area of space, superconductivity, nano-technology and stem cell technology.

The major problem that is staring into our face in the IPR regime and what steps India need to take to protect itself against the economic exploitation by advanced countries of the West. We are already facing numerous problems in agriculture and health-related researches. The mapping of genes, production of genetically modified seeds, cloning, robotics, Embryonic stem cell technology, skin cells to stem cell technology and techno-science etc. are few such areas in which we are facing problems.

Ancient Indians defined knowledge to belong to two types. *Apara vidya (lower knowledge) and para vidya (higher).* Somehow these definitions continue to be valid for our discussion even today as well. Apara vidya is a kind of knowledge, which seeks to understand the apparent phenomenon of existence externally, by an approach from outside, through the senses and the intellect. This is how we acquire lower knowledge. The lower knowledge constitutes all human knowledge acquired through books or experiments. Even the Vedas fall in this category since they are not themselves the direct experience of the Self and of the eternal that is beyond all beings. Para vidya, is the knowledge, which seeks to know the truth of existence

from within. This mystic knowledge does not follow any of the well-known steps of research. Indian mystics continue to talk of *samadhi*, the awakening of *kundalini, yogic mudras* etc. that yield definitive results.

Four types of knowledge Indians have eventually developed. The first one is metaphysical or intuitive knowledge. It is a purely matter of individual experience and consciousness. The second form of knowledge is logical knowledge. India happens to have a vast body of literature in this field and interestingly it is far advanced than the West. We are the only people in the world who developed a logical method or reasoning called 'vitanda.' Third was the development of sastras or researched knowledge. This was called rational knowledge. The development of logic in Nyaya or Mimamsa philosophies is the typical product of that age and effort. It is this phase of development that came to its eventual fruition in the philosophical contributions of Nagarjuna and Dharmakirti. A glimpse of their logic can be witnessed in Milindapanha (the dialogue between King Mahendra and Nagsena).

Then came the fourth, experimental sciences. This form of knowledge has no descent but a step toward progress. This gave us some of the greatest scientists and physicians. The astronomers, mathematicians, physicians etc. are the product of this knowledge. William James recorded: "From the Vedas (ancient Indian scriptures) we learn a practical art of surgery, medicine, music, house building under which mechanized art is included. They are encyclopaedia of every aspect of life, culture, religion, science, ethics, law, cosmology and meteorology."

In the 7th Century A.D. Kumaril Bhatt developed methods of research for discovering, creating and improving knowledge. He defined in the typical aphoristic style the steps one must follow in research. These steps are common to both social as well as physical sciences. The aphorism is: "Vishayo Vishaaschaiva purvapaksha stathotaram/Niranayaishchi panchang shashtradhikarana smritam." In other words he declared that researcher ought to remember five steps in writing a sastra.

The first step was doubt/identification of a problem. The second was review of existing literature or the establishing of the ground for conducting research or defining grounds why research had become imperative. Thereafter he, like Hegel, proposed dialectical method for arriving at the truth. The researcher has to propose purvapaksha or the arguments against the propositions. Then he must follow it up with uttarpaksha or offer answers to each of the grounds raised in the earlier proposition. The result has to be a synthesis or the final decision. It should be clear now that modern researchers to follow the same steps. Here is the latest version of the steps developed by an Italian researcher named Carlo Lastrucci. His steps are 1. Formulation of the Problem; 2. Surveying related literature; 3.

Preparing research design; 4. Fixing the size of the sample; 5. Data collection; 6. Interpretation of the data; 7. Verification of the interpretation. Or rejection of the hypothesis and lastly 8 viz. Preparing research report. For conducting empirical research we need not have to borrow all our tools from the West instead we can compare the aforementioned steps and draw conclusions particularly for empirical research in law and related disciplines. Knowledge like truth is not easy to cognize. We may agree with Jayanta, an Indian thinker of Nyaya School, that knowledge is a mode of buddhi, which transforms itself into the shape of the object it cognizes.

Hypothetical reasoning is an intellectual act, which contributes to the ascertainment of truth by means of adducing logical grounds in favour of one of the alternative possibilities when reality is not known in its actual character. This type of reasoning can or might not help resolve indecisiveness. This reasoning is also of five types. 1. Atmasraya is an argument that is self-dependent in respect of genesis, subsistence and cognition e.g. A is the cause of B. Here B must be different from A, because the cause is different from effect. 2. Anyonyashraya is a mutually dependent argument. Such as A depends on B, and B depends on A. 3. Chakraka/circular. Here the argument is circular in nature e.g. A requires B, and B requires C, and C requires A. 4. Anavastha is the regression ad infinitum. E.g. If we explain A by B, and B by C etc. we can go in doing so without explaining anything. 5. Reductio ad absurdum or tandanyabadhitaprasanga. It indirectly proves the validity of the argument by showing that the contradictory of its conclusion is absurd. This may be done by opposing the contradiction of the conclusion by means of some fact or by applying some universal law. If the contradictory be false the original conclusion must be true. Compare Prof. Wambaugh's theory of ascertaining *ratio decidendi* of a case which seems to be similar to this. Error or viparyaya-when any object is presented in a form which does not belong to it, it is a case of error or illusion. Sky-lotus is one such example..

The nature of Prama (valid knowledge) will be of immense use for teleological research in law. Valid knowledge has two-fold characteristics of truth and novelty. In this regard all Indian philosophies are common. Perception, Inference, Comparison and verbal testimony are commonly accepted as four forms of valid knowledge. It might interest some law students to go through the following configuration and see how they are placed and their utility in legal research.

Lokayata	perception
Buddhism	perception, inference
Vaisesika	perception, inference
Samkhya	perception, inference, word (sabda)

Nyaya	perception, inference, words Comparison
Vedanta	perception, inference, word - Comparison, postulation (arthapatti) And non-perception (anupalabhadi)
Bhatta Mimamsa	perception, inference, word - Comparison, postulation and non perception.
Prabhakara Mimamsa	perception, inference, word- Comparison, postulation.

One could easily select one or more of the above methods for conducting research particularly in Law.

Gunnar Myrdal once said there is no objectivity in research particularly in analyzing the judgments. We see what we wish to see. In law and social sciences the truth gets colored the moment one tries to formulate a hypothesis. You eventually come to prove what you started to prove. The truth that we know is therefore relative, transitory and malleable. This perception is very important from the point of forensic exercises. Research is the innate function of all human minds, the purpose of research is to help humanity by creating tools of collecting quality information and revealing some aspect of the unknown. All progress is definable in terms of quality research alone with all other considerations constituting the very core of that effort. Look at the methods used in accurately predicting the outcomes of the judgments of the U.S. Supreme Court in Brown's case (1955)[10]. *Linkletter* v. *Walker*[11], *Roe* v. *Wade*[12], *Bush* v. *Al Gore*[13] etc.

It may be observed that these and a host of other principles of interpretation formulated or indicated by Jaimini have been utilised in the field of Dharmasastra to such an extent that for an accurate understanding of a Dharmasastra text a good acquaintance with the Mimamsa rules of interpretation (the nyayas as they are commonly called) is absolutely necessary. These rules have parallels in the modern legal interpretation. This phase of Mimamsa is, therefore, of a very wide and at the same time lasting importance. As a philosophy of action (karma), reinterpreted so as to suit the changed conditions of the modern world, the Mimamsa will yet be of importance and interest. The whole world stands today in need of a teaching which will make us conscious of duties (social or otherwise) and teach

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[10] *Brown* v. *Board of Education (2)*, 1955 SCC OnLine US SC 54 : 99 L Ed 1083 : 349 US 294 (1955).

[11] 1965 SCC OnLine US SC 126 : 14 L Ed 2d 601 : 381 US 618 (1965).

[12] 1973 SCC OnLine US SC 20 : 35 L Ed 2d 147 : 410 US 113 (1973).

[13] 2000 SCC OnLine US SC 83 : 148 L Ed 2d 388 : 531 US 98 (2000).

us to wait and let the rights come as a natural consequence of the acts performed. (cf Leon Duguit)

IX. DHARMIC POLITICAL THOUGHT

There are certain questions that are universal, while some questions belong only to a particular history. For example, the question concerning the legitimate sources of power, the manner of its exercise, and the limits to which it must be subject, is a question that is universal. But the question as regards the relation between the state and the church in their competing claims over the allegiance of the individual person is a product only of western history. It formed no part of dharmic reflections on man and society. The issue between the sacred and the temporal power posed no challenge of the kind that it did for many centuries in the history of western societies, for *dharma* perceived no polarity between the two. Similarly, the question as to whether law is given as divine commands and is therefore immutable, or is a product of the material conditions of a society and must keep changing with them, posed no theoretical problem in dharmic political thought. The idea of *dharma* cuts across this use by showing that:

a. In its attributes of *prabhava* and *dharana* and *ahimsa*, *dharma* as the ordering reality of life is always and everywhere necessarily the basic condition of human living, and, in that sense, is not subject to the particularities of *desha* and *kala*.

b. But insofar as a particular time, a particular place, and a particular society are the determining factors of legislated law, no one set of laws can be called either universal or unchanging. And

c. The particularities of *desha* and *kala*, undoubtedly important in their own place, cannot be invoked as always decisive in going against the foundations of human living.

That is to say, no law, no custom, however old, will have any authority if it tends to debase and degrade human worth, if it creates separations, or if it does violence to human dignity. Even the changing laws, made in response to the changing times, must at all times be subject to the unchanging *dharma* as foundation. What the *Mahabharata* had suggested in saying this is clearly the position also of the modern philosophy of law.

The chief concern of dharmic political thought was power or *bala*: its sources; the purpose for which it is exercised; the limits to it; and the legitimacy of revolt against it when it becomes *adharma*, that is, when it creates conditions of oppression and violence. The *Mahabharata* enquires into all these in systematic detail. The question of power is naturally connected with the purpose for which a king, or, in the modern idiom, the state, exists.

In all that follows, substitute the word 'state' for the word 'king'. The greatest part of the political thought in the *Mahabharata* unfolds in the form of a long conversation between Yudhishthira and the dying Bhishma, who often recalls some other conversations that had taken place earlier on the subject of governance.

This can be further exemplified by the following verses from the Holy Bhagawad Geeta where Lord Krishna says:

यदा यदा हि धर्मस्य ग्लानिर्भवति भारत।
अभ्युत्थानमधर्मस्य तदात्मानं सृजाम्यहम्।।

[Chapter 4 : 7]Whenever there is decay of dharma and rise of adharma, then I embody Myself, O Bharata.

ब्रह्मणो हि प्रतिश्ठाहममृतस्याव्ययस्य च।
शाश्वतस्य च धर्मस्य सुखस्यैकान्तिकस्य च।।

[Chapter 14 : 27]All the four Yogas are herein harmonized. Bhakti and the attainment of the *Saguna Brahma*, through it have been explained in the previous stanza. The Immortal and the Immutable Brahman or the *Nirguna Brahman* is reached by Jnana yoga. By serving the Lord through Karma yoga, the *Eternal Dharma* or the *Sanatana Dharma* which is another name for Brahman is made one's own. The practiced Raja yoga culminates in the creation of *Amrita dhara*, the Divine Nectar which provides Absolute Bliss which is another name for Brahman. Thus all the four yogas are paths by pursuing which the *sadhaka* gets beyond the three Gunas. The right course is to adopt all these four yogas simultaneously. He who does so traverses the three Gunas and gets into Brahman who is supremely beyond them.

In Sanskrit works, it is a recognised tradition that the opening stanza should generally indicate the whole theme of the text. The bulk of the book, then discusses at length, the different views and gives all possible arguments, until in its concluding portion, the last stanza generally summarises the final conclusions of the shastra on the theme indicated in the opening section of the book. In this way, when we consider the Bhagawad Geeta, we find that the Divine Song starts with the word 'Dharma' and concludes with the term 'Mine' (Mama); and therefore, the contents of the Geeta — we may conclude - are nothing but 'My *Dharma*' (*Mama Dharma*).

The term *Dharma* is one of the most intractable terms in Hindu philosophy. Derived from the root '*dhar*' (*Dhri*) to uphold, sustain, support, the term *Dharma* denotes "that which holds together the different aspects and qualities of an object into a whole. Ordinarily, the term *Dharma* has been translated as religious code, as righteousness, as a system of morality, as duty, as charity, etc. But the original Sanskrit term has a special connotation of its own which is not captured by any one of these renderings. The best rendering of this term *Dharma* so far is, the law-of-Being meaning, "that which makes a thing or being what it is". For example, it is the *Dharma* of the Fire to burn, of the Sun to shine, etc.

Dharma means, therefore, not merely righteousness or goodness but it indicates the essential nature of anything, without which it cannot retain its independent existence. For example, a cold, dark Sun is impossible, as heat and light are the Dharma of the Sun. Similarly, if we are to live as truly dynamic men in the world, we can only do so by being faithful to our true nature, and the Geeta explains us 'my *Dharma'*.

X. SOCIAL JUSTICE, SOCIAL CHOICE AND PUBLIC GOOD : DHARMA IN CONTEMPORARY CONTEXT:

Chanakya emphasised the essential duty of the King as below:-

प्रजासुखे सुखं राज्ञः प्रजानां च हिते हितम्।
नात्मप्रियं हितं राज्ञः प्रजानां तु प्रियं हितम्।।

In the happiness of his subjects lies the king's happiness; in their welfare his welfare. He shall not consider as good only that which pleases him but treat as beneficial to him whatever pleases his subjects. (*Chanakya*)

Chanakya's principles of governance and the foundation of Raja Dharma, Law and Governance discussed in *Shanti parva* and *Bhishma parva* of Mahabharata are reflected in the contemporary International Instruments emphasising social justice with human dignity and consequent imposition of obligations on Indian State in the form of directive principles of state policy for ushering in welfare state. From ages India believed in ।। यतो धर्मस्ततो जयः।। (Gandhari to Duryodhana) as repeatedly reiterated in Mahabharata and significantly found in the logo of the Supreme Court of India. Collective choice or social choice should precede the individual virtue to fulfil the ends of law through development, as the aggregation of individual virtues to achieve justice.

At this juncture WE MAY emphasize on the transformative role of law in justicing process for development echoes the contemporary aspects of social choice and individual virtues. Justice as was earlier thought is not an individual virtue but should be based upon social choice as has been developed through 18th century. The central problem of social choice theory is also the central concern of democracy. The enquiries into these questions engaged the attention of Marquis de Condorcet, the late 18th century French Philosopher and Mathematician. Normative social choice theory is an influential approach to politics that derives its basic ideas from the mathematical field of 'positive' social choice theory pioneered by Nobel Laureate Kenneth Arrow and others. Social choice theory studies mathematical functions or rules aggregating multiple individual preference rankings into a single collective preference ranking.

Deliberative democracy means the idea that political authority depends on a healthy application of practical intelligence in reasonably egalitarian public deliberation. It emphasizes the social processes that form individual attitudes, where social choice theory emphasizes rules for aggregating attitudes (i.e. preferences) that are, for purposes of analysis, taken as given. Deliberative democratic theory also distinctively understands practical rationality as including more than an individual's pursuit of her own aims. Normative social choice theory and deep deliberative democracy treat democracy as a kind of correspondence between outcomes and certain individual interests of the citizens.

In our quest for justice all these centuries four approaches to justice are explored. The first theory is the outcome from Arthasastra and Dharmasastra propounding the highest ideal is Dharma as the genus and Vyavahara the existentialist form of transformative Justice as species and rooted in Ancient Indian Jurisprudential thought. *A priorists* accept the absolute division between existentialist is and normative ought (Manu and Kant) and believe in '*a priori*' normative *ought* whereas, Bentham, Jhering and Pound believe in existential 'is' like Yajnavalkya and Vijnaneshwara. The second theory says that justice means in maximizing utility or welfare – the greatest happiness for the greatest number. The third says justice means respecting freedom of choice – either the actual choices people make in a free market (the libertarian view) or the hypothetical choices people would make in an original position of equality (the liberal egalitarian view). The fourth says justice involves cultivating virtue and reasoning about the common good. Social Justice emphasises human capabilities (Amartya Sen and Martha Nussbaum). This is similar to Finnis' basic goods of "human flourishings", though more extensive. It has also close links with Rawls.

The utilitarian approach has two defects: First, it makes justice and rights a matter of calculation, not principle. Second, by trying to translate all

human goods into a single, uniform measure of value, it flattens them, and takes no account of the qualitative differences among them.

The freedom-based theories solve the first problem but not the second. They take rights seriously and insist that justice is more than mere calculation. Although they disagree among themselves about which rights should outweigh utilitarian considerations. They agree that certain rights are fundamental and must be respected. But beyond singling out certain rights as worthy of respect, they accept people's preferences as they are. They don't require us to question or challenge the preferences and desires we bring to public life. According to these theories, the moral worth of the ends we pursue, the meaning and significance of the lives we lead, and the quality and character of the common life we share all lie beyond the domain of justice.

Prof. Michael Sandel transforms moral philosophy by putting it at the heart of civic debate and says that freedom and utility based theories are mistaken and asserts that a just society can't be achieved simply by maximizing utility or by securing freedom of choice. To achieve a just society we have to reason together about the meaning of the good life, and to create a public culture hospitable to the disagreements that will inevitably arise.

Justice is not only about the right way to distribute things. It is also about the right way to value things. "In my lifetime", Prof. Sandel says "the most promising voice in this direction was that of Robert F. Kennedy, as he sought the Democratic presidential nomination in 1968. For him, justice involved more than the size and distribution of the national product. It was also about higher moral purposes."

Four decades later, during the 2008 presidential campaign, Barack Obama also tapped Americans' hunger for a public life of larger purpose and articulated a politics of moral and spiritual aspiration. Whether the need to contend with a financial crisis and deep recession will prevent him from turning the moral and civic thrust of his campaign into a new politics of the common good remains is yet to be realised particularly in an era of Alt Right, Afd, post truth and half-truths.

Markets are useful instruments for organising productive activity. But unless we want to let the market rewrite the norms that govern social institutions, we need a public debate about the moral limits of market. Too great a gap between rich and poor undermines the solidarity that democratic citizenship requires. The affluent secede from public places and services, leaving them to those who can't afford anything else. The hollowing out of the public realm makes it difficult to cultivate the solidarity and sense of community on which democratic citizenship depends. So, quite apart from its effects on utility or consent, inequality can be corrosive to civic virtue.

Conservatives enamoured to markets and liberals concerned with redistribution overlook this loss. A more robust public engagement with our moral disagreements could provide a stronger, not a weaker, basis for mutual respect. A politics of moral engagement is not only a more inspiring ideal than a politics of avoidable. It is also a more promising basis for a justice society. All these ideals of Justice are reflected in Ancient texts of all religious as ought propositions. God commands you to be just and kind. The Arab is not superior to non-Arab. Let not the hatred of people incite you to depart from justice. Be just that is higher to piety, to awaken higher consciousness of their relation with God and the Universe (Holy Quran).

In 1951, while still a student at Columbia University, Professor Arrow wrote on Social Choice and Individual Values, which contained what is known as Arrow's Impossibility Theorem (ironically called the General Possibility Theorem by Arrow himself). His contribution is considered the foundation of modern social choice theory, for which he is best known. The theorem proves that meaningful aggregation is impossible from individual choices. Arrow showed that any procedure that satisfies two plausible requirements has to be dictatorial. The Arrow impossibility result led to the birth of an entirely new field of research for economists and political scientists, called the social choice theory. The theory, whose development also owes a great deal to the work of Amartya Sen, explores the structure of voting procedures from several perspectives. Virtually all models to analyse political competition originate in some way or the other from Arrow's impossibility result.

Kenneth Arrow wrote down some simple axioms that any process of aggregation of individual preferences into societal preference ought to satisfy and proved that there is no way of satisfying all these few elementary axioms. This is one of the most astonishing theorems because it is, in principle, so simple. Its proof does not require any special mathematics or prior theorems. All you need is the ability to reason, but the reasoning is so long and sustained that most people find it hard. It is still a wonder how Arrow hit upon this theorem in what was then virtually barren terrain. One of the fascinating stories one learns from Amartya Sen's book is his discovery of Arrow's theorem.

Further expansion of the social choice theory took place post 1950s particularly during the seminal writings of John Rawls and Amartya Sen. Prof. Sen emphasizes the concept of social choice through the social or collective choice principle and are to be preferred goals of justice rather than aggregation of individual virtues.

It will be meaningful and rewarding to discuss to what extent law in a democratic society can meet the social justice by applying the social choice

theory and aggregate of preferences from the political stand point of view. Law being the will of majority and also an instrument to achieve justice can justify its role by applying social choice theory via mathematical economics encompassing the law making to the pluralities and not merely majority. This in itself leads to justice as an institution. Answers to these debates may contribute to the transformative justice in the present century which is of seminal importance.

The presence of remediable injustice may well be connected with behavioural transgressions rather than with institutional shortcomings Justice is ultimately connected with the way people's lives go, and not merely with the nature of the institutions surrounding them. In contrast, many of the principal theories of justice concentrate overwhelmingly on how to establish 'just institutions', and give some derivative and subsidiary role to behavioural features.

The analytical – and rather mathematical – discipline of 'social choice theory', which can be traced to the words of Condorcet in the eighteenth century, but which has been developed in the present form by the pioneering contributions of Kenneth Arrow in the midtwentieth century, belongs to this second line of investigation. That approach, suitably adapted, can make a substantial contribution, to addressing questions about the enhancement of justice and the removal of injustice in the world. The Transformative Justice at global scale depends much on the perceptions of collective choice and social welfare.

A synthetic and eclectic multi-dimensional approach to the notion of law, development and justice will permit the mathematical and economic aspects of Justice as outlined above needs to be addressed.

At this juncture it may be pertinent to argue that the legitimacy of the universal political cry for "Social Justice" or public choice or justice or an aggregate of individual virtues as perceived by the elected leadership is itself questionable as Nobel Laureate M. Buchanan, a co-founder with Gordon Tullock defined "public choice" as "politics without romance". Tullock applied the public choice theory to electoral politics to often arrive at controversial conclusions including why voting is a waste of time, and why voters have no incentive to make informed decisions as the recent electoral results in the U.S. and Europe demonstrated. Because the day real world political behaviour seeks to examine the present politicians as individuals are guided by their own selfish interests – rather than as benevolent promoters of the 'common good' to better design policy.

XI. JUSTICE AS DHARMA- PRESENT PERFECT:

At a time when terrorists play death games, currencies careen amid rumours of a third world war, embassies flame and storm troopers lace up their boots in many a land, we stare in horror at the headlines. Governments of the world are reduced to paralysis or imbecility. Faced with all this, a massed chorus of Cassandras fills the air with doom song. The present day shift to alternative right, Af.D, post truth, part truth and fake news and learned Machine (AI) are ringing Bells of alarm. The world has not swerved into lunacy, beneath the clatter and jangle of seemingly senseless events there lies a startling and potentially hopeful pattern aiming at stability, peace and order through legal pluralities.

The essence of Greek tragedy, as expounded by Aristotle, lies in the twin concepts of *anagnorisis*, insight into the working of fate, and catharsis, purging of baser emotions, that result from the protagonist's downfall and suffering. Adversity is supposed to refine human character, stimulate philosophical insights and ennoble individuals. Francis Bacon echoes a similar sentiment when he says, "Prosperity doth best discover vice, but adversity doth best discover virtue." Not only that, it also leads to intellectual introspection as alluded to in Shakespeare's Romeo and Juliet: "Adversity's sweet milk, philosophy."

This is in line with Nietzsche's critique of the Christian virtues of passive suffering and meekness, which he subsumes under the derogatory expression, "slave morality". To find our answers we need, as Socrates would say, to examine lives – ours and of those we know well. We shall find that growth of any kind takes place only after pain has been endured. So it stands to reason that spiritual growth would also require the bearing of pain and suffering. Adversity engenders challenge and challenge opens the door for the nobility of heroic struggle against odds. (Pradeep Bajpai)

The side effects of spiritual life are prosperity and happiness. The Bhagavad Geeta is an invaluable guide not only for spiritual aspirants. As counsellor, the Gita helps nurture fulfilling relationships, too. The Gita does not advocate giving up on life and retiring to forests. The Gita enables you to enjoy life to the fullest while focussing on inner enrichment. The 18th chapter summarises the entire Gita. It deals with the transformation of the individual from a finite, powerless victim into the infinite, omnipotent victor.

There is a tenor common to all the great scriptures of the world. Directly or indirectly they are all exponents of the *maha-vakyam*, the Sentence Sublime. The Vedas contain four such proclamations. The most popular one among them '*Tat tvam asi'* this sentence contains three words. When

literally translated it means 'That thou art'. In propose order it is 'Thou art That'.

The Bhagavad Geeta is from beginning to end a grand commentary on the sublime statement—Thou art Thai. There are eighteen chapters in the Bhagavad Geeta. They are conventionally called the Three Sixes the *tri-satkam*. The first six chapters elucidate the word *thou* in the *maha-vakyam*. The word stands for the Jivatman or the individual soul with its potentialities and possibilities. The seeming limitations of the individual soul, and how they could be overcome to the point of perfection are fully delineated here. Chapters seven to twelve form the second *satkam*. This portion deals with the word *that* indicating God or the Ultimate Reality. What is called Nature is none other than that Reality contacted through the senses and the intellect. The third *satkam* contains the last six chapters. The predicate *art* gets explained in this portion. The inviolable relationship between the Cosmic Reality and the individual soul is well established in this part of the book.

Ancient India was led by the wise, not the wealthy. The wise guided the wealthy kshatriyas and protected them from the corruptive influence of wealth and power. These categories were not based on heredity; they were as per a person's proclivities. Krishna encapsulates the entire spiritual path starting with Karma, Bhakti and Jnana Yogas and concludes with meditation. Karma Yoga is acting with the attitude of giving, not taking. Bhakti Yoga is inclusive love, not exclusive attachment. Jnana Yoga is distilling the permanent from the transient aspects of life. Krishna then leaves you to do as you wish. The Gita is not a doctrine of adesha, commandments, to be accepted without question. It is upadesha, advice based on logical, scientific exposition of the human personality. (Jaya Row)

Select References:-

1.	Chidbhavananda, Swami (Commentary)	:	The Bhagavad Gita (Tapovan 1965)
2.	Chinmayananda, Swamy (Commentary)	:	The Holy Geeta (Chinmaya Trust – Reprint 2011)
3.	Gajendragadkar, P. B. Justice	:	The Historical Background and Theoretic basis of Hindu Law Ramakrishna Mission (2013)
4.	Kangle R. P.	:	The Kautilya Arthasastra (in three volumes) Motilal Banarsidas 8th Reprint 2014
5.	Michael Sandel	:	Justice –What is the right theory to do? Penguin Book (2009)

6.	Nariman Fali S.	:	India's Legal System : Can it be saved – Penguin
7.	Neil Mac Cormack	:	Institutions of Law OUP 2007
8.	Pound, Roscoe	:	An Introduction to the Philosophy of Law (5th Indian Reprint 2009- Universal
9.	Patrick Olivelle	:	King, Governance and Law in Ancient India OUP (2013)
10.	Publications division	:	Founders of Philosophy, Govt. of India Reprint August, 1992
11.	Radhakrishnan, S	:	Indian Religions, Orient Paper books 5th Reprint 1992
12.	Rama Jois, M Justice Dr.	:	Legal and Constitutional History of India, Universal Law Publishing Company, New Delhi Reprint-2010
13.	Rama Jois, M Justice Dr.	:	Raja Dharma, 2nd edition 2011 Universal Law Publishing Company, New Delhi
14.	Rangarajan, L. N.	:	Kautilya: The Arthasastra Penguin Classics, India 1992
15.	Sarkar, K. L.	:	Mimamsa Rules of Interpretation 2013, Thomson Reuters
16.	Sen, Priya Nath	:	General Principles of Hindu Jurisprudence (Allahabad Law Agency)

THE PARIS ACCORD AND TRUMP WITHDRAWAL

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Abstract *"A year and a half ago, the world came together in Paris around the first-ever global agreement to set the world on a low-carbon course and protect the world we leave to our children. It was a steady, principled American leadership on the world stage that made that achievement possible."*

—President Barack Obama

The Paris Agreement[1] is a climate agreement within the United Nations Framework Convention on Climate Change (UNFCCC 2015) as ratified at the 21st Conference of Parties (COP-21) in Paris and adopted by consensus on December 12, 2015. This agreement is set to come into force in 2020 and calls for nationally determined contributions (NDCs); that is, each country has to determine, plan and report its contribution to reduce global warming (for discussion on key tasks to implement the Paris Agreement, see Northrop and Krnjaic 2016). Specifically, the aims of the agreement are: (a) Holding the increase in the global average temperature to well below 2 °C (Celsius) above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change; (b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and, (c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development (Corbyn 2016).

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[1] It is also known as *Accord de Paris* in French.

Governments of the participating countries agreed to: (1) come together every five years to evaluate their efforts and set new targets for further emission reductions as required by science; (2) report to each other as well as to the public on the progress they achieved to reach their intended targets; (3) track progress toward the long-term goal through robust transparency and accountability system; (4) strengthen societies' ability to deal with the impacts of climate change; and, (5) provide continued and enhanced international support for adaptation to developing countries. Toward this end, developed countries would collectively provide $100 billion per year until 2025, when a new collective goal will be set (Corbyn 2016). Developing countries are encouraged to provide support on voluntary basis; but, developed countries are required to report twice a year on levels of their support. In essence, this agreement is a treaty as a matter of international law; that is, all ratifying countries are expected to bind to each other by the terms of the agreement (for further discussion on this topic, see Myer 2015; Streck 2015).

I. TRUMP WITHDRAWAL

Though nearly 200 nations signed the Paris Agreement, the U.S. President Donald Trump announced the withdrawal of the U.S. from it on Thursday, June 1, 2015. In his opinion, the "Paris climate accord is simply the latest example of Washington entering an agreement that disadvantages the U.S., leaving American workers …and taxpayers to absorb the cost in terms of lost jobs and lower wages and vastly diminished economic production." To him, the Paris accord imposes "draconian and financial economic burdens" on the U.S. by requiring the implementation of the Nationally Determined Contribution (NDC) and Green Climate Fund (for full transcript of Trump's announcement, see CBS 2017). Claimed that he has been fighting every day for the "great people of this country," Trump defended his position by saying, "I was elected by citizens of Pittsburgh, not Paris" (Liptak and Acosta 2017). But, neither the Pittsburgh mayor nor its people were very pleased with it. Pittsburgh Mayor Bill Peduto expressed his outrage in a news conference right after Trump's proclamation: "In this [Trump's] speechwriter's mind, Pittsburgh is this dirty old town that relies upon big coal and big steel to survive and he represents those people that are Pittsburgh, and he completely ignores the sacrifices that we made over 30 years in order to get back up on our feet, in order to be creating a new economy, in order to make the sacrifices to clean our air and clean our water and what he did is use us as this example of a stereotype in order to make a point and it missed completely" (Joseph 2017). Marjorie Cohn, Professor Emerita at Thomas Jefferson School of Law, maintained that Trump "acted in concert with 22 Republican senators, who collectively receive $10,694,284 in contributions from the coal and oil industries" (Cohn

2017). In addition, 40 self-described free-market organizations asked Trump in a letter to keep his campaign promise and withdraw the U.S. from the Paris agreement, which, in their opinion, would send a strong signal to other world leaders that they cannot place unfair demands on the United States (Blackhurst 2017).

Trump also signed an executive order in March 2017, which directed Environmental Protection Agency (EPA) to cut back on its Clean Power Plan. According to Cohn (2017), the current withdrawal from Paris Agreement amounts to Trump's impeachable crime against humanity that "will ultimately cause great suffering to the people of the world." Gallup National Tracking Poll also showed that public support for Trump's impeachment is now higher (43%) than approval of the job he is doing (36%) —a clear sign of declining popularity following his decision on the Paris agreement (Riotta 2017).

Conservative Proponents' Reactions**:** Conservative proponents supported Trump's decision to pull U.S. out of the Paris deal. For example, 22 Republican senators, including Senate Majority Leader Mitch McConnell; 40 conservative think tanks or activist groups, including Heritage Foundation, Grover Norquist's American for Tax Reform, the Koch brothers' Americans for Prosperity, and the longtime climate science—denying Heartland Institute; Pro-Trump conservative media like Fox News and Breitbart; and, other talk show hosts like Limbaugh praised the move as expected, primarily because it was signed when the democratic president Obama was in the White House (Prokop 2017). To them, it is simply a matter of "smashing Obama's legacy" (Dinan 2017). Republican House Speaker Paul Ryan said, "The Paris climate agreement was simply a raw deal for America. …I commend President Trump for fulfilling his commitment to the American people and withdrawing from this bad deal." Sen. Mitch McConnel echoed, "I applaud President Trump and his administration for dealing yet another significant blow to the Obama Administration's assault on domestic energy production and jobs."

Liberal Opponents' Reactions**:** Former President Barack Obama disagreed with Trump's claim that the Paris agreement causes losing jobs and lowering wages in the U.S. His assessment is quite opposite: "The nations that remain in Paris Agreement will be the nations that reap the benefits in jobs and industries created. I believe the United States of America should be at the front of the pack." Former Vice President Al Gore is a known environmental activist for decades, who condemned Trump's action thusly: "Removing the United States from Paris Agreement is a reckless and indefensible action. It undermines America's standing in the world and threatens to damage humanity's ability to solve the climate crisis in time." New York's democratic senator, Chuck Schumer predicted that "future

generations will look back on President Trump's decision as one of the worst policy moves made in the 21st century because of the huge damage to our economy, our environment and our geopolitical standing." In Nancy Pelosi's (D-California) view, Trump's withdrawal amounts to "abandoning America's leadership position in the fight against the climate crisis and sending a strong message to the rest of the world to create, design and manufacture clean energy solutions and create jobs elsewhere" (Ballinger 2017). Some Republicans joined in the criticism as well. For example, Sen. Susan Collins (R-Maine) tweeted, "Climate change requires a global approach. I'm disappointed in the President's decision to withdraw from the Paris Agreement" (Joseph 2017). George Shultz, a former Cabinet member of the Reagan and Nixon administrations, and Climate Leadership Council's Ted Halstead wrote, "Global statecraft relies on trust, reputation and credibility, which can be all too easily squandered. The United States is far better off maintaining a seat at the head of the table rather than standing outside. If America fails to honor a global agreement that it helped forge, the repercussions will undercut our diplomatic priorities across the globe, not to mention the country's global standing and the market access of our firms" (Leber 2017). Even Rex Tillerson, Trump's Secretary of State, agreed that the U.S. should retain a seat at the table (Leber 2017).

Celebrities' Reactions: Several prominent celebrities ranging from Leonardo DiCaprio to Michael Moore went on social media to express their views in opposition to Trump's withdrawal of U.S. from the Parris climate agreement. The following tweets are illustrative: "I'm guessing that Donald Trump doesn't see the irony in making his announcement to leave the Paris Agreement while standing in a garden—Chelsea Handler"; "Trump is our national embarrassment—John Legend"; "A 70-year old moron who thinks climate change is a hoax hired a band to celebrate the earth dying faster. This is beyond embarrassing—Ike Barinholtz"; "Trump just committed a crime against humanity. This admitted predator has now expanded his predatory acts to the entire planet—Michael Moore"; "Our children & our grandchildren have all just been handed a dark future because of a man who tweets at 3:00 AM & doesn't "trust" science—Josh Gad" (for additional examples, see Gallucci 2017; Lenker 2017; Rubin 2017).

Corporates' Reactions**:** Corporate leaders also swiftly rebuked Trump's decision. For example, Exxon CEO Daren Woods sent a letter to President Trump on May 9, 2017 in which he wrote that "ExxonMobil maintains the view that the Unites States is well positioned to compete within the framework of the Paris agreement with abundant low carbon resources such as natural gas, as well as innovative industries including the oil, gas and petrochemical sectors. Importantly, the agreement is global, and includes both developing countries and developed countries; this critical as developing countries already account for a majority of greenhouse gas emissions, and

are expected to grow to account for nearly three quarters of greenhouse gas emissions by 2040. By remaining a party to the Paris agreement, the United States will maintain a seat at the negotiating table to ensure a level playing field so that all energy sources and technologies are treated equitably in an open, transparent and competitive global market so as to achieve economic growth and poverty reduction at the lowest cost to society." In the same letter he encouraged the United States and broader society "to remain focused on pursuing the most cost effective greenhouse gas reduction options, as well as policies that promote flexibility and innovation." Jeff Immelt, the Chairman and CEO of General Electric tweeted, "Disappointed with today's decision on the Paris Agreement. Climate change is real. Industry must now lead and not depend on government." Robert Iger, Chairman and CEO of the Walt Disney Company reported, "As a matter principle, resigned from the President's Council over the Paris agreement withdrawal." Similarly, Elon Musk from Tesla, SpaceX, Open Al & Neuralink also reported, "Am departing presidential councils. Climate change is real. Leaving Paris is not good for America or the world" (Zavis 2017). Other corporate leaders like Facebook CEO Mark Zuckerberg, Twitter CEO Jack Dorsey, and Google head Sundar Pichai, Goldman Sachs CEO Lloyd Blandfein also expressed their disapproval of Trump's decision to withdraw from Paris accord (for additional discussion on this aspect, Joseph 2017).

Even before Trump announced his decision to withdraw from the Paris agreement, Fortune 100 companies—ranging from oil and gas to retail, mining, utilities, agriculture, chemicals, information and automotive—voiced their support to remain in the agreement through public letters and full-page ads (Shultz and Halstead 2017).

Public Reactions: Although Trump and his supporters tend to think that Global warming is a hoax or something that was created by China, a study jointly conducted by the Yale program on Climate Change Communication and the George Mason University's Center for Climate Change Communication in March 2016 revealed that: (1) seven in ten Americans think global warming is happening; (2) over one-half (53%) of Americans think that global warming is mostly human caused; (3) over one-half (58%) say they are "somewhat" or "very" worried about the issue; (4) majority of Americans think that it will cause a "great deal" or "moderate amount" of harm to people in developing countries (63%), people in the U.S. (59%), future generations (70%), and to them personally (41%); (5) Thirty-one percent of Americans say they discuss global warming with family and friends at least occasionally; (6) majority of Americans say that "much more" or "more" should be done to address global warming by corporations and industry (71%), U.S. Congress (60%), governors (55%), local government officials (55%), and then President Obama (49%); and, (6) majority of Americans say global warming is a major environmental (68%), scientific

(59%), agricultural (55%), or severe weather (54%) issue. And, nearly one-half consider it a major health (45%) or economic (44%) issue (Leiserowitz et al., 2016:3-4). For all these reasons, majority of Americans in every state (ranging from 52% in West Virginia to 77% in New York) said that the U.S. should participate in the Paris agreement, with an aggregate national level of 69 percent. Stated differently, seven in ten registered voters said that the U.S. should participate in the Paris agreement (86% Democrats, 61% Independents, and 51% Republicans). Only conservative Republicans are split—40 percent said the U.S. should participate and 34 percent it should not. Also, about half of Trump voters (47%) said the U.S. should participate in the agreement, 28 percent said it should not, and 25 percent said they didn't know (Marlon et al., 2017).

Gallup poll observed a striking contrast along the party lines among those who said they were worried a "great deal" about global warming: Democrats (66%), Independents (45%), and Republicans (18%). Table 1 shows the percentage distributions of respondents worried a "Great Deal" about various environmental problems by party affiliations:

Table 1: Percentage Worried a Great Deal, by Political Party

Environmental Problems	Democrats	Republicans	Difference
Global warming or climate change	66	18	48
Air pollution	63	28	35
Pollution of rivers, lakes & reservoirs	69	38	31
Extinction of plant and animal species	55	24	31
The loss of tropical rain forests	56	25	31
Pollution of drinking water	75	47	28

Source: Gallup on Social Issues, March 7, 2017. Accessed on 6/21/17 [http://www.gallup.com/poll/206513/democrats-drive-rise-concern-global-warming.aspx?g_source=global+warming&g_medium=search&g_campaign=tiles]

Bob Irvin, President of American Rivers said in a statement he issued that, "In withdrawing from the Paris agreement, President is abdicating the responsibility of the United States to be a global leader and is putting our nation's health, economy and national security at risk. Far from making America great again, his decision will leave our planet worse for future generations.…The president's head-in-the-sand approach to climate change contrasts sharply with the leadership and moral courage of countless individuals, businesses and cities that are working tirelessly to stop dirty fossil fuel pollution and strengthen communities against climate impacts including increased flooding and drought" (Kober 2017).

The Politico/Morining Consult survey conducted during June 1-2, 2017 found that nearly six in ten (57%) disagreed with Trump's withdrawal from the Paris agreement (Edelman 2017). In a Washington Post-ABC News Poll conducted during June 2-4, 2017, only 28 percent approved and 59 percent opposed Donald Trump's decision to withdraw from the Paris climate agreement—approximately 2-to-1 margin in opposition. A sharp contrast along party lines was also evident in that an overwhelming 67 percent Republicans supported Trump's action, while it dropped to 22 percent among independents, and further to mere 8 percent among Democrats. In response to Trump's claim that his decision would help creating jobs, only 39 percent agreed and 47 percent felt that it would actually cost jobs—a sign of considerable skepticism. Overall, 51 percent (including 17% Republicans, 51% Independents, and 80% Democrats) reportedly felt that Trump's decision would hurt international efforts to address climate change; 42 percent (including 12% Republicans, 42% Independents, and 69% Democrats) felt it would hurt U.S. economy; and, 55 percent (including 21% Republicans, 56% Independents, and 82% Democrats) felt it would hurt U.S. leadership in the world (Clement and Dennis 2017; Washington Post 2017).

Another poll conducted by the Associate Press-NORC Center for Public Affairs Research during June 8-11, 2017, found that 52 percent (78% Democrats, 24% Republicans) worry that withdrawing from the Paris agreement will hurt the national economy; 70 percent of Americans are "very concerned" or "moderately concerned" that withdrawing will hurt the country's standing in the world; by a 46 percent to 29 percent margin, more oppose than favour the U.S. withdrawing from the agreement; 43 percent say they are "very" or "extremely" concerned that the withdrawal will hurt global efforts to fight climate change; 74 percent disapprove how Trump is handling the issue of climate change; and, two-thirds of Americans think that climate change is happening. Bonnie Sumner, an independent voter from Colorado said, "His [Trump's] position, as it is with too many other things, is, 'I know what's best, I know better than everybody else, and this a hoax, and this is fake news.' I'm frightened for us, my children and my grandchildren. We only have one earth, we have to work together" (Biesecker and Swanson 2017).

Global Reactions: Trump withdrawal from Paris accord caused disappointment and anger among many nations. French President Emmanuel Macron said that the U.S. President had "committed an error for the interests of his country, his people and a mistake for the future of our planet." The British Prime Minister Theresa May said that the Paris accord provides the "right global framework" for tackling climate change and that she was disappointed with Trump's decision to withdraw from it. Chine Premier Li Keqiang said that Beijing would continue to fight climate change even without the U.S. participation in the Paris accord. In response to Trump's tweet

in 2012 that Beijing had invented global warming to "make U.S. manufacturing non-competitive," Li said that "fighting climate change is a global consensus, not invented by China." Belgium Prime Minister Charles Michel called Trump's action is a "brutal act" and "leadership means fighting climate change together. Not forsaking commitment." The European Union's climate change chief Miguel Arias Canete said that "Thursday was a sad day for the global community, as a key partner turns its back on the fight against climate change." Canada Prime Minister Justin Trudeau said he was "deeply disappointed" with Trump's decision, but "Canada is unwavering in our commitment to fight climate change and support clean economic growth." Indian Prime Minister Narendra Modi said that "we do not have the right to spoil the environment for future generations. … That is, morally speaking, a crime on our part." Other nations expressed similar sentiments (Boffey, Connolly and Asthana 2017; Gaffey 2017; Zavis 2017).

Kofi Annan, Chair of the Elders (an independent global leaders group for peace and human rights) said that, "Climate change is the greatest existential threat of our time. The Paris Agreement was born out of effective multilateralism and a desire to find a cooperative solution to a global problem. No one country can dismantle the Agreement. While the US withdrawal weakens that international accord, it will not trigger its demise" (The Elders 2017). Mary Robinson, Elder and former UN Special Envoy on Climate Change denounced Trump's decision by saying that, "the US reneging on its commitment to the Paris Agreement renders it a rogue state on international stage. But the Trump administration's withdrawal from the Paris Agreement will not stop climate action in the United States. At state level, in cities, in businesses and communities around the country the move away from fossil fuels is well underway. We encourage all actors in the US working to tackle climate change to stand their ground, share the benefits of their work and to keep making their voices heard" (The Elders 2017).

Jean-Claude Juncker, the President of the EU Commission doubted whether Trump actually knows the details of the agreement: "That's not how it works. The Americans can't just leave the climate protection agreement. Mr. Trump believes that because he doesn't get close enough to the dossiers to fully understand them. It would take three to four years after the agreement came into force in November 2016 to leave the agreement. So this notion, 'I am Trump, I am American, America First, and I'm going to get out of it'—that won't happen. We tried to explain that to Mr. Trump in Taormina in clear German sentences. It seems our attempt failed, but the law is the law and it must be obeyed. Not everything which is law and not everything in international agreements is fake news, and we have to comply with it" (Crunden 2017). Juncker is right because Article 28 of the agreement says that (UNFCC 2015:31):

1. At any time after three years from the date on which this Agreement has entered into force for a Party, that Party may withdraw from this Agreement by giving written notification to the Depositary.
2. Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.
3. Any Party that withdraws from the Convention shall be considered as also having withdrawn from this Agreement.

Therefore, despite Trump's announcement to withdraw from the Paris agreement on June 1, 2017, the U.S. will be a party to it until late 2020. Any attempt to withdraw from the agreement by Trump may constitute a violation of international law and potentially jeopardize the world's trust in the U.S. as a negotiating partner, which will be a major diplomatic blowback for other negotiations like security and trade (Rosenthal 2017).

II. CONCLUSIONS

Borger (2017) has rightly characterized Trump's Paris Accord speech as his "darkest speech since the 'American carnage' inaugural address," as it is "an entirely needless piece of diplomatic and environmental vandalism… The world was presented as something to fear rather than to aspire to lead." McMaster and Cohn (2017) wrote in their commentary that "America first doesn't mean America alone. It is a commitment to protecting and advancing our vital interests while also fostering cooperation and strengthening relationships with our allies and partners." Trump ignored the treaty agreed upon by 195 nations and his withdrawal caused unnecessary dismay and confusion among several other participant nations. Though Trump later said that he will consider renegotiation, several global leaders including British Prime Minister Theresa May, Canadian Prime Minister Justin Trudeau, French President Emmanuel Macron, German Chancellor Angela Merkel, and Italian Premier Paolo Gentiloni were unwilling to return to the drawing board (Stavins 2017; Zavis 2017). Even domestically, the U.S. Conference of Mayors strongly opposed Trump's decision and vowed to continue efforts to "reduce greenhouse gas emissions blamed for global warming at the city and state levels" (Hunt 2017). For example, California Governor Jerry Brown said in an interview with the Los Angeles Times, "Here we are, in 2017, going backwards.… It cannot stand; it's not right, and California will do everything it can to not only stay the course, but to build more support—in other states, in other provinces, in other countries.… Trump is going against science. He's going against reality. We can't stand by and give aid and comfort to that" (Myers 2017). Senate President Pro

Tem Kevin de Leon (D-Los Angeles) said: "As with so many other matters, from human rights to healthcare, the Trump administration has continued to surrender our nation's longstanding role as a global leader" (Myers 2017). Lt. Governor Gavin Newsom tweeted his prediction on previous day to Trump's decision: "If Trump does pull out of the Paris Agreement, the US would join just Syria & Nicaragua. Dumb + destructive doesn't begin to describe it" (Myers 2017). And, unfortunately, it happened.

Teaming up with California Gov. Jerry Brown and Washington Gov. Jay Inslee to form the U.S. Climate Alliance to rally state-level action to uphold the Paris agreement, the New York Governor expressed his outrage over Trump's decision: "The White House's reckless decision to withdraw from the Paris Climate Agreement has devastating repercussion not only for the United States, but for our planet. This administration is abdicating its leadership and taking a backseat to other countries in the global fight against climate change" (Blain 2017).

Will it weaken the U.S. foreign relations? At least some did think so. For example, Gro Harlem Brundtland, Deputy Chair of the Elders, former UN Special Envoy on Climate Change, and former chair of the Brundtland Commission, who established the concept of sustainable development, indicated that, "President Trump's decision to quit the Paris Agreement and slash US funding for the Green Climate Fund weakens the already frayed bonds of trust between developed and developing countries. It places an enormous burden on other industrialized countries to mobilize the $100 billion per year promised to support climate action in developing countries" (The Elders 2017). Leber (2017) said that "Trump has no idea what he just did or the backlash that awaits; if he's capable of regret, he'll regret leaving the Paris deal." Time only decides how adverse the impact of Trump's withdrawal would be on the US and/or on other parts of the world, but by then, Trump may not be the president to face the consequences of his actions.

References

Ballinger, Matt (June 1, 2017). Reaction to President Trump's decision to pull the U.S. out of the Paris Agreement. *Los Angeles Times*. Accessed on 6/14/17 [http://www.latimes.com/politics/washington/la-na-essential-washington-updates-reaction-to-president-trump-s-decision-1496348624-htmlstory.html]

Biesecker, Michael and Emily Swanson (June 20, 2017). AP-NORC poll: Few favour Trump move to ditch Paris accord. *ABC News*. Accessed on 6/21/17 [http://abcnews.go.com/Technology/wireStory/ap-poll-agree-trump-move-ditch-paris-accord-48148037]

Blackhurst, Kathryn (May 9, 2017). 40 Groups Ask Trump to Reject Paris Climate Agreement. *PoliZette*. Accessed on 6/21/17 [http://www.lifezette.com/polizette/40-groups-ask-trump-to-reject-paris-climate-agreement/]

Blain, Glenn (June 1, 2017). New York unites with California, Washington to honor Paris climate deal. *The New York Daily News*. Accessed on 6/19/17 [http://www.nydailynews.com/news/politics/n-y-unites-calif-wash-honor-paris-climate-deal-article-1.3213643]

Boffey, Daniel; Kate Connolly and Anushka Asthana (June 2, 2017). EU to bypass Trump administration after Paris climate agreement pullout. *The Guardian*. Accessed on 6/19/17 [https://www.theguardian.com/environment/2017/jun/02/european-leaders-vow-to-keep-fighting-global-warming-despite-us-withdrawal]

Borger, Julian (June 2, 2017). Abandoning Paris Climate Accord Marks Trump's Return to Angry Populism. *Earth Island Journal*. Accessed on 6/19/17 [http://www.earthisland.org/journal/index.php/elist/eListRead/abandoning_paris_climate_accord_marks_trumps_return_to_angry_populism/?gclid=CJuvrq7au9QCFdgVgQod848CfA]

CBS (June 1, 2017). Full Transcript: Trump's Paris climate agreement announcement. *CBS News*. Accessed on 6/14/17 [http://www.cbsnews.com/news/trump-paris-climate-agreement-withdrawal-announcement-full-transcript/]

Clement, Scott and Brady Dennis (June 5, 2017). Post-ABC poll: Nearly 6 in 10 oppose Trump scrapping Paris agreement. *The Washington Post*. Accessed on 6/19/17 [https://www.washingtonpost.com/news/energy-environment/wp/2017/06/05/post-abc-poll-nearly-6-in-10-oppose-trump-scrapping-paris-agreement/?utm_term=.151e0ac308c7]

Cohn, Marjorie (June 8, 2017). Trump's Climate Withdrawal Is An Impeachable Offense. *Huffington Post*. Accessed on 6/14/17 [http://www.huffingtonpost.com/entry/trumps-climate-withdrawal-is-an-impeachable-offense_us_59395721e4b094fa859f1625]

Corbyn, Chloe (April 4, 2016). The Paris Agreement on Climate Change-A Summary. *In Brief*. Accessed on 6/13/17 [https://assemblyinbrief.wordpress.com/]

Crunden, E.A. (May 31, 2017). Top European Union official says Trump doesn't understand Paris climate accord. *ThinkProgress*. Accessed on 6/21/17 [https://thinkprogress.org/juncker-trump-paris-g7-nato-merkel-macron-42bffac62b01]

Dinan, Stephen (May 31, 2017). How Trump is smashing Obama's legacy with decision to exit Paris climate deal. *Washington Times*. Accessed on 6/14/17 [http://www.washingtontimes.com/news/2017/may/31/donald-trump-exit-paris-climate-accord/]

Edelman, Adam (June 7, 2017). Trump's decision to pull U.S. out of Paris Climate Accord earns 57% disapproval rating from American voters. *The New York Daily News*. Accessed on 6/21/17 [http://www.nydailynews.com/news/politics/trump-paris-accord-withdrawal-earns-57-disapproval-rating-article-1.3228067]

Gaffey, Conor (June 2, 2017). Paris Climate Agreement: The World Reacts to Trump's Withdrawal. *Newsweek*. Accessed on 6/19/17 [http://www.newsweek.com/trump-paris-climate-agreement-619514]

Gallucci, Nicole (May 31, 2017). From politicians to celebrities, few are happy to see Trump pull out of Paris Agreement. *Mashable*. Accessed on 6/15/17 [http://mashable.com/2017/05/31/paris-climate-agreement-reactions/#QvyeGTLVySq3]

Hunt, Elle (June 2, 2017). Where next for the US and the Paris deal? *The Guardian*. Accessed on 6/19/17 [https://www.theguardian.com/environment/live/2017/jun/01/donald-trump-paris-climate-agreement-live-news]

Joseph, Cameron (June 1, 2017). Trump says U.S. will withdraw from Paris climate agreement. *The New York Daily News*. Accessed on 6/19/17 [http://www.nydailynews.com/news/politics/trump-u-s-withdraw-paris-climate-agreement-article-1.3213184]

Joseph, Rebecca (June 1, 2017). Pittsburgh residents upset after Trump used them to justify Paris climate agreement withdrawal. *Global News*. Accessed on 6/14/17 [http://globalnews.ca/news/3496365/pittsburgh-mayor-paris-climate/]

Kober, Amy (June 1, 2017). Withdrawal from Paris Climate Agreement: Statement from American Rivers. *American Rivers*. Accessed on 6/21/17 [https://www.americanrivers.org/conservation-resource/withdrawal-paris-climate-agreement-statement-american-rivers/?js=false&source=adwords&gclid=CICmuLe5zdQCFVZbhgodVDAC2Q]

Leber, Rebecca (June 1, 2017). Trump Has No Idea What He Just Did or the Backlash That Awaits. *Mother Jones*. Accessed on 6/21/17 [http://www.motherjones.com/environment/2017/06/trump-will-regret-leaving-paris-climate-deal-0/]

Lenker, Maureen Lee (June 1, 2017). Trump blasted for ditching Paris climate change accord: 'Shameful'. *Entertainment*. Accessed on 6/15/17 [http://ew.com/news/2017/06/01/donald-trump-paris-climate-change-accord-reactions/]

Leiserowitz, Anthony; Edward Maibach, Connie Roser-Renouf, Geoff Feinberg and Seth Rosenthal (March 2016). *Climate Change in the American Mind, 2016*. Yale University and George Mason University. New Haven, CT: Yale Program on Climate Change Communication. Accessed on 6/21/17 [http://climatecommunication.yale.edu/wp-content/uploads/2016/06/Climate-Change-American-Mind-March-2016-FINAL.pdf]

Liptak, Kevin and Jim Acosta (June 2, 2017). Trump on Paris Accord: 'We are getting out.' *CNN*. Accessed on 6/14/17 [http://www.cnn.com/2017/06/01/politics/trump-paris-climate-decision/index.html]

Marlon, Jennifer; Eric Fine and Anthony Leiserowitz (May 8, 2017). A Majority of Americans in Every State Say the U.S. Should Participate in the Paris Climate Agreement. Yale University. New Haven, CT: Yale Program on Climate Change Communication. Accessed on 6/21/17 [http://climatecommunication.yale.edu/publications/paris_agreement_by_state/]

McMaster, H.R. and Gary D. Cohn (May 30, 2017). America First Doesn't Mean America Alone. *The Wall Street Journal*. Accessed on 6/19/17 [https://www.wsj.com/articles/america-first-doesnt-mean-america-alone-1496187426]

Myer, Robinson (December 16, 2015). A Reader's Guide to the Paris Agreement: The most important piece of international diplomacy in years, deciphered. *The Atlantic*. Accessed on 6/14/17 [https://www.theatlantic.com/science/archive/2015/12/a-readers-guide-to-the-paris-agreement/420345/]

Myers, John (May 31, 2017). Gov. Jerry Brown and Democrats say Trump is going 'backwards' if he pulls out of Paris climate pact. *Los Angeles Times*. Accessed on 6/19/17 [http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-gov-jerry-brown-and-democrats-say-1496261754-htmlstory.html]

Northrop, Eliza and Melisa Krnjaic (March 4, 2016). After COP21: Key Tasks to Implement the Paris Agreement. *World Resources Institute*. Accessed on 6/14/17 [http://www.wri.org/blog/2016/03/after-cop21-7-key-tasks-implement-paris-agreement]

Prokop, Andrew (June 1, 2017). Don't just blame Trump for quitting the Paris deal—blame the Republican Pary. *Vox*. Accessed on 6/14/17 [https://www.vox.com/2017/6/1/15726726/trump-paris-climate-agreement-republicans]

Riotta, Chris (June 5, 2017). Support for Donald Trump's Impeachment is Now Higher than His Approval Rating. *Newsweek*. Accessed on 6/21/17 [http://www.newsweek.com/donald-trump-impeachment-support-odds-removal-approval-rating-white-house-620913]

Rosenthal, Erika (June 1, 2017). The Paris Climate Agreement: A Good Deal for the United States. An Essential Deal for the Planet. *Earth Justice*. Accessed on 6/21/17 [http://earthjustice.org/features/paris-agreement?gclid=CIPu28e0zdQCFUM6gQod1rYArg]

Rubin, Rebecca (June 1, 2017). Celebrities Blast Trump's 'Shameful' Plan to Withdraw From Paris Climate Accord. *Variety*. Accessed on 6/15/17 [http://variety.com/2017/biz/news/celebrities-react-to-paris-accord-withdraw-1202450934/]

Shultz, George P. and Ted Halstead (May 9, 2017). The Business Case for the Paris Climate Accord. *The New York Times*. Accessed on 6/21/17 [https://www.nytimes.com/2017/05/09/opinion/the-business-case-for-the-paris-climate-accord.html?_r=0]

Stavins, Robert N. (June 5, 2017). Why Trump Pulled the U.S. Out of the Paris Accord. *Foreign Affairs*. Accessed on 6/19/17 [https://www.foreignaffairs.com/articles/2017-06-05/why-trump-pulled-us-out-paris-accord]

Streck, Charlotte (December 28, 2015). The Paris Agreement Summary. *Climate Focus*. Accessed on 6/14/17 [http://www.climatefocus.com/sites/default/files/20151228%20COP%2021%20briefing%20FIN.pdf]

The Elders (June 1, 2017). The Elders condemn US for quitting Paris climate agreement: no one country can dismantle it. *The Elders*. Accessed on 6/19/17 [http://theelders.org/article/elders-condemn-us-quitting-paris-climate-agreement-no-one-country-can-dismantle-it]

UNFCC (December 12, 2015). Adoption of the Paris Agreement. *Conference of the Parties, Agenda Item 4(b)*. Accessed on 6/14/17 [https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf]

Washington Post (June 7, 2017). Washington Post-ABC News Poll, June 2-4, 2017. *The Washington Post*. Accessed on 6/19/17 [https://www.washingtonpost.com/page/2010-2019/WashingtonPost/2017/06/05/National-Politics/Polling/question_18761.xml?uuid=8Q_YuEohEeeYfEKrV0XbLg]

Zavis, Alexandra (June 1, 2017). World leaders close ranks on climate change: 'Paris agreement cannot be renegotiated.' *Los Angeles Times*. Accessed on 6/19/17 [http://www.latimes.com/world/la-fg-trump-climate-reaction-20170601-story.html]

INTELLECTUAL PROPERTY IN INDIA: THE HUMAN RIGHTS DILEMMA

—*Gaurav Sharma*[*] *& Dr. Shashikant Hajare*[**]

Abstract The nature of intellectual property (IP) is such that the society on the whole and we as individuals interact with some form of IP all day and every day. This interaction takes place without us realizing the significance of doing so or giving it a second thought. From the branded clothes to the fancy engines in our cars, from the computers at the work desk to that final beverage at night from a far off geographical location, IP products play a rather significant role in our day to day activities. Given such a vital impact of IP, it is only natural that at some point there would be either a conflict, clash or some intermingling with the vast domain that is 'human rights'.

Legal instruments on IP protection, inter alia, work on the principle that when an inventor or creator shares his or her work with the public, there needs to be some form of return that he or she sees on the investment of time, effort and money.[1] *By offering protection, not only does the inventor or creator benefit commercially but the society at large also benefits from such creations. While domestic policy and legislation can endeavour to strike this balance, it is equally important that in the international context also some balance of this nature is imperative.*

This article briefly looks at the international legal instruments relating to IP and provides a broad perspective on the human rights framework in such instruments. It also deals with the relationship

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[1] Report of the Commission on Intellectual Property Rights, London: 'Integrating Intellectual Property Rights and Development Policy (London September 2002), http://www.iprcommission.org/papers/pdfs/final_report/ciprfullfinal.pdf.

between the theory of IPR most relevant in the context of human rights like access to medicines, right to education and right to public health and the relevant judicial responses.

I. INTRODUCTION

Over the last couple of decades, intellectual property has seen an outpouring of debates and discussions in the international arena. These policy discussions are, in a large part, attributed to the agreement on Trade Related Aspects of Intellectual Property Rights or the TRIPS agreement and the needs of developing countries. The signatories to the TRIPS agreement, member countries of the World Trade Organisation (WTO), were required to adhere to certain minimum standards with regards to their domestic IP legislation.

The World Intellectual Property Organisation (WIPO), a specialised agency of the United Nations (UN), through its Development Agenda in 2007 also witnessed a paradigm shift in its approach to IP and related issues. The 45 recommendations adopted by consensus as part of the 2007 Development Agenda '*has ushered in a more balanced perspective of IP in other substantive areas of WIPO's work*[2]*' including in areas of public policy and development vis-à-vis IP.*

To cite an example in the Indian context, the Patents Act, 1970 did not have any provisions for product patents in the food, agriculture and pharmaceutical domain prior to 1995. This gave rise to the generic pharma market and access to cheaper medicines was possible. However, having signed the TRIPS agreement, India was required to amend its Patent legislation and provide for product patents in those domains as well.

The obligations under TRIPS ensured that the Indian pharmaceutical companies could no longer focus on the generic versions of patented drugs by using other processes. While this article does not focus on the impact the TRIPS agreement on Indian IP protection issues, it would be prudent to mention here that the Indian pharma markets had to look at other innovation techniques to remain relevant in the market.[3] Whether the access to medicines became cheaper or dearer post the TRIPS compliance is a matter of an altogether different analysis, yet in India a landmark grant of a

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[2] Nandini Kotthapally, *From World Intellectual Property Organization (WIPO) to World Innovation Promotion Organization (WIPO)? Whither WIPO?*, 3(1) The WIPO Journal, 56-70 (2011).

[3] Dr. Murali Kallummal & Ms. Kavita Bugalya, *Trends in India's Trade in Pharmaceutical Sector: Some Insights*, http://wtocentre.iift.ac.in/workingpaper/Working%20Paper2.pdf.

compulsory licence regarding a patented drug, as will be seen later in this article, had a bearing on a pressing 'right to life' issue.

II. HUMAN RIGHTS IN THE INTELLECTUAL PROPERTY FRAMEWORK

When we look at Intellectual Property Right, it is conventionally thought of as a right to ownership of property, which is a result of human intellect and creativity. The fundamental nature of IP right is such that it seeks to balance the economic and moral rights of creators with the needs of the society. These rights are seen more in the nature of economic and legal ownership of property rather than basic human rights in themselves. However, that argument does not hold much merit given the various international legal instruments on human rights and intellectual property having addressed the issue in their principles, declarations, and objectives.[4]

At its Twenty- Fourth Session in Paris in June 1985, the Executive Committee of the Assembly of the Berne Union for the Protection of Literary and Artistic Works (Berne Convention), in clear and explicit terms declared among other things '*that the principles of the law of copyright are founded in human rights and justice; that the law of copyright enriches mankind by encouraging authors to create and by promoting access by all people to culture, the arts, beauty and learning*;….'[5]. While this declaration is particularly applicable to copyright, it is nevertheless important to consider the declaration as acknowledgement of IP rights being regarded as inherently human rights.

The International Covenant on Economic, Social and Cultural Rights (ICESCR), a multilateral treaty adopted by the United Nations General Assembly that came into force in 1976, gave prominence to the principle that intellectual property is a basic human right. Article 15(1) of the Covenant lists some important provisions in this regard, namely 15(1)(c) '*the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'*. Furthermore the Covenant under Article 15(1)(b) also enshrines, in no uncertain terms, the '*right of everyone to enjoy the benefits of scientific progress and its applications',* thereby espousing the philosophy of greater good and social welfare as well.[6] The legally binding

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4 Graham Dutfield, *IPR rules and human rights: is there a conflict?*, http://www.scidev.net/global/policy-brief/ipr-rules-and-human-rights-is-there-a-conflict-.html.

5 International Union for the Protection of Literary and Artistic Works (Berne union) Executive Committee, Twenty- Fourth Session (9th Extraordinary), Paris, June 17 to 25, 1985, http://www.wipo.int/mdocsarchives/B_EC_XXIV_85/B_EC_XXIV_3_E.pdf.

6 International Covenant on Economic, Social and Cultural Rights, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx.

nature of the Covenant[7] has guaranteed that domestic legislation, and where warranted international mechanisms, have to protect intellectual property not only as a basic right but also provide a balance vis-à-vis the needs of the society.

The Universal Declaration of Human Rights (UDHR), a historical document adopted by the United Nations General Assembly in Paris in 1984 as a common standard of achievements for all people and all nations, vide Article 27(2) states that '*Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author*'.[8] Another interesting provision under Article 17(1) of UDHR provides for '*the right to own property alone as well as in association with others'*.

While conventional wisdom may suggest that this right to property under Article 17(1) is applied to tangible property, it is a well settled principle that intellectual property is also to be treated as 'property', albeit in the intangible form.[9] Although IP is treated as property it is still essential to ensure and understand that traditional concepts of tangible property are not applied to IP protection systems as well.[10]

The near identical language between Article 15(1) (b) of ICESCR and Article 27(2) of UDHR suggest that intellectual property and its protection is indeed to be treated as a basic human right.

The TRIPS agreement as its objectives[11] under Article 7 states that '*The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations'*. Though not explicitly stating it so, this objective as enshrined in the TRIPS agreements nevertheless makes it amply clear that a balance between protection and the needs of the society at large are to be met while considering IP legislation at the domestic level.

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7 Section 5: Background Information on the ICESCR, https://www.escr-net.org/resources/section-5-background-information-icescr.

8 The Universal Declaration of Human Rights, http://www.un.org/en/universal-declaration-human-rights/.

9 Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 Harvard Journal of Law and Public Policy 108 (1990).

10 Peter S. Menell, *Intellectual Property and the Property Rights Movement*, Peter S. Menell, Intellectual Property and the Property Rights Movement, 30 Regulation 36 (2007), http://scholarship.law.berkeley.edu/facpubs/728.

11 TRIPS Agreement, Part I - General Provisions and Basic Principles, https://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm.

While treating IP rights as basic human rights and the reading of the relevant portions of UDHR, the TRIPS agreement, and especially ICESCR it is clear that '*the rights of the creator are not absolute but conditional on contributing to the common good and welfare of society*'. (Discussion paper on *Implementation of the International Covenant on Economic, Social and Cultural Rights* submitted by Audrey R. Chapman, American Association for the Advancement of Science (AAAS) Washington, USA, to the United Nations Committee on Economic, Social and Cultural Rights, E/C.12/2000/12, 3 October 2000)

India is a signatory to, and has ratified, all the international legal instruments as enumerated above. It is therefore imperative that all IP legislative and policy mechanisms in India, as also in the international context, ought to have considered the human rights approach. Besides being a signatory to the conventions, India has also enacted the Protection of Human Rights Act, 1993[12] wherein human rights has been defined under Section 2(1) (d) to mean '*the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India'*. Having kept this definition broad, it is important to note the use of the words '*or embodied in the International Covenants*[13]' to affirm India's commitment to strictly adhere to principles as enshrined in the international instruments.

Among studies on the four theories[14] of intellectual property rights, one theory suggests that the IP protection mechanisms exist, and that the rights are granted, to foster innovation and creativity while balancing the larger needs of the society. The utilitarian theory of intellectual property rights proposes that it is important for inventors and creators to see some form of commercial return on their work given the time, capital and labour invested in such creations while striking a balance with the benefit of the creation accruing to public as well. This equilibrium occurs when the rights that are granted are '*limited in duration so as to balance the social welfare loss of monopoly exploitation'*.[15]

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[12] As amended by the Protection of Human Rights (Amendment) Act, 2006 [No. 43 of 2006].

[13] *International Covenants* have been defined u/s 2(1) (f) to mean the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights adopted by the General Assembly of the United Nations on the 16th December, 1966 [and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify"].

[14] For a reading on IP theories, See, William Fisher, *Theories Of Intellectual Property*, https://cyber.harvard.edu/people/tfisher/iptheory.pdf.

[15] Peter S. Menell, *Intellectual Property: General Theories*, http://levine.sscnet.ucla.edu/archive/ittheory.pdf.

Although intellectual property rights can be seen as some form of human rights, there is a vast contrast in the construct of the rights given or granted. Human rights are regarded as universal and inalienable[16] and derived by virtue of being a human, intellectual property rights on the other hand are derived from legislative instruments granted by the State in lieu of making the creative and inventive work available to the public. Intellectual Property rights are '*allocated, limited in time and scope, traded, amended and even forfeited'*,[17] this is in stark opposition to the fundamental entitlement that principles of human rights possess. This understanding of IP rights and human rights merely addresses the nature of the rights granted and does not take away from the basic principles as enshrined in the international instruments as set forth above.

In situations of public health concerns and IP rights, precedents from foreign jurisdiction have made it clear that public health trumps IP concerns. When Australia introduced its Tobacco Plain Packaging Act (TPPA) in 2011 several tobacco companies brought the case to the Australian High Court challenging its Constitutional validity arguing*, inter alia*, that the Act '*allows the Australian government in essence to acquire their intellectual property, trademarks and logo, without any compensation'*.[18]

The High Court of Australia rejected the Constitutional challenge to the Act, and the arguments concerning public health policy[19] by the Australian Government were also accepted by the Court. The Act was then challenged in the international forum by Philip Morris Asia Limited through Arbitration which was found in favour of Australia and under the WTO dispute settlement process the report of which is likely to be released by the end of this year.[20]

Recently a Public Interest Litigation (PIL) has been filed in the Supreme Court of India seeking the implementation of plain packaging rules for

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[16] For a contrarian narrative, See, Donald Van De Veer. *Are Human Rights Alienable?* Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition Vol. 37, No. 2 (Feb., 1980), pp. 165-176, http://www.jstor.org/stable/4319361

[17] *Human rights and intellectual property*, Statement by the Committee on Economic Social and Cultural Rights, Substantive Issues Arising In The Implementation Of The International Covenant On Economic, Social And Cultural Rights (E/C.12/2001/15, 14 December 2001).

[18] Caroline Jamet, *Big-Four Tobacco Companies' Fight Against Plain-Packaging Legislation,* (May 30, 2012), http://www.ipbrief.net/2012/05/30/big-four-tobacco-companies-fight-against-plain-packaging-legislation/.

[19] Sarah A. Hinchliffe, *Comparing Apples and Oranges in Trademark Law: Challenging the International and Constitutional Validity of Plain Packaging of Tobacco Products*, 13 J. Marshall Rev. Intell. Prop. L. 130 (2013).

[20] WTO Disputes – Tobacco Plain Packaging, http://dfat.gov.au/international-relations/international-organisations/wto/wto-dispute-settlement/Pages/wto-disputes-tobacco-plain-packaging.aspx.

cigarette and other tobacco products. On 7 March, 2016, *a* bench comprising Chief Justice T.S. Thakur and Justice U.U. Lalit issued notice to the Ministry of Health on the PIL contending that delaying the implementation of plain packaging was in violation of the rights of the citizens under Articles 14 and 21 of the Constitution.[21] Only time will tell if any of the tobacco companies here decide to challenge the validity of any Act that the Government may pass depending on the outcome of the PIL or simply comply having learnt a lesson from the Australian case. However, it would be interesting to see how the Supreme Court deals with the issue based on the Governments reply and what precedents are established, if any, in the public health policy and IP regime in the country.

III. INTELLECTUAL PROPERTY RIGHTS AND INDIAN CONSTITUTION

The Indian Constitution guaranteed "right to acquire, hold and dispose of property" as a fundamental right under Article 19 (1) (f). The right of the State to acquire private property for public purpose was also restricted under Article 31 of the Constitution and it was laid down that no property should be compulsory acquired without the authority of legislature-made law and such law was required to provide for "compensation". Right to property as a fundamental right became an obstacle in the way of the State to implement certain welfare measures intended to promote the welfare of the people, to secure social, economic & political justice, equitable distribution of material resources of the community and to prevent the concentration of wealth & means of production to the common detriment. The courts struck down number of laws giving effect to the said objective enshrined under Articles 38 & 39, particularly laws relating to abolition of *zamindari* (landlord) system and nationalization of industries. Initially, attempts were made by the Parliament to dilute right to property by series of amendments and eventually right to property as a fundamental right was abolished by repeal of Article 19 (1) (f) and Article 31 by 44th Constitutional amendment enacted in 1978. Now, it is reduced to a constitutional right under Article 300A which only prohibits deprivation of right to property by mere executive order unless that order is made or authorised by some law enacted by the legislature.

Unlike Article 1(8) of the U.S. Constitution which provides "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and

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[21] *PIL on tobacco products' plain packaging: SC seeks Centre reply*, Business Standard, (March 8, 2016), http://www.business-standard.com/article/pti-stories/pil-on-tobacco-products-plain-packaging-sc-seeks-centre-reply-116030800976_1.html.

discoveries", the Indian Constitution does not expressly provide for right to intellectual property.

Before the 44th Amendment in the Constitution, Intellectual Property (IP) was covered by Article 19 (1) (f) as "intangible property" and now it is covered by Article 300A of the Constitution. As right to property has ceased to be a fundamental right, right to intellectual property can be restricted in the public interest under any legislature-made law. The validity of such law cannot be challenged even if an unreasonable restriction is imposed on individual's right to intellectual property in larger interest of the community or implementation of any directive principles of state policy enshrined under Part IV of the Constitution.

For Example, Section 84 of the Patents Act, 1970 which confers power on the Controller General of Patents, Designs and Trade Marks to make the patented medicines available to patients at affordable rates by compulsory licensing is consistent with directive principle under Article 47 which imposes an obligation on the State to "raise the level of nutrition and the standard of living and *to improve public health* (emphasis supplied)" although it restricts right to intellectual property.

In *Entertainment Network (India) Ltd.* v. *Super Cassette Industries Ltd.*[22], the Indian Supreme Court although acknowledged that "the ownership of any copyright like ownership of any other property must be considered having regard to the principles contained in Article 19 (1) (g) read with Article 300A of the Constitution, besides, the human rights on property" but also clarified that "the right of property is no longer a fundamental right. It will be subject to reasonable restrictions. In terms of Article 300A of the Constitution, it may be subject to the conditions laid down therein, namely, it may be wholly or in part acquired in public interest and on payment of reasonable compensation".

In *Super Cassettes Industries Ltd.* v. *Music Broadcast (P) Ltd.*[23], the Indian Supreme Court has reiterated that "copyright" is a property within the meaning of Article 300A and "deprivation can only be by the authority of law and it is too well entrenched a principle on the constitutional law that such a law could be only for a public purpose".

With respect to the principles of right to life and access to medicines, two cases in the patent domain which have reached final adjudication with the Supreme Court having pronounced its judgment within the last five years are of importance in the public policy and IP rights debate.

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[22] (2008) 13 SCC 30.
[23] (2012) 5 SCC 488.

The first case, *Novartis AG* v. *Union of India*[24], regarded as a landmark decision in the patent landscape of India, dealt with the issue of patentability of Novartis' drug called 'Gleevec' for which the Indian Patent Office had rejected the patent. The grounds cited were that the product had failed the test of invention and patentability under the Patents Act, 1970 as it had been anticipated by prior publication.

Upholding the view of the patent office, the Supreme Court grappled with issues of promoting scientific research and development and, India's obligations under international treaties on the one hand and preventing the 'ever greening[25]' or the practice of making trivial changes to an existing product, on the other hand.[26]

The judgment has been hailed as one which has adequately addressed the issue of public health and allowing generic manufacturers to provide life-saving drugs at a reasonable cost. However, the Supreme Court in its judgment did state that its observations were not a *'bar on patent protection for all incremental inventions of chemical and pharmaceutical substances'*,[27] thereby leaving the ever-greening provision open for yet another analysis should the same ever come up again.

In the second case, *Bayer Corpn*. v. *Union of India*[28]*,* the Bombay High Court agreed with the findings of the Controller General of Patents and the Tribunal regarding compulsory licensing under section 84 of the Patents Act.

The Bombay High Court upheld the compulsory licence that was granted to 'Natco Pharma' in 2012 by the Controller General of Patents to work Bayer's patented kidney-cancer drug, Nexavar on the grounds that it met the criteria as enumerated under section 84 of the Act.

In its 52-page judgment, the High Court had held that the *'public interest is and should always be fundamental in deciding a* lis *between the parties while granting a compulsory licence'*.[29] The Supreme Court in December 2014 refused to entertain the Special Leave Petition and in its order stated that it was not inclined to interfere in the case that sought to set aside the Bombay High Court judgment.

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[24] (2013) 6 SCC 1.

[25] Roger Collier, 'Drug patents: the evergreening problem', 185 (9) CMAJ (2013), http://www.cmaj.ca/content/185/9/E385.

[26] Kevin Tarsa, *Novartis AG* v. *Union of India: Why the Court's Narrow Interpretation of Enhanced Efficacy Threatens Domestic and Foreign Drug Development*, 39 B.C. Int'l & Comp. L. Rev. 40 (2016), http://lawdigitalcommons.bc.edu/iclr/vol39/iss3/5.

[27] *Novartis AG* v. *Union of India*, (2013) 6 SCC 1, para 168.

[28] 2014 SCC OnLine Bom 963.

[29] 2014 SCC OnLine Bom 963, para 19.

A landmark decision in the domain of Copyright has affirmed the principles on the education system in India being of more relevance than copyright mechanisms. The suit, *University of Oxford* v. *Rameshwari Photocopy Services*[30], was filed in 2012 in the Delhi High Court. One of the issues addressed by the Court was whether the making of course packs amounted to infringement of copyright of the plaintiffs.

The case was decided on 16th September, 2016 and the Delhi High Court in its 94-page judgment while noting the 'fair use' provision under the Copyright Act, 1957 stated that a law could not be interpreted '*so as to result in any regression of the evolvement of the human being for the better*'. The Court further went on to say that copyright is '*intended to motivate the creative activity of authors and inventors in order to benefit the public'*.

IV. CONCLUSION

The effort of the Government of India to provide a National IPR Policy in 2016 has, as one of its objectives, the enabling of '*strong and effective IPR laws, which balance the interests of rights owners with larger public interest*'.[31] Given the population of the country and access to life saving medicines being difficult or unaffordable this objective bodes well for India.

The intellectual property jurisprudence in India is in a relatively nascent stage as compared to its developed country legal systems and will yet see many debates and judgments emerging in future. However, as the cases mentioned above reflect, the Courts in India would tend to side more with the public welfare principles and chart its own course on IP jurisprudence rather than strictly adhere to philosophies of IP which sometimes consider commercial implications alone.

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[30] 2016 SCC OnLine Del 6229.

[31] *Objective 3: Legal and Legislative Framework of the National Intellectual Property Rights (IPR) Policy*, http://dipp.nic.in/English/Schemes/Intellectual_Property_Rights/National_IPR_Policy_08.08.2016.pdf.

FOOD SECURITY AND PUBLIC DISTRIBUTION SYSTEM: RESPONSE AND POLICY INITIATIVE AGAINST HUNGER IN INDIA

—*Balwinder Singh*[*] *& Rahul Yadav*[**]

Abstract India is making efforts for the full realisation of right to food and a sort of frame work towards achieving hunger free nation status is also developing but it is harsh reality that hunger and starvation is multiplying at a time when India has the biggest Public Distribution System operative. Hunger and malnutrition grew at a time when buffer stock of food grain in country is higher than the required norm, when country had more anganwadis set up and more schools being provided with mid day meals. In India food consumption today is not any operational inability to produce more food, but a far reaching failure to make the poor of the country able to afford enough food. There is obviously something terribly wrong in our approach. The Public Distribution System is plagued by corruption, leakages, errors in selection, delays, poor allocations and little accountability. It also tends to discriminate against and exclude those who most need them, by social barriers of gender, age, caste, ethnicity, faith and disability and state hostility to urban poor migrants, street and slum residents and unorganised workers. At a time when the Indian Parliament has enacted National Food Security law, which aimed at granting differential legal entitlement of food grains to nearly 800 million people through Targeted Public Distribution System network, it is high time to ask whether the said law will mean anything for the poor and hungry. The question arises whether hunger can be

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removed by relying on the same public distribution system that has failed to deliver in the past more than sixty years.

I. INTRODUCTION

As long as starvation and deprivation exist, the slogan *"Every man, woman and child has the inalienable right to be free from hunger and malnutrition…"*[1] looms large over humanity. When every nation attains food security for its people, there begins the journey towards prosperity. Food security for a country means sufficient quantity of essential commodities produced, stored properly and made available to all of the people, especially the under privileged sections.[2] According to definition emerging out of World Food Summit, 'Food Security exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food which meets their dietary needs and food preferences for an active and healthy life. Household food security is the application of this concept to the family level with individuals within households as the focus of concern.[3]

Food security is broadly characterized by three pillars: Availability, accessibility and absorption (nutritional outcomes). In an effort to attain these, it is almost certain that it will be necessary to innovate and consider out-to-the box policy options. The role of various stakeholders and partnerships among them will be critical. These include public and private sectors, community groups, multilateral agencies, and philanthropic foundations as well as bilateral collaboration between nations.[4] Improving food security is an issue of considerable importance for developing country like India where millions of people suffer from hunger and malnutrition. It is now widely recognised that food security is not confined only to production, availability and demand for food. Ultimately, the key question is that of the ability of the people to access food and utilize it effectively at all time, to lead a healthy life.

In the post independence period India has several achievements on the food front. Successive five year plans have laid considerable emphasis on policies and strategies aimed at raising the level of nutrition and standard of living of the people. The production of food grains has increased more than four fold since independence from 50 million tonnes in 1950-51 to about 250 million tonnes in 2012-2013. As a result, India has moved from

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1 Raised by the World Food Conference in the year 1974.

2 B.K. Taimni, *Food Security in 21*st *century-Perspective and Vision*, Konark Publishers Pvt. Ltd, Delhi, (2001), p. 45.

3 Rome Declaration on World Food Security, World Food Summit, 1996.

4 Dilip Kailas Jadhav, "Food Security in India," 3 *IIRJ*, 314, (2013).

a stage of chronic food shortages to self-sufficiency in food production and built up substantial buffer stocks. The level of procurement and the reach of Public distribution system has also increased considerably, overtime. Additionally, the government has introduced several nutrition programmes such as the Integrated Child Development Services providing supplementary nutrition for pre-school children and expectant or nursing mothers and the mid day meal scheme. All these have contributed greatly towards improving the availability of food and level of nutrition in the country. **However, all is not well with the food security policy, particularly with reference to procurement, public distribution system and nutrition programmes**. With the advent of economic liberalization and globalization, some new challenges have also emerged. Despite the implementation of several programmes, there are concerns regarding calorie intake and malnutrition. The problem of malnutrition is acute and widespread and is extremely serious among women and children.[5]

II. FOOD AND NUTRITION SECURITY IN INDIA: A BACKDROP

With a population approaching almost 1.22 million, India is likely to be the most populous country on this planet by 2030 with 1.6 million people. It currently accounts for more than 17% of the global population and 456 million poor, or 41.6 per cent living on less than 1.25 a day. Ensuring food and nutrition security is thus a challenge for India. Food security concerns can be traced back to the experience of the Bengal famine in 1943 during British colonial rule. With the launching of major reforms in 1991, although liberalization was already under way since the 1980, India has grown out of a period of acute shortages and heavy dependence on food aid to self-sufficiency, or broadly, self reliance in food.[6] The agriculture sector in India has had quite a revolutionary past with the Green Revolution in the late 1960s and 1970s to increase the food production. This programme worked very well particularly in Punjab, Haryana and parts of Uttar Pradesh and Rajasthan, where lands were well developed, fairly fertile water for irrigation was available in plenty and farmers were looking for an opportunity to increase their income.[7] The impact of green revolution on food security in India from 1950 to 2010 can be noticed from the fact that the area under crop production increased from 115.58 million hectares in 1960 to 125.75 million hectares in 2010. The food grain production also increased from 82 million tons in 1960 to 176.4 million tons in 1990 and to 241.56 million

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5 S. Mahendra Dev, K.P. Kannan, *et. al*., *Towards a Food Secure India-Issues and Policies*, Institute for Human Development, New Delhi and Centre for Economic and Social Studies, Hyderabad,(2003), p. 7.

6 *Supra* note 3.

7 Narayan G. Hegde, *Strategy for Ensuring Food Security in India*, BAIF Development Research Foundation, Pune, (2012), p. 16.

tons in 2010. While the population increased from 349 million in 1960 to 1150 million in 2010.[8] At present India agriculture system is also undergoing a structural transformation, especially the high value segment. Raising productivity of staples like rice and wheat is a challenge as the area under these grains is likely to remain constant or even decrease due to increasing pressure on land for non-agricultural uses.

Unlike in the past when the country had to suffer foreign exchange constraints and depend heavily on food aid, India today is in a much better position to enter the global markets with $294.4 billion in foreign exchange reserves. While increased investment and technological breakthrough can improve availability, these may not necessarily translate into increased accessibility and absorption of food. As far as Right to food in India is concerned, some of the worst violation of the right to food can be seen in India today. India is suffering from alarming hunger, ranking 67th position among 84 developing Countries. India is a home to about 217 million undernourished persons.[9] The main reasons are these persons do not have access to sufficient productive resources (essentially land, water and seeds) nor an income sufficient to allow them to provide themselves as well as their families, with a dignified life free from hunger. India continues to be a land of mass poverty and despite various poverty alleviation schemes, the disparity between rich and the poor is widening day by day and more so in the aftermath of economic liberalization.[10] It has been realized that there are limits to increasing the food grains productions through increase in area under cultivation because the country has almost reached a plateau in so far as cultivable land is concerned. The contribution of high yielding varieties which has been the basis of green evolution in seventies has now plateaued and there is hardly any fresh contribution to growth in yields. There is a new awareness that a substantial proportion of food crop output is lost after harvest.

A. Production of different Food Crops in India

The data pertaining to total production of different crops during the last more than 60 years in (Table-1) divulged that the production of total food grains increased from 50.82 million tons in year 1950-51 to 264.77 million tons in year 2013-14 but decreased in year 2014-15 to 252.68 million tons

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8 Tilak Raj, "Food Security Scenario in India: New Challenges and Policies," 2 *HJCR*, 459, (2013).

9 Hunger report-*State of Food Insecurity in the World*, Food and Agriculture Organization of the United Nations Rome, (2011). Available at http://www.fao.org/docrep/014/i2330e/i2330e.pdf last visited on 22.03.2014.

10 Parmanand Singh, "Hunger Amidst Plenty: Reflections on Law, Poverty and Governance," 48 *JILI,* 57 (2006).

due to less rain fall. It is expected that total food grain production will rise up to 264.10 million tons by the year 2015-16.

Table No-1

Production of Different Food Crops in India (In million tons)

S.No	Year	Rice	Wheat	Coarse Cereals	Pulses	Total Food Grains
1	1950-51	20.58	6.46	15.38	8.41	50.82
2	1960-61	34.58	11.00	23.74	12.70	82.02
3	1970-71	42.22	23.83	30.55	11.82	108.43
4	1980-81	53.63	36.31	29.02	10.63	129.59
5	1990-91	74.29	55.14	32.70	14.26	176.39
6	2000-01	84.98	69.68	31.08	11.80	196.81
7	2010-11	95.98	86.87	43.40	18.24	244.49
8	2011-12	105.30	94.88	42.01	17.09	259.29
9	2012-13	105.24	93.51	40.04	18.34	257.13
10	2013-14	106.54	95.91	43.05	19.27	264.77
11	2014-15	104.80	88.94	41.75	17.20	252.68
12	2015-16*	106.10	94.75	43.20	20.05	264.10

**Targets*

Source: Department of Agriculture Cooperation, GOI, Ministry of Agriculture, Annual Report 2014-15[11]

B. Net Availability of Food Grains per capita per day in India

The data (Table-2) shows the net availability of food grains per capita per day in India from 1951 to 2014. The per capita net availability of food grains was 394.9 grams per day in 1951, 510.1 grams per day in 1991, 462.9 grams per day in 2011, and 491.2 grams in 2014. Similar trend can be seen from the Table in case of rice and wheat. Whereas pulses, gram, cereals and other cereals shown the declining trends for the same periods up to 2012. Thus it can be seen that Post liberalization period in India witnessed a decline in the per capita net availability of cereals and pulses.

Table-2

Net availability of food grain per-capita per day in India (In grams)

[11] *Ibid.*

S.No	Year	Rice	Wheat	Other cereals	Cereals	Gram	Pulses	Food grains
1	1951	158.9	65.7	109.6	334.2	22.5	60.7	394.9
2	1961	201.1	79.1	119.5	399.7	30.2	69.0	468.7
3	1971	192.6	103.6	121.4	417.5	20.0	51.2	468.8
4	1981	197.8	129.6	89.9	417.3	13.4	37.5	454.8
5	1991	221.7	166.8	80.0	468.5	13.4	41.6	510.1
6	2001	190.5	135.8	56.2	386.2	8.0	30.0	416.2
7	2011	188.8	164.6	70.0	423.5	14.6	39.4	462.9
8	2012	190.1	158.1	60.0	408.2	13.5	41.6	449.9
9	2013	159.6	145.8	52.7	358.1	15.3	43.3	401.4
10	2014(P)	199.0	183.1	62.0	444.1	16.3	47.2	491.2

(P)- Figures are provisional

Source: Agricultural statistics at a glance 2015 as on 7 April 2015[12]

III. INDIA'S RESPONSE AND POLICY INITIATIVE TOWARDS FOOD SECURITY

A. Public Distribution System

Every individual has a fundamental right to be free from hunger and have access to sufficient, safe and nutritious food and its effective utilization for an active and healthy life. According to the UN Food Agriculture Organization (FAO) the right to adequate food is not the 'right to the fed' it is the right to feed oneself with dignity and it equates the right to adequate food with food-standards or the right to safe food.[13] There should be no place for hunger and food insecurity in a democratic society. In India the Public Distribution System (PDS) is a large-scale food rationing programme, meant to increase food security at both the national and the household levels. India faced serious problems on its food front right from the independence and food deficits persisted up to mid 1970s. The government of India has attempted to move towards the goal of food security. The state intervention in this direction has been two-pronged, adopting an economic growth approach and simultaneously a welfare approach. Government has made significant attempts at food security through the food based social security interventions. In this direction Public Distribution System is one of the major policy initiatives. Public distribution of food at affordable prices through the Fair Price Shops has been the key element of food security

[12] *Ibid.*

[13] Food and Agriculture Organisation, *Guide on Legislative for the Right to Food*, Rome, (2009) available at www.fao.org/right to food.

system in India. Public Distribution System in India is indeed the largest of its kind in the world. The Public Distribution System (PDS) has evolved over a long period in India.[14]

Public Distribution System (PDS) is one of the largest welfare policies in India. It represents the direct intervention of the Indian state in the food market to ensure food security. PDS serves a dual purpose of providing subsidised food to the consumers as well as providing price-support to farmers. It supplements the policy of buffer stocking under which the effect of raising prices on account of supply constraints is modulated by market intervention.[15] The objectives of PDS are to maintain price stability, rationing during times of scarcity, raising the welfare of the poor and keeping a check on the private trade.[16] In view of the Government of India, "the PDS aims at insulating the consumer from the impact of rising prices of these commodities and maintaining the minimum nutritional status of our population."[17] The PDS supplies have a stabilizing effect on Open Market prices by increasing availability, removing scarcity psychosis and deterring speculative tendencies".[18] Over the decades the functioning of the government PDS has suffered due to inefficient management and lack of proper targeting to improve the food security of the poor. Although, India has achieved self-sufficiency in food grain production and surplus food stocks are available in the Food Corporation of India godowns across the country, the poor have little access to food primarily because they lack purchasing power. This paradox of surplus food availability in the market and chronic hunger of the poor has brought into sharp focus the lopsided policies of the government with regard to food distribution in the country. The weaknesses of the Public Distribution System have been augmented by the introduction of structural adjustment policies in the 1990s, intended for reduction in public expenditure.[19]

As part of structural adjustments made by the Government of India to reduce public expenditure, the PDS in India was modified as Revamped Public Distribution System (RPDS) during 1992. It was intended to give

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[14] Vijay S. Vyas, *Food Security in Asian Countries in context of Millennium Goals*, Academic Foundation New Delhi, (2005), p. 123.

[15] Y. Nilachandra Singh, "Public Distribution System: Problems and Prospectus," in Amalesh Banerjee, *Food Security and the Public Distribution System Today- Failures and Successes*, Kanishka Publishers, New Delhi, (2004) p. 156.

[16] Madhura Swaminathan, *Weakening Welfare - The Public Distribution of Food in India*, Left Word Books, Naya Rasta Publishers Pvt. Ltd. New Delhi, (2000), p. 145.

[17] Bhaskar Majumder, *Poverty, Food Security and Sustainability – Public Distribution System in India*, Rawat Publications, Jaipur, (2004), p. 135.

[18] Government of India, Annual Report Part II, Ministry of Food and Civil Supplies, Department of Civil Supplies, New Delhi, (1991-1992), p. 53.

[19] M.H. Suryanarayana, 2000, "Food Security and Calorie Adequacy Across States: Implications for Reform," in N. Krishnaji and Krishnan, *Public Support for Food Security-The Public Distribution System in India*, Sage Pub., New Delhi,(2000), p. 80.

thrust to providing food grains at subsidized rates to people in specific geographical areas like hilly regions, drought-prone areas, urban slum areas, deserts, tribal areas etc., where people were facing hardships.[20] Later on, Targeted Public Distribution System (TPDS) has been introduced in 1997, giving emphasis to providing benefits to poorer sections of the population, i.e. targeting households on the basis of income criterion. The Targeted PDS uses income poverty line to demarcate 'poor' and 'non-poor' households. People are classified as Below Poverty Line (BPL) and Above Poverty Line (APL). Special ration cards are issued to families below the poverty line. Food grains like rice and wheat are distributed to the people below poverty line at specially subsidized price. TPDS is administered under the Public Distribution System (Control) Order 2001,[21] notified under the Essential Commodities Act, 1955 (ECA).[22] The ECA regulates the production, supply, and distribution of essential commodities including edible oils, food crops such as wheat, rice, and sugar, among others. It regulates prices, cultivation and distribution of essential commodities. The PDS (Control) Order, 2001 specifies the framework for the implementation of TPDS. It highlights key aspects of the scheme including the method of identification of beneficiaries, the issue of food grains, and the mechanism for distribution of food grains from the centre to states.

Analyses of TPDS have revealed several gaps in implementation. These challenges pertain to the inaccurate identification of households and a leaking delivery system. One of the major problems with targeting the scheme specifically to the poor is the high cost involved in the correct identification of the target group. Narrow targeting at the level of individual households, for e.g. requires very detailed data for all households and a complex and expensive process of testing in order to identify the eligible households. The effectiveness of such mechanisms depends on the magnitude of the two possible errors- the errors of exclusion and inclusion. The exclusion error indicates the extent to which the poor are excluded from the list of beneficiaries and the inclusion error, the extent to which the non-poor are included in the list. Expert studies have shown that PDS suffers from nearly 61% error of exclusion and 25% inclusion of beneficiaries, i.e. the misclassification of the poor as non-poor and vice versa. Direct targeting of the poor through means testing, entails high administrative costs due to the need for repeated periodic identification. The cost of identification of the poor, which is of a recurring nature, can be very high and implementation of such schemes could become cumbersome going by the experiences of other countries.[23] Another challenge is the leakage of food grains during transportation to

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[20] *Supra* note 14.

[21] The Public Distribution System (Control) Order, 2001.

[22] The Essential Commodities Act, 1955.

[23] Shikha Jha and P.V. Srinivasan, "On Improving the Effectiveness of the PDS in Achieving Food Security," in S. Mahendra Dev, K.P. Kannan *et. al*., *Towards a Food Secure*

the ration shop and from the ration shop itself into the open market. The incentive for leakage has increased due to the larger differences between the open market and ration market prices for BPL families. Thus, although the off-takes are higher for BPL than APL food grains it is not clear how much actually reaches the poor.[24]

The organizational structure according to which the Public Distribution System is being run in India includes the following steps:

a) Procurement of Food Grains for the Central Pool

b) Storage of Food Grains

c) Transportation

d) Distribution

e) Retailing

i. Procurement of food grains for the central pool

In order to meet the requirements of the Public Distribution System, food grains are to be acquired. Prior to the establishment of the Food Corporation of India (FCI) in 1965, procurement from internal sources was limited. It was the responsibility of the State Department of Revenue and the Department of Civil supplies to procure food grains by imposing a levy on farmers, traders and millers. The major source of procurement prior to the mid-sixties was imports under PL-480 handled by the Government of India through the State Trading Corporations.[25] The Green Revolution and food self-sufficiency brought about a new dimension in the food grains management, as a result of which the focus was shifted on fair procurement price for farmers in order to insulate them from market anomalies, buffer stocking and control of market prices and public distribution of essential commodities.

b. Food Corporation of India (FCI)

The principal public agency involved in the procurement and distribution of food grains on behalf of the government is the Food Corporation of

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India-Issues and Policies, Institute for Human Development, New Delhi and Centre for Economic and Social Studies, Hyderabad, (2003), p. 379.

[24] Sakshi Balani, "Functioning of the Public Distribution System An Analytical Report," PRS Legislative Research, December 2013 Available at http://www.prsindia.org/administrator/uploads/general/1388728622~~TPDS%20Thematic%20Note.pdf last visited 07.07.2014.

[25] S.L. Bapna, "Food Security through the Public Distribution System: The Indian Experience," in D.S. Tyagi (ed.), *Increasing Access to Food-The Asian Experience* 110 (1990).

India. The main purpose of Food Corporation of India is to act as the main agency for handling food grains on behalf of the central government and to function as a major instrument of state policy in achieving the following objectives-

a) To procure or acquire a sizeable portion of the market surplus at incentive prices from the farmers on behalf of central and state governments,

b) To ensure timely releases of stocks through the public distribution system so that prices do not rise unduly,

c) To minimise inter-seasonal and inter-regional prices variations; and

d) To build sizeable buffer stocks of food grains from out of internal procurement and imports.

Food Corporation of India purchases food grains from the farmers at Minimum Support Price (MSP) and allocates to the states. The allocation is made on the basis of poverty and level of domestic food production in a particular state. Thus there is an attempt at the national level to balance the availability of food between surplus and deficit regions. To achieve the above mentioned objectives of procurement and distribution of the Public Distribution System, the Department of Food, Ministry of Food and Civil Supplies prepares the plans. Primary responsibility for maintenance of purity, integrity and efficiency in FCI vests in the Chairman & Managing Director (CMD) of FCI who is the Head and Chief Executive of the Corporation.

The Food Corporation of India generally purchases food grains in the regulated markets and pays a commission to the agents for their services. The price paid is fixed by the government on the recommendations of the Commission for Agricultural Costs and Prices (CACP). In order to facilitate procurement, the prices in surplus states are depressed by restricting movement of grains outside the zones so that the prices closely approximate the support prices.[26] The important decisions in procurement regarding the quantity to be procured and the prices to be offered are recommended by CACP. The Commission takes into account the cost of production for agricultural commodities, crop situation and so on while deciding the price. The government generally accepts the recommendation and instructs the FCI to procure goods at the suggested price.[27]

Currently procurement is carried out in two ways: (i) Centralised Procurement (CP), and (ii) Decentralised Procurement (DCP). CP is carried

[26] *Ibid.*

[27] S.L. Bapna, *op. cit.* at 115.

out by the FCI, where FCI buys crops directly from farmers. DCP is a central scheme under which 10 states/Union Territories (UTs) procure food grains for the central pool at Minimum Support Price (MSP) on behalf of FCI. The scheme was launched to encourage local procurement of food grains and minimise expenditure incurred when transporting grains from surplus to deficit states over long distances. These states directly store and distribute the grains to beneficiaries in the state. Any surplus stock over the state's requirement is handed over to FCI. In case of a shortfall in procurement against an allocation made by the centre, FCI meets the deficit out of the central pool.

c. Minimum Support Price and Central Issue Price

The Government of India fixes the Minimum Support Price (MSP) of food grains at which procurement is made from the farmers. While the price at which food grains are sold under TPDS is much lower. The centre sells food grains to States at subsidised prices, known as Central Issue Price (CIP). The MSP is fixed by the GOI based on rates recommended by the Commission for Agricultural Costs and Prices (CACP) which takes into consideration cost of cultivation and remunerative prices for farmers on their produce with a view to encouraging higher investment and production. While determining MSP, the CACP considers the cost of production, trends in domestic and international market prices, stock position, changes in agricultural terms of trade, inter-crop price parity, prices fixed in previous years, etc. The prices recommended by the CACP are considered by the Cabinet Committee for Economic Affairs (CCEA) for approval. Typically the MSP is higher than the market price. This is intended to provide price support to farmers and incentivise production.

d. Buffer Stock Policy

Availability of food grains in the country is characterized by sharp fluctuations and becomes an important element, to be taken care of, in India's food policy. It is, therefore, necessary to use a part of the production of good year(s) in the subsequent year(s) of lower production by creating buffer stocks. Buffer stocks also stabilize the intra-year availability, taking care of the lean months. As buffer stocks involve huge costs and also some inevitable damage to stored grains, imports are suggested as an alternative. Practical experience has, however, shown that imports can never provide that kind of food security for a big and populous country like India, which buffer stocks can. In the absence of buffer stocks the country's bargaining power in the international market would be eroded, with the result that purchases may have to be made at high prices and on the seller's terms. In the absence of buffer stocks, the nation is prone to be pressured; economically as well as politically the autonomy of the country may itself be in

the danger of being impaired. Whereas the Strategic reserve of food grains means the emergency food reserve or food security reserve.

v. Storage of Food Grains

Storage management and movement of food grains are important links in the whole system from procurement to distribution of food grains to the consumers. Procurement of food grains for the Central Pool is carried out by agencies such as FCI, State Government Agencies (SGAs) and private rice millers. In addition, 10 States/UT[28] which are presently under Decentralised Procurement (DCP) scheme also procure food grains for the Central Pool but directly store and distribute under TPDS and Other Welfare Schemes (OWS) based on the allocation made by the GOI. Any surplus stock over their requirement is taken over by FCI and in case of any shortfall in procurement against allocation made by the GOI, FCI meets the deficit out of the Central Pool. The procured food grains are taken over into the Central Pool by FCI, the only government agency entrusted with movement activities, from SGAs and private rice millers and are moved from the procuring states to the consuming states for distribution to the consumers and for creation of buffer stock in various states. Food grains of the Central Pool are stored by FCI in both its owned capacity and hired godowns in different parts of the country. The function of distribution of food grains to the consumers is carried out by the State Governments through TPDS and OWS. The food grains are also disposed of by FCI and State Governments based on allocation of the GOI through sale under Open Market Sales Scheme (OMSS).[29]

vi. Transportation of the Food Grains

Ensuring accessibility to food in a country of India's size is a Herculean task. The food grains are transported from the surplus States to the deficit States. The basic objective of movement is to evacuate food grains from the procuring States to deficit States with a view to reducing strain on the available storage capacity and to ensuring availability of food grains for distribution in different parts of the country. Stock of food grains is also to be moved to consuming States irrespective of consumption requirement to create buffer stocks as a measure of food security. The food grain surplus is mainly confined to the Northern States. Transportation involves long distance carriage throughout the country. Stocks procured in the markets and purchase centers are first collected in the nearest depot and from there dispatched to the recipient States within a limited time. Transport forms an

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[28] West Bengal, Madhya Pradesh, Chhattisgarh, Uttarakhand, Andaman and Nicobar Islands, Odisha, Tamil Nadu, Gujarat, Karnataka and Kerala.

[29] Performance Audit Report on Storage Management and Movement of Food Grains in FCI, 2 Report No. 7 2013.

integral link between production and consumption centres. State is a dominant player in this linkage through procurement, transportation, storage and distribution. The overall freight carried by road and rail is in the ratio of 65:35. The road transport is preferred for short leads and small parcel sizes whereas rail transport scores over road transport in long movement through a lifeline of 64,000 kilometers.[30]

vii. Distribution of Food grains

Distribution of food grains is as complex as the policy of procurement. The phenomenon of distribution involves various aspects *viz*., quantity of food grains to be allocated to different states, fixing of central issue price, distribution agency at the retail level and the allocation agency at the different regional levels, arrangements for transportation, storage and coordination and the retail price and margins of different agencies.

h. Quota and Price Fixation

The fixation of the total quota to be supplied to each State is determined by the Central Government, keeping in view the production of food grains in the State and the off-take in the previous months. Prices for the consumer are determined by taking into consideration marketing costs, open market prices, fiscal burden and the paying capacity of the consumer. If the prices are less than the cost of marketing and procurement, the FCI is reimbursed by the government from the general exchequer. A part of this reimbursement is the cost of administration, while part is subsidy to the consumer. The distribution of food grains through governmental agencies is precisely significant in ensuring an equitable distribution of food grains at reasonable prices.[31]

i. Transportation of Allocated food grains

While the storage and transportation of food grains up to the regional (FCI) godowns in various States is the responsibility of the FCI but the lifting of grain from the regional (FCI) godowns to the State depots is the responsibility of the concerned State governments. Lastly it is the responsibility of the fair price shop dealers to collect the food grains from the State depots, except in some states such as Andhra Pradesh where transportation is provided by the State government up to the Fair Price shops level.[32]

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[30] Maneesh Kumar and Garv Malhotra, "National Food Security on the Shoulders of Indian Railways," in Prof. Dr. Bimal N. Patel and Dr. Ranita Nagar (eds.), *Food Security Law-Interdisciplinary Perspectives* 113 (2014).

[31] Mohammad Shafi and Abdul Aziz, *Food Systems of the World* 269 (Rawat Publication, Jaipur, 1989).

[32] *Supra* note 24 at 115.

x. Retailing

At the retail level, three types of Fair Price Shops have been set up *viz*., private, co-operative and government owned. The decision pertaining to the location of Fair Price Shops is taken by district level officials keeping in mind the stability of the applicants and the size of the village. Local political pressures also play an important role in this decision.[33] In some States, mobile Fair Price Shops for interior remote areas have been arranged. The operation of the Fair Price Shops is supervised and monitored by Food Inspectors.[34] Though, most States get their supplies from the Central Government, some variations in the management of the Public Distribution System at the State level is observed. The State Civil Supplies Department or Food Corporation of India manages the distribution of grains through the Fair Price Shops. It is generally wheat, rice, sugar, kerosene, oil as essential items are covered under the Public Distribution System, while some State governments could add other commodities depending upon the local situation. However, the arrangements for procurement of other commodities have to be made by the concerned State governments only.

B. The National Food Security Act, 2013

The National Food Security Act gives statutory backing to the TPDS. This legislation marks a shift in the right to food as a legal right rather than a general entitlement. The Act classifies the population into three categories: excluded (i.e., no entitlement), priority (entitlement), and Antyodaya Anna Yojana (AAY; higher entitlement). It establishes responsibilities for the centre and states and creates a grievance redressal mechanism to address non-delivery of entitlements. Though the motive behind NFSA is very noble, but it seems difficult for government to implement this act without overcoming the governance issues and challenges prevailing in the system. The National Food Security Act, 2013 that extend to the whole of India and makes right to food a legal entitlement. In the current scenario and given the way poverty is measured, this law will benefit approximately 800 million people which are about 67 percent of India's population. The preamble of the Act clearly states that it is an Act to provide for food and nutritional security in human cycle approach, by ensuring access to adequate quantity of quality food at affordable price to people to live a life with dignity and for matters connected therewith or incidental thereto. Chapter II of the Act makes provisions for the food security. Section 3 provides a Right to receive food grains at subsidised prices by persons belonging to eligible households

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[33] S.L. Bapna*, op. cit.,* at 116.

[34] M.H. Suryanarayana, "Public Distribution System Reforms and Scope for Commodity Based Targeting," *Economic and Political Weekly*, 115 (1 April, 1995).

under Targeted Public Distribution System.[35] The Act also makes special provisions for pregnant women and lactating mothers[36] and Nutritional support to children.[37] The Act ensures the access to food grains through doorstep delivery of food grains by reforms Targeted Public Distribution System.[38] Provisions for Food Security Allowance by cash transfer in case of non-supply of food grains.[39] Chapter VII of the Act provides for the Grievance Redressal Mechanism.[40] Thus this Act is a positive step towards providing the legal protection to human right to food and making it a enforceable right. There had been some criticism given the wide scope of this act and previous bad experiences in poor implementation of different government schemes. Questions have been raised regarding the possibilities of making the scheme universal instead of targeting a certain percentage of the population, since the definition and measurement of poverty are disputed and have changed many people's status overnight, on paper. The current Act has also been criticized by several economists and media professionals on the grounds that it would be very difficult for the government to provide sufficient finances for the implementation of this Act as food grain requirement for implementing this Act is 612.3 lakhs tons and total

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[35] The National Food Security Act, 2013, Section 3 (1) Every person belonging to priority households, identified under sub-section (1) of section 10, shall be entitled to receive five kilograms of food grains per person per month at subsidised prices specified in Schedule I from the State Government under the Targeted Public Distribution System:

Provided that the households covered under *Antyodaya Anna Yojana* shall, to such extent as may be specified by the Central Government for each State in the said scheme, be entitled to thirty-five kilograms of food grains per household per month at the prices specified in Schedule I:

Provided further that if annual allocation of food grains to any State under the Act is less than the average annual off take of food grains for last three years under normal Targeted Public Distribution System, the same shall be protected at prices as may be determined by the Central Government and the State shall be allocated food grains as specified in Schedule IV.

E*xplanation*— For the purpose of this section, the "*Antyodaya Anna Yojana*" means, the scheme by the said name launched by the Central Government on the 25th day of December, 2000; and as modified from time to time.

(2) The entitlements of the persons belonging to the eligible households referred to in sub-section (1) at subsidised prices shall extend up to seventy-five per cent of the rural population and up to fifty per cent of the urban population.

(3) Subject to sub-section (1), the State Government may provide to the persons belonging to eligible households, wheat flour in lieu of the entitled quantity of food grains in accordance with such guidelines as may be specified by the Central Government.

[36] *Ibid*., Section 4.

[37] *Ibid*., Section 5.

[38] *Ibid*., Section 12.

[39] *Ibid*., Section 8. Right to receive food security allowance in certain cases- In case of non-supply of the entitled quantities of foodgrains or meals to entitled persons under Chapter II, such persons shall be entitled to receive such food security allowance from the concerned State Government to be paid to each person, within such time and manner as may be prescribed by the Central Government.

[40] *Ibid*., Section 14 (Internal grievance redressal mechanism), Section 15 (District Grievance Redressal Officer) and Section 16 (State Food Commission).

Food Subsidy will reach to Rs.124747 crores. There are several challenges this Act will have to face in order to feed such a large percentage of the population. Effective implementation will also depend of pro-activeness of the states. However, if well implemented, its impact on poverty will be vast and visible.

IV. CONCLUSION AND SUGGESTIONS

While India has made significant progress in the areas of science and technology and industrial development, food security for the rural poor continues to be a cause of concern. Food insecure people neither consistently produce enough food for themselves nor have they the purchasing power to buy food from markets. It is a complex issue which would have far reaching and serious implications like threat to national security, disturbance of peace, human rights violations and decline in the quality of human resources. In addition to the domestic causes, imperfect market practices of multinational groups in controlling production, usage, transport and trading practices are causing food insecurity in India. Small producers and people working in unorganised sectors are the ultimately sufferers both in rural and urban areas due to neo-liberal policies. There is no dearth of availability of food grain in the country, still a large section of the poor population does not have adequate access to food.

The previous green revolution was the product of a million small beginnings. Likewise, the next green revolution will advance on the basis of an outpouring of human creativity, innovations not just in the technological but in the human land scale as well the only way a new story can arise. It is clear that Freedom from hunger is not only a basic human right but it is essential for the full enjoyment of other rights, such as health, education, information etc. Innovative strategic interventions are the needs of the hour to ensure food availability, food access and utilization of food. The strategic and technological intervention can improve the agricultural food production scenario to fulfil the domestic demand and also look for food export prospects. Innovative food access mechanism such as food coupons, food stamps and food credit cards can ensure food security from access point of view if implemented seriously. On the other hand steps should be taken for non-farm interventions to give individuals and households more capabilities to improve livelihood security and to raise living standards.

LIFTING THE CORPORATE VEIL ON SHELL AND SHADOW COMPANIES - AN INDIAN OVERVIEW

—Varun Chopra[*] & Subin Thattamparambil Govindankutty[**]

Abstract With the advent of the Panama Paper leaks investigation it has come to light that there exists hundreds and thousands of shell and shadow companies that the infamous Panamanian Law Firm, Mossack Fonseca created across the world, with the intention of covering up questionable funds. Shell companies[1] have no active operations and exist solely for the purpose of estate acquisition and business takeovers without engaging in any employment or production activities. Hence, their presence subsists only on paper and can be used to facilitate tax evasion, fraud and money laundering. Shadow companies, on the other hand, are more malice oriented. They are incorporated with the intention of using a pre-existing brand identity with goodwill attached to it without the authorization of the trade mark owner. However, these companies are legal as long as their illicit activities remain hidden and unquestioned.

As one of the fastest growing economies in the world, India has clearly acknowledged and encouraged the incorporation and activities of multiple companies, be it multinational or subsidiaries, to promote economic activity within the country and create a competitive market on a global scale. However, fraudulent companies like the aforementioned exist in India as well. They hide behind the corporate veil and use it as a mask to prevent them from getting recognized by the eye of equity. This does not mean

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[1] Explained in detail in the first chapter of this paper.

that piercing the corporate veil is the course of action that must be taken with respect to every shadow or shell company. Rather, what it does highlight is the need to distinguish between a genuine shell company from a bogus one.

I. QUESTIONS PRESENTED

- What are the grounds that must be ascertained before lifting the corporate veil of a shell company or a shadow company?
- What is the impact of lifting the corporate veil of a shell company or a shadow company?
- What can be done to identify and differentiate between the malafide shell companies and the genuine ones?
- What are the SEBI regulation whilst taking into consideration the subsidiaries of listed companies which may rank as a shell/shadow company?

II. SHADOWS AND SHELLS

A. Meaning and Scope

Shadow companies are those companies that are incorporated with a trademark or a brand name that is identical to a trademark which has already been well established. The brand name that has been imitated carries goodwill, and this is the factor that shadow companies intend to exploit. The important characteristic that should be brought to notice is that these companies are mere counterfeits and have no form of relation or any type of connection to the original authorized trade mark owner. People, unaware of the lack of connection, engage in business transactions with them and the losses are suffered by two parties- the people themselves and the original trademark owner. The originals are placed at a higher price compared to the floor level as they are recognized and appreciated for their trade activities nationally and more pivotally on the international market. Consumers are misguided into buying counterfeit products, which were supposed to have a large amount of credibility attached to them, as they are available to them at a cheaper price. The only ones who gain from this exercise are the shadow companies. They are able to cash-in on the ostensible relation while the originals lose out on clients and potential profits. The existence of these companies is technically invalid but lackadaisical registration requirements and compliance norms enable their growth and survival in the market.

On the other end of the spectrum lie shell companies. The U.S Securities and Exchange Commission has defined a shell company as any publicly held company with no or nominal assets other than money. A shell company is a corporation that does not actively take part in business operations or one that merely owns the shares of another company. Business operations may have taken place at a previous point in time however; they are currently dormant or have been wound up. Some jurisdictions do not make it a necessity for companies to disclose identities of directors and officers and there may be no mandate for locally residing directors. This enables a person to run an offshore holding company as the sole director without having to disclose his control. Moreover, if a person intends to control the ownership of assets without being identified with such ownership, they can just transfer the assets to the offshore shell company. The existence of shell companies is completely legal and most conglomerates use them for genuine business activities. A shell company is usually created as a subsidiary to facilitate business takeovers and estate acquisitions, and by virtue of that fact serves as a vehicle regardless of their dormancy and lack of assets. They are non-trading firms that are generally listed on the stock exchange, thus allowing the parent company to avoid any attention which it may receive whilst undertaking any business activity on the stock exchange. Predominantly existing on paper as a registered financial entity, shell companies have become a vital cog in the money laundering machinery. After ownership of the shell company is obtained and its activities approved, it is fairly easy to conceal the point of origin and the motive of large funds that are invested into such companies. Due to this peculiar characteristic of shell companies, it is seen that most of them are set up in locations that are regulated by poor anti-corruption laws or are tax havens such as British Virgin Islands, Macao, or Panama. It has even been reported in the United States' city of Delaware that there exist more companies than state residents!

III. PANAMA PAPER LEAK CONNECTION

The International Consortium of Investigative Journalists (ICIJ) had published a list that completely exposes the hidden files of more than 200,000 offshore entities spread across the entire world. Mossack Fonseca, the firm from where the data was leaked, has been recognized as one of the most avid creators of corporate compositions and shell companies whose main function revolves around hiding the ownership of assets. Being a "registered agent", the firm provided the signatories with all the valid paperwork and even the mailing address which gives life to the shell companies they created around the world. The database encloses a great deal of information about company owners, proxies and intermediaries in tax havens and weakly regulated jurisdictions. However, the ICIJ has not disclosed bank accounts, emails exchanged and financial transactions contained in the

documents. Hundreds of reporters all across the world investigated these files for a year, where it has come to light that that there are world leaders, more than a 100 politicians of different jurisdictions, fraudsters, drug traffickers and other corporate criminals whose companies have already been blacklisted by the respective jurisdictional authorities. Even though their reputation is well known to the general public, they are still allowed to purchase shell companies in areas where it becomes futile for prosecutors and other interested investigators to trace their assets.

The main reason for shadow companies to be used as a vehicle is due to the fact that at a glance it may seem like the investments into such companies are valid because it can be well understood why respectable figures from around the world would want to invest in high ranking companies. However, it must be understood that they are not the companies that they claim to be. When the investor chooses to continue his operations with them especially after he is alert of this fact, it amounts to fraud. Authorities in the Mainland China, US, the European Union and Japan also raised their voices in alarm when such "shadow companies" started to exploit the company name registration system in Hong Kong to facilitate their counterfeiting activities in the Mainland. The panama paper leak has revealed that associates of Russian President Vladimir Putin secretly shuffled as much as $2 billion through banks and shadow companies.[2]

Shell companies, being a lawful registered company, can use their existence to facilitate tax evasion and fraud. An instance that can be cited to show how people suffer from such scams is the case of Nick Kgopka, an African child who lost his father at the age of 14. His father used to work at the gold mine in Southern Africa and lost his life because of chemical exposure. Nick's troubled family were able to survive through the monthly cheques that the company provided. However, one day the payments stopped as a $60 million investment fraud hit the company. The leaked documents show that two of the men involved in this fraud had acquired the assistance of the Panama based law firm to create offshore companies. The leak further goes to show how many assets, which were cycled through shell companies, were used to buy yachts and luxury homes in Beverly Hills. Through shell companies, black or illegal money is first converted into forms of white money using cards and cheques. The money is then layered through different accounts and shell companies, thus making it harder for a regulator to keep track. After the money has been "cleansed" it is used for other purposes. Fernando Zevallos, Peruvian drug trafficker, was able to use shell companies located in the US to launder the money he earned. Even though he was jailed, he was still able to move around

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[2] Marina Walker Guevara, ICIJ releases database revealing thousands of offshore companies, ICIJ, https://panamapapers.icij.org/blog/20160509-offshore-database-release.html.

$1.4 million within the US. After the paper leak, British Virgin Islands' Financial Investigation Agency (FIA) investigated the corporations created by Mossack Fonseca and it was found that the FIA had continued to licence the created companies, despite the fact that Mossack Fonseca had no idea for whom these companies were acting. Even though the regulations had been strengthened in 2008, they were still unable to name its companies' beneficial owners when asked.

A. Recent developments

In the wake of the recent Panama Leaks and the explosive information it unearthed, it is evident that a lot of attention needs to be paid to this blatant abuse of shell and shadow companies from within and from outside the country. Thus, the aftermath of the Panama Papers leak saw a period of increased scrutiny where many different firms were put through the litmus paper test. The results were very disturbing. Anonymously owned companies have created a global black market which has given people a legal way to cheat the Governments out of trillions of tax dollars. In an investigation in December 2015, the CBI came across a foreign investment scam amounting to an astounding 6000 Crore rupees where the accused had used over 60 accounts of shell companies situated in various places like Hong Kong to make the money disappear[3]. The same month saw an allegation being reported against one of India's largest bank companies where shell companies in Iran had been used to misappropriate an amount of up to 35,000 Crores.[4] The same trend is being seen in every country across the globe. In May 2016, another CBI investigation revealed a fraud carried out by a leading public sector bank wherein some individuals along with their co-conspirators from the bank had managed to cheat the government out of a huge amount of money by sending it through a maze of shell companies. As more and more cases of money laundering and tax evasion through shell companies are unearthed, it becomes more and more apparent how deep rooted the problem is as well as the importance of implementing swift preventive measures.

The legal and administrative systems around the world have developed two main ways of combating the problems caused by shell and shadow companies.

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[3] Kaushik Dutta, *Shell Companies: putting tax evasion, money laundering under scanner,* The Financial Express, July 2016.

[4] Virendrasingh Ghunawat, *Whistle blower blows the lid off Rs. 20,000 Crore UCO bank Scam,* India Today, December 14th, 2015.

IV. THE PROCESS OF DIFFERENTIATION (ISOLATION)

A. Meaning and Importance

One of the most important things to be kept in mind while taking action against shell companies is that not all shell companies are bad. Even though recent trends show that most of the shell companies are used for illegal ventures, there still exist legitimate uses for which these shell corporations exist. The most common among them is for the purpose of helping people planning to start a new business. Most start-ups do not have the means for large initial investments and thus start off as a company on paper only. Even though they do undergo activities and conduct transactions they have minimal or no assets and thus fit into the categories of shell companies. Similarly, huge corporations may want to create a separate single-purpose entity to improve the security of their intellectual property by keeping the ideas constrained to limited set of people. Furthermore, such entities are often used as the perfect face for joint ownership ventures. This is seen especially in cases where a company is planning to expand into new products that don't really go with the existing image of the corporate personality. Adidas for example, created a separate shell corporation called Adidas Originals to tap into the fashion apparels department since casual and formal every day wear do not go with their image as sportswear giants. Such a joint venture allows the parent company to enter into new ventures without having to damage their reputation in case such a venture fails.

It is, therefore evident, that shell companies also have a positive role to play in the economy. Thus it becomes very important to weed out those companies that exist just for the exploitation of the system and to treat them accordingly while allowing the legitimate shell companies to carry on their functions in the economy.

B. Regulations and Grounds for differentiation

Each country has developed its own grounds and parameters for differentiating between useful and malicious shell entities. In India, in a statement released on February 7, 2015, SEBI had identified three main parameters or indicators for the identification and separation of shell and shadow companies from useful subsidiaries.

The first among these parameters is whether the companies physically exist or not at the address provided in the Memorandum of Association. This parameter mainly aims at eliminating shadow companies created just for the purpose of carrying out illegal activities on behalf of the parent

company. Since the companies are only to be used for purposes like cheating the stock market, the companies are not started with many assets and thus usually do not have any offices. Such companies, a study by SEBI revealed, existed only for the purpose of rallying up share prices. To do this, when the companies are created, the shares are allotted on a preferential basis to certain connected 'entities' who hold onto these shares only till the time that the price is floated up without the company undertaking any activity, solely on the basis of unethical share trading activities. This would be followed by the initial investors immediately selling to the public and the connected entities rake in huge profits. The first parameter however, is not that effective in separation of shell companies. Shell companies are usually used for the purpose of tax evasions. These are companies that are created with huge amounts of investments and assets but are not given any functions to carry out. As a result, the investment made in such companies in the form of capital and assets remains unused and retains its value while the company helps in the evasion of tax by cutting down the amount of tax payable on the virtue of their location or their dormancy.

The second indicator that SEBI mentioned was the misuse of preferential allotment of shares. As discussed earlier, the use of shadow companies involves the allotment of preferential shares to certain 'entities' that are, in most cases, either the principal or relatives of the principal forming such company. In recent times, the Board has started monitoring such preferential allotments of shares in IPOs especially if the prices of such shares flare up without any apparent reason. Similarly, shell companies too are just fronts that are listed on the Stock Exchange. Even though they are mostly used for takeovers and acquisitions, they too can be used just like shell companies to rake in huge amounts of money.

The final parameter that SEBI included was a need to carry out transactions. The most telling fault in a shell company lies in the fact that it does not take part in any sort of real world transactions or activities. A majority of the reason for the existence of such companies is the trading of its shares by third parties, which involves no work whatsoever on behalf of the malicious shell companies. Any company that does not fulfil these conditions can be identified as a malicious entity and can be prosecuted before the courts.

C. Legislative Amendments

Following the efforts made by the Securities and Exchange Board of India, the Indian Government has also taken to the war against these companies by making amendments to the Companies Act, 1956 and the Income Tax laws. The main amendment made to the Companies Act with regard to the shell companies lies in the amendment made to Section 3 of the Act.

The definitions of private and public companies have been changed to include a provision which fixes a minimum requirement of paid up capital. In the case of Private Companies, the minimum paid up capital requirement in Rs. 1 Lakh[5] whereas for public companies, the minimum amount of paid-up capital required has been set at Rupees 5 Lakhs[6] This aims at eliminating those shadow and shell companies which are created with minimal investment to short the market and earn money. Since there is now a minimum capital requirement, it ensures that such companies will now need assets to provide compensations and meet legal obligations.

Further, the Government has amended the Income Tax laws to curb the use of Shell companies from abroad to evade taxes. According to the new amendment, all companies (whether incorporated in India or abroad) will be taxable in India as long as their management took important commercial decisions in India at any time. According to the Finance bill for the financial year 2015 tabled in the Lok Sabha, "A company shall be said to be resident in India in any previous year, if it is an Indian company; or its place of effective management (POEM), at any time in that year, is in India.."[7] Before this amendment the income tax laws defined a company as an Indian resident if it was either situated in the country, or if its entire control and management affairs were handled in India at any point of time. This was a very weak regulation and was easy to exploit, but the new amendment ensures that people can't get away with incorporating countries in tax havens and running them from India.

D. Lifting the Corporate Veil

i. Meaning

When cases of scams, fraud or other wrongful acts being carried out by companies solely for the benefit of its shareholders or officers are brought before the court of law, the most predominant defence used is that of companies having a separate legal identity for their shareholders and officers. As per Common Law, a company once incorporated becomes a separate legal entity and the owners or shareholders cannot be held accountable for the actions of the company. This principle was first explored in Salomon v. A. Salomon & Co. Ltd.[8] where the House of Lords decided to uphold the doctrine by ruling that the primary shareholder could not be held personally liable for discharging the debts of the company. This principle propounded by the House of Lords has been widely accepted in India as

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5 Companies Act, §3 (1956).

6 *Ibid*.

7 Shruti Srivastava, *Government amends I-T Act to put curbs on shell companies,* The Indian Express, March 2nd, 2015.

8 *Salomon* v. *A. Salomon & Co. Ltd*., 1897 AC 22.

ballast for company law. However, the doctrine has exposed a lot of loopholes that have been exploited over time by companies and their shareholders for personal benefit. As a consequence, shell companies came into existence. Since the recognition of a separate corporate personality is full and absolute, a person can use such a legal identity to undertake any legal action that he cannot under his own legal persona. For instance, if a person, by virtue of a court order is stopped from trading in a particular product, such a personal obligation can be overcome by said person if he forms a company where he is the majority shareholder. Similarly, since companies are also legal entities, they can overcome obligations by creating subsidiaries such as shell companies which have either little, or no assets to indulge in illegal and risky ventures to ensure that the liability of the parent company is limited. Similarly, shell companies are also used by investing a lot of money in a company that undertakes no operations so that the invested money is safe and remains non taxable. The Panama paper leaks have information about thousands of such companies that were being used by various top brass officials and corporations to save or earn a lot of cash and exploit the safety net provided by possessing a legal identity.

ii. Grounds

To overcome these obstacles put forth by the decision in the Salomon[9]case, the courts developed a principle whereby, in certain cases, it is permissible to "pierce" or "overthrow" this corporate veil: that is, to disintegrate the artificial and separate status enjoyed by the companies. This allows the court to impute the owners and the shareholders directly with the obligations that arise out of the actions of such companies. However, courts across most jurisdictions have reiterated the importance of the Salomon principle by ensuring that piercing the corporate veil remains an action carried out only in peculiar circumstances instead of becoming the norm. In State of U.P. v. Renusagar Power Co.[10] the Indian Supreme Court held that whenever a corporate entity is abused for an unjust and inequitable purpose, the court would not hesitate to lift the veil and look into the realities so as to identify the persons who are guilty and liable therefore. It was further held by the Supreme Court that the corporate veil can be pierced when the corporate personality is opposed to justice, convenience and interest of the revenue or the workman or against public interest.[11] Thus there are certain grounds which, if satisfied, will lead to the courts exercising the act of piercing the corporate veil. Chief among these grounds is when there is a case of fraud and improper conduct involved. Courts across countries and jurisdictions have come to the common consensus that the Saloman principle will not be allowed to stand in cases where the principal uses

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9 *Ibid*.

10 *State of U.P.* v. *Renusagar Power Co*., (1988) 4 SCC 59.

11 *Kapila Hingorani (l)* v. *State of Bihar*, (2003) 6 SCC 1 : 2003 Supp (1) SCR 175.

the company for corporate fraud or for getting improper gains. This was first witnessed in ***Gilford Motor Co. Ltd.*** v. ***Horne***[12] wherein the defendant was the plaintiff's former managing director who had been bound by a non-compete clause to not carry on particular activities. To avoid the consequences of the contract, the defendant created a company and sought to carry on his business through it. It was decided that the company was "the channel through which the defendant Horne was carrying on his business" and so, an injuction was granted to stop the activities of the company. Simultaneously, in the Indian case of ***State of Gujarat*** v. ***Shri Ambica Mills Ltd.,***[13] the Supreme Court held that the corporate veil of a company can be lifted in cases of criminal acts of fraud by the officers of a company. Another pivotal ground for the lifting of the corporate veil is tax evasion or avoidance of any other financial obligations. One recent case in which this was seen was that of ***Vodafone International Holdings BV*** v. ***Union of India***[14] wherein the defendant had procured companies in tax havens such as the Netherlands to avoid taxes to the tune of 12 thousand crores. The Bombay High Court had pierced he corporate veil to arrive at the verdict that the transactions which relate to the acquisition of shares in offshore target companies amounted to fraudulent avoidance of tax obligations. The Supreme Court went on to hold during the appeal that "once the transaction is shown to be fraudulent, sham, circuitous or a device designed to defeat the interests of the shareholders, investors, parties to the contract and also for tax evasion, the Court can always lift the corporate veil and examine the substance of the transaction."[15] Lastly, in those cases where a company employs an agent to undertake obligations on behalf of it, the principle of vicarious liability is given preference over the principle propounded in the Salomon case. Therefore, the shareholders will be held responsible for such actions.

There are certain statutory provisions that have been established which can lead to the court piercing the corporate veil. The first and foremost among these is given under Section 5 of The Act. According to this, any officer who is in default, that is, involved in any wrongful or illegal acts are liable in respect of the offences by themselves. If an officer matches the description of an "officer in Default" as per Section 5, then they will not be allowed to hide behind the protection of the Salomon principle. Also, as per section 542 of the Act, if at the time of the winding up of the company, it is revealed that the activities of the company were carried out to deceive the investors of the company, then the individuals who had prior information about such fraudulent intentions will be held personally liable for any financial obligations that exist. In such cases, the corporate veil can

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[12] *Gilford Motor Co. Ltd.* v. *Horne*, 1933 Ch 935 : 1933 All ER 109.
[13] *State of Gujarat* v. *Shri Ambica Mills Ltd.*, (1974) 4 SCC 656 : (1974) 3 SCR 760.
[14] *Vodafone International Holdings BV* v. *Union of India*, (2012) 6 SCC 613.
[15] *Ibid*.

be pierced by the court and punishment can be meted out to the shareholders directly. The failure to refund application money within 130 days of the prospectus being issued can also allow the courts to look past the corporate veil and hold the directors directly responsible.

V. CONCLUSION

In the above article, we have discussed what shell and shadow companies are and the menace they pose to the economy of our nation. The recent avalanche of information unearthed by the Panama papers and CBI and Income Tax department raids have made it necessary for the Indian Judicial system to act in a quick and strong way. The Indian judiciary and the regulatory mechanism has provided the strict response in terms of a shift in the legal perspective with regard to lifting the corporate veil, as well as various changes in the regulations and legislations surrounding the creation and operation of such companies. A glance into these changes shows the intention of nipping the problem at the roots by providing simple and easy to implement restrictions that affect the effectiveness of these shadow and shell companies. It is too early to tell which way this war on money laundering through shell and shadow companies will go, but the early signs look encouraging. If implemented sternly and in the right manner, these changes can provide a significant dent to the use of such companies.

ANTI DUMPING INVESTIGATION: A WEAPON OF CHOICE OR A SHIELD OF NECESSITY

—*Sakshat Bansal*[*]

Abstract World Trade Organization deals with trade, to be more specific it is about free and fair trade, it is not just international trade without barriers. It is axiomatic that absence of fair trade affects an economy in an adverse manner and hence the notion of "Trade Remedies" is a correctional measure, a measure about and for remedying unfair trade practices. This work puts premium on Anti Dumping. Catena of disputes clearly show that "Remedy" said by one is taken as "barrier" by another in many cases. In this context, it is worth mentioning that equating remedy with a barrier is wrong as perceiving both the terms as synonymous is flawed. But, the way in which trade remedies are implemented has raised several concerns which goes to the very root of the entire mechanism and hence compelling the concerned party to view the alleged actions as barriers and not remedies.

I. INTRODUCTION

Antidumping policy has been a controversial aspect, which has been favoured and criticized in myriad of forms. Those who favour are of the view that incorrect signals owing to market imperfections are taken care of to an extent by Anti-dumping proceedings. Also, the tags like "Safety valve" and "response of free market to unfairness", are often quoted in this regard. While those who hold an opposite view, question the very rationale for imposing this duty as the original justification for this policy had nexus with anti-trust laws having proclivity towards rectifying the injurious

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aftermaths of predatory pricing[1], which seems to be apposite but under the amplitude of W.T.O., no distinction is made between different kinds of dumping.[2] Reservations have also been made about the bureaucratic discretion that lies with designated authorities (DA) which can result in more restricted trade.

Recently, the decision of DGAD (India) to impose 25-30% duty on the imported jute from Bangladesh has heralded a wave of deliberations and debate over the anti-dumping mechanism.[3] This investigation outcome has attracted criticism on often quoted grounds like lack of clear and strong findings owing to which Indian domestic industry has suffered losses or retarded production. Authorities from Bangladesh opined that changes witnessed in Indian jute industry came as a result of several economic factors and not solely and primarily because of Bangladeshi Jute. Statistics reveal that Jute exported from Bangladeshi market constitutes 8% of the total Indian market in this regard which makes this anti dumping decision a debatable one.[4] This particular incident poses catena of issues like that of employment challenges for Bangladesh residents as jute industry constitutes its third largest earning sector, higher price to be paid by Indian Consumers and also the relationship between two countries, in particular South Asian Free Trade Agreement (SAFTA) effectiveness has also been questioned by Bangladesh.

Also in the matter raised by companies like that of Hindalco, indulged in the business of Foil making, in which Chinese companies were dumping in Indian market, an investigation was done. The questions raised by these three entities were found to be valid as a result of which the dumping duty was increased from $ 0.69 to $1.63/Kg.[5] Also the proposal to impose higher import duty on cold rolled stainless steel of 300 series in addition with anti circumvention for effective results attracted attention in October 2014.

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1 John B. Taylor & Akila Weerapana, *Principles of Microeconomics*, 257- 59 (7th Ed. 2012) & Raj Bhala, *Rethinking Antidumping Law,* 29 GEO. WASH. J. INT'L L. & EcON., 14 (1995).

2 Reid M. Bolton, *Anti-Dumping and Distrust: Reducing Anti-Dumping Duties under the W.T.O. through Heightened Scrutiny'*, 66, Berkeley J. Int'l Law (2011), available at http://scholarship.law.berkeley.edu/bjil/vol29/iss1/2, last seen on 15/01/2017.

3 *India Urged Not To Impose Anti-dumping Duty on Jute*, The Independent (16/11/2016), available at http://www.theindependentbd.com/printversion/details/68506, last seen on 15/01/2017.

4 Kunal Bose, *Nepal wants India to roll back duty on imported jute products*, Business-Standard (06/01/2017), available at http://www.business-standard.com/article/economy-policy/nepal-wants-india-to-roll-back-duty-on-imported-jute-products-117010600044_1.html, last seen on 15/01/2017.

5 *Govt. may impose anti-dumping duty on Chinese aluminium foil*, The Times of India (14/03/2017), available at http://timesofindia.indiatimes.com/business/india-business/govt-may-impose-anti-dumping-duty-on-chinese-aluminium-foil/articleshow/57633439.cms, last seen on 15/03/2017.

It is worth mentioning that according to many industry experts, Chinese Government gives subsidies to these companies as a result of which their manufacturing cost goes very low and they dump the same at a lower price in many countries as a result of which anti dumping duties are imposed on Chinese Products in many jurisdictions. Entities like Uflex, Hindalco and Nalco had much to gain from this imposition as a result of which they pushed this smatter.

These two examples are chosen with a reason to signify that imposition of anti dumping duties encompasses under its domain serious repercussions on both the countries. By no means I am suggesting that imposition of anti dumping duties in itself is wrong in every case as sometimes sustainable benefits are derived out of it but any short term measure taken due to lack of data to reach to a conclusion or lobbying of a particular segment of Industry with the concerned authorities is unwarranted. Hence, it becomes very important to reduce the amount of subjectivity involved in this entire process of investigation. It is important to note that imposition of anti dumping duties in those cases where it is not required, might not work in the long run as the root cause of economic instability remains untouched and hence imposition does not work as a remedy in the real sense. Also, the chances of retaliatory measures taken by the exporter countries get high along with a blow to the diplomatic ties which might work adversely for nations having geographical affinities.

It is not the intention of the writer to enter into the merits of the decision, rather the focus is on highlighting the diverse range of factors which might not be present in both of the above mentioned instances. Imposition in one of them might not be as difficult to justify as in another. This work is an attempt to shed light on the the broad scope of the parameters indicated for injury determination as a result of which enormous amount of discretion is yielded to the Designated Authorities which in turn results in the birth of complex issues like retaliatory measures and many more due to lack of clear guidance that prevails in this area.

The following are the key elements chosen for this research work, for highlighting the discretions that vest with Designated Authorities.

II. NORMAL PRICE FOR THE PURPOSES OF ANTI-DUMPING INVESTIGATIONS

It is very clear that legal instrumentalists do not and would not want to dictate the price of a product, except in some rare cases like that of pharmaceutical drugs and temporary ceiling. But, whenever a country exports a product on a price lower than that of the manufacturing cost with an

infliction of injury on domestic industry, dumping comes into picture. Dumping by itself is not actionable and hence mere proving of dumping is not sufficient as it does not constitute cause of action, second step of showing that Dumping has caused injury is must. It is on this point that there is a difference between anti-dumping mechanism and Competition law framework with regards to the "Predatory Pricing" as predatory pricing in itself is enough for cause of action. The key aspect is that WTO wants to ensure is that no country can get away by affecting other country due to dumping and the way to ensure it is in the form of a trade remedy i.e., Anti Dumping Duty. It is calculated on the basis of difference between Normal value and Ex factory price.

III. LACK OF GUIDANCE ON OTHER KEY ELEMENTS

Article 2 of the AA[6] provides no guidance on determination of appropriate third country, meaning of the phrase 'in the ordinary course of trade'. Discretion vests with member states to formulate their own methods for ascertaining dumping margin. Free hand to such an extent often results in problems linked with antidumping duties, which are concluded by relying on constructed circumstances.[7] Process gets further complicated in the case of slightly different products (i.e. not "like" products in narrow sense of W.T.O. analysis), which then calls for further assumptions to devise an 'apples to apples' comparison.[8]

In several cases, easy way to ascertain the same is absent and then a sequence of events is to be followed, in which an assessment is made by placing reliance on certain assumptions.[9]. These assumptions are often questioned on the grounds of objectivity. As we know that the first step is by analyzing the situation on the basis of "Home Sales' of exporting country but sometimes market representative data is not available and hence second step is taken which focuses on "sales to third country" but manufacture might sell the same product in different countries at varying prices.[10]

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[6] Procedural issues related to determining the normal value of the product and the dumping margin, evaluating injury to domestic industries, defining 'domestic industries' in operational terms, etc. are dealt with in a separate agreement called the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Antidumping Agreement).

[7] Thulasidhass P.R., *Constructive Methods and Abuse of Antidumping Laws: A Legal Analysis of State Practice within the WTO Framework* 13(2) The Estey Centre Journal of International Law and Trade Policy, 185 (2012)), available at http://ssrn.com/abstract=2170604 last seen on 15/01/2017.

[8] *Supra* 2 at 77.

[9] *Ibid* at 66.

[10] *See* Brink Lindsey and Daniel Ikenson, *The Rhetoric and Reality of US Anti-Dumping Law, in Anti-Dumping: Global Abuse of a Trade Policy Instrument* (Bibek Debroy &

A pertinent question that arises over here is about the third country chosen for this comparison as economy of a third nation might not be comparable to the concerned nation. For example, selling cycles in Bhutan might not be same as that of selling the same in India. Also, 'constructed value'[11] created by designated authority in cases of 'cost dumping'[12] seems to vest DA with elephantine discretion[13] as "Cost of production", "reasonable profit "and "administrative, selling and general costs" constitutes a very subjective criterion.

The Key issue is that Current Legal framework seems to be make it very subjective as the bureaucrats sitting in India are going to decide the cost of a product in third nation. It is worth mentioning that this decision is not an easy one as various factors like property cost, labour Costs and investment are involved which needs to be taken into consideration by the authority in India. For taking this decision they typically need to place reliance on Books of Accounts but in many cases, for example China, Books of Accounts are not maintained and even if maintained, there is no surety that they are in compliance with Generally Accepted Accounting Standards (GAAS) and International Financial Reporting Standards (IFRS). So the way in which the authority in India extracts the information in itself is questionable as the data furnished by the concerned industry itself might be concocted to suit their interests. Also, the expertise of the concerned bureaucrats in this regards poses a major concern.

It is worth mentioning that price related data has its own nuances as the figures shown in accounts are not monitored and verified in many countries. For information collection purposes, W.T.O. says that the respective exporter must co-operate and also the commissions can be sent on-site, but it has rarely happened after 1995, as a result of which the designated authority

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Debashis Chakraborty eds., 2007), pp. 106-08.

[11] It is equal to the inferred production costs of the product plus a profit margin.

[12] Scholars like Hoekman and Leidy (1989) are of opinion that there are two kinds of dumping, namely, price dumping and cost dumping. Price dumping is that which occur due to price discrimination between the export price and domestic price. As defined by the Antidumping Agreement, price dumping may occur when the export price is "less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. *Supra* 7.

On the other hand, cost dumping, as defined by the Antidumping Agreement, may occur when the export price is compared with "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. Supra 7 at 191.

[13] There is tremendous variation in costs of different factors of production in different countries, whether the cost of material inputs or the cost of labour, which are often cheaper in developing countries (Lee, 2006). All these factors exert considerable influence on the price of a product in a given market (Barefield, 2005). In such a case, the investigating authorities from developed countries may not consider the comparative advantages of a developing country, like cheap labour costs or cheaply available local input. Supra 7 at 192.

depends on the data given by the domestic industry because except Normal Value, other things are known and the normal value construction is followed with lot of subjectivity in it.

Hence on the basis of the cumulative points mentioned herein it won't be an exaggeration to say that spectrum of subjectivity is driven by one authority in these matters and that too with the inclination towards domestic manufactures due to many reasons.

IV. "MATERIAL INJURY"[14] TO THE DOMESTIC INDUSTRY

As far as the determination of injury is concerned, it is based on positive evidence which encompasses under its domain, volume of products & effect of dumped products on like product[15] in the domestic market and also its consequent impact on domestic producers.[16] Also, Article 3.5 of the Anti-dumping agreement states that investigation authorities are to establish the causal link between the injury and the like product that has been exported to the domestic market to the domestic industry, which in no way puts a limit to the factors to be considered for this purpose as the determination can be done by examination of all relevant evidence. As a result of this broad approach, material injury can be easily shown due to the abundance of negative indicators capable of being pointed out by an industry like price decreases, impact on the state of industry, actual and potential decline in sales, lower market share, depressed productivity or low return on capital investments.[17]

Also, 'constructive antidumping' measures[18], at times, are imposed by adopting diverse methods for ascertaining injury under 'Article 4 of the

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[14] *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Jan. **1,** 1995**,** Art. 3.2.

[15] Before initiating the Anti-dumping action, it needs to be ensured that the claim of domestic industry with regards to injury pertains to like articles in comparison to that of dumped goods by an exporter. (Product like "similar") shall be interpreted to mean a product, which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product that, although not alike in all respects, has characteristics closely resembling those of the product under consideration, available at http://commerce.nic.in/traderemedies/Anti_Dum.pdf, last seen on 20/2/2017.

[16] *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Jan. **1,** 1995**,** Art. 3.1.

[17] *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Jan. **1,** 1995, Art. 3.4. The ADA also notes that "the list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

[18] The expression 'constructive antidumping action' is used to indicate a situation where the export *per se* is not liable to antidumping actions in the strict sense of the relevant provisions, but is subsequently liable to antidumping actions due to the inventive and

agreement'.[19] 'Captive Production' method is one of them. "Domestic producers as a whole" needs to be take into account in relation to the determination of injury by the virtue of Article 4. In contrast to the same, some countries limitedly include a specific segment amongst the domestic producers as a result of which injury is established. Japan questioned this method in the U.S. – Hot-Rolled Steel Products case, on the ground of inconsistency with Articles 3 and 4 of the Antidumping Agreement.[20] Although Japan emerged victorious but many scholars opine that it lost the argument[21] in a sense because Appellate Body held that if the authorities "examine one part of a domestic industry, they must examine, in like manner, all the other parts of the industry or provide a satisfactory explanation as to why it is not necessary**"**.

Indian Government has been trying to safeguard the domestic producers through many ways. Minimum Import Price(MIP) is a transitory measure which is taken when instances of dumping are brought to the notice of authorities and is not a sustainable measure with comparatively longer term effects like that of Anti Dumping. In February 2016 all imports took a massive hit after the introduction of MIP scheme mandating a high landed prices on around 170+ steel products.[22] According to S&P Global plats, steel imports went down by 30% during April- June 2016 Quarter.

Chinese exports were affected and claims itself to be a victim of India's state Protectionism. After its expiry in the first week of August 2016, provisional anti dumping duties along with reference price were given by DGAD in relation to some Cold-Rolled Steel Products. It needs to be mentioned that reference price (&594/ton) given was much higher than that of the Minimum Import Price ($500-560/ton) earlier given.[23] Therefore, on August 4 2016, 107 out of 173 products were pushed into the Anti Dumping for a period of 5 years based on evidence. In October, 2016 decision to impose Anti dumping duty on 36 products out of remaining 66 products

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innovative methods adopted by the authorities in determining the injury and the dumping margin. Supra 7 at 186.

19 *Ibid* at 196.

20 United States –'*Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*', Appellate Body Report (WT/DS184/AB/R) of 28 February 2001.

21 *Supra* 7 at 198.

22 National Bureau, *Government imposes minimum import price on 173 steel items*, The Hindu (07/02/2016), available at http://www.thehindu.com/business/Industry/government-imposes-minimum-import-price-on-173-steel-items/article8203743.ece, last seen on 08/02/2016.

23 K.R. Srivats/ Debabrata Das, *Govt slaps anti-dumping duty on cold-rolled flat steel products*, The Hindu (18/08/2016), available at http://www.thehindubusinessline.com/economy/govt-imposes-antidumping-duty-on-coldrolled-flat-steel-items/article9002854.ece, last seen on 19/08/2016.

has brought to the light the intensity with which India is applying Anti-Dumping Duties.[24]

Amidst all this the balancing of claims of various stake holders needs to be done because allegations regarding stifling the normal trade and restricting the choices of consumers are inevitable. Indian authority needs to ensure that steel prices do not balloon up and remain competitive. The onus to showcase that measures like that of MIP scheme were not effective in terms of helping the domestic industry to cope up with the external pressures needs to be discharged by the authorities in very clear manner. All this needs to be done with a view to establish that imposition of a measure like Anti Dumping duty was very much required.

V. THE PRACTICE OF ZEROING VIS-A VIS DUMPING MARGIN

Article VI of the GATT and Article 2 of the Antidumping Agreement (AA) allows imposition of dumping duty only in the presence of a 'positive dumping margin'. Some countries consider 'negative dumping' margins as zero, which artificially bolsters the overall dumping margin- value.[25] In the EC – Bed Linen case[26], though the Appellate Body affirmed the practice of zeroing to be contradictory to the provisions of the AA, this practice continued as an impediment for free trade for a considerable time. Since, reports given by panels and the Appellate Body are not taken as precedents for future disputes, even with same factual matrix and issues involved. At most, the violating member can be required to discontinue the practice as a remedy for the violation as reparation aspect is absent in these matters. In both cases, WTO agreements provide scope to member countries to adopt diverse methods and practices, so as to further their ends, based even on non-genuine grounds.

VI. ESTABLISHING A CAUSAL LINK

Anti dumping measures can be resorted to only after establishing a causal link[27] between injury caused to the domestic industry and dumping of imported goods. It entails assessment of macroeconomic factors and ascertaining whether the dumping was a "principal cause" of the injury.

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[24] *Govt to impose anti-dumping duty on 36 products: Steel Secy*, Money Control (04/10/2016), available at http://www.moneycontrol.com/news/business/economy/govt-to-impose-anti-dumping-duty36-products-steel-secy-959367.html, last seen on 05/10/2016.

[25] *Supra* 7 at 186.

[26] European Communities – *'Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India'*, Appellate Body Report (WT/DS141/AB/R) of 1 March 2001.

[27] *Agfa Gevaert AG* v. *Designated Authority*, (2001) 130 ELT 741.

However, as it is quite clear that anti-dumping duties are capable of being established by merely showing the 'threat of injury', anti-dumping duties can be imposed even in the absence of the 'required link'.[28] Also, while ascertaining casual nexus, there is no indication in WTO:ADA and the Indian Legislative framework that specifies that whether dumped imports have to be the 'sole cause' of injury or 'predominant cause of injury' or will it suffice if the dumped imports can be termed as a cause(even with minimal intensity)?

In India, DGA generally sees towards the deterioration in the status of the domestic industry in comparison to the previous years. The deterioration can happen due to many other factors such as lack of the domestic companies to cope up in terms of technological advancement or the failure of the Government to devise structural adjustment policies to help the domestic firms in matching the lightening pace of globalization. Conclusion derived on the basis of the same seems to a far stretched idea of establishing a casual link which is bereft of merit in most of the cases.

VII. CONCLUDING REMARKS AND SUGGESTIONS

Making a nation self reliant is definitely one of the most important goals to ensure that the economy of a nation is immune from alien attacks which might not be the case in the long run if the nation is heavily dependent on imports. But, at the same time in this process of becoming self reliant a straight forward negation of imports without any qualifications can't be done. The key word to be kept in mind is 'qualifications'. It can be understood by taking an example of a situation where the goods are exported at a price which is not sustainable in the long run and that too because of dumping. It is in these situations artificial barriers are required to be imposed by a country and not otherwise. For example the way in which China has tried to devalue its currency i.e. Yuan, has put the Indian business under pressure. Also the gigantic mismatch between the demand and supply of steel within China in a way seems to have compelled them for dumping irrespective of fare cost. Indian producers don't have state intervention support like that of China and addition of heavy costs like that of electricity charges and buying of Iron ore at premium prices, makes it even more difficult for the Indian manufacturers. In this context it needs to be mentioned that JSPL had to cut the salaries of its employees by 10% and also the plans to add capacities were put to halt owing to pressure exerted due to alleged dumping of goods.

But this issue is not simple as diverse opinions have are possible on this issue. China is undoubtedly the leader in bringing the prices down, but is it

[28] *Supra* 10 at 317.

through dumping? What if ay upcoming investigation into Chinese domestic prices reveal that they are not selling at high price at domestic level and selling it at lower price in importing country. It needs to be mentioned that their steel plants are driven by low costs of production due to many factors. When they have surplus, they export it. In this case the possible justification might lie in the fact that in the interim period if the domestic industry gets hampered owing to cheap imports, it would be a herculean task start the industry anew. But, is this justification falling under the domain of trade remedy in the form of Anti Dumping? One of the major questions to be answered from the perspective of Anti dumping is: whether China's exported steel is cheap steel or dumped steel?

> *Imposition can not be justified only because it is cheap steel, rather it needs to be established it is state sustained, underpriced and unfairly traded steel.*

It is in the light of the above mentioned principle that some scholars put premium on the aspect of doing away with the Lesser duty rule. Realistic, robust and higher tariffs can be imposed which might work, especially when the dumping margin is high. But whatsoever the intent be, it needs to be kept in mind that trade defense instruments might not work for long term and these defense instruments are an answer for short term. It is imperative for a nation to keep itself abreast with lightening pace of technology and other advancements. An attempt to see these measures as panacea in all the situations exhibits the myopic vision and short termism approach.

Sometimes, innovators devise these constructive methods with the primary aim to protect their domestic producers against the global competitiveness. If such practices are not checked, it may lead to exploitation of the economic position of exporting countries.[29] It has the potential to seriously impact the overall trade[30] with a chilling effect.[31] Imposition of this

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[29] Previous researches show that antidumping investigations are often directed against countries that do not have the legal capacity to defend themselves, and that countries with low capabilities tend to forego challenges to anti-dumping duties due to the complexity of these disputes. See Marc Busch, Eric Reinhardt, & Gregory Shaffer, *Does Legal Capacity Matter? Explaining Patterns of Protectionism in the Shadow of WTO Litigation,* (unpublished working paper, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfn?abstract-id=1091435. Last seen on 25/2/2017.

[30] Anti-dumping provisions on stand alone basis can depress real income globally through higher prices since the "mutual threat of anti-dumping enforcement could stifle international competition and the abuse of discretion can further aggravate the situation. See Robert D. Willig, *'Economic Effects of Antidumping Policy',* (Robert Z. Lawrence ed., 1998), Brookings Trade F, p. 68.

[31] *See* K.D. Raju, *India's Involvement in Antidumping Cases in the First Decade of WTO, in 'Anti-Dumping: Global Abuse of a Trade Policy Instrument'* Academic Foundation, 37 (2007).

duty sends signals at pace in the market and companies anticipating the imposition at some occasions elect to restrict the exports or hike in prices. It is most likely to happen in respect of the nations who are regular users of anti dumping mechanism. Also these everyday occurrences can result in the invocation of retaliatory measures[32], which in a broader sense affects the customers.[33] It is because of these reasons; many scholars have said that although there are theoretical rationales for imposing anti-dumping duties, but these rationales are seldom present in circumstances where allegations of dumping are made.

> *If the other fellow sells cheaper than you, it is called "dumping"*[34]
>
> *Course, if you sell cheaper than him, that's "mass production."*

Anti Dumping is inherently considered as a protectionist measure and is one of the areas where W.T.O. does not allow the application of Grand Father Clause. In India's context, giving this kind of a responsibility to the bureaucratic authorities who do not have judicial powers seems to be a pressing concern. In addition to it investigation in relation to anti dumping is conducted by Directorate General of Anti-Dumping and allied duties (DGAD) with reference to establishment of dumping margin and determination of injury to the domestic market. In Indian context, hierarchical set up is such that the independence gets compromised in many cases, which calls for emulation of other models where two independent agencies deliberate over two areas like that of United States having Department of commerce and International Trade Commission.

Though, Judicial role in these matters has been appreciated due to their independence but this deliberation by these authorities at the level of CESTAT is a time consuming affair and hence the independence issue needs to be taken care of at the base level itself. Change within the system

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[32] For example, when the United States announced that it was placing tariffs on Chinese automobile tires under the W.T.O.'s safeguard provision, China announced only two days later that it would be initiating an anti-dumping investigation into whether exporters in the United States were dumping automobile and chicken products into China. See 'China Probes 'Dumping' of U.S. Auto, Chicken Products, (Bloomberg 2009), available at: http://www.bloomberg.com/apps/news?pid=20601087&sid=a7nGNZzouDOM, last seen on 27/03/2016.

[33] Consumers are harmed by the anti dumping duties, as they belong to a politically powerless group. See, Anti-dumping Action in The United States and Around the World: An Update, Cong. Budget Office xi (2001), available at http://www.cbo.gov/ftpdocs/28xx/doc2895/Antidumping.pdf, last seen on 01/03/2017. *See also* Douglas Nelson, '*The Political Economy of Antidumping: A Survey'*, 22, EUR. J. POL. ECON. 554, 577 (2006).

[34] Will Rogers, *quoted in* James Bovard, The Fair Trade Fraud 107 (1991).

is another way[35]. One of the ways in this regard is to embark on the journey of adjudication with a notion of inconsistency between the W.T.O.'s core principles and antidumping duties. Due to this notion, member countries get an impression that if the duties imposed by them are challenged and found unjustified, they will have to bear certain costs because of which they will think twice before imposing harsh duties without legitimate claims.

[35] *Supra* 2 at 69.

SURROGACY (REGULATION) BILL 2016- CRITICAL ANALYSIS & LEGITIMACY AND RIGHTS OF UNBORN CHILD

—*Shiren Panjolia*[*] *& Rowena Colette Dias*[**]

Abstract India is one of the largest markets of the surrogacy in the world. But the concern which hovered around was its unregulated market. There were many attempts by the government to regulate it by enacting certain rules and laws, for example- surrogacy guidelines by Indian Council of Medical Research (ICMR) and ART Bills 2008, 2010, and 2013. But the majority of these provisions do not come into effect, thus ended up escalating the already unregulated market of surrogacy. The cases of exploitation of both surrogate mothers as well as intending parents made the government to bring new Surrogacy (Regulation) Bill, 2016 to counter it. The Bill rather than regulating the surrogacy in India outright bans the commercial surrogacy in the country and brought it to catbird seat. To understand the complex issue of legal parents of the surrogate child, a comparison on the same has been made with other countries of the world.[1] *This paper also discusses the LGBTs issues with reference to surrogacy. In the last part, the authors have discussed the related topic of 'rights of the unborn child' and have brought out many anomalous provisions in this area. Throughout the paper. The authors have raised many substantive arguments on the topic and have also sprinkled some suggestions. The authors have attempted their very best to show how the stakeholders would get affected by all the developments.*[2]

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1 This paper would provide you with the critical analysis of the Surrogacy (Regulation) Bill, 2016 and also the different viewpoints on its legitimacy with reference to the Fundamental Rights enshrined in Indian Constitution.

2

I. INTRODUCTION

India is known as the "surrogacy hub" of the world. Infertile couples from every nook and corner of the world fly down to India to pay those willing to carry their embryos till birth. Throughout the years, surrogacy has ranged from opportunity to exploitation, i.e., from rural women being uplifted out of the poverty stricken slums to a futuristic nightmare of developing India into a baby farm. This medical practice which started as convenience grew into the "womb for rent" commercial business and later turned out to be a luxury, due to which exploitation of surrogates began. For this very reason, the government came up with the Surrogacy (Regulation) Bill, 2016 which prohibits and penalizes commercial surrogacy services to protect the dignity of Indian womanhood, prevent trafficking of human beings and to put an end to the business of selling surrogate child. The authors have provided you the critical analysis of the new Surrogacy (Regulation) Bill 2016 and also contains detailed analysis of the Bill with regard to its legitimacy in context to Fundamental rights enshrined in the Indian constitution from both proposition's and opposition's point of view. It is a strenuous task to determine whether the surrogates in India are exercising their personal rights or whether they are forced to get into this field in order to fulfil their material and financial needs. The authors have tried to bring the issue of status of legal parents in surrogacy in India as well as other countries. Matters pertaining to whether the surrogate mother or the intending parent has rights over the child have been discussed. The LGBT issue with reference to surrogacy highlighted in this paper shows how the Government's discriminatory laws have affected the minority by barring them from basic human rights. The status and condition of the unborn child has been critically discussed along with rights of unborn child and light is thrown onto whether the unborn or the surrogate has right to sue. This paper is a spark on whether the demarcation between citizens is made by the Government leading to division of the society into majority and minority. It puts to thought why a Government authorized to safeguard rights of all citizens equally, infringes the rights of the minority.

II. SURROGACY (REGULATION) BILL 2016

The Surrogacy (Regulation) Bill 2016, introduced in the Lok Sabha on 21st November 2016 by cabinet minister J.P. Nadda, Ministry of Health and Family Welfare, defines surrogacy as a practise whereby one woman bears and gives birth to a child with the intention of handling over the child to the intending couple after birth.

The bill bans or prohibits commercial surrogacy, including trade or purchase of human embryo or gametes or selling or buying or trading the

services of surrogate motherhood by way of payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her representative, except the medical expenses incurred during surrogacy and insurance coverage of the surrogate mother, and allows only altruistic surrogacy, which has no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative.

III. REGULATION OF SURROGACY

The Bill bans commercial surrogacy. Surrogacy and surrogacy procedures shall be used on the following conditions, when: either or both the intending couple suffers from proven infertility; it's for altruistic purposes; it's not for commercial purposes like producing children for sale or prostitution, or any other form of exploitation; suffering from any other condition or disease

A. Eligibility Criteria

The Bill has strict eligibility criteria for intending parents and surrogates differently, without which no surrogacy procedures shall be undertaken or initiated by surrogacy clinics.

i. Eligibility criteria for Intending Parents:

- They should possess the 'certificate of essentiality', issued by appropriate authority upon fulfilment of the following conditions: (i) a certificate of proven infertility favouring the intending couple from a District Medical Board (ii) an order concerning parentage and custody of the surrogate child passed by the Magistrate Court (iii) an insurance coverage favouring the surrogate mother from a recognised insurance company.

- They should possess an 'eligibility certificate', issued by appropriate authority upon fulfilment of following conditions: (i) age of the intending couple should be between 23-50 for females and 26-55 for males; (ii) the intending couple is married for at least 5 years and are Indian citizens; (iii) they have not had a child either biological or adopted or through surrogacy earlier.

- There is an exception for intending couples having a child who is mentally or physically challenged or suffers from life threatening disorders

or fatal illness with no permanent cure and is approved by appropriate authority with due medical certificate from a District Medical Board.

ii. Eligibility criteria for Surrogates

Surrogate mothers should possess an 'eligibility certificate' issued by the appropriate authority upon fulfilment of following conditions: (i) should be an ever married woman having a child of her own; (ii) should be between 25 to 35 years old; (iii) shall be a close relative of intending parents; (iv) be a surrogate once in her life time; (v) shall possess a certificate of medical and psychological fitness for surrogacy procedure.

There is a prohibition on encouraging the surrogate mothers to conduct the surrogacy procedures on her. If surrogate mother seeks or conduct surrogacy, the practitioners has to explain all known side effects and after effects of the procedure and possess a written informed consent of her. The intending couple cannot abandon any surrogate child irrespective of his nationality for any reason e.g. Genetic defect, more than one baby etc.

B. Registration of Surrogacy Clinic

Surrogacy clinics should possess 'certificate of registration' issued by the appropriate authority for surrogacy services or related procedure. Clinics shall within a period of sixty days apply for registration. They can be registered only when the appropriate authority is satisfied that available necessary equipment and maintenance of standards including specialised manpower and infrastructure and diagnostic facilities.

C. Appropriate Authority

Both Central and State Government shall within the period of ninety days from the date of commencement of the Act appoint one or more appropriate authorities, whose functions are: (i) granting or suspending registration of surrogacy clinic; (ii) investigating and taking action against the complaints of breach of this Act; (iii) supervising the implementations of provisions of this Act; (iv) enforcing standards for surrogacy; (v) recommending modifications of rules and regulations.

i. Commission of National and State Surrogacy Board

The Central and State Government shall constitute the National Surrogacy Board and the State Surrogacy Board respectively, consisting personalities from various fields and profession for a term of office of three years. The Board shall meet at least once in six months. They

can be disqualified for misbehaviour or incapacity by an order of the Central Government. The Functions of Board are: (i) to advise the Central Government of policy matters related to surrogacy; (ii) to monitor the implementation of the Act, rules and regulations; (iii) to oversee and regulate performance of various bodies constituted under the Act; (iv) to lay down the code of conduct for surrogacy clinics;(v) to supervise functions of the State Surrogacy Boards.

ii. Offences and Penalties

The Bill declared the following as offences: (i) undertaking commercial Surrogacy; (ii) advertising surrogacy; (iii) abandoning and exploiting surrogate children; (iv) exploiting surrogate mothers; (v) selling and importing human embryo and gamete for surrogacy or illegal purposes. Contravention of these provisions is a punishable offence with imprisonment for a term not less than 10 years and fine up to 10 lakhs.

Initiation of commercial surrogacy is punishable with imprisonment of not less than five years with a fine of five lakh rupees for first offence and for any subsequent offence with imprisonment of ten years with fine of ten lakh rupees.

Notwithstanding anything in the Code of Criminal Procedure, 1973, every offence under this Act shall be cognizable, non-bailable, and non-compoundable.

The surrogacy clinic shall maintain all records, charts, forms, reports, consent letter, agreements and all the documents under this Act and preserve it for a period of twenty-five years of such period.

IV. LEGITIMACY OF THE SURROGACY (REGULATION) BILL 2016

The Bill has been presented from both proposition and opposition point of view reflecting how it affects its stake-holders' Fundamental Rights enshrined in the Indian Constitution.

A. Proposition's view – in favour of the Bill

The Surrogacy (Regulation) Bill, 2016 bans or disqualifies gay couples, single parents, foreigners, NRIs, PIOs, live-in partners, couples with a child either biological or adopted or through surrogacy. The equality in Article 14 does not speak of formal equality before the law, but it embodies the concept of real and substantive equality which strikes at the inequalities arising

on account of the vast social and economic differentiation.[3] The intending parents are mostly people ready to invest a lot of money in surrogacy and are in better position to exploit surrogates. State has the duty to prevent the exploitation and ban it in the interest of the welfare of the surrogates.

The ascertainment of nationality and citizenship pose to be legal hurdle endangering the child, as many countries outlaw surrogacy and doesn't recognize surrogate children, thereby leaving the child in limbo. For example, *Jan Balaz v. Anand Municipality*[4] (German Couple case), Israeli Gay Couple case[5] and *Baby Manji Yamada v. Union of India*[6] (Japanese baby case).

It is virtually uncontested fact that children fares best when they are raised at home with their biological parents and there is ample evidence that traditional family conditions are the best for children. The law making bodies have legitimate interest and authority in passing laws and restrictions to provide the best atmosphere for children with married biological parents.

The provision stating only married mother with at least one baby to be a surrogate mother is for the welfare of the women and to prevent the commoditisation of the body. Single women lack familial support and are prone to exploitation. The National Commission for women has recommended that surrogates should be married and have children. The surrogate must have a medically proven fertility. If she has not given birth before, she might be unaware about what to expect out of a pregnancy and find it hard to cope up with the pregnancy process.[7]

The bill does not violate freedom of trade as ART clinics act as a middleman between commissioning parents and surrogate mothers and charge a huge fee for their services. Surrogates are usually poor illiterates who are not aware of their rights and often get exploited by getting a less fraction of the actual money.

The Bill is in accordance with the right to life and right against exploitation. Surrogacy recognises women as a commodity, providing an "endocrinological vehicle" for performing a "gestational role". The stakes are very high and are not paid for any mishaps. The surrogacy business is estimated

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3 *Haryana SEB v. Suresh*, (1999) 3 SCC 601 : AIR 1999 SC 1160.

4 *Jan Balaz* v. *Anand Municipality*, 2009 SCC OnLine Guj 10446 : AIR 2010 Guj 21.

5 Anil Malhotra, *Ending Discrimination In Surrogacy Laws, The Hindu* (May 03, 2014, 01:04 AM), available at http://www.thehindu.com/opinion/op-ed/Ending-discrimination-in-surrogacy-laws/article11640850.ece.

6 *Baby Manji Yamada* v. *Union of India*, (2008) 13 SCC 518 : AIR 2009 SC 84.

7 Center for Social Research, *Surrogate Motherhood: Ethical Or Commercial*, National Commission for Women, available at http://ncw.nic.in/pdfReports/Surrogacy_Report_CSR.pdf.

to be more than USD 2.3 Billion[8]. There exists no legal framework to regulate surrogacy and the affected child's life. It can be assumed that the surrogate mother can be qualified as forced labour which is one of the criteria of exploitation as they do it out of necessity or vulnerability.

B. Opposition's view – not in favour of the Bill

The Surrogacy (Regulation) Bill 2016 violates Right to Equality as the provisions of the bill restricts providing of surrogacy treatment to foreign nationals, NRIs, PIOs, single parents, gay couples, live-in partners and couples with adopted or biological child. This shows that there is no intelligible differentia[9] between Indian commissioning parents and foreign couples who are placed in a disadvantaged position of being unable to conceive naturally and seek to artificial remedy it by taking optimal use of technological advancements, as regulation is difficult and complications arise in recognition of legal status of transnational surrogate child. The citizenship and nationality issue arises in a situation where Indian commissioning parents seek to migrate along with the surrogate child to a country not recognizing surrogacy. The rights and welfare of the surrogate mother can be infringed when she is denied remuneration for complications arising during or after her surrogacy. It is unfair to deny benefits of parenthood through surrogacy to the disqualified when the government has allowed the adoption process to them. Even in Juvenile Justice (Care and Protection of Children) Act 2015 a child can be adopted by foreign countries irrespective of marital status too.

This Bill violates Right to Freedom of Speech and Expression. A woman has the right and power to enter into the contract of commercial surrogacy, as she has the right decide how her body is to be used. This right is always read with self-determination and personal liberty.

The Bill violates right to practise any profession or to carry on any occupation, trade or business, as the restriction imposed does not have direct nexus with the object of the legislation due to the reasons mentioned aforesaid. It will cause the ART clinics to suffer immensely as commercial surrogacy ban would lose their all clients.

The bill violates Right to Life of the Indians and foreign nationals discriminated from availing surrogacy services. The Right to procreation is a basic right[10] and the right to life enshrines the right of reproductive autonomy and parenthood, which is not within the domain of state power. It is prerogative of persons to have a child born naturally or by surrogacy.

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8 Sanjeev Sirohi, *Surrogacy Laws in India*, Yojana (November 01, 2013), available at http://yojana.gov.in/surrogacy-laws-in-india.asp.

9 *State of W.B. v. Anwar Ali Sarkar*, AIR 1952 SC 75.

10 *B.K. Parthasarathi* v. *Govt. of A.P.*, 1999 SCC OnLine AP 514 : AIR 2000 AP 156.

The bill violates the Right to freedom of religion. Hinduism, being largest religion by population in India, speaks that one is blessed to have children and infertile women are socially ostracized and are considered inauspicious[11]. Children are necessary to perform *samaskaras* to ensure that their parents attain *moksha*. This bill which disqualifies people on the basis on nationality, sex, marriage etc. from having children when science and technology permits is flagrant violation of her right to religion.

The Bill violates Right to Exploitation, as the poor gets attracted to it just for the money it offers. There are many other jobs or professions where the poor gets attracted by the money offered like pharmaceutical trials, but it does not make those contracts invalid. Therefore, it would not be held in violation of Art. 23 as they are being paid.

V. LEGAL PARENTS – STATUS IN DIFFERENT COUNTRIES

Is the definition of a parent somebody who takes the decision to have a baby with someone or someone who cares and nourishes child throughout the child's life or someone that the biological or legal parents asks or invites to become a parent?

With the growth in technology and surrogacy, these simple questions have grown into complex issues. Parent meant inclusion of male and female's union is no longer the same as there arose new categories like gay couple or lesbian couple. With the concept of civil partnership one can experience a married life without even marriage. So the traditional kinship system of marriage and parenthood has undergone a drastic change.

Every country has laws which determine who are the actual or legal parents. In India, the Surrogacy (Regulation) Bill 2016 determines the intending couple as the legal parent or guardian of the surrogate child. The intending couple can take possession of the child just after birth as they are legal parents since birth. But this is not same in all countries. By comparing laws of other countries an analysis has been drawn on the position of legal guardian in other countries.

In United Kingdom, the surrogate mother is the legal guardian or parent of the child upon birth. Transfer of guardianship is done through adoption if the intending parents are genetically related to the surrogate baby, if not, transfer of guardianship happens through court order. The intending parent has to complete the 'SPP Consent to being legal parent in surrogacy form.'

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[11] Julius Eggeling, *Satapatha Brahmana: Grihya Sutras*, Sacred Text, available at http://www.sacred-texts.com/hin/.

whereas, the surrogate has to complete the 'SWP consent (as a surrogate) nominating an intended parent to be the legal parent' form.'[12] These consents are required prior to egg, sperm and embryo transfer. Only after these considerations the child is handed over to the intending parents.

In Netherlands, the legal guardian of surrogate child is the surrogate mother. Transfer of guardianship to intending parents is through adoption, irrespective whether genetically related or not.

In South Africa, the intending parents, single parent or a couple are considered as the legal guardian of the surrogate child. The same is followed in Greece.

In Russia, rules regarding legal guardianship are an amalgamation of all. The first situation is that the surrogate mother is the legal guardian of the surrogate child if she has provided her egg for the surrogacy. The second being, the intending parents are the legal guardian of the surrogate child if the surrogate has not provided her egg for the surrogacy.

VI. LGBT ISSUES W.R.T. SURROGACY

> *It cannot be forgotten that discrimination is the antithesis of equality and that it is the recognition of equality which will foster dignity of the very individual.*

The medical costs associated with surrogacy in Indian clinics are lower as compared to many other countries and thereby turning into a very popular destination for prospective lesbian and gay parents. However, according to new laws, singles and gay couples will no longer be able to seek a surrogate mother in India.

Lesbian, gay and bisexual rights have always been minimal in India. Consensual sex between two gay men was illegal up until 2009 and gay marriage continues to be illegal[13]. The Supreme Court is sitting on a review petition on S. 377 of the IPC, pertaining to the status of gay rights, but, no clear legal stand on the issue has emerged. Therefore, if legal rights are conferred to a surrogate child of gay parents, it would itself endanger the rights of the surrogate child.

The controversy around The Surrogacy (Regulation) Bill 2016 in India highlights a number of considerations for lesbian, gay and bisexual

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[12] HFEA, *Legal Parenthood And Surrogacy Parenthood Consent Form Guide*, Human Fertilisation and Embryology Authority (November 19, 2013), available at http://www.hfea.gov.uk/docs/Legal_parenthood_and_surrogacy_parenthood_consent_form_guide.pdf.

[13] Sec. 377, Unnatural Offences, Act No. 45 of 1860, Pen. Code (1860).

individuals and couples. Accordingly only married couples are allowed to opt for surrogacy and gays, single, live-in couples are barred from doing so. This is the first time that the government's transparent homophobia for LGBT community has come out open to the public's eyes. India's External Affair Minister very clearly stated that surrogacy for a homosexual is against "Indian ethos", although homosexuality has been constantly mentioned in various Indian texts. Though this ban could be construed as a mere following of the law i.e. Section 377 against "unnatural" intercourse.

The bill would violate citizens' Fundamental Rights as enshrined in the Indian Constitution by not allowing surrogacy for certain classes of citizens on the basis of their lifestyle, sexual orientation, and marital life. This highlights how restrictions to our human rights in our own country of origin can also influence rights of other country citizens and the intricacies faced by people in wishing to have a child. Our role in changing or perpetuating global inequities for ourselves and others is put to doubt and makes it questionable. A democratic, universalistic, caring and inspirationally egalitarian society embraces everyone and accepts people for and as who they are. The acknowledgement and acceptance of difference is important is to unite our diverse country.

For gays who want to parent a genetically-related child, like any other normal parent, surrogacy may be their only hope. The new laws have been mocked for being illiberal and discriminatory while imposing the 'Bharatmata' brand of values on citizens. There are many a times instances where lesbian and gay-identifying individuals and couples make good parents, and thus it is unclear and ambiguous as to how these new laws are in the best interest of any potential child. The government banned adoption to the LGBT community on the ground of protection of every child. It was held in *Minister of Home Affairs* v. *Fourie*[14] that it is fundamentally a matter of equality when it comes to extending the benefits of marriage to same-sex partners. Our Constitution throws light on how it causes a radical rupture which is based on intolerance and exclusion and the movement forward to the acceptance of the need can be developed by a society based on equality and respect for all by all.

Those against legalizing homosexuality argue that such a practice is against the moral values of the society. What is forbidden in the religion need not be necessarily prohibited by law as morality cannot be a ground to restrict the fundamental rights given to the citizens. A legal wrong is necessarily a moral wrong but not vice versa because a moral wrong becomes a legal wrong only when its consequences are for the society and not just for the person/s committing it. Citizens have been guaranteed the right to

[14] *Minister of Home Affairs* v. *Fourie*, 2005 SCC OnLine ZACC 20 : (2006) 1 SA 524.

privacy and state has no right to regulate their preferences and behaviour and thereby causing barriers. Slowly but steadily, the government is show casing a truth which was hidden all this while within its laws, rules and regulations: homophobia, discrimination towards non-heteronormative relationships, and a paternalistic enforcement of cultural norms. Since reproductive rights, including the right to parent, are truly human rights, they should be universally assured.

VII. RIGHTS OF THE UNBORN CHILD

> *"*I feel that the greatest destroyer of peace today is abortion, because it is a war against the child, a direct killing of the innocent child, murder by the mother herself.*"*
>
> —MOTHER TERESA

It is necessary to criminalize all conducts which injures or causes death of an unborn child, so that the unborn is protected from conception until birth. From the very moment of conception, the foetus is regarded as human being and should be protected by the right to live as a human being. Each unborn children is to be considered as a 'person', only then, can any tortuous act committed against him/her, it will be recognized and made punishable. The rights of an unborn child are recognized in various different legal contexts. The problem is whether unborn foetus or a child in the mothers' womb are legal persons or not?[15]

In order to b ranked as a person in law, a natural person must be a living human being, i.e., must not be a monster and must be born alive, an infant *en ventre sa mere* (child in womb), who is supposed to be born for many purposes is an exception. A child in its mother's womb can acquire certain rights and inherit property, but the rights granted are contingent on his being born alive. He/she is counted as a person when it comes to the matters of partition. Such a child can claim for any damages of injury sustained while in its mother's womb.

The question highlighted is whether the infant is a distinct person from the mother and whether the mother or unborn has right to sue. Whenever a child is born at an advanced pre- natal age, the child will always have chances to live separate from its mother, such a child has a right of action for any injuries wantonly or negligently inflicted while in its mother's womb. Any time before this stage, the child is clearly only a part of its mother[16].

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[15] *Bennett* v. *Hymers*, 101 NH 483 (1958).

[16] *Allaire* v. *St. Luke's Hospital*, D. Neb. Gen. R. 56. 638, 640 (NeGenR).

When the unborn child is treated as a human being, it would be entitled to certain rights, which includes the right to life. The right to life implies a correlative duty in every human being not to take the life of the unborn child, except in a case where the child commits aggression against the life of another person or where the continued life of the child and the continued life of another person are mutually incompatible due to the existential circumstances. An unborn child aged five months onwards in mother's womb till its birth is treated equal to a child in existence. The unborn child to whom the live birth never comes is held to be a 'person' who can be the subject matter of an action for damages for his death. The foetus is basically a loss of child in the offing[17]. The criminal law speaks about causing death of foetus, which is held to be an offence under Sections 312 to 316 of the Indian Penal Code.

The law of property considers the unborn child as a human being for all purposes which are to its benefit, be it will or descent. Section 5 of the Transfer of Property Act mentions clearly that a property can only to be transferred to a living person, and Sections 13, 14 and 18 of the Act deals with laws to transfer property for the benefit of the unborn child. It says, to transfer property to an unborn child, a prior "interest" has to be created, meaning that a trustee has to be appointed for the benefit of the yet-to-be-born child. This "interest" must contain the whole of the remaining interest in the property of the person who desires to transfer the property, or else, the transfer will not take effect. Section 13 says that a direct transfer cannot take place to a person who is not in existence on the date of the transfer. It is for this very reason that the Section uses the expression "for the benefit of" and not "transfer to an unborn person".

A child in womb will inherit only if the child was conceived at the time of death of the intestate and the child is born alive subsequently, whereby the child will inherit in the same manner as if he were born before the death of the intestate[18]. Any child, male or female who is in mother's womb at the time of death of the intestate will be deemed to have come in existence in the eyes of law and after his birth will divest any person of the property which temporarily had been vested in such person during his absence. The creation of proprietary rights in favour of unborn persons is governed by the rule against perpetuity, meaning that one cannot postpone vesting of an estate beyond a longer period than the lifetime of the transferee or transferees existing at the date of the transfer and the minority of the ultimate unborn beneficiary.

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[17] *Prakash* v. *Arun Kumar Saini*, 2010 SCC OnLine Del 478 : 2010 ACJ 2184.

[18] Sec. 20, Hindu Succession Act, 1956, No. 30, Acts of Parliament, 1956 (India).

The Indian laws are silent on the rights on an unborn surrogate child. The child starts acquiring his/her legal rights only after birth and mostly while with the intended parents.

The Supreme Court has said that the right to privacy is implicit in Article 21 of the Constitution and the right to abortion can be read from this right. Abortion may be classified into various categories depending upon the nature and circumstances under which it occurs, i.e. natural, accidental, spontaneous, artificial or induced abortion. Abortions falling under the first three categories are not punishable, while induced abortion is criminal unless exempted under the laws of the country. Indian laws specify up to which period pregnancy could be terminated i.e. up to twenty weeks of pregnancy, the termination of pregnancy could be done only by a qualified registered medical practitioner and only in a place established, maintained or approved by the Government[19]. The framers of the Code have been silent on the word 'abortion', in S.312, which relates to an unlawful termination of pregnancy. This section speaks of a woman who causes herself to miscarry leading to imprisonment and pecuniary charges. Ss. 313 to 316 speaks of different kinds of activities leading to abortion and which are punishable under IPC. "This law guarantees the Right of Women in India to terminate an unintended pregnancy by a registered medical practitioner in a hospital established or maintained by the Government or a place being approved for the purpose of this Act by the Government. Thus, not all pregnancies could be terminated.

A surrogate has all the rights to ask monetary compensation from the intended parents while carrying the child, but has no legal right over the child under Indian laws.

The people in support of the mother's right to sue states that although the unborn are part of the species Homo sapiens, and in that sense are humans, they are not truly persons since they fail to fulfil a particular set of necessary personhood criteria. And those in support of the unborn are right to sue states that a person who has the natural inherent capacity to give rise to human functions is a fully human entity. And since an unborn entity typically has this natural inherent capacity, he or she is to be called and considered as a person. In India the hoards of policies and schemes for the welfare of pregnant women and unborn are conceptualized and implemented by the government. The intention behind such schemes is to ensure protection to the pregnant women so that she is able to carry her child to term in a safe and healthy environment. As a natural culmination of this effort, it is only logical that not only the pregnant women but also the unborn be legally

[19] Sec. 3 (2) (b), Medical Termination of Pregnancy Act, 1971, No. 34, Acts of Parliament, 1971 (India).

protected, and perpetrators of crimes/torts against unborn children be held accountable for their acts in law.

VIII. CONCLUSION

The controversial Surrogacy (Regulation) Bill 2016 has been brought in order to prevent exploitation and bring in a social change. The Bill bans commercial surrogacy outright, rather than regulating it and disqualifies many people from surrogacy, which in turn is a violation of their basic rights that should be enjoyed by all. While taking this step, the Government has failed to realize the fact that, this may lead to increase in trafficking of surrogates along with the mushrooming of illegal ART clinics. On one hand the government brings in restriction in the name of protection and well-being of people and on the other hand it is causing unreasonable restriction to those who have a genuine reason to opt for surrogacy. The restriction imposed not only takes away the rights of those seeking services from surrogate mothers i.e. intending couples, but also to surrogate mothers who earn living through surrogacy and to ART clinics which can help in surrogacy contracts. This Bill has brought out the discriminatory nature of the Government to light and has proved how the Government has infringed upon the rights of its own citizens and the citizens of other countries. The LGBTs being barred from both surrogacy and adoption, are deprived the right to procreation, thereby making the Bill discriminatory to them. When one keeps traditional values and believes along with ethical and moral standards, as the foundation rock in framing laws, it leads to a situation where the laws are meant only for the majority and the minority has neither any say nor any rights. There is no rationale given behind allowing only biological parents or hetero-sexual couples to raise children by surrogacy and the belief that only biological parents or hetero-sexual couples are good parents is unfounded, untested, and illogical. A blindfold belief has taken away the dreams of LGBTs and singles to become a good parent or at least parents.

The creator of anything has few guaranteed rights over its invention, and so should a parent have rights over his/her child. The right to legally terminate one's child is to be given to the intending parents, whereby the time limit of abortion is to be liberalized to 24 weeks instead of 20, but there should be a categorical list of congenital anomalies for abortion. Anything that is being developed or has been developed has to be granted rights for its sustained development or further growth. In order to protect the unborn child from conception until birth, it is necessary to criminalize all conducts which leads to injures or death of the child. Thus, by measuring all pros and cons, we come to such a conclusion that the present situation is such that the Bill is doing more harm rather good to all the stakeholders.

E-WASTE IN INDIA: WHO GETS THE TRASH?

—*Ayushi Sinha*[*] *& Satya Vrat Yadav*[**]

Abstract *If you feel that your laptop has attained the highest degree of product obsolescence, it is perfectly normal for you to replace it. But if you plan to toss it into the dustbin, you need to think twice. It goes without saying that the fruits of the developments in the field of information and technology are nothing less than spectacular, having changed the lifestyle of millions. At the same time, these have unconsciously given birth to multitudinous hitches in the form of production of hazardous wastes electrical and electronic equipment, all over the world. These "Electronic wastes" or "E-wastes" are categorized as anything that running on batteries, utilizing electricity to function. These E-wastes on being released contain humongous amounts of toxins, which carry the potential of causing environmental pollution. The E-wastes of developed countries are shipped into the developing countries in the name of free trade, for the fact because the underdeveloped countries do not have the requisite infrastructure and technical know how to handle the ever growing perils of E-waste.*[1] *Many bodies of organizations have adopted various strategies to eradicate the menace of E-waste and come up with challenges and perspectives, but are these only on paper? Indian governmental intervention to implement the legislations is the need of the hour today. More so, recycling the E-wastes is the pressing exigency because they serve as purposeful raw materials for future production of electronic equipment.*

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[1] This proves to be a cheap, cost-effective mechanism to get rid of E-waste unlike in the developed countries which find it an expensive proposition to dispose E-waste legally.

I. INTRODUCTION

It goes without saying that the fruits of the developments in the field of information and technology are nothing less than spectacular, having changed the lifestyle of millions. At the same time, these have unconsciously given birth to multitudinous hitches in the form of production of hazardous wastes electrical and electronic equipment, all of this at an ethical cost. These "Electronic wastes" or "E-wastes" are categorized as anything that running on batteries, utilizing electricity to function. These E-wastes on being released contain humongous amounts of toxins, which carry the potential of causing environmental pollution. These contain toxic as well as useful materials. The fraction including iron, copper, aluminium, gold and other metals in e-waste is over 60%, while plastic account for about 30% and the hazardous pollutants comprise only about 2.70%[2]. The E-wastes of developed countries are shipped into the developing countries in the name of free trade[3], for the fact because the underdeveloped countries do not have the requisite infrastructure and technical know how to handle the ever growing perils of E-waste. This claims to be the primary source of computer wastes in India. This proves to be a cheap, cost-effective mechanism to get rid of E-waste unlike in the developed countries which find it an expensive proposition to dispose E-waste legally. According to the report on the Indian IT sector, Radha Gopalan[4] said, "*the rate of obsolescence of computers in India is 2% per week, i.e., in 50 weeks- time the value of the computer is effectively zero*." Also, recent research has exhibited that United States possesses the fastest growing municipal waste stream.[5]

II. E-WASTE: THE INDIAN SCENARIO

The approximations carried out by WEEE task force speak that the total E-waste generation in India stands at about 1,46,000 tonnes per year.[6]The IT expertise along with the eye for business, generate tonnes of hazardous wastes, left to gather dust which are accidently discovered by children hunting for food. Recent findings of the worldwide research institute in e-waste,

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2 Widmer R., Heidi Oswald-Krapf, Deepali Sinha-Khetriwal, Max Schnellmann, Heinz Bo¨ni, *Global Perspectives on E-waste*, Environmental Impact Assessment Review 25 436– 458, 2005.

3 *E-Waste in Chennai Time is running out*, Toxics Link, 2004, available at http://toxicslink.org/docs/06033_reptchen.pdf (last accessed 20th August 2016).

4 Radha Gopalan, "A Study on the Indian IT Sector", 2002, available at www.nautilus.org (last accessed on 22nd August 2016).

5 *Facts and Figures on E-waste and Recycling*, Electronics Takeback Coalition, July 24, 2013, available at http://www.electronicstakeback.com/wpcontent/uploads/Facts_and_Figures.

6 Wath S. et al., *A roadmap for development of sustainable E-waste management system in India*, Sci. Total Environ. 409:19-32, 2010.

"United Nations University"[7] show that amount of global waste has reached 41.8 million tonnes in 2014, clinching the 5th position[8] only behind the U.S, China, Japan and Germany. This included 16,500 kilotons of iron, 1,900 kilotons of copper, and 300 tonnes of gold and also valid amounts of silver, aluminium, palladium, and other potentially reusable resources, the estimated value of which is US$52 billion.[9] One-third of this waste was primarily generated by the US and China alone. The developed nations ship the huge amount of E-waste to the developing Asian countries because the cost of treatment supersedes the cost of shipment to these countries, hence proving to be a relatively cheaper recourse. The issue faced is that in India, for example, everything from collection to segregation is done by unorganized sectors. Owing to the lack of efficient techniques and adequate infrastructure, the modus operandi is manual. Many a times there occurs the illegal export of "non-functional goods" instead of "used goods". This report[10] has it that India turns out to be the prime terminus for European waste Hundreds of companies send unwanted electronics to plant industries every day, and from those they recover plastics, copper, steel and sometimes, even gold! Bangalore, known as the IT hub generates waste of about 20,000 tonnes of E-waste per year[11] according to a report by ASSOCHAM[12]. But, it is not just companies that generate E-wastes. India has million mobile phone users and it is the fastest growing smartphone market in the world. The sale of other electronic items is rising by 15% every year. So start-ups buy used gadgets from people, check to make sure that they are working, fixing them if they are not and then re-selling the items to other consumers. There is an enormous opportunity view in going forward-by not just enabling people to resell their gadgets but also providing certified gadgets. This in turn has a dual role play- extending the life cycle of the gadgets itself as well as preventing e-waste from accumulating. If we just look around, we can be sure to find computers, keyboards, television sets, headphones and of course, mobile handsets. At some point of time, all of these will be thrown

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7 *The Global E-Waste Monitor 2014: Quantities, Flows and Resources (2014)*, United Nations University, available at http://i.unu.edu/media/ias.unu.edu-en/news/7916/Global-E-waste-Monitor-2014-small.pdf (last accessed 23rd August 2016).

8 *India: The Fifth Biggest Generator of E-waste in 2014*, The Hindu, April 20, 2015, available athttp://www.thehindu.com/todays-paper/tp-national/india-fifth-biggest-generator-of-ewaste-in-2014-un-report/article7120245.ece (last accessed 23rd August 2016).

9 United Nations University, *The Global E-Waste Monitor 2014: Quantities, Flows and Resources (2014).*

10 United Nations Environment Programme (UNEP), available at http://www.unep.org/environmentalgovernance/Portals/8/documents/rra-wastecrime.pdf (last accessed 24th August 2016).

11 Leah Borromeo, *India's E-waste burden*, The Guardian, October 11, 2013, available at http://www.theguardian.com/sustainable-business/india-it-electronic-waste (last accessed on 22nd August 2016).

12 Available at http://www.assocham.org/publications/genpub.php (last accessed 20th August 2016).

away. Now in 2011, India created rules[13] for safe recycling of things like these. But today, 90% of the country's electronic waste is not disposed of properly. Instead, it is dealt with a large number of unorganized industries that mostly operate from slums and smaller-towns in major cities. Today gadget makers are responsible to what happens to items when they are no longer wanted. And while most big manufacturers have set up systems to collect items, few people are still aware of how to dispose of E-wastes, and so, only a very small fraction of India's E-waste is at present being channelled to safe recycling plants which work with companies, a problem that India surely needs to fix.

A. Impact Of E-Waste

A population of 1.2 billion combined with one of the 118 signatories to the Basel Convention, India has to be responsible. It is known that E-waste consists of hazardous elements, and most of these hazards are given birth due to inefficient recycling and disposal techniques.[14] Though there is no specific regulation that addresses the issue of E-waste, most of them find recourse within the purview of "the Hazardous and Waste Management Rules, 2008". In the light of this regulation, the E-wastes are not treated as wastes unless they are proved to be hazards of the highest order. Often due to extremely inadequate level of efficiency and expertise in India, the wastes end up in the hands of the informal sector which operate manually and hence, no special attention is given to the mode of disposal. The toll this takes on the health and environment is very critical, amounting to chronicle ailments[15]. It might not be known, but E-waste contains toxic substances such as Lead and Cadmium in circuit boards; lead oxide and Cadmium in monitor Cathode Ray Tubes (CRTs) Mercury in switches and flat screen monitors; Cadmium in computer batteries; polychlorinated biphenyls (PCBs) in older capacitors and transformers; and brominated flame retardants on printed circuit boards, plastic casing, cables and polyvinyl chloride (PVC) cable insulation that release highly toxic dioxins and furans when burned to retrieve Copper from the wires.[16] If the system of landfills is used, it will lead to the leaching of lead into groundwater, some nations already have forbidden this practice. The CRT emits toxic fumes if burned into the air.[17] Incineration seems to be a process of easy disposal, but has its devastating implications due to the release of toxic materials.

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[13] *Central Pollution Control Board*, 'Implementation of E-waste Rules 2011'.

[14] E-Waste Guide, available from www.ewaste.in (last accessed on 24th August 2016).

[15] B. Wath, Sushant, *E-waste scenario in India: Its management and Implications*, Environmental Monitoring And Assessment, Vol. 172, Issue 1, January, 2010.

[16] Dr. B.J. Mohite, *Issues and Strategies in Managing E-Waste in India*, Indian Journal Of Research In Management, Business And Social Sciences (IJRMBSS), Vol. 1, Issue 1, March, 2013.

[17] Joseph, Kurian, *Electronic Waste Management in India: Issues and Strategies*, Eleventh International Waste Management And Landfill Symposium, Sardinia, 2007.

The concept of reuse seems to be in vogue because it is for this purpose that second hand electronic goods are shipped from the developed nations to the developing nations. The limitation lies in the fact that using the second hand goods poses a threat to the people living in the vicinity, which further can be made available to the nearby factories. Via recycling, the problem of cost effectiveness finds recourse because this demands the lowest cost in the developing nations. To the workers doing it, this is a critical risk to their health. Reducing the use of power to save the life of electronics could be seen as a viable option, lest it remains only on paper.

III. IMPORT OF E-WASTE

It's quite clear by now that, India is one of the biggest dumping grounds of the electronic waste in the world for the e-waste of the developed giants. To tackle the alarming impact of the hazardous waste, a parliamentary panel has recommended curbing the practice through an effective legislation. There are a plethora of reports which address the issue of e-wastes and majority of them are of stands point that, wastes are being shipped to developing countries in Asia, Africa and Latin America from developed nations under the garb of "used goods" to pass on the hazards associated with it and to "avoid" the cost of legitimate recycling[18].

It's quite distressful to note from environmental aspect that, India is amongst worlds one of the largest importers of the waste like lead waste and scrap, used batteries, electronic and plastic waste etc. This has devastative impact on the public health and environment.

E-waste rules of 2011, clearly lay down that, every producer, distributor collection center, refurbished, dismantler, recycler, consumer or bulk consumer shall not import used electrical and electronic equipment or components in India for use unless it is imported for the purpose of repair or refurbishment or to fulfil obligations under the Extended Producer Responsibility (EPR)[19]. Among all the ports, Mumbai Port and Jawaharlal Nehru port are most junk effected ports of the country. The e-waste trade is a thriving business in India with cities like Dubai and Singapore serving as a trade route. E-waste from Australia, North America, South Korea and Japan is received in Singapore and dispatched again to the importing Asian countries including India.

India has been labelled as one of the largest e-waste generators in the Asia. More than 90% of the e-waste generated ends up in the unorganized

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[18] *E-waste in India increasing at an alarming rate*, The Hindu Business Line, (May 3, 2015) available at http://www.thehindubusinessline.com/news/ewaste-in-india-increasing-at-alarming-rate/article7167129.ece (last accessed on 24th August 2016).

[19] E-Waste Rules, Rule 16, 2011.

market of the country. A study by the Basel Action Network (BAN) in partnership with the Toxic Link reveals that e-waste is received and processed in India in similar manner as is done in China, or the condition could be even worse[20].

E-waste as provide cheap raw material, has many people advocating in its favour. One of such comment was made by Late President of India Dr. A.P.J. Abdul Kalam who commented that, "with metal prices rising, recycling will help in sustaining our economy as it is much cheaper than extracting metals from its ore".[21]

IV. LAWS GOVERNING E-WASTE

There have been number of convention which discussed about the issue hazardous waste and its disposal among which, Basel Convention is one, which disused issue in the most comprehensive manner. This convention was signed by almost 173 countries. The convention sought to work in the field of following activities[22]:

- active promotion and use of cleaner technologies and production methods;
- further reduction of the movement of hazardous and other wastes;
- the prevention and monitoring of illegal traffic;
- improvement of institutional and technical capabilities— through technology when appropriate — especially for developing countries and countries with economies in transition;
- further development of regional and sub-regional centers for training and technology transfer; and
- Enhancement of information exchange, education and awareness-raising in all sectors of society.

Basel convention indicates that, every country exporting waste must take prior permission from the importing country. In case of illegal trade, it becomes obligatory for the exporting country to take back their junk and pay the damages and the cleanup cost to the importers.

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[20] Rajya Sabha, 'E-waste in India', 2011.

[21] *E-waste causes concern,* The Hindu, January 23, 2010.

[22] *Ministers Call for Cleaner Production Methods as they Set Priorities for Next Decade of Basel Convention on Hazardous Wastes*, UNEP News Release, December 14, 1999, available at http://www.unep.org/ (last accessed 25th August 2016).

A. The Bamako Convention

Aim of the convention was protection of environment and human health from the ever-dangerous hazardous wastes and reducing their generation to a minimum in terms of quantity and/or hazardous potential. Only difference between the two conventions was that, instead of using same language to Basel convention, Bamako convention is way too strict to make countries adhere to the rules of prohibition of hazard dump[23].

B. The Rotterdam Convention

It is a multilateral treaty to promote shared responsibilities between exporting and importing countries in protecting human health and environment. The Convention promotes exchange of information among Parties over a broad range of potentially hazardous chemicals that may be exported or imported.[24]

The Rotterdam Convention calls on exporters of hazardous chemicals to use proper labelling, include directions on safe handling, and inform purchasers about known restrictions or bans. This treaty was adopted in 1989 and entered into force in 1992. Parties can decide whether to allow or ban the import of chemicals listed in the treaty, and countries exporting chemicals are obliged to make sure that producers within their jurisdiction comply with the directions and rules[25].

C. A bill in the right direction

To put a limit on the export of E-waste, a bill has been introduced in the US House of Representatives, with an aim to direct ethical recycling of E-wastes. This move is in furtherance of a domestic recycling of the electronic equipments, with the main purpose of preventing the E-waste from becoming a victim of counterfeit goods that might enter military supply chains in the United States.[26] There are a certain items which are exempted from the category of electronic wastes, which are- tested, working used electronics, low risk counterfeit electronics, recalled electronics.[27]

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[23] Available at http://www.unep.org/delc/BamakoConvention (last accessed 25th August 2016).

[24] Available at http://www.iisd.ca/process/chemical_management-picintro.html (last accessed 25th August 2016).

[25] Kummer, Katharina, International Management Of Hazardous Wastes: The Basel Convention And Related Legal Rules, Oxford: Clarendon Press, 1995.

[26] *E-Waste Export Bill introduced in Congress*, Environmental Leader, July 7, 2016.

[27] Congressional Bills 114th Congress, 2015-16, Section 2(2), available at https://www.congress.gov/bill/114th-congress/house-bill/5579/text/ih?format=txt.

V. INDIAN STAND ON THE E-WASTE

After the Bhopal gas tragedy, First legislation in India was legislation concerning the Environmental aspect it was names as Environmental Protection Act (EPA), 1986. Act only addressed the problem of hazardous waste and was clueless about the problem of e-waste. Thereafter, India adopted the principle like "Polluters pay" and "precautionary"[28] from the International Enviro-prudence.[29] Presently, e-waste is treated by both informal and formal recyclers sharing total e-waste quantity in 95 to 5 ratios in the country.[30]

The Hazardous Waste Management regulates that, the company or individual has to first obtain the permission from the relevant states pollution control board (SPCB) in order to receive, transport or store the hazardous waste. Further, the rules also banned the import of Hazardous waste for dumping or disposal. An authorization is needed to be issued by Central government in order to process or reuse the hazardous waste. The amendment to the rules in 2000, for the first time increased the scope of the rules to e-waste[31].

The new Hazardous Wastes Management, Handling and Tran's boundary Movement Rules of 2008 replaced the old HWM rules and now contain additional provisions on e-waste handling within India. These provisions require every person planning to recycle or reprocess e-waste to obtain prior authorization from the relevant SPCB. However, the SPCB registration process has been criticized for granting the same authorization to collectors, dismantlers and recyclers without assessing their capability to treat the e-waste in an environmentally sound manner. Furthermore, responsibility is split between the states and the federal government[32].

A. E-Waste Management Rules 2010

Ministry of Environment and forest of government of India the E-Waste management rule in 2010. Central government for the purpose of public welfare found it considerably necessary to enable the recovery and reuse of useful material from e-waste, thereby reducing the hazardous waste destined

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[28] Indian Council For Enviro-Legal Action v. Union of India, (1996) 3 SCC 212.

[29] Enviroprudence stands for environmental jurisprudence.

[30] Mahesh C. Vats, Santosh K. Singh, 'Status of E-waste in India- A review', International Journal of Innovative Research in Science, Engineering and Technology, Vol. 3, Issue 10, October 2014.

[31] Hazardous Waste Management Amendment Rules, 2000.

[32] Mahima, S., *Rules on Electronic Waste Management- An Analysis*, Indian Journal Of Applied Research, Vol. 3, Issue 4, April, 2013.

for disposal and to ensure the environmentally sound management of all types of waste electrical and electronic equipment.

i. E-Waste Law 2011

Owing to the low cost value of labour used and the non-stringent regulations, India and other developing countries became export hub for about 50-80% of e-waste collected by the developed countries.[33] India has introduced a new e-waste rule that makes environmentally sound management and disposal of electronic waste mandatory. The E-waste (Management and Handling) Rule, 2011 places responsibility on the producers for the entire lifecycle of a product, from design to disposal. Apart from Extended Producer Responsibility principle, the rule is a significant step towards international standards of Restriction of Hazardous substances in electronics. The rules were notified by the Ministry of Environment and Forests on May 30. The rule will be implemented throughout the country from May 1, 2012.

VI. CONCLUDING REMARKS

The only viable way to reduce E-wastes is to produce less of it. Not only is e-waste illegally imported but it is also generated in India. Growing up to become one of the fastest waste streams today, it all ends up posing a huge challenge and threat to the environment clubbed with human life. It should essentially be kept in mind that the electronics are to be re-used and so it should be designed in that manner, which ultimately result in conservation of energy and toxic-free environment. Reliance should be placed on an 'e-waste policy' to promote the collective initiatives of the industry towards a better management. If the existing laws don't serve the mettle, they should be done away with and replaced with a comprehensive legislation regulating e-waste and ensuring safe and legal disposal. With respect to the products, an end-of life strategy should be borne in mind while designing the products.

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[33] *Solving the E-waste Problem (StEP)*, Sustainable Innovation And Technology Transfer Industrial Sector Studies: Recycling From E-Waste To Resources, United Nations Environment Programme, July 2009.

CHANGING PUBLIC POLICY FOR FOSTERING COMPETITIVE BUSINESS

—*Apoorv Ashit*[*] *& Nitin Pandey*[**]

Abstract *Most governments strive to augment the supply of able entrepreneurs and India is no different. The stable economic climate provided by a more decisive government in the centre has given impetus to the entrepreneurial spirit. So the current focus is on the improving ranking on the ease of doing business list published by the World Bank. It is a good barometer for the government to measure itself up against.*

Simplification of tax regime by the introduction of GST will improve ease of business ranking. The government is also focusing on its commitment to double farm income and improve rural infrastructure in its five year tenure. The thrust of the Union Budget for the last few years has not only on providing certainty in taxation and simplification and rationalization of taxation but also reducing related litigation. A new Dispute Resolution Scheme to reduce pending cases and the avoidance of "retrospectivity" is a testament to the same. To foster the new app based ecosystem, Start-up India Action plan has dedicated a Rs. 10,000 crore corpus for a period of four years for start-ups and has made their profits not taxable for the first three years, with special schemes for women entrepreneurs.[1]

This paper takes stock of how the government is trying to change its interaction with the corporate world, foster innovation and in process increase transparency. It is an uphill task and we need to

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[1] All of this is aimed towards the goal of revolutionizing the Indian economy by fostering an environment conducive for the growth of start-ups and to reenergize the corporates.

learn from parallels and best practices in implementation and tax regimes which this paper will attempt to gloss over as well.

I. INTRODUCTION

In the recent years, the Indian economy has expanded. This can be understood as the product of the hard focus of the government on improving business conditions in the country. The emphasis has been on making government-to-business interactions less burdensome. To achieve the same, rules are being simplified and rationalized, with the help of introducing information technology measures to stimulate foreign investment and boost local productivity.

The current economic outlook is quite positive, with the GDP growth steadying at 6.6 per cent[2] despite various hampering factors like the global economic scenario and demonetization. It is the fastest growing major economy in the world at this moment.[3] However, this growth has been largely been effected by the demand from urban households and public investments[4]. India has also suffered two consecutive drought years, leaving rural households under severe stress.[5] The growth has clearly been imbalanced.

The government has taken clear strides in creating a non-adversarial business environment, and improving its role as a regulator. Measures to ease FDI investment and extended cooperation with countries in terms of Memorandum of Understandings are in pursuance of the same.[6]

'Make in India' is the flagship scheme of the government, which aims to improve investment conditions, foster innovation, create job opportunities and protect intellectual property while challenging major world powers as a favourable manufacturing destination.

With India at 130th on World Bank's Doing Business Index, there's much being done to improve ease of doing business in India.[7] Initiatives like

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2 GDP of India | India GDP 2015 - StatisticsTimes.com, Statisticstimes.com, available at http://statisticstimes.com/economy/gdp-of-india.php.

3 Indian Economy Overview, Ibef.org (2016), available at http://www.ibef.org/economy/indian-economy-overview.

4 India Development Update-World Bank, available at http://documents.worldbank.org/curated/en/543111468194942579/pdf/106456-P156828-PUBLIC-MAKE-PUBLIC-8PM-DC-JUNE-19-IDU-Jun16-vweb.pdf.

5 *Ibid*.

6 *Supra* note 2.

7 Doing Business 2016, (2016), available at http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB16-Full-Report.pdf.

simplifying company registration[8], the e-Biz initiative of the Department of Industrial Policy and Promotion[9], ease in raising debt from shareholders and reduced compliance burden, regulatory bodies and the government are pushing for reforms throughout the corporate structure.[10]

Tax regime is also being rationalized by introduction of a General Sales Tax, via the 122nd Amendment forecasted for implementation from July 2017. It would contribute massively to improve a convoluted system of taxes, duties, fees and allows for a simpler tax collection regime. It is indeed a marked departure from the red-tape of the tax earlier, and will contribute heavily by removing fiscal barriers between states.[11] It also expands the tax base and will divide the burden between manufacturing and services equally.

Innovation is being promoted like never before, with the government promoting a 'Start-up India Action Plan', and is rekindling the entrepreneurial spirit in the youth. The initiative is a 19 point programme which is aimed at powering an ecosystem which will drive sustainable growth and generate employment opportunities.[12] In the current scenario where the world is vying for the attention of the same set of investors, it is important that India remains an investor friendly destination.[13]

The paper expands on how a holistic ecosystem is being cultivated to improve the prospect of doing business and also explores how all aspects are being emulsified towards improving government-to-business relations within the country.

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[8] Form INC-29: Procedure for Fast Track Company Registration, Indiafilings.com (2016), available at https://www.indiafilings.com/learn/form-inc-29-fast-track-company-registration/.

[9] A Tease Of Doing Business In India - Corporate/Commercial Law - India, Mondaq.com (2016), available at http://www.mondaq.com/india/x/394480/Corporate+Commercial+Law/A+Tease+Of+Doing+Business+In+India (last visited Sep 20, 2016).

[10] The Times of India, Companies Act to help startups take private company route, 2015, available at http://timesofindia.indiatimes.com/business/india-business/Eased-Companies-Act-to-help-startups-take-private-company-route/articleshow/47793424.cms.

[11] GST – Simplifying India's complex tax regime and widening the tax base, Aurum Equity Partners (2016), available at http://www.aurumequity.com/gst-simplifying-indias-complex-tax-regime-and-widening-the-tax-base/.

[12] Startup India, Startupindia.gov.in (2016), available at http://startupindia.gov.in/actionplan.php.

[13] Doing Business in India, (2016), available at http://www.ey.com/Publication/vwLUAssets/EY-doing-business-in-india-2015-16/$FILE/EY-doing-business-in-india-2015-16.pdf (last visited Sep 20, 2016).

II. CHANGES IN TAX REGIME:

A more accessible tax regime has been the focal point of the policy of pursuing ease of doing business. The government has invested a lot of its political capital in bringing forward various changes, and will like the program to yield results. Like the world over, this evolution in India has been motivated by concern for efficiency conditions and the issue of replacing public enterprise profits with taxes as a source of revenue for the government to continue its conduct of business. The globalisation of financial activities was another motivating factor. The tax strategy is bound to change even further as a response to changing economic strategies.[14]

India has had a byzantine tax regime since its independence, but post liberalisation, it has become an appealing business destination largely because of its consumer base, which spends about $600 billion in a year. But businesses face the problem of choosing the right states for conducting, which has led to disproportionate spread of jobs, tax revenue for states and consequently some states end up losing out on investment from abroad.[15]

Recent clarification on the FIIs payment of minimum alternate tax, on the lines of the recommendations of the A.P. Shah Committee, the recommendations of the Easwar Committee on the simplification of various provisions of the income tax Act are representative of the direction forward. The clarification of the definition of capital assets, changes in section 50C and regarding agreements to sell assets are representative of the same.[16] Also retrospective taxes creating fresh liability are to be avoided.[17]

General Anti-Avoidance Rules (GAAR) have also been notified and are to be applicable on income arising from 1st April, 2017.

The credit rules have also been amended to improve inflow of credit[18]. The 2014-15 budget initiated the implementation of the Indian Customs

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[14] Trends and Issues in Tax Policy and Reform in India, (2016), available at http://www.nipfp.org.in/media/medialibrary/2013/04/wp05_nipfp_037.pdf.

[15] DIPP has ranked states on basis of implementation of suggested reforms: Initiatives on Improving 'Ease of Doing Business' in India, available at http://dipp.nic.in/English/Investor/Ease_DoingBusiness/EoDB_Intiatives_11December2015.pdf.

[16] Easwar Committee report on the simplification of various provisions of the Income Tax Act, (2016), available at https://www.kpmg.com/IN/en/services/Tax/FlashNews/Easwar-Committee-report-on-the-simplification-of-various-provisions-of-the-Income-tax-Act-1.pdf (last visited Sep 20, 2016).

[17] Sukumar Mukhopadhyay: Fostering ease of doing business, (2016), available at http://www.business-standard.com/article/opinion/sukumar-mukhopadhyay-fostering-ease-of-doing-business-116022901346_1.htm l last visited Sep 20, 2016).

[18] *Ibid.*

Single Window.[19] Another 13 cesses have been abolished, which brought revenue less than 5 crore a year.[20]

The 2016 budget also saw the reduction of corporate tax rates from 30 per cent to 25 per cent, over a period of four years. However the withdrawal of incentives simultaneously has largely been seen as a step backwards.[21]

The creation of a seamless national market, bereft of any fragmentation is vital to the construction of a better business climate. In pursuance of the same, the nationwide Goods and Services Tax (GST), and will amalgamate most indirect taxes imposed by states and central government.

A. GST

Goods and Services Tax is a comprehensive tax to be levied on manufacture, sale and consumption of goods and services at the national level and will help integrate State economies by eliminating fiscal barriers between different states. Its object to eliminate fiscal barriers between states and simplify existing tax structure, leading to the abolition of various taxes like the Central Sales Tax, state-level sales tax, entry tax, stamp duty, turnover tax, tax on transportation of goods and services, etc.

It is also considered one of the vital legislations that will help India in building a corruption free reputation across the world and will also help businesses understand the tax web better, as it will only be levied at the point of sale.

The clear plan is to implement a dual GST system, one involving a Central Goods and Services Tax, and a State Goods and Services Tax.[22] All goods and services will be brought under the GST umbrella. There will be no distinction between goods and services. The burden of taxation consequently will be divided equally between manufacturing and the services sector. The direct impact of GST on the ease of doing business is that it will bring the tax regime at par with world standards thus making it easier for manufacturers and businesses to conduct business within India. Businesses can set off the taxes paid when procuring raw material, which will be favourable for the industry in the long run. Manufacturers, service providers

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[19] Ease of Doing Business and Single Window, CBEC (2016), available at http://www.cbec.gov.in/htdocs-cbec/EaseOfDoingBusiness (last visited Sep 20, 2016).

[20] *Supra note* 16.

[21] EY - Budget 2016: Simplify and rationalize corporate tax, Ey.com (2016), available at http://www.ey.com/in/en/newsroom/news-releases/ey-budget-2016-simplify-and-rationalize-corporate-tax (last visited Sep 20, 2016).

[22] Business Portal of India : Taxation, Archive.india.gov.in (2016), available at http://www.archive.india.gov.in/business/taxation/index.php (last visited Sep 20, 2016).

and distributors will see a fall in costs once they start getting a refund on the taxes paid for raw material.[23]

The tax base will be comprehensive, as all goods and services will now become taxable, with very few exemptions. It will also improve corporate earnings, and attract more businesses to India. For consumers, the benefits will come as it reduces the burden on corporates. Businesses have no longer to set up shop in various states just to avoid a set of taxes.[24] A system of seamless tax-credits throughout the value-chain, and across boundaries of States, would ensure that there is minimal cascading of taxes. This would reduce hidden costs of doing business.[25] The new tax will enforce itself across borders, since firms will not be able to offset the losses incurred on the taxes paid on inputs if their supplier has not declared them.[26]

B. DISPUTE RESOLUTION SCHEME:

Litigations had an unfortunate effect on the environment of business and tax collection, and the recent budget has emphasized that litigation is an affliction the economy can no longer suffer from in the current environment.[27] To reduce the cases pending with the first appellate authority the Budget has proposed a new Dispute Resolution Scheme.

The Finance Act of 2016 has introduced Direct Tax Dispute Resolution Scheme (the Scheme) which provides an opportunity to taxpayers to settle their past cases by making payment of the prescribed tax, interest or penalty in respect of any tax arrears or specified tax. It is a positive step to reduce tax related litigation and provides an opportunity to settle past cases on the payment of prescribed taxes, interest or penalty.[28]

Two dispute resolution schemes are Indirect and Direct Tax Dispute Resolution schemes, applicable in cases pending before Commissioner, where the applicant can file after paying penalty equivalent of 25% of duty.

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[23] *Ibid*.

[24] "Will it help cut prices?" Businesstoday.in (2016), available at http://www.businesstoday.in/moneytoday/tax/will-it-help-cut-prices/story/8473.html.

[25] Frequently Asked Questions (FAQs) on Goods and Services Tax (GST), Pib.nic.in (2016), available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=148240 (last visited Sep 20, 2016).

[26] Trickle through, The Economist (2009), available at http://www.economist.com/node/15127568 (last visited Sep 20, 2016).

[27] *Supra note* 16.

[28] Government notifies the Direct Tax Dispute Resolution Scheme Rules, 2016, (2016), available at https://www.pwc.in/assets/pdfs/news-alert-tax/2016/pwc_news_alert_1_june_2016_govt_notifies_the_direct_tax_dispute_resolution_scheme_rules_2016.pdf (last visited Sep 20, 2016).

The indirect tax dispute resolution scheme covers The Customs Act, 1962, Central Excise Act, 1944 and Chapter V of the Finance Act, 1994.[29]

The Direct Tax Dispute Resolution Scheme is applicable where a declarant has an appeal pending before CIT(A) Tax determined in consequence of or is validated by an amendment made with retrospective effect in IT Act or WT Act, for a period prior to the date of enactment of such amendment and a dispute in respect of which is pending as on 29.02.2016.[30]

III. REKINDLING THE ENTREPRENEURIAL SPIRIT:

The Startup India initiative is designed to foster innovation, create jobs and facilitate investment. Government launched Start-up India Campaign in order to boost the Start-ups. Government launched Start-up Action plan with exciting 19-point action plan for start-up enterprises at the start of this year which was divided into 3 parts that were Simplification and Handholding, Funding Support and Incentives, industry-academia partnership and incubation[31]

Start-up within the context of this action plan means an entity, incorporated or registered in India not older than five years, annual turnover not more than INR 25 crore in any preceding financial year[32].

The most significant part of this plan was Self Certification under which requirement of attestation by gazetted officers is sought to be replaced by self-certification by the citizen (through the Start-up mobile app), the self-certification will apply to laws including payment of gratuity, labour contract, provident fund management, water and air pollution acts, in order to reduce the regulatory burden on Start-ups thereby allowing them to focus on their core business and keep compliance cost.

Government has also proposed to create an all-India hub which will be called as Start-up Hub in order to create a single contact point for start-up foundations in India, which will help the entrepreneurs to exchange knowledge and access financial aid,[33] in addition to this an online portal, in the

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[29] Indirect Tax Dispute Resolution Scheme Rules, 2016, (2016), available at http://www.cbec.gov.in/htdocs-cbec/excise/cxrules/it-disp-resoltn-sch2016 (last visited Sep 20, 2016).

[30] The Direct Tax Dispute Resolution Scheme Rules, 2016, (2016), available at http://www.incometaxindia.gov.in/communications/notification/notification35_2016.pdf (last visited Sep 20, 2016).

[31] Startup India Standup India Action Plan, Eligibility & Scheme Details, ProfitBooks.net (2016), available at http://www.profitbooks.net/startup-india/ (last visited Sep 20, 2016).

[32] *Ibid*.

[33] Start Up India, Stand Up India: 19 exciting plans for start-ups : Polity and Governance, Indiatoday.intoday.in (2016), available at http://indiatoday.intoday.in/education/story/start-up-india-stand-up-india/1/573128.html (last visited Sep 20, 2016).

shape of a mobile application, has been launched to help start-up founders to easily register with this app. not only registering but also can track the status of the registration application digital version of the final registration certificate shall be given.

To promote awareness and adoption of the Intellectual Property Rights (IPRs) by the start-up foundations government has setup fast-track system for patent examination at lower costs.

In order to provide funding support to Startups, Government will set up a fund with an initial corpus of INR 2,500 crore and a total corpus of INR 10,000 crore over a period 4 years (i.e. INR 2,500 crore per year), it will not invest directly into Startups, but shall participate in the capital of SEBI registered Venture Funds[34]

Also in order to promote investments into Start-ups, exemption shall be given to persons who have capital gains during the year, if they have invested such capital gains in the funds recognized by the government and also government with a view to stimulate the development of Start-ups in India and provide them a competitive platform, it is imperative that the profits of Start-up initiatives are exempted from income-tax for a period of 3 years.

The government has already taken a series of progressive policy measures aimed at improving the business climate; however, the fact remains that to boost GDP manufacturing has to take the lead. The Make in India programme was announced to prop up the flagging manufacturing sector.[35]

Government has launched the Make in India with the primary goal of making India a global manufacturing hub, by encouraging both multinational as well as domestic companies. Led by the Department of Industrial Policy and Promotion, the initiative aims to raise the contribution of the manufacturing sector to 25% of the Gross Domestic Product (GDP) by the year 2025 from its current 16%,[36] in order to make it easier to do business in India and to attract the foreign investor the government of India plans to have a single window clearance for food import, paper less income tax and reduce compliance among other initiatives.

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[34] Startup India, Startupindia.gov.in (2016), available at http://startupindia.gov.in/actionplan.php (last visited Sep 20, 2016).

[35] Ruchika Chitravanshi, Government seeks industry's views to improve ease of doing business - The Economic Times The Economic Times (2016), available at http://economictimes.indiatimes.com/news/economy/policy/government-seeks-industrys-views-to-improve-ease-of-doing-business/articleshow/51986843.cms (last visited Sep 20, 2016).

[36] Make in India: Reason & Vision for the Initiative - Make In India, Makeinindia.com (2016), available at http://www.makeinindia.com/article/-/v/make-in-india-reason-vision-for-the-initiative (last visited Sep 20, 2016).

Government of India has now consciously decided to allow 100% foreign direct investments in 25 sectors such, in several other sectors investment limits have been increase substantially,[37] number of sectors which require approval of the central government has been reduced to twenty.

The Mega Make in India event in February this year has alone collected a total sum of 15.2 lakh crore investment.

Tangles impairing ease of doing business must be addressed so that we can have a positive report card on 'Make in India' initiative.

Government of India has taken proactive measures to expand digital footprints across the country by way of digital literacy, digital empowerment and digital ecosystem. Indeed, the government is committed to provide digital infrastructure as a core utility to every citizen of the country and e-governance services on demand. The government has already started the process of developing safe and secure cyber space, sharable private space on public cloud, high speed internet, mobile banking network, and unique and authenticable digital identity[38].

Since the launch of Make in India in September 2014, FDI inflows of USD 77 billion including equity inflows of USD 56 billion has been received for the period October 2014 to March 2016, this represents about a 44% increase in FDI Equity inflows over the same corresponding period.[39]

In order to attract FDI and ease business 14 government services delivered via eBiz, a single-window online portal With the integration of these services on eBiz portal, through this a person can now avail all these services 24*7 online end-to-end i.e., online submission of forms, attachments, payments, tracking of status and also obtain the license/permit from eBiz portal[40] 20 services have been integrated into the portal to ease the new business

Online portals for Employees State Insurance Corporation (ESIC) and Employees Provident Fund Organization (EPFO) has been launched

Department of Commerce, Government of India has launched Indian Trade Portal. Important feature of this portal is to be a single point for

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37 Srirang Jha, Make in India: The Road Ahead, SSRN Electronic Journal.

38 *Ibid.*

39 Make in India: Reason & Vision for the Initiative - Make In India, Makeinindia.com (2016), available at http://www.makeinindia.com/article/-/v/make-in-india-reason-vision-for-the-initiative (last visited Sep 20, 2016).

40 eBiz Mission Mode Project - An Overview, (2016), available at http://dipp.nic.in/english/Ebiz/eBiz_Project_Report_25May2016.pdf (last visited Sep 20, 2016).

relevant information on measures other than tariff called the non-tariff measures like standards, technical regulations, conformity assessment procedures, sanitary measures which may affect trade adversely.[41]

To create a level-playing between India's private sector and public sector the anomalies in excise duty and custom duty has been reduced. As per revised policy all industry (public & Private) are subjected to the same kind of excise and custom duty levy.

The long process of winding up a bankrupt company contributes to overall legal paralysis and locks up assets and intellectual property that could be deployed elsewhere. The Insolvency and Bankruptcy Code, 2016, that governs the liquidation process, insolvency for corporations, and regulation of insolvent professionals would help in alleviating the woes of public sector banks already burdened with bad loans and improving the ease of doing business.[42] It reduces insolvency process for corporate debtors to a two stage process,[43] and simplifies the process for individuals and establishes a new regulator.

IV. ENERGIZING THE RURAL ECONOMY:

While India becomes the fastest growing economy in terms of GDP growth, the large number of people left behind does not bode well. The expansion of the potential market is key to India's accessibility as a global market and unlock the potential of the rural economy is vital for exciting businesses. Studies suggest that in order to increase the size of the middle class, pursuing agricultural growth is the way[44]. The focus of the finance policy this year has been to on the long-standing need to bring the rural economy up to speed with its urban counterpart. One of the important promises is that of doubling farmers' income in five years. It is an important promise as recent studies have suggested that despite the increase in terms of incomes and spurt in trade, non-farm income remains thrice as much as farm income. Rural landscape has changed drastically as the main profession of farmers has changed, with decrease in average land holding

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41 CENTRAL GOVERNMENT INITIATIVES - Make In India, Makeinindia.com (2016), available at http://www.makeinindia.com/eodb/central-government-initiatives (last visited Sep 20, 2016).

42 Ministry Of Corporate Affairs - Insolvency and Bankruptcy Code, 2016, Mca.gov.in (2017), http://www.mca.gov.in/MinistryV2/insolvency+and+bankruptcy+code.html.

43 The Insolvency And Bankruptcy Code, 2016 - Key Highlights - Insolvency/Bankruptcy - India, Mondaq.com (2017), http://www.mondaq.com/india/x/492318/Insolvency+Bankruptcy/The+Insolvency+And+Bankruptcy+Code+2016+Key+Highlights.

44 World Development Report, http://siteresources.worldbank.org/INTWDR2008/Resources/WDR_00_book.pdf.

size. About 36 million workers have moved from agricultural to non-agricultural works.[45]

The government has announced policies like an e-market for farmers,[46] for stimulating growth in the hinterland, the corporate sector has too undertaken initiatives to enter into the rural economy. India's hinterland is a special problem, and needs special attention as well. Entrepreneurs are leading the way again by engaging the village-folk through the digital ecosystem. EVOMO, is an Ahmedabad based start-up making utility vehicles for the consumer demands of rural India, and sells it for a price cheaper than a Tata Nano.[47]

Another start-up has built a network of rural healthcare centre, backed by software based platform to provide for important metrics related to doctors' attendance and monitoring patients' progress.[48]

While up until now the growth drivers have generally been the urban market, the future lies in semi-urban and rural centres. About 70% of the total numbers of Indian households are rural[49]. However, they contribute only about 45% to the GDP. Recognizably, markets in rural and urban areas are different and need to be treated differently. Ernst and Young, sees that organizations will need to maximize their distribution equity, which is directly linked to their sales performance[50].

V. RESPONSE TO CHANGES:

All states in December 2014, at the "Make in India" workshop decided to agree to a 98 point action plan for business reforms. The objective of the plan was to layout at first a series of recommendations and transparency to improve efficiency of government and regulatory bodies along with more streamlined tax collection. The results of the workshop were indicative of the enthusiasm of the States' to partake in such a comprehensive reform plan. The study undertook as a result threw a lot of light on the actual status of the ease of doing business in India. It provided a benchmark for the

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[45] 68th Round: National Sample Survey, (2016), http://mospi.nic.in/Mospi_New/upload/KI-68th-E&U-PDF.pdf.

[46] Five entrepreneurs offering innovative solutions in rural India - The Economic Times, The Economic Times (2016), http://economictimes.indiatimes.com/five-entrepreneurs-offering-innovative-solutions-in-rural-india/articleshow/26478096.cms (last visited Sep 20, 2016).

[47] *Ibid.*

[48] *Ibid.*

[49] *Supra note* 32.

[50] Competing for market share in rural India | EY Performance Portal, EY Performance Portal (2011), http://performance.ey.com/2011/05/12/competing-for-market-share-in-rural-india/ (last visited Sep 20, 2016).

future implementation of such plans[51]. FDI policy having been further liberalized has led to almost 90 per cent of the proposals being accepted, and inflows have increased, when FDI inflows have declined globally.

About 32 per cent of the requisite reforms had been implemented across the country on an average. It was also important to note that the report indicates that the reforms were actually working on the ground and the effects were being felt by the target audience, being the private sector.

India's regulatory framework for businesses is the key to ease of doing business. The government has already embarked on the task of breaking into the top 50 of ease of doing business rankings by 2017.

The report[52] suggests that States have in general made good on promises of reducing tax complexity. E-registration, digitization plans like e-Biz, payment of VAT and CST online, Construction Permits and land use approvals are some of the examples of how States are clearly reforming by utilizing the action plan[53]. Work on other major tasks like electronic courts, allowing e-filing of disputes, e-summons, online payments and cause lists is still pending.

A key finding is that none of the states have yet fully displayed a comprehensive list of all permissions, licenses and NOCs required by a business to set up and operate[54].

VI. BEST PRACTICES: LESSONS TO LEARN IN IMPLEMENTATION

The Department of Industrial Policy and Promotion believes that States together can drive each other to holistic solutions to their various facilitating business problems. In pursuit of the same it has conducted an exhaustive study of reports concerned with the 'Improvement of the Business Environment', taking examples from India. From this emerged six best practices, Comprehensive system for managing indirect taxes in Karnataka, Labour Management Solution (LMS) by Maharashtra, Single Window Clearance (SWC) for Industries -MAITRI by Maharashtra, Land related interventions in Gujarat, Implementation of e-2 Governance in Pollution in Gujarat and Single Window Clearance mechanism in Rajasthan and

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51 *Supra note 14.*

52 Assessment of State Implementation of Business Reforms, (2015), https://www.kpmg.com/IN/en/IssuesAndInsights/ArticlesPublications/Documents/State-Assessment-Report.pdf (last visited Sep 20, 2016).

53 *Ibid.*

54 *Ibid.*

Punjab[55]. In all these cases, technology has been the key driver of change and a critical State Official has been the change agent. Following is a short description of each of the same:

i. Comprehensive system for managing indirect taxes in Karnataka[56]:

All VAT collections and e-registrations, along with e-payments, e-returns have been moved online to provide 24x7 access to the portal. By moving the system online, the log-jam of going to an office to submit indirect taxes has been removed, and about 20,000 visits have been reduced per day. The Kerala Government also hopes to achieve 20 per cent growth in sales tax collections in 2016-17. The Delhi Government hopes to adapt the same

ii. Labour Management Solution in Maharashtra[57]:

It has simplified and provided ready access to labour laws and all licenses and permits so related have been moved to an online presence. This has reduced all procedure duration from almost 10-15 days to 0.5 days. It has eased compliance to multiple and cumbersome labour laws, physical interactions have reduced due to eServices, and a compliance checklist has been made available to the staff and businesses for ready reckoning.

iii. MAITRI in Maharashtra[58]:

It reduces average time and effort required for establishing industrial units, and has for ready access about 31 clearances required for setting up industries in the State. It has linked about 15 different departments on a single platform, with all required sites in a single platform. It can also be used to make queries and provides alerts, apart from 24x7 access to implementation and services.

iv. Land related interventions by Gujarat- GIDC Investor Facilitation Portal[59]

It has hugely simplified land acquisition in the state with minimum direct government participation. It has allowed flexibility to negotiate, and has reduced litigation significantly by guaranteeing secure returns to farmers at stable rates. It works on a Public Private Partnership (PPP), and provides

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55 Best Practices to Improve the Business Environment across India, (2014), http://dipp.nic.in/English/publications/Reports/improve_BusinessEnvironment_06May2014.pdf (last visited Sep 20, 2016).

56 *Ibid.*

57 *Ibid.*

58 *Ibid.*

59 http://gidc.gujarat.gov.in/.

information on land on online portal, highlighting availability of land, power, gas, and 65 other parameters as per specific requirements chosen by the entrepreneur. GIDC MITRA is an online grievance redressal problem[60].

v. Online mechanism for clearances: Implementation of e-Governance by Gujarat Pollution Control Board[61]*:*

All information relating to consents regarding underwater, air, hazardous material are merged into a single online form, where applicant is awarded provided provisional certificate within 45 days of applications and 72 hours of approvals. It also emphasizes on timely acceptance and processing of Industries and Hospital Applications. The number of applications processed throughout the year have increased manifold and has also lead to an increase of about 400% in E-returns.

vi. Single Window Clearance System in Rajasthan and Punjab[62]*:'*

All the information related to starting a business in the state is available online with a checklist and is passed through a single nodal authority[63]. It is a user friendly portal, easy to navigate and provides email alerts to investors. About 86 forms from 11 departments are integrated into the system and have to complete those tasks within a timeframe, barring which they can be penalized. It also provides for a grievance redressal system.

To assist the aforementioned innovations, we will have to augment productivity at micro and macro level in the economy. The key drivers here are the government policy alterations and how the corporates react to the same changes. Indeed a simplification of interaction between government and businesses is leading to better understanding, improved entrepreneurial spirit and reducing corruption. However the same is yet to reflect in the improvement in the ranking, with India remaining at 130 for the year 2017. The reasons for the same is that all such changes as compared have been dwarfed by the efforts of other nations, and it will take time for efforts to be felt on the ground. Otherwise, the effort to improve the business environment is on track.

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60 *Supra note* 42.
61 *Ibid.*
62 *Ibid.*
63 *Ibid.*

CRIMINALISATION OF POLITICS: A MATURING TREND IN INDIA

—*Dr. Mayengbam Nandakishwor Singh*[*]

Abstract In a vast and diverse country like India, smooth sustenance of democracy has its own drawbacks. It is more so because electoral democracy in India is a growing phenomenon. The fact is that electoral politics is a playground for all the political parties and the pedestal of political power is solely determined through it. A conspicuous trend, however, has plagued electoral politics in India in the recent times and it is the fast burgeoning criminalisation of politics. Beyond any doubt, criminalization of politics is an increasing trend today in India. This unholy nexus between the politicians and the criminal elements seriously poses several challenges in various fronts. It has become a political endemic today and no sincere approach to check this menace has been actuated so far. Today, the very legitimacy of electoral democracy India is alarmingly questionable on many grounds. This would be worth to excavate the umpteen cognizable factors breed this incessant trend. This papers first explains as to how criminalisation of politics in India is getting matured, then it examines the vital factors that promote this trend and the repercussions. Subsequently, it also explores some of the feasible remedies for this mushrooming political trend.

I. CONCEPTUAL UNDERSTANDING

A new political culture is slowly slipping into the floors of Indian politics. This new political culture is the increasing trend of criminalisation of politics. Criminalisation of politics basically means persons with criminal

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records or who are convicted entering into politics and becoming a part in law making bodies.[1] In simpler sense, it is the trend of politicians or political parties endorsing the nexus with criminals. In this political fashion, persons with criminal background enter politics, get elected and become a part of law making authorities. This broadly works in two reciprocal ways: the politicians patronize criminals as they require muscle as well as money power and in turn criminals are ensured protections from the politicians.[2] Politicians get financial help from the criminals in elections; moreover, criminals are used in inciting violence, proxy voting, booth capturing, rigging, intimidation to the candidates and killing of party workers etc. They also render both money and muscle power to politicians having connections with them. Politicians when elected render protections to the criminals using state machineries. Criminals also expand their sphere of activities under the covert patronage of politicians. In this fashion, criminalization of politics unfolds.

Today, this trend is certainly getting matured specially in two contexts. First, criminals seldom contest in elections directly in large magnitude earlier and they tend to serve the politicians in exchange of their protection. But today, large number of criminals themselves are jumping into the electoral fray and securing their place in the administrative set up, thus becoming their own custodians legally. In this way, large candidates with criminal records are elected and they are the law makers naturally. In other words, the covert practice is that when criminals help politicians to ascend to the power, they will get protected by the politicians through state machineries. But the maturing scenario is that the many criminals manage to get themselves elected using their might, they become the master of the state machineries and thus reversing their dependency on other politicians. This reverse scene emerges because criminals intend to reap the maximum benefits for themselves instead of working for politicians. Secondly, this trend is so rampant and so recurring today that it is a salient facet of Indian politics. No matter how illegitimate it appears, it is a practised political norm in numerous political pockets today. Since this trend is not erased from Indian politics, it is maturing in each passing election.

Then a lingering question is whether the intriguing elections in democracy can be done away so as to abstain from the criminalisation of politics. Democracy is an antidote to anarchy and election, through which the

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[1] Criminals basically means persons having committed a crime, may be murder, rape, extortion, theft, harassment of others, forceful annexation of land etc.; and criminalization is the process of operating politics with criminal elements. In other words, it is an act of forging ties between politics and criminals.

[2] M.P. Jain lucidly puts criminalisation of politics as the nexus between politics and criminals and it is a threat to the survival of a true democracy. See M.P. Jain, *Indian Constitutional Law*, LexisNexis, Gurgaon, 2014, p. 43.

yielder of political power is determined, is an integral pillar of it. Doing away with election in a democracy is not the ultimate panacea to this problem. Another equally puzzling proposition is whether the level of education and development have any vital correspondence with the criminality in politics this far in India. Surprisingly, the higher rate of education and development index of states has negligible correspondence with the pattern criminalisation of politics in India.[3] Today, we find significant number of elected representatives who are decently educated, both in the states and centre, having charged with high criminality. So, politics being criminalised is a ubiquitous phenomenon today in all levels disregarding of any parameters.

II. FACTORS IMPELLING THE CRIMINALISATION OF POLITICS

The political culture of large criminals entering in elections takes place in the Indian parliament as well as in state level, and needless to say, it is happening in many countries, not just an Indian specific political phenomenon. The political culture of large criminals entering in elections is happening worldwide, and it is wrong to assume that it is just an Indian specific political phenomenon. It is an increasing political facet in several countries albeit varied degrees. In the context of India, it visibly takes place in the Indian parliament as well as in state level. Needless to say, criminalisation of politics is so deeply seated in Indian politics and there are some observable reasons behind this increasing trend over the years.[4] *First,* democracy in India is essentially a number game in which the parties that secure maximum votes get to the power. There is a mushrooming growth of political parties and their sole target becomes winning the elections at any costs. Parties knowingly field the candidates having criminals background to maximise their winning numbers.[5] A serious lack of 'political will' among the political parties to transform this menace is quite visible. And, in this era

[3] The point is that there is no specific pattern about the criminalisation of politics in Indian states based on the development index. For instance, in the last Lok Sabha Elections 2014, underdeveloped states like Rajasthan (4%) and Madhya Pradesh (10%) have relatively lower percentage of winners with serious declared criminal cases, at the same time Bihar (45%) and UP (28%) have high percentage. Likewise, while a developed state Punjab (8%) has lower percentage of winners, Maharastra (40%) and Gujarat (27%) have higher percentage of winners. See *Lok Sabha Elections 2014-Analysis of Criminal Background, Financial, Education, Gender and Other Details of Winners*, Association for Democratic Reforms, 18 May, 2014, New Delhi, p. 15.

[4] This is an evil feature of Indian politics today and various committees or commissions like The Law Commission of India, the Election Commission of India, Vohra Committee, Dinesh Goswami Committee have been set up to examine this political menace and they all have come out with their recommendations though all turn out to be futile thus far.

[5] As per some surveys, states of U.P. and Bihar top the list of criminals involving in politics actively, and there are cases where candidates lodged in jail win the election. The North Eastern states have the lowest rate of criminals entering in politics.

of coalition politics, there is frequent implications of political parties changing their alliances based on several calculations. There is often instability of governments and politicians changing their political parties. Black money, funds from mafia are directed to lure elected politicians and in this way criminals are entailed in politics. The practice of 'horse trading' is exercised inside the parliament and state assemblies. Even in the case of being elected, many elected representatives are not sure about becoming the part of the ruling party alliance. So it becomes extremely important for the contesting candidates to increase the winnability in elections by hook or by crook.[6] This prevailing system paves the way the infusion of criminal elements in Indian politics.

Second, corruption in the elections is one cause for this and without any doubt, majority of the candidates contesting in elections require money, fund and donations. They avail help from big business persons or rich persons and when they are elected, they have to return whatever they have garnered. Corruption is breed in this fashion and with the rising level of corruption, criminal elements are germinated in politics. Candidates nurture their network with criminals because they have to propel victory in the succeeding elections. In fact, there is a misperception about the genuine purpose of politics in the eyes of many. Politics is perceived by many as a kind of business and once elected, the state exchequer will in their cusp. With the quick ballooning of wealth, power and status guaranteed, the driving motive becomes entering in politics. As a matter of fact, there is a visible decline in morality in public life as far as politics in India is concerned. Over the years, the simmering groundswell is that politics is not an ideal profession and this psychological make up discourages good people from taking politics as a full time activity. Thus, thugs are incited to hold over politics. At times, there is a sense of alienation between people and government and since less is expected, many politicians feel less responsible to the people and this way encourages criminals to be in the helm of the political power.

Third, Indian society is sharply divided on varied aspects and politics is usually based on those divisions. Taking the advantages of such cleavages, the criminals join the electoral fray by portraying themselves as the protector of their respective caste, religion, community and so on. They provoke people's mind, they make inflammatory speeches and thus they enjoy loyal

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[6] In this context, K.C. Suri's linear view that it is the political elite who use money and muscle power to win elections since older means like social domination is unviable in mass democracy is completely wrong. Almost all political parties are found to have some elements of criminality. Large individual politicians, not just political elite, are having nexus with criminals and this has further channelized social fissure as one of the formidable factors to get through elections. See K.C. Suri, *Parties Under Pressure: Political Parties in India Since Independence*, Lokniti-Programme on Comparative Democracy, CSDS, Delhi, 2005, p. 57.

supporters. People in general too do not bother to scrutinise about the criminal background of the candidates and instead they tend to look at caste, ethnicity, religion, community and linguistic lineage of the candidates. In addition, certain archaic political system such as dynastic politics and lifelong politics also aggravate it. There is no retirement policy in Indian politics and some party leaders never retire.[7] Many political parties turn out to be nothing but the family fiefdom. Since this seriously jeopardises the career prospects of many budding politicians, aspiring politicians are pushed to explore means to be a part of the political power body.

Fourth, politicians overwhelmingly interfere in the administration today and in the process state machineries like the bureaucrats become their subservient stooges who are willing to obey them just to seize plum rewards. In this regard, Ramachandra Guha is right when he argues that civil servants were shielded from politics during the time of Jawaharlal Nehru. But from the 1970 onwards, the trend is changed and there is increasing alliance between bureaucrats and political parties or politicians and they work for each other's interest.[8] There is a rampant 'politicization of the administration' in which individual politicians favour certain bureaucrats for their mutual benefits. Such bureaucrats implement policies on party lines and this open the gates for the criminalisation of politics. Needless to say, there are cases where state machinery executes certain actions on the orders of their political masters and in the process, they connive with the criminals. In this way, the connection between the criminal elements and the politicians are directly or indirectly established. Moreover, sinister nexus between the anti-national elements working both inside and outside the country and certain selfish politicians cannot be totally ruled out. Since the antinational elements are working around the clock to disturb the tranquil political atmosphere in the country, sordid politicians become their easy catch to marshal their diabolical activities. *Finally,* it is true that the slow pace of Indian judiciary system also elevates the criminalisation of politics.[9] Powerful criminals can buy the best lawyers and the court of law takes longer time in delivering justice. In many of the high profile cases, it takes many years and thus justice is often delayed. According to the present judicial system in India, anyone who is charged or accused for any crime cannot be convicted until proven guilty in the court.[10] Given this existing

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7 Having no proper retirement scheme for politicians is one factor that propels this trend. A similar idea is also put up by Trilochan Sastry in his paper 'Towards the De-Criminalization of Politics.' See Trilochan Sastry, 'Towards the De-Criminalization of Politics,' a talk at IIC, New Delhi, September 12, 2013, p. 4.

8 *See* Ramachandra Guha, *India After Gandhi*, London: Picador, 2007, p. 687.

9 Two glaring plights that plague Indian judicial system are the prolonged inadequacy of judges across the country and the stinking wave of corruption that has crept the judiciary. And the deadlock on the question of judicial reform in India continues to loom large.

10 As Vohra Committee Report finds it correctly that mafia organization has established linkages with political leaders and government functionaries to carry on their illegal

lacuna, many politicians having criminal charges freely contest elections and foster rapport with those in power to bail them out.

Without an iota of doubt, criminalisation of politics is an evil feature of Indian politics today. Several committees or commissions like the Law Commission of India, the Election Commission of India, Vohra Committee, Dinesh Goswami Committee have been set up to examine this political menace and they all have come out with their recommendations. Unfortunately, all those recommendations are continuously put under cold storage thus far thereby making them extraneous.

III. RAMIFICATIONS OF THIS GROWING POLITICAL CULTURE

This accelerating political trend seriously manifest several ramifications. Criminalisation of politics generates the loss of trust between the government and people which accounts for the decay of transparent and accountable governance. This ultimately brings the 'democratic deficit' in the country along with the declining spirit of democracy.[11] Since electorates are literally purchased in every election and as the result, elections are won not by merit of the candidates, the legitimacy of the electoral democracy is slowly loosening. It is a menace that Indian democracy is confronting today. It puts Indian democracy under tremendous threat. In fact, India's immediate adoption of an experimental democracy given its unprepared and complex socio, economic, political set up also largely causes it. As Sunil Khilnani emphatically expressed that the rise of politics based on caste, regional, language, religion identity are the result of the success of the democratic ideas in India. However, democracy has been menacingly restricted only to refer to elections and this provokes the political parties or candidates to win the elections by using any tactics.[12] With persons having criminal background becoming part of political power structure, there is fuzzy distinction between the people's representatives and the criminals. There is burgeoning blur between the law breakers and the law makers. Criminals or the thugs against whom laws are to be applied becomes the law makers themselves. This produces a situation where law becomes blunt and people are often forced to lose their faith in their elected representatives. Not only politics is criminalised, crime is also politicised today to a larger extent. Many criminals are backed by the politicians and often political parties try

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activities with impunity. The existing criminal justice system in India is not sufficient to tackle these activities. See *Vohra Committee Report 1993*, Minister of Home Affairs, Government of India.

[11] Democracy Deficit occurs when the executive bodies are not held accountable to the people's assemblies. It essentially means the absence of the accountability of executive to the popular assemblies. See Andrew Heywood, *Politics*, New York: Palgrave, 2005, p. 143.

[12] *See* Sunil Khilnani, *The Idea of India*, New Delhi: Penguin Books, 2004, p. 58.

to defend ministers having criminal backgrounds without any shame. It is not unknown fact that investigating agencies are used by the government to witch-hunt their political rivals. And this trend increasingly pollutes democratic politics. Moreover, once elected, politicians with criminal tinge seek to recoup whatever have been incurred during elections and they are tempted to acquire greater wealth and money expecting the fierce competition among candidates. They also tend to heed to the interest of those who matter and this widens the socio-economic and political gap in society. Criminalisation of politics stretches chasms in Indian society. If this trend continues unstopped, it can be figured out that what Ambedkar professed about Indian democracy would turn out to be completely right someday. For Ambedkar, 'Democracy in India is only a top dressing on an Indian soil, which is essentially undemocratic.'[13] For Ambedkar, social democracy is as important as political democracy. As a matter of fact, there may come the balkanisation of the country if the pernicious trend of politics perpetuates. Last but not the least, it not only hampers the political interest of deserving and diligent people, but also blocks their opportunity to serve the people. In a worst case scenario, when politics is orchestrated by the politicians with the clout of criminals and there is a severe vacuum for competent and dedicated persons, the indispensability of politics in a democratic set up would get tampered and the entire democratic system will tantamount to total erosion.

IV. WORKABLE MEASURES TO CURB THIS TREND

If criminalisation of politics is a menacing threat in Indian politics, what are the practicable measures to deter this trend?

(1) The Supreme Court of India and the Election Commission of India have significant roles to play to this trend.[14] The plausible step taken by the Election Commission of India that there should be one column in the form of affidavit in the nomination paper indicating the information about the conviction or acquittal of any criminal offence in the past; information about any accusations punishable with imprisonment for two years or more prior to six months of filing of nomination; and information about the assets and educational qualifications etc. Moreover, furnishing wrong information is liable to be punished. Subsequently, the directive of the Supreme Court of India to furnish an affidavit while filing the nomination by the contesting

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[13] *See* Ramachandra Guha, *Makers of Modern India*, Gurgaon: Penguin Books, 2012, p. 316.

[14] The recent nullification of certain criteria for disqualification of people's representatives on conviction for certain offences under The Representation of the People's Act, 1951 by the Supreme Court of India (2013) can be seen as a right direction towards the cleaning the criminals from politics. See *The Representation of the People Act, 1951*, chapter 3, part 2, p. 68.

candidates indicating their criminal records, assets and education is a commendable effort.[15] This must be made to implement effectively.

(2) Media, the fourth estate in a democracy has much to contribute in this aspect. A fearless and vigilant media to educate people about the vagaries of elections and democracy is absolutely called for. It cannot be undermined that many media houses are owned or connected with big corporate houses or political parties. But the magnitude of impact that an independent and vibrant media can give in curbing this perilous trend is beyond any measure. In this age of information technology and social media, its role is enormous. For instance, even if people cannot be completely persuaded not to consider in electing their representatives on caste, language, religion, region and ethnic grounds, they may be made aware about the repercussions of having to choose person with criminal shade. A reasoned and decent public opinion on this regard can be initiated and diffused wide and open. Alongside, the functioning of robust civil societies are essential for precluding this trend in politics. Vibrant civil societal organisations can spread awareness among the masses about the menace of politics getting highly criminalised.

(3) The long pending electoral reform in India must be taken up.[16] The present electoral system is 'first past the post' and this system encourages candidates to spend humongous amount in every election. Options of switching to presidential system or two party system or proportionate representative etc can be rigorously explored. Certain steps to cut down the humongous election expenditure, which is the main cause of corruption in elections, must be taken. To minimize the election expenditure, measures such as: conducting state and parliamentary elections simultaneously; reduction of election campaign; allowing a candidate to contest only from one constituency and making election code of conduct legal etc. can be effectively implemented.[17] Alternative ways of funding in elections must be carefully reviewed. In this regard, state funding for election expenditure is one often discussed alternative; but this too has its inherent drawbacks. For instance, the problem inherent with the state funding of elections is that slimy candidates and the political parties may use the funds as the source of their own income and

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[15] *See* the directive of the Supreme Court of India, (2002) 5 SCC 294 (*Union of India* v. *Assn. for Democratic Reforms*).

[16] As Subhash C. Kashyap rights argues that electoral reform has been the subject of discussion from the first general election of independent India. Not only the election commission of India has shown the necessity of electoral reform, the Lok Sabha has passed a resolution to bring it. See Subhash C. Kashyap, *Our Constitution*, National Book Trust, New Delhi, 2011, pp. 321-22. However, a unanimous modalities about the overall electoral reform is yet to arrive in India.

[17] *See* Subhash C. Kashyap, *Our Parliament*, National Book Trust, New Delhi, 2004, p. 82.

independent candidates may try to jump to electoral fray to utilise the fund, resulting in the unnecessarily shrink of public exchequer. However, honest measures can be tackled through legislative route to contain election malpractices which is one of germs of politics getting criminalised. Stringent laws can be passed democratically and assist constitutional institutions like the Election Commission of India or specially established committees in stifling this trend.[18] Scopes in which the judiciary can invoke judicial activism to combat this trend can be unfolded diligently. The right to information can be scrupulously pursued about the political parties, their candidates, source of income, election expenditure, fulfilment of manifestos and so on. Finally, a speedy and efficient judicial system is the need of the hour as delay in delivering justice is deemed to be one of the loopholes which the criminals are converting into their edge.

What is pertinent is the holistic approach from all quarters in society. It is not judicious to argue that politicians and criminals are solely responsible for this political menace. In fact, both politicians and criminals are the product of society and all the stakeholders in society are equally answerable for any ramifications from murky politics. Having a stringent law in this matter will not alleviate this pernicious problem altogether unless each citizen fell responsible towards building a well ordered society. Individuals, all civil societal organizations and state machineries must be accountable towards each other. Only when a sincere attempt toward this direction is made then only criminalization of politics can be annihilated.

V. CONCLUDING REMARKS

Criminalisation of politics is making a mockery of Indian electoral process and it is practically derailing Indian democracy. This fast deteriorating standard in Indian politics is not a bright sign for Indian democracy. Today, Indian politics reaches a height where people find it obscure to distinguish between the genuine public representative and the dishonest conmen. It is an irrefutable fact that sizable number of candidates having criminal charges easily win elections and hold powerful ministerial berth. The illegitimate process of law breakers taking the role of law makers has snowballed in Indian politics with diluted manifestations. However, it is not judicious to hold politicians only responsible for this appalling trend; and

[18] For instance, Dinesh Goswami Committee on electoral reforms which was established in 1990 gave the recommendation, amongst many, that legislative measures can check election malpractices such as rigging of votes, booth capturing, proxy voting, threatening of voters and buying of votes etc. See *Report of the Committee on Electoral Reforms*, May 1990, Government of India, Ministry of Law and Justice, Legislative Department, pp. 33-6. But things are not getting bright till this day and as the result of which politics in India does not get clean.

truly speaking, voters, politicians, existing electoral system, law, political parties, and state machineries are all liabilities for this. There are sufficient way-outs to cleanse this mess and what is immediately required is a vigilant public and strong political will. Albeit the argument that Indian democracy is an experimenting journey, such incessant political culture should not be allowed to blossom further. Criminalization of politics, if not ceased, will ultimately cumber the already chequered nation building process in India.

MEDICAL 'VALUE' TOURISM INDUSTRY IN INDIA: AN ANALYSIS OF THE SECTOR

—*Anjali Bisht*[*] *& Meghna P. Sahay*[**]

Abstract The term 'value' that is being used in 'Medical Value Tourism' denotes the economic importance associated with the booming sector. It is rightly referred as the next crown jewel of India as the country offers first world treatment at third world rates which attracts millions of foreign tourist arrivals in the country. The country has been advertising 'zero-waiting' period for treatments and has acquired the status of being one of the most sought after destinations for medical tourism. But, being a multi-billion-dollar sector that medical value tourism is, the question here arises that are we able to contain this booming sector in terms of legislative boundaries. Or, the issues like banning surrogacy and growing cases of medical mal-practice are resulting in our loss in the sector to our neighbouring countries.[1] *This paper aims to bridge the gap between one face of India which is medically adept and professing zero waiting to foreigners and the other which is in the medial stone-age and is striving for grass-root healthcare necessities. If the rift between these two is not filled then there will be ruptures between the reality and the illusory.*

I. LIST OF ABRREVIATIONS USED

ASSOCHAM- Associated Chamb`ers of Commerce and Industry

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[1] India has surely revolutionised the medical sector but, the question here is whether the development moving parallel with legislative, technical and economical metes and bounds.

CIS- Commonwealth of Independent States

CII- Confederation of Indian Industry

FRRO- Foreigner Regional Registration Offices

FTA- Foreign Tourist Arrival

FDI- Foreign Direct Investment

GoI- Government of India

GATS- General Agreement on Trade and Services

JCI- Joint Commission International

MVT- Medical Value Tourism

MoT- Ministry of Tourism, India

MHA- Ministry of Home Affairs

MV- Medical Visa

MXV- Medical Attendant Visa

MENA- Middle East and North Africa

II. INTRODUCTION

With the world developing at a rapid rate, globalisation has left no area outside its purview. When and as the world population becomes aware of the alternatives of health care opportunities that can be availed by them, people in search of suitable healthcare opportunities choose to cross borders. The reasons for which cross-border health care services are opted could range from better quality, specialised treatment, no waiting line, affordability or lack of proper health care services in one's own home country.[2] Medical tourism has gained popularity and India has gained popularity among foreigners as a most sought after destinations. More recently the world has seen a spatial shift in this industry from the West, especially, to Asian countries. The growth seen in the medical tourism is astonishing.

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[2] *Anjali Bisht and Meghna Sahay, College of Legal Studies, University of Petroleum and Energy Studies.

Status, Growth and Impact of Medical Tourism in India, http://globalresearchonline.net/journalcontents/v34- 1/46.pdf (last visited Nov 18, 2016).

The increase of medical tourism has led to privatization of health care as a result of increased globalization of health care as well as tourism.[3] The Global estimate of the Medical Tourism Industry is USD 10.5 billion and it is estimated that the industry has the potential to grow to up to USD 32.5 billion over the coming 5 years at a CAGR of 17.9 per cent.[4] Even though this industry can be said to be in somewhat budding phase in India, it is still developing and emerging at an over whelming pace and occupies massive portion of the tourism industry. Through this project, the researchers seek to highlight existing status as well as the potential of Medical Value Tourism too develop into the Next Crown Jewel in India and the impact of globalisation of this sector. The researchers aim at highlighting the key areas where the sloppy legislations and other factors such as medical malpractice and insurance relating fraud are causing the stunted growth of this sector. Other issues such as the prioritising of this industry at the cost of health care for the citizens or the growing trend of 'womb for sale' have also been highlighted.

III. WHAT IS MEDICAL 'VALUE' TOURISM?

According to Goodrich & Goodrich (1987), "medical tourism is the attempt to attract tourists by deliberately promoting its health-care services and facilities, in addition to its regular tourist amenities." Connell defines medical tourism as "a popular mass culture where people travel to overseas countries to obtain healthcare services and facilities such as medical, dental and surgical care whilst having the opportunity to visit the tourist spots of that country."

Defining medical tourism Carrera and Bridges stated that "medical tourism as travel which is systematically planned to maintain one's physical and mental health condition". According to GATS (General Agreement on Trade and Services), "medical tourism is the second mode of trade in health services."

With Globalisation at its peak, hardly any sphere is outside its reach and medical tourism is one of its manifestations. It is referred to as the out of country movement of patients who are seeking for better alternatives which include escaping long waiting lines, cost efficiency, better medical facilities from what is offered in their own country. "The globalization of health care is an increasing fact of life. Medical tourism is but one piece of that puzzle.

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[3] Status, Growth and Impact of Medical Tourism in India, http://globalresearchonline.net/journalcontents/v34-1/46.pdf (last visited Nov 18, 2016).

[4] Alexandra Katz & specially for RIR, INDIA EMERGES AS NEW DESTINATION FOR RUSSIAN MEDICAL TOURISTS RUSSIA & INDIA REPORT (2015), http://in.rbth.com/society/2015/04/16/india_emerges_as_new_destination_for_russian_medical_tourists_42649 (last visited Nov 18, 2016).

Beyond posing ethical and regulatory challenges in its own right, medical tourism offers us a welcome opportunity to re-examine some fixed stars in the constellation of domestic health care regulation"[5]

It can be understood as the burgeoning of the privatized health care market in the destination countries. Medical tourism is also termed as 'medical travel' or 'health tourism'.[6] Another term that has been coined is **'Medical Value Tourism' (MVT)**. The term value has been used as an operative word.[7] It is a two-dimensional concept. The patients seeking medical care services mostly from the developing countries seek value when to choose a particular destination country. At the same time the host country is benefitted economically and developmentally. MVT means cross-border flows from the developed 'north' to the developing 'south'.[8] Trading in services are looked into by the developing country as a vehicle for development. It is often welcomed by the government in the form of favourable policies by the government of the host country, especially of medical and health tourism.[9] Some of the patient-flow to the destination country is due to the reason that certain services are unavailable at their home countries, these include surrogacy practices or stem cell treatment. The laws in the destination country are relaxed regarding these practices and also due to poverty in the developing nations people are ready to offer 'wombs of rent' or 'organs for sale' at a much lower rate. the ever-burgeoning industry of Medical Travel raises before us a very serious question that is whether the trade-for- profit centric approach and the commoditisation of medical sector, like any other sector, should be permitted?[10]

The initial trend in what is often termed "medical tourism" was thought to be propelled by people seeking cheaper alternatives for cosmetic procedures and increasingly more vital health procedures (such as heart valve surgeries, knee and hip replacements and liver transplants) are being offered

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5 Sarah Burningham, Roxanne Mykitiuk & Alana Cattapan, CANADIAN JOURNAL OF COMPARATIVE AND CONTEMPORARY LAW, www.cjccl.ca/wp-content/uploads/2015/01/entire-issue-1-2015-1-cjccl-3.pdf (last visited11ADAD).

6 Medical Tourism An Upsurge Health Essay, UKEssays, https://www.ukessays.com/essays/health/medical-tourism-an-upsurge-health-essay.php (last visited Mar 30, 2017).

7 DR. A. DIDAR SINGH, *MEDICAL VALUE TRAVEL IN INDIA:FCCI HEAL CONFERENCE,* KPMG,1 (2014) (Nov. 11, 2016, 12.02 AM) mof.gov.in/WorkingPaper/WorkingPaper012016DEA.pdf.

8 Sarah Burningham, Roxanne Mykitiuk & Alana Cattapan, CANADIAN JOURNAL OF COMPARATIVE AND CONTEMPORARY LAW, www.cjccl.ca/wp-content/uploads/2015/01/entire-issue-1-2015-1-cjccl-3.pdf (last visited 11ADAD).

9 Ramya M. Vijaya, Medical Tourism: Revenue Generation or International Transfer of Healthcare Problems? Medical Tourism: Revenue Generation or International Transfer of Healthcare Problems?, https://ideas.repec.org/a/mes/jeciss/v44y2010i1p53-70.html (last visited Nov 18, 2016).

10 Sarah Burningham, Alana Cattapan & Timothy Caulfield, *Health Law & Human Rights*, 1 Canadian Journal of Comparative and Contemporary Law, http://www.cjccl.ca/wp-content/uploads/2015/01/Entire-Issue-1-2015-1-CJCCL-3.pdf.

and considered in the destinations such as Thailand, Singapore and India.[11] One of the positive impacts of MVT is the improvement in the market and labour conditions of the doctors. The major reasons that can be attributed for the growth of MVT is due to the exorbitant treatment price in the developed nations, specially the United States where, according to the reports of Organisation for Economic Cooperation and Development (OECD, Health Data 2009) the per capita expenditure on health care which is about $7290 is far ahead of the average for the rest of the developed economies, service indicators such as the per capita number of doctors, nurses and hospital beds are all lower than the average.[12] This article seeks to differentiate between Medical tourism and wellness tourism and focuses only upon the effect of Medical Tourism in the Indian Context. There is a need to distinguish between the two because the countries usually subsidize or take measures to promote such industries which has the highest potential for economic growth and development. In order to obtain accurate statistical data and clear definition it is required to separate medical and wellness tourism. The Global Spa Summit produced are port in the year 2011, which was articulated by a worldwide gathering of industry specialists characterized medicinal tourism and wellbeing tourism.[13] Medical tourism includes "individuals who go to a better place to get treatment for an illness, a disease, or a condition, or to experience a restorative system, or a cosmetic procedure, and who are looking for lower cost of care, higher nature of care, better access to mind or distinctive care than what they could get at home." Wellness tourism, on the other hand, includes individuals who go to a better place in order to that keep up or improve their own wellbeing and health, and who are looking for one of a kind, genuine and result oriented programs or area based treatments that they don't have an access to at their home countries.[14] MVT touches development of several industries hand in hand. After a patient has undergone a surgery he may be prohibited from airline travel for a particular span time, in furtherance of such post-operative instructions. A person seeking such medical facility, before opting it will also look into the post-operative facilities that the destination country has the potential to provide. The Hospitality industry and the environmental attractiveness are the deciding factors in such a situation. The future of

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[11] Ramya M. Vijaya, Medical Tourism: Revenue Generation or International Transfer of Healthcare Problems? Medical Tourism: Revenue Generation or International Transfer of Healthcare Problems?, https://ideas.repec.org/a/mes/jeciss/v44y2010i1p53-70.html (last visited Nov 18, 2016).

[12] Ramya M. Vijaya, Medical Tourism: Revenue Generation or International Transfer of Healthcare Problems? Medical Tourism: Revenue Generation or International Transfer of Healthcare Problems?, https://ideas.repec.org/a/mes/jeciss/v44y2010i1p53-70.html (last visited Nov 18, 2016).

[13] ENBlogger, *Medical and Wellness Tourism: Differences,* Europe NOW:Lifestyle Expo, (Apr. 10, 2013) (Nov. 11, 2016, 09.30 AM).

[14] ENBlogger, *Medical and Wellness Tourism: Differences,* Europe NOW:Lifestyle Expo, (Apr. 10, 2013) (Nov. 11, 2016, 09.30 AM), http://www.europenow.ca/show-info/blog/item/11-medical-and-wellness-tourismdifferences.

Medical Tourism for all the stakeholders (Government, Healthcare providers and Travel and Hospitality Industry) will depend on the availability of comprehensive research to consult in order to improve, update and adapt to the needs of the prospective medical tourist.[15]

IV. STATUS OF MEDICAL VALUE TOURISM IN INDIA

In the past decade, India has surfaced as the most popular Asian destination for medical tourists and the same has been recognised by the Indian government due to which the medical visa has been reduced in order to draw more people in the country. India was a closed economy before the major reforms in 1991. After the globalization and liberalization of Indian economy in 1990s, the government of India has unbolted the medical service to the private sectors for foreign tourists. Whittaker (2008) said that "opening up of the health sector trade under the General agreement of Trade in services (GATS) and increased corporatization of medicine with Asian countries are reasons for the growth of medical and health tourism in Asian countries."[16] In 1990s the swift growth and development of corporate health sector was a component of the wide-ranging strategy that was fashioned to endorse the private health sector of our country.

Medical tourism certainly does not provide assistance to emergency facilities and the facilities provided are mostly restricted to cosmetic and other major surgeries. The western countries' private healthcare is expensive and therefore, the people have no option but to get the medical treatment done in the Asian countries where the cost is much lesser than in their own country. Due to this, India has the potential to grow to be the global leader in this sector and is developing as the first-class medical travel destination because, as of 2016, India has 28 JOINT COMMISSION INTERNATIONAL (JCI) accredited hospitals.[17] In India, the accreditation system is well maintained and highly skilled medical practitioners and price arbitrage which has improved with the devaluation of rupee vis-à-vis the dollar thereby making India a honey- comb for MVT.[18]

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[15] Renee-Marie Stephano, *Medical Tourism Index: Leading Industry Tool,* Medical Tourism Magazine, (Sept. 23, 2016) (Nov.11, 2016, 10.34AM), http://www.medicaltourismmag.com/15252/.

[16] G. Saravana Kumar, Status, Growth and Impact of Medical Tourism in India, http://globalresearchonline.net/journalcontents/v34-1/46.pdf (last visited Nov 11, 2016).

[17] Joint Commission International, Joint Commission International, http://www.jointcommissioninternational.org/about-jci/jci-accredited-organizations/ (last visited Mar 30, 2017).

[18] Oommen A. Ninan, India may capture a third of medical value travel market The Hindu (2016), http://www.thehindu.com/business/industry/india-may-capture-a-third-of-medical-value-travel-market/article8397060.ece (last visited Nov 13, 2016).

Out of the total medical travelling, India captures almost one-third of it.[19] Jain states that most patients from countries like the USA and UK travel to developing countries such as India for treatment because India offers some of the cheapest pricing options of treatment, offers a good holiday, and there are no waiting lists or queues to stand in.[20] The "*Medical Tourism Market Report: 2015"* stated that India was *"one of the lowest cost and highest quality of all medical tourism destinations, it offers wide variety of procedures at about one-tenth the cost of similar procedures in the United States.*"[21]

The medical sector in India is predominantly ruled by the private sector. The major service providers in Indian medical tourism are: the Apollo Hospitals, Escorts Hospital, Fortis Hospitals, Breach Candy, Hinduja, Mumbai's Asian Heart Institute, Arvind Eye Hospitals, Manipal Hospitals, Mallya Hospital, Shankara Nethralaya etc. AIIMs, a public-sector hospital is also in the fray.[22] Apollo Hospitals are the largest healthcare provider and the first JCI-certified hospitals in India. According to Rohini Sridhar, Chief Operating Officer of Apollo Hospitals, the number of international patients visiting the hospital has been witnessing an increase of 20 per cent every year and said "We provide medical care for around 400 to 500 people from European countries, Malaysia, Singapore, Sri Lanka and the Middle East in a year,"[23]

Traditionally, the U.S. and the U.K. have been the largest source countries for medical tourism to India but, according to a CII-Grant Thornton report released in October 2015, Bangladeshis and Afghans accounted for 34% of foreign patients, the maximum share; Russia and the Commonwealth of Independent States (CIS) accounted for 30% share of foreign medical tourist arrivals and other major sources of patients include Africa and the Middle East, particularly the Persian Gulf countries. Bangladesh and Afghanistan dominate the Indian MVT with 34%

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[19] Oommen A. Ninan, India may capture a third of medical value travel market The Hindu (2016), http://www.thehindu.com/business/industry/india-may-capture-a-third-of-medical-value-travel-market/article8397060.ece (last visited Nov 13, 2016).

[20] G. Saravana Kumar, Status, Growth and Impact of Medical Tourism in India, http://globalresearchonline.net/journalcontents/v34-1/46.pdf (last visited Nov 11, 2016).

[21] Medical Tourism Market Report: 2015 Worldwide Market Size, Share, Trend, Analysis, Growth and Research Report | Medgadget (2016), http://www.medgadget.com/2016/04/medical-tourism-market-report-2015-worldwide-market-size-share-trend-analysis-growth-and-research-report.html (last visited Nov 13, 2016).

[22] Dr. Suman Kumar Dawn, *Tourism In India: Issues, Opportunities And Designing Strategies For Growth And Development*, 1, ZENITH, International Journal of Multidisciplinary Research 6–6, 6-6 (2011), medical tourism (last visited Nov 6, 2016).

[23] Facts & Statistics | Health Tourism, Health Care, Medical Travel | MedicalTourism.com, Facts & Statistics | Health Tourism, Health Care, Medical Travel | MedicalTourism.com, http://medicaltourism.com/forms/facts-statistics.aspx (last visited Nov 13, 2016).

share.[24] In 2015, India became the top destination for Russians seeking medical treatment.[25] Chennai, Jalandhar, Kolkata, Mumbai, Hyderabad and the National Capital Region received the highest number of foreign patients primarily from South Eastern countries.[26] The city of Chennai in particular has been termed "India's health capital"[27] From the year 2009 to 2011 the number of medical tourists in India has grown by 30% and it is estimated that after the year 2015, India will receive nearly half a million medical tourists annually.[28]

Table 1: No. of FTA in India

Year	No. of Foreign Patients
2012	171,021
2013	236,898
2014	184,298

Source: "Promotion of Medical Tourism". Press Information Bureau.

Table 2: FTAs in India along with the Growth Rates

Year	2012	2013	2014
Provisional FTAs (in millions)	6.65	6.85	7.46
Growth rate (%)	5.4	4.1	7.1
Final FTAs (in millions)	6.58	6.97	7.68
Growth rate (%)	4.3	5.9	10.2

Source: Ministry of tourism, Govt. of India, press release dated 27-7-15

Table 3: Foreign Exchange Earnings from tourism in India

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[24] Indian medical tourism to touch Rs 52,200 crore by 2020 ..., DNA, http://www.dnaindia.com/money/report-indian-medical-tourism-to-touch-rs-52200-crore-by-2020-grant-thornton-2140885 (last visited Nov 13, 2016).

[25] Alexandra Katz & specially for RIR, INDIA EMERGES AS NEW DESTINATION FOR RUSSIAN MEDICAL TOURISTS RUSSIA & INDIA REPORT (2015), https://in.rbth.com/society/2015/04/16/india_emerges_as_new_destination_for_russian_medical_tourists_42649 (last visited Nov 8, 2016).

[26] Alexandra Katz & specially for RIR, INDIA EMERGES AS NEW DESTINATION FOR RUSSIAN MEDICAL TOURISTS RUSSIA & INDIA REPORT (2015), https://in.rbth.com/society/2015/04/16/india_emerges_as_new_destination_for_russian_medical_tourists_42649 (last visited Nov 8, 2016).

[27] Medical tourism in India, WIKIPEDIA, https://en.wikipedia.org/wiki/medical_tourism_in_india (last visited Nov 7, 2016).

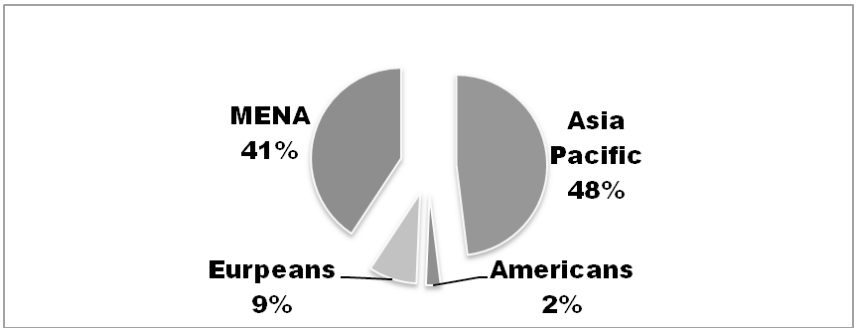
[28] Research/Surveys/Statistics, MEDICAL RESEARCH AND SURVEYS, http://www.medicaltourismassociation.com/en/research-and-surveys.html (last visited Nov 6, 2016).

Month/Year	Revenue (in Crores)
January 2013	10785
January 2014	11082
January 2015	11529

Source: India Tourism Statistics 2015

India has become a medical tourism hot spot, with 166,000 international patients in 2012 coming to the country due to the selection of highly skilled doctors and improved medical infrastructure.[29] India provides various healthcare services at 20% of the U.S. cost and the most popular treatments sought in India by medical tourists are alternative medicine, bone-marrow transplant, cardiac bypass, eye surgery and hip replacement.[30] Most estimates found that treatment costs in India start at around one-tenth of the price of comparable treatment in the United States or the United Kingdom.[31]

Figure1: FTA in India by region, 2012



In 2013, Medical Tourism Patient Survey found that Mexico and India respectively have the highest demand for medical tourism.[32] Chennai, Jalandhar, Kolkata, Mumbai, Hyderabad and the National Capital Region

[29] Medical Tourism Statistics and Facts, Medical Tourism Statistics & Facts. Info about Health Care Abroad., https://www.health-tourism.com/medical-tourism/statistics/ (last visited Nov 13, 2016).

[30] Medical Tourism Statistics and Facts, Medical Tourism Statistics & Facts. Info about Health Care Abroad., https://www.health-tourism.com/medical-tourism/statistics/ (last visited Nov 13, 2016).

[31] Medical tourism in India, Wikipedia, https://en.wikipedia.org/wiki/medical_tourism_in_india (last visited Nov 7, 2016).

[32] Facts & Statistics | Health Tourism, Health Care, Medical Travel | MedicalTourism.com, Facts & Statistics | Health Tourism, Health Care, Medical Travel | MedicalTourism.com, http://medicaltourism.com/forms/facts-statistics.aspx (last visited Nov 13, 2016).

received the highest number of foreign patients primarily from South Eastern countries.[33]

Table 4: Cost of treatments in comparison with India in U.S. Dollars

Medical Procedure	**U.S.A.**	**Singapore**	**Thailand**	**India**
Heart Bypass	130,000	18,500	11,000	10,000
Heart Valve Replacement	160,000	12,500	10,000	9,000
Angioplasty	57,000	13,000	13,000	11,000
Hip Replacement	43,000	12,000	12,000	9,000
Hysterectomy	20,000	6,000	4,500	3,000
Knee Replacement	40,000	13,000	10,000	8,500
Spinal Fusion	62,000	9,0000	7,000	5,500

(Source**: Traveller's Digest 2014**34**)**

Rao describes *that "a substantial number of foreigners are coming to India to avail themselves of quality medical treatment at a cost much lower than that of other countries of the world, particularly in the field of cardiology, cardiac surgery, joint replacement, ophthalmology, pathology and Indian systems of medicine etc.*" Mohanty and Mohanty are of the opinion that the Indian health care industry began to recently emerge as a prime destination for medical tourists by upgrading its technology, gaining greater familiarity with western medical practices and improving its image in terms of quality and cost.[35] Pankaj Mochi said that "the key reason for India's emergence as an important destination for healthcare is due to Indian doctors who are renowned world over. There are over 35,000 specialty doctors of Indian origin in the US alone. Also, Indian nurses are the most sought after and their caring approach towards treatment is well recognized."[36] The steps taken by Ministry of Tourism to promote India as a Medical and Health Tourism Destination includes promotion at international platforms such as World Travel Mart London, ITB Berlin, ATM, etc., yoga/Ayurveda/ Wellness has been promoted in the past years in the print, electronic,

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[33] Alexandra Katz & specially for RIR, India emerges as new destination for Russian medical tourists Russia & India Report (2015), https://in.rbth.com/society/2015/04/16/india_emerges_as_new_destination_for_russian_medical_tourists_42649 (last visited Nov 13, 2016).

[34] The Medical Tourism Industry - Traveler's Digest Traveler's Digest (2013), http://www.travelersdigest.com/574-medical-tourism-article/ (last visited Nov 10, 2016).

[35] G. Saravana Kumar, Status, Growth and Impact of Medical Tourism in India, http://globalresearchonline.net/journalcontents/v34-1/46.pdf (last visited Nov 11, 2016).

[36] G. Saravana Kumar, Status, Growth and Impact of Medical Tourism in India, http://globalresearchonline.net/journalcontents/v34-1/46.pdf (last visited Nov 11, 2016).

internet and outdoor media under the Ministry of Tourism's "Incredible India Campaign".[37]

V. IMPACT OF MEDICAL VALUE TOURISM IN INDIA

A. Relaxation in visa rules

The GoI has made certain policy reforms in order to attract more foreign national in the medical tourism sector. It introduced medical visa for foreign nationals across the world who are seeking medical treatment in India for extensive periods. A "visa-on-arrival" system for tourists from few selected countries has been instituted by government of India, which allows foreign nationals to stay in India for 30 days for medical procedures.[38] As per the new rules a maximum of two blood relatives are allowed to accompany the patient who will be given "Medical Attendant Visa" MXV. The validity of MXV will be same as the patient Medical visa and the preliminary duration of Medical visa is up to a year or duration of the treatment, whichever is less.[39] Under this visa a foreign national can pay a maximum of three visits to India in a year. Extension of this visa up to another year is also possible year on the orders of the State Governments or FRROs, if recognized hospital of India gives a medical certificate and if further extension is needed then on the suggestion of the State Government/FRROs coupled with suitable medical papers, the Ministry of Home Affairs can give a validation.[40]

The tourism ministry urged to the finance ministry last February, "It is well known that the potential of medical tourism to earn foreign exchange and create jobs in India is much bigger than any other form of tourism.

However, there is a requirement to make the medical visa regime more customer friendly,"[41] And now, the GoI has introduced "e-visas" under which applicants from nearly 150 countries eligible for e-tourist visas will be able to send online applications for medical visas with scanned copies of medical prescriptions from a government-accredited hospital of his/her

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[37] ANNUAL REPORT 2011 12 - nchm.nic.in, Ministry Of Tourism, http://www.nchm.nic.in/nchmct_adm/writereaddata/upload/annualreports/annual report 2011-12.pdf (last visited Nov 13, 2016).

[38] Medical VISA to India, Medical Tourism India, http://www.medicalindiatourism.com/medical-visa-india/ (last visited Nov 13, 2016).

[39] Medical VISA to India, Medical Tourism India, http://www.medicalindiatourism.com/medical-visa-india/ (last visited Nov 13, 2016).

[40] Medical VISA to India, Medical Tourism India, http://www.medicalindiatourism.com/medical-visa-india/ (last visited Nov 13, 2016).

[41] Amitav Ranjan, Eye on medical tourism, Govt clears e-visas for patients The Indian Express (2016), http://indianexpress.com/article/india/india-news-india/eye-on-medical-tourism-govt-clears-e-visas-for-patients-2783208/ (last visited Nov 13, 2016).

country.[42] This short term medical visa will be valid for 30 days from the date of arrival, after which the home department of individual states can extend it by up to one year, provided the application is based on a medical certificate backed by documented advice from a specialised and reputed hospital here.[43] The "e-VISA" can only be extended with the permission of the MHA.

B. MVT places citizens on a back foot

The public healthcare of India is underfunded and overcrowded. According to the World Health Organization (WHO), just 33 percent of Indian health care expenditures in 2012 came from government sources.[44] In 2015, there was one government hospital bed for every 1,833-people compared with 2,336 persons a decade earlier.[45]

Kumar in his book **Medical Tourism in India (Management and Promotion**) has the following two views on medical tourism:

i. Medical tourism will turn out to become a boon for the country as its growth will ultimately improve healthcare for the citizens and it will make India an economic superpower in the coming years.

ii. Medical tourism should be banned completely, as it increases the cost of medical treatment for the citizens who cannot afford such overpriced private hospitals.

The following graph explains the miserable condition of the Indian Primary Healthcare-

Figure 2: Country wise expenditure on "health"

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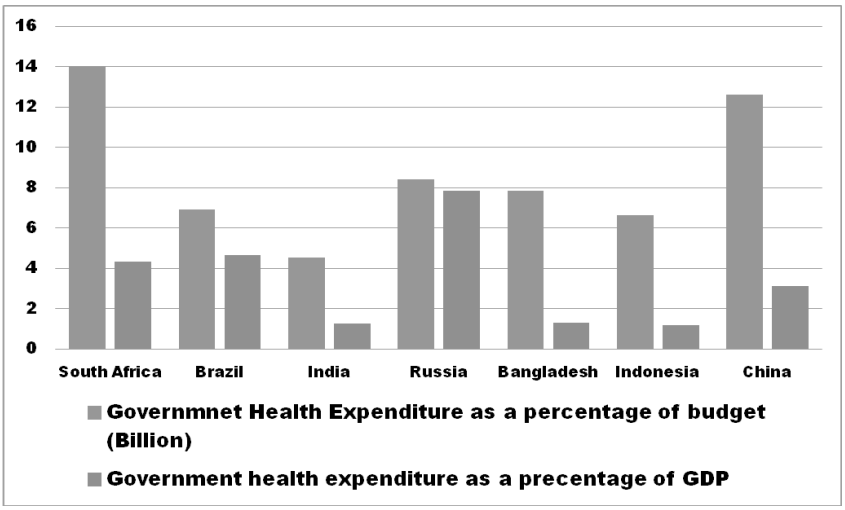
[42] Amitav Ranjan, Eye on medical tourism, Govt clears e-visas for patients The Indian Express (2016), http://indianexpress.com/article/india/india-news-india/eye-on-medical-tourism-govt-clears-e-visas-for-patients-2783208/ (last visited Nov 13, 2016).

[43] Amitav Ranjan, Eye on medical tourism, Govt clears e-visas for patients The Indian Express (2016), http://indianexpress.com/article/india/india-news-india/eye-on-medical-tourism-govt-clears-e-visas-for-patients-2783208/ (last visited Nov 13, 2016).

[44] 5 Things to know about India's Healthcare System | Forbes India Blog Forbes India, http://www.forbesindia.com/blog/health/5-things-to-know-about-the-indias-healthcare-system/ (last visited Nov 4, 2016).

[45] Ravi Krishnan, Seven charts that show why India's healthcare system needs an overhaul http://www.livemint.com/ (2015), http://www.livemint.com/opinion/qxd81719wxxdqvpgyyarro/seven-charts-that-show-why-indias-healthcare-system-needs-a.html (last visited Nov 13, 2016).



Source: National Sample Survey Office (NSSO)

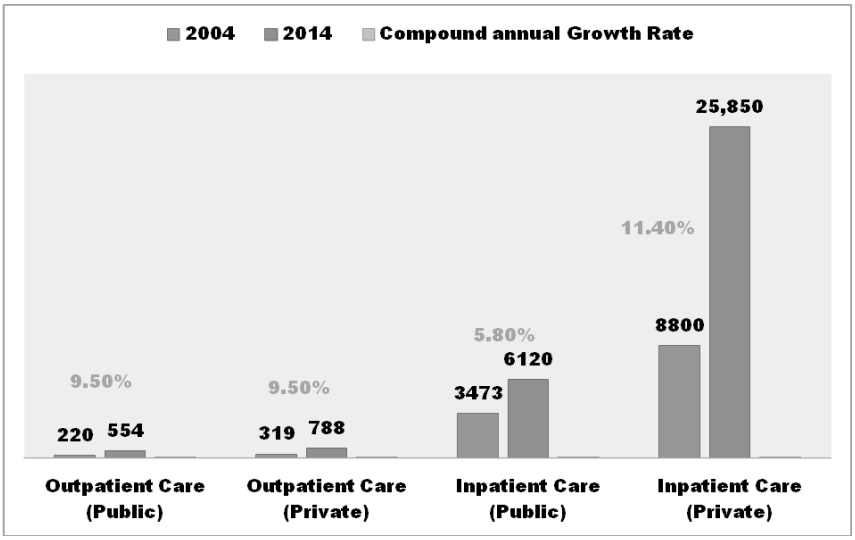
The above graph clearly shows the condition of our Public healthcare system the GoI's constant attempts to attract foreign nationals has put the Indian citizens on a back foot. The economical weaker sections have to endure the burns of this scenario as the urban mass has diverted towards the private healthcare. The Lancet Report said, many state governments also fail to use allocated funds, but this "might simply reflect structural weaknesses in the system and that need to be addressed with more resources and a different approach to provision and delivery of care". The *Lancet* study further stated, "India does not have an overarching national policy for human resources for health. The dominance of medical lobbies such as the Medical Council of India has hindered adequate task sharing and, consequently, development of nurses and other health cadres, even in a state like Kerala that has historically encouraged nurse education and has been providing trained nurses to other parts of India and other countries," The National Sample Survey Office (NSSO) numbers show a decrease in the use of public hospitals over the past two decades—only 32% of urban Indians use them now, compared with 43% in 1995-96.[46] To make the situation worse, India's ratio of 0.7 doctors and 1.5 nurses per 1,000 people is dramatically lower than the WHO average of 2.5 doctors and nurses per 1,000 people.[47] The situation is further aggravated as the qualified medical

[46] Ravi Krishnan, SEVEN CHARTS THAT SHOW WHY INDIA'S HEALTHCARE SYSTEM NEEDS AN OVERHAUL HTTP://WWW.LIVEMINT.COM/ (2015), http://www.livemint.com/opinion/qxd81719wxxdqvpgyyarro/seven-charts-that-show-why-indias-healthcare-system-needs-a.html (last visited Nov 13, 2016).

[47] 2015 HEALTH CARE OUTLOOK INDIA, DELOITTE www2.deloitte.com/content/dam/.../gx-lshc-2015-health-care-outlook-india.pdf (last visited Nov 13, 2016).

professionals are concentrated in the urban areas leaving the patients at rural areas in the hands of unqualified lot. The industry needs an additional 1.54 million doctors and 2.4 million nurses to match the global average.[48]

Figure 3: out of pocket Expenditure on Health in Rupees



Source: NSS 71st Round on Health

In India, it is argued that a "policy of 'medical tourism for the classes and health missions for the masses' will lead to a deepening of the inequities" already embedded in the health care system. The private corps and government has become so busy with foreign travellers that the economically weaker section of the Indian society has been forgotten and side-lined.

C. Surrogacy Trail

In India Surrogacy costs about $12,000, including all medical expenses and the surrogate's fee while it can cost up to $70,000 in U.S.A. "The number of surrogate mothers has gone up from 2009. In the past two years, at least 75 women have opted to become surrogate mothers through our trust," said Gurumurthy, an embryologist who runs a city-based trust which spreads awareness about surrogacy. For 10 years, transnational surrogacy was a thriving business in India. India's total assisted-reproduction sector has been reported as being worth between £305m and £1.6bn (there is no

[48] 2015 HEALTH CARE OUTLOOK INDIA, DELOITTE www2.deloitte.com/content/dam/.../gx-lshc-2015-health-care-outlook-india.pdf (last visited Nov 13, 2016).

reliable measure of commercial surrogacy's real value).[49] There is no law to regulate surrogacy practices in India; therefore, the foreign tourist can easily rent a womb in India. This ultimately leads to exploitation of women bearing the child i.e. surrogate mother as they are given petty amount whereas the Doctors/clinics take a much hefty amount from the foreign clients. India has become a hub for surrogacy for foreign clients and it is one of the major impacts of medical tourism.

VI. LIMITATIONS TO THE SECTOR

A. Legislative Loopholes: posing threat to the industry

India is rapidly growing in the number of FTA, but at the same time it is surrounded with major problems that give it a negative global imagine. One of the major problems that limit the growth of MVT in India is the lack of specific regulations to govern the industry on a standard scale. There are numerous tax anomalies and lack of investor friendly policies that drive away the potential market. Communal tensions and frequent terrorist attack are another two reasons that puts it on a back foot. The government has made attempts to attract foreign nationals, but the attempts are in vain as the GoI has not yet formed any specific regulation in this regard. Due to this, the foreign nationals usually find themselves in a situation where they have no option. Government is still sceptical on many fronts; therefore, FDI in healthcare sector is still a distant dream. The expenditure on healthcare in India every year is not adequate. The government should reduce barriers in getting medical visa and institute visa-on-arrival for patients and also can create medical attachés to Indian embassies that promote health services to prospective Indian visitors.

B. Medical Malpractice

Medical Malpractice is referred to as the There are many instances of medical malpractice that the foreign patients are susceptible to fall prey to. Sometimes the patients are charged with exorbitant price as compared to what is locally being charged from the citizens, other instances of malpractices include use of local language in the hospital documents and refusal by the hospital management to provide for a translator, sometimes technological means are used to predict the characteristics of the foetus.[50] Unethical

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[49] Abby Rabinowitz, The trouble with renting a womb | Abby Rabinowitz The Guardian (2016), https://www.theguardian.com/lifeandstyle/2016/apr/28/paying-for-baby-trouble-with-renting-womb-india (last visited Nov 6, 2016).

[50] Medical Tourism Magazine, Medical Malpractice in the realm of Medical Tourism, (May 23, 2011) (Nov. 11, 2016 16.15 PM), http://www.medicaltourismmag.com/medical-malpractice-in-the-realm-of-medical-tourism/.

organ transplant activities are another major concern. Another issue is that patients are sometimes not provided appropriate post-operative care. These practices performed by private institutions in order to gain short term benefits taint the reputation of the destination country.

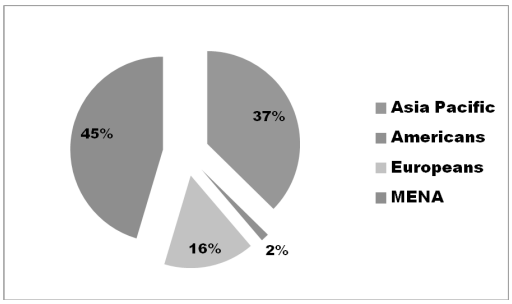
C. Insurance frauds

Out of the several reasons attributing to the flow of patients from the developed to the developing countries is *uninsured and under insured patients* who are looking for price savings (in some cases more than 80 percent) of what they would pay out of their pockets in their home countries such as United States. In U.S., many firms offer a full package to the medical tourist starting from hospital stay in an exquisite destination along with a trip itinerary which includes a visit to Taj Mahal or exotic beaches of goa or backwaters of Kerala.[51]

VII. OPPORTUNITIES: MVT AS THE NEXT CROWN JEWEL OF INDIA

Medical Tourism is poised to be the next Indian success story after Information Technology. India's medical tourism market is expected to more than double in size from $3 billion at present to around $8 billion by 2020, a report says.[52] A growing middle class has led the government to allocate the equivalent of 5% of annual GDP to expand and improve health care in the country.[53]

Figure 4: FTA in India by region, 2018 (Estimate)



[51] I. Glenn Cohen, *Medical Tourism: View from Ten Thousand Feet,* The Hastings Centre Report,40,1-3, (Mar. 2010) (Nov. 11, 2016, 6.42 AM), http://www.jstor.org.spicework.ddn.upes.ac.in:2048/stable/pdf/40663829.pdf.

[52] Indian medical tourism to touch Rs 52,200 crore by 2020: Grant Thornton, DNA (2015), http://www.dnaindia.com/money/report-indian-medical-tourism-to-touch-rs-52200-crore-by-2020-grant-thornton-2140885 (last visited Nov 13, 2016).

[53] Sunil Tyagi, *MEDICAL TOURISM AND INDIA*, 3 INDIA LAW NEWS, 28, 28 (2012).

VIII. CONCLUSION

Medical Value Tourism has no doubt made India stand out globally but, at the same time it cannot be denied that the healthcare sector of India is being neglected and the citizens are striving for basic healthcare necessities. The gap between the quality of healthcare services offered by the public healthcare sector and the private ones has no improvement. Yet the ever-rising prices of the private healthcare sector deprive the citizens of medical facilities. On one hand the country propagates about the 'zero-waiting' line scheme for foreign nationals, the citizens on the other hand are fighting for 'a bed' in a public hospital. Another ugly face of medical tourism can be traced in the loose ended/less implemented legislations that the potential medical mal-practitioners take advantage of to lure foreign nationals. While on one hand they are successful in filling their pockets, they are robbing India of its global image as medical value tourism destination.

The researchers have following suggestions to make pertaining to certain treatments and practices:

1. Surrogacy: The recent Surrogacy Bill must be implemented at the earliest. Clear laws relating to surrogacy must be framed. The concept of 'womb for rent' must be curbed down. However instead of completely banning surrogacy practices it can be curbed down. Women should be allowed to be surrogate mothers only once. Banning surrogacy for foreign tourists cannot be a viable solution to curb malpractices instead regulating it would be a proper option. Cases in which infertility in couples subsists for a reasonable period of time (upon medical grounds) should be considered.
2. Malpractices: With the burgeoning list of cases of malpractices unwarranted advertisements regarding medical therapies should be banned. Doctors should not be allowed to advertise of their expertise even through indirect measures. This includes doctors advertising about illegal stem cell therapies.
3. Government should increase the primary health care budget as the current budget clearly fails to meet the medical needs of 1.2 billion people.

BIBLIOGRAPHY

Articles/Journals:

1. Lakhvinder Singh, An evaluation of medical tourism in India.
2. Status, Growth and Impact of Medical Tourism in India.

3. Alexandra Katz & specially for RIR, India emerges as new destination for Russian medical tourists Russia & India Report (2015).
4. Sunita Reddy & Imrana Qadeer, Medical Tourism in India: Progress or Predicament.
5. Sarah Burningham, Roxanne Mykitiuk & Alana Cattapan, Canadian Journal of Comparative and Contemporary Law.
6. The changing world of medical tourism, (2013).
7. Dr. A. Didar Singh, *Medical Value Travel In India: FCCI Heal Conference,* KPMG,1 (2014) (Nov. 11,2016,12.02 AM).
8. Ramya M. Vijaya, Medical Tourism: Revenue Generation or International Transfer of Healthcare Problems.
9. Renee-Marie Stephano, *Medical Tourism Index: Leading Industry Tool,* Medical Tourism Magazine.
10. Medical Tourism Index, Destination Ranking, (2016).
11. India, Global Ranking, Medical Tourism Index.
12. Canada, *Global Ranking, Medical Tourism Index*, (2016).
13. Singapore, *Global Ranking, Medical Tourism Index*, (2016).
14. Dr. Suman Kumar Dawn, *Tourism In India: Issues, Opportunities and Designing Strategies For Growth And Development*, 1, ZENITH, International Journal of Multidisciplinary Research 6–6, 6-6 (2011).
15. Research/Surveys/Statistics, Medical Research and Surveys.
16. Alexandra Katz & specially for RIR, India emerges as new destination for Russian medical tourists Russia & India Report (2015).
17. The Medical Tourism Industry - Traveler's Digest Traveler's Digest (2013).
18. G. Saravana Kumar, Status, Growth and Impact of Medical Tourism in India.
19. ANNUAL REPORT 2011 12 -Ministry Of Tourism.
20. Ravi Krishnan, Seven charts that show why India's healthcare system needs an overhaul.
21. Glenn Cohen, *Medical Tourism: View from Ten Thousand Feet, T*he Hastings Centre Report.
22. Indian medical tourism to touch Rs 52,200 crore by 2020: Grant Thornton, dna (2015).

23. Sunil Tyagi, *MEDICAL TOURISM AND INDIA*, 3 India Law News, 28, 28 (2012).

Newspaper/Press Release:

1. Forbesindia, 4 things to know about India's next crown jewel, Medical Tourism | Forbes India Blog Forbes India.
2. Oommen A. Ninan, India may capture a third of medical value travel market The Hindu (2016).
3. Indian medical tourism to touch Rs 52,200 crore by 2020, dna.
4. Amitav Ranjan, Eye on medical tourism, Govt clears e-visas for patients The Indian Express (2016).
5. 5 Things to know about India's Healthcare System | Forbes India Blog Forbes India.
6. Medical Tourism Magazine, Medical Malpractice in the realm of Medical Tourism, (May. 23,2011).

Internet Sources:

1. India: A Premier Healthcare Destination - India Healthcare TourismIndia: A Premier Healthcare Destination - India Healthcare Tourism.
2. Why India - Med Tour India 4 HealthMed Tour India 4 Health.
3. ENBlogger, *Medical and Wellness Tourism: Differences,* Europe NOW:Lifestyle Expo.
4. JCI Accredited Organizations - Joint Commission International.
5. Medical Tourism Market Report: 2015 Worldwide Market Size, Share, Trend, Analysis, Growth and Research Report | Medgadget (2016).
6. 2015 health care outlook India, DELOITTE.
7. Abby Rabinowitz, The trouble with renting a womb | Abby Rabinowitz The Guardian (2016).
8. Facts & Statistics, MedicalTourism.com.

NATIONAL HEALTH POLICY: A STEP TOWARDS RIGHT TO HEALTH

—*Abhishek Naharia*[*]

Abstract *The paper focuses upon the viewpoint of Right of Health as being included in the ambit of the Fundamental Rights in the Constitution of India. The paper critically analyzing the fact as to why Right to Health could not be placed under this ambit despite the fact that there have been full-fledged policy making in the past 20 years, and despite the fact that there have been three national policies exclaiming the same but none of them has been successful in the same. The paper tries to focus on the pros and cons of National Health Policy 2017 which has recently been launched by the Government of India, and has clearly highlighted the point where the Government was successful in proving to its people that it has remained successful in making out another draft which is only and only for the welfare of its people.*[1] *Further, the paper specifies the landmark cases where it was said that Right to Health must be included into the Constitution as per the facts of the case and at the and the lacunas and suggestions as to how the Government can improve upon the same in the coming years.*

I. INTRODUCTION TO NATIONAL HEALTH POLICY 2017:

The National Health Policy of India of 1983 and 2002 have been contributing to the condition of Health in India, especially the deprived class and

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[1] The paper has also highlighted the lacunas where the Government had failed to work upon in the previous National Health Policies as well as has also this time committed the same blunder of not including certain significant things in it.

ones succumbed to diseases. The primary aim of the Govt. in this policy is to nationalize health sector so that everyone derives a benefit out of it, employ more and more people for the development of health sector, make access to the technologies to every citizen, to develop better financial facilities especially for the deprived class and prevention of diseases and promote good health. It has been a long time that after 14 years the Govt. has updated with a new policy for the country which according to the experts is not contributing a great deal to the health of the people. The main reasons behind it being the rapid technological advancement in the process of healthcare services provided to people and also the lack of the applicability and implacability of the policies drafted throughout poor areas of the country. As these areas, have been kept void since time immemorial, there have been hardly any changes seen in the ratio of people cured in accordance with the policies implemented. It is seen that despite no-tolerance policies for diseases like HIV, Leprosy etc. there has hardly been a variation in the percentage of people suffering from such diseases. If the percentage of GDP devoted to Health is seen in relation to the 2002 National Health Policy, then the experts say that there is a negligible amount of variation in the same. In 2002 policy, it was kept at 2% and now the aim for 2025 has been kept at 2.5%, so a 0.5% increase of total GDP would be negligible for the improvement of Health in India, keeping in mind the point that WHO has suggested the standard rate be 5% of the GDP of the country. Also, among various surveys conducted across the country, it has been shown that the government spends only 1.1% of the GDP which constitutes only 28% of the expenditure.[2]

II. PROS AND CONS OF NATIONAL HEALTH POLICY 2017

Some new points added on to the policy are as follows. First of all, the government has realized that the lack of proper healthcare facilities has not been just because of the reason that there was an absence of an efficient infrastructure to deal with the same but because that there was a lack of professionals in this field of work. Secondly, there has been an introduction of mid-level service providers, qualified through the bridge course and other quasi-medical short courses. Although there is a concern for reducing the Maternal Mortality Rate (MMR) in every such policy but in comparison to 2002, the current policy has failed to mark upon the level of the earlier one. Similarly, the old age people have got less attention this time in the policy. Further, the health programs adopted in the school have gained less attention as well as the decentralization of these policies have been a cause for concern. The policy since 2002 has also been silent on the concern of children below the age of 5 which must have been a major take-up

[2] www.livelaw.in/national-health-policy-2017-erroneous-assumptions.

of the Government. The policy also covers Yoga as an essential element for the formulation of health policies and their implementation. It expects states to increase their expenditure till 2.5% of the GDP and lastly it provides a framework for the establishment of Public Health Management Cadre in every state. Further, towards its criticism, the Government had brought a health cess earlier which the policy seeks to abolish, would act as a setback for the Nation's health. And most importantly it fails to bring health as a justiciable right through National Health Rights Act as Right to Education made it for the school education in the year 2005.[3]

III. WHAT IS HEALTH? DEFINITION BY UNWHO.

- WHO defines health as the state of complete mental, physical and social well-being not just merely the absence of any disease or infirmity.[4] WHO further says that the development of health is necessary for a country because it leads to the attainment of Peace and Security. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition. It says that without the development of health in a country, the country cannot even think of prospering in an international context. The danger of the spread of contagious diseases remains a common factor haunting governments of different nations, as without proper spread of the knowledge by the responsible authorities throughout the country, it is difficult for other authorities to take action upon the same, so it becomes necessary for the state to intervene between the people and take the responsibility to provide adequate facilities in the direction of health of the people.

IV. WHAT IS RIGHT TO HEALTH? WHICH ALL INT'L ORGANIZATIONS HAVE RECOGNIZED IT?

As per Article 12 of International Covenant on Economic, Social and Cultural Rights, the Covenant recognizes the right of everyone to an adequate standard of living, for himself and his family, including adequate food, clothing, and housing and to the continuous improvement of living conditions.[5] The covenant enables the State parties further to take steps so that everyone can be free from hunger by improving methods of consumption, conservation, and distribution of food.

Recently in 2006, with the Convention of Rights of a person with disabilities has said that the person with disabilities have the complete right to the

[3] http://forumias.com/portal/analysis-of-national-health-policy-2017.
[4] http://www.who.int/about/mission/en/.
[5] http://www.claiminghumanrights.org/adequate_living_definition.html.

enjoyment of the highest standard of health irrespective of the fact that the person encompasses the right to health as different states have been making out different provisions with regards to the same.[6]

Further, Article 17 of the Beijing Conference of 1995, Articles 11, 12, and 14 of the Convention of All forms of discrimination against women CEDAW and Article 12(1) of Protocol on Economic, Social, Cultural Rights the State parties have agreed upon the fact that there is a need for Right to Health as it empowers the surrounding.

V. WHAT IS RIGHT TO HEALTH IN INDIA? WHERE HAS ALL IT BEEN ENSHRINED IN THE CONSTITUTION?

The Constitution of India manifests the responsibility of right to Health in the Executive branch of the Government rather than the legislative part of the Government. This further means that it is the duty of the Central Executive Government along with the State Executives to look after the health of its citizens and ensure to the timely availability of the facilities keeping the balance of nutrition among every section of the society. As talked about earlier that the National Health Policy was first started by the Government of India in the year 1983 and then subsequently updated formally in the year 2002 and now recently in 2017 again it has been updated. Although according to experts there have not been any special changes in the National Health Policy as compared to the earlier ones, but rather than remaining impactful towards the situation it is better that the Health policy is slowly and gradually growing towards the true path, that is towards the fulfilment of the goal of the physical and mental well-being of the people. Now after the enactment of these National Health Policies, it has been a matter of continuous observance that there has been a gigantic amount of difference, variation in the health inequality between the states be it the difference in Infant Mortality Rate or be it the Maternal Mortality Rate.

Right to Health has not been enshrined as such specific in the Constitution as a fundamental Right but despite this fact it can be said that it has been mentioned several times in the Directive Principles of State Policy as;

> ***Article 38****: The state will secure a social order for the promotion of the welfare of the people. Providing*

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[6] http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=24507.

affordable healthcare is one of the prominent ways of promoting welfare.[7]

Article 39 (e): *This ensures that the health, as well as the strength of the workers, men, and women and the tender age of children, are not abused.*[8]

Article 41: *This article in the DPSP imposes the duty on the state to provide public assistance in cases of unemployment, old age, sickness, and disablement.*[9]

Article 42: *This article makes the provision for the benefit of the child and the mother, i.e. the maternity benefit.*[10]

Article 47: *This makes it the duty of the state to improve public health, securing of justice, human conditions of work, an extension of sickness, old age disablement and maternity benefits and also contemplated. Further State's duty includes the prohibition of consumption of intoxicating drinking and drugs injurious to health.*[11]

Article 48 A: *This ensures that the State shall endeavor to protect and impose the pollution free environment for good health.*[12]

Apart from these being mentioned in the Directive Principles of State Policy, some other provisions related to health have been enshrined in the eleventh (11th) and the twelfth (12th) schedule of the Constitution of India where the topic of Panchayats and Municipalities has been mentioned. Here they have talked about the sanitation facilities been provided to a citizen being a part of this country, which includes healthy potable drinking water, keeping in mind the health and sanitation, for the welfare of the family, women and child development and at last the overall development of the society.

Article 243 G says that,

That the legislature of the State may endow the panchayats with necessary power and authority in relation to matters listed in the eleventh

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7 Constitution of India, Art. 38.
8 Constitution of India, Art. 39 (e).
9 Constitution of India, Art. 41.
10 Constitution of India, Art. 42.
11 Constitution of India, Art. 47.
12 Constitution of India, Art. 48 A.

schedule. The entries in the eleventh schedule have direct relevance to the right to health in the following manner,

11 – Drinking

23 – Health and Sanitation including Hospitals, primary health centers and dispensaries

24 – Family Welfare

25 – Women and child development

26 – Social welfare including welfare of the handicapped and the mentally retarded people.

Whereas Article 243 W finds its place in the part IX-A of the Constitution of India titled "The Municipalities":

5 – Water supply for domestic industrial and commercial purpose.

6 – Public Health, sanitation conservancy, and solid waste management.

9 – Safeguarding the interests of the weaker sections of sections, including the handicapped and the mentally retarded.

16 – Vital statistics including registration of births and deaths.

17 – Regulation of Slaughter – houses, and tanneries.

It is pretty clear from mentioning above that as these principles belong to the DPSP category and not under fundamental rights, hence they cannot be enforced in the court of law. These types of rights are made for the citizens with regards to DPSP, that is keeping in mind that they cannot be enforced against the individual, and no person in the future can claim the same for the non-fulfilment of these directives.

Despite considering the above fact, it needs to be taken care that the Supreme Court at several instances has brought Right to health under the purview of Article 21. The scope of this provision has been widening since Supreme Court in several judgments has laid down on the same point. The Supreme Court has further expanded the horizon of the comprehension of Right to personal Liberty and Right to Health. Thus, it could be said that Right to Health along with several other numerous political, civil, economic rights has been protected under the Constitution of India.

It was made clear by the Supreme Court in the year 1973 itself in the landmark case of *Kesavananda Bharati* v. *State of Kerala*[13] uttering

[13] *Parmanand Katara* v. *Union of India*, (1973) 4 SCC 225.

progressive jurisprudence engaging in between the fundamental rights of individuals. In the same period of time in India, there were several instances when it could be said that a hope arose in relation to the access of justice easily by the people, when firstly there was the establishment of consumer courts where there were provisions laid down in a manner such that the consumers were easily accessible to the Justice, and there were expectations of speedy trials by the courts in regards to this, and the law made it easier for the common man to avail their rights through medical negligence. Secondly, the growth has been seen in the filing of the Public Interest Litigation where the health care relates to the recognition as a fundamental right. The PIL through the Supreme Court has permitted each and every citizen of India to individual approach the Supreme Court directly in matters related to the same.

Article 21 of the Constitution of India states that, "

No person shall be deprived of his life or personal liberty except according to procedure established by law", according to the Constitution makers, Right to life means something more than this, not mere existence on this planet but to live constantly with human dignity and decency.

The Supreme Court in *"Parmanand Katara* v. *Union of India"*[14] held that whether the patient is an innocent person or be a criminal liable to punishment under the law, it is the obligation of those who are in charge of the health of the community to preserve life so that innocent may be protected and the guilty may be punished.

Further, in the year 1993, the Supreme Court had held that the Right to Health is a fundamental Right covered under Article 21 of the Constitution of India since health is essential for making the life of workmen meaningful and purposeful and compatible with personal dignity. So, the Court said that the state had an obligation under Article 21 to safeguard the right to life of every person, preservation of human life being of Paramount importance.

VI. ARTICLES DEALING WITH RIGHT TO HEALTH OTHER THAN ARTICLE 21?

Along with the DPSP and Article, Article 23 of the Constitution of India is howsoever related to the Right to health. Article 23 of the Constitution deals with the traffic in human beings and other similar forms of forced labour, which in turn can lead to a highly contagious disease AIDS and here comes the concept of Right to Health. Furthermore, Article 24 is in relation with the Child Labour where the article says, "No child below

[14] *Parmanand Katara* v. *Union of India*, (1989) 4 SCC 286 : AIR 1989 SC 2039.

the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment."[15] Thus this article is of direct relevance to child health.

VII. CASES REGARDING RIGHT TO HEALTH BEING EXCLAIMED AS FUNDAMENTAL RIGHT?

There have been many such cases in the past where it was decided that Right to Health falls under the ambit of the Fundamental Right, such as in *Consumer Education & Research Centre* v. *Union of India*[16], the Court had held that Right to Health and medical care is a fundamental right under Article 21. The Supreme Court while examining the issue of the Constitutional Right to Health care under Articles 21, 41 and 47 in *State of Punjab* v. *Ram Lubhaya Bagga*[17], observed that the right of one person correlated to the duty upon the another individual, employer, government or authority. Hence the right of a citizen to live under Article 21 casts an obligation on the states. This obligation is further re-enforced under Article 47, where it says that it is for the state to secure health to its citizens as its primary duty. No doubt the Government is rendering this obligation by opening government and health centers, but to be meaningful, they must be within the reach of an ordinary person and of sufficient liquid quality. Since it is one of the most sacrosanct and sacred obligation of the state, every citizen of this welfare state looks towards the state to perform this obligation with top priority, including by way of allocation of sufficient funds. This, in turn, will not only secure the rights of its citizens to its satisfaction but will benefit the state in achieving its social, political and economic goals.

There have been cases related to labourers especially where it had been stated that the rights of workers would be held under the right to basic health facilities under the constitution, as well as under the International Conventions where India is a party. In its pathbreaking landmark judgment, the Supreme Court had delineated the scope of Article 21 of the Constitution and held that it is the fundamental right of everyone in this country to live with human dignity which has been enshrined in Article 21 of the Constitution and that has been directly related to the Directive Principles of State Policy. The court in this case of *Bandhua Mukti Morcha* v. *Union of India*[18] had said that Article 21 must include the opportunities and facilities given to the children and workers, freedom of professing whatever they want to, educational facilities, just and humane conditions to

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[15] India Const., art. 24.

[16] *Consumer Education & Research Centre* v. *Union of India*, (1995) 3 SCC 42 : AIR 1995 SC 922.

[17] *State of Punjab* v. *Ram Lubhaya Bagga*, (1998) 4 SCC 117.

[18] *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161.

work upon and maternity relief and called all these as minimum requirements which should exist as a person to work in a humane environment. In another *CSE Ltd.* v. *Subhash Chandra Bose*[19], the Court held that the health and strength of a worker is an integral factor in the right to life and is closely linked with the Right to Health. The aim of fundamental rights is to create an egalitarian society to free all citizens from coercion or restrictions by society and to make liberty available for all. The court while reiterating its stand for providing health facilities, in *Vincent Panikurlangara* v. *Union of India*[20] held that a healthy body is the very foundation of all the human activity. That is why the adage 'Sariramadyam khalu dharma sadhanam'. In a welfare state, therefore, it is the obligation of the state to ensure the creation and the sustaining of conditions congenial to good health

Further the Supreme Court in *Paschim Banga Khet Mazdoor Samity* v. *State of W.B.*[21], while widening the scope of Article 21 and the government's responsibility to provide medical aid to every person in the country, held that in a welfare state, the primary duty of the government is to secure the welfare of the people, providing adequate medical facilities for the people is an obligation undertaken by the Government in a welfare state. The government discharges this obligation by providing medical care to the persons seeking to avail of those facilities. Article 21 imposes an obligation on the state to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The Govt hospitals run by the Govt are duty bound to extend medical assistance for preserving human life. Failure on the part of the govt hospital to provide timely medical treatment to a person in need of such treatment, results in aviolation of his right to life guaranteed under Article 21.

VIII. WHAT IS THE REASON BEHIND RIGHT TO HEALTH NOT BEING CONSTITUTED AS FUNDAMENTAL RIGHT?

The main logic behind Fundamental Right is not being constituted under the constitution although many landmark judgments by the Supreme Court have laid down the fact that it should anyhow be one of the rights of the citizens of India. The right to health has been one of the prominent forces that have been driven across the branches of Government in India, that is the Judiciary, Executive and up to some extent Legislature and it has been solely due to this reason that as conflicts have arisen to such an extent that it is disputed till date. The fact cannot be declined that the Central as well as the state Governments having the right to govern the Right to Health

[19] *CSE Ltd.* v. *Subhash Chandra Bose*, (1992) 1 SCC 441.
[20] *Vincent Panikurlangara* v. *Union of India*, (1987) 2 SCC 165.
[21] *Paschim Banga Khet Mazdoor Samity* v. *State of W.B.*, (1996) 4 SCC 37.

might not be able to go for enacting the same because it has in back of its mind the fact that it would not be able to provide such facilities so as to fulfil the needs of the citizens with respect to the healthcare facilities provided by them both in the technological aspect and in the facility aspect.

Another major factor in this has been that Directive Principles of State Policy are not enforceable as has been prescribed in the Constitution by the makers, so whatever might be the statements of the eminent jurists and whatever might be the decisions by the Supreme Court, till Right to Health as a Bill is not passed in the legislature, this problem will not be solved and this menace will keep on troubling innocent people who are not even aware of their rights, that is the common men as well as those who are aware of their rights but can just wait and watch as to what time will it take the Government for the enforcement of this right.

IX. METHODS TO BE ADOPTED IN REFERENCE TO NATIONAL HEALTH POLICY TO MAKE IT A FUNDAMENTAL RIGHT?

More emphasis must be laid on Right to Health by the Government and the *misuse* of the policy of *separation of powers* must be taken care of. At the end of the day what matters is to the Government of a country is whether its citizens are getting proper rights as prescribed by the Constitution of that Country. Talking in coherence with the *doctrine of separation of powers*, which talks about the interference of the three branches of the Government between each other, it could be said that till the time this stops happening and each organ of the government co-ordinates with the other, there cannot be any fruitful result. In several cases, the judgment of the Supreme Court has clearly stated that it must be included as a fundamental Right, but the issue has been that the other branches of the Government have not come in support of the same and the idea is rejected straight away by any other branch of the government.

Following this measure, what can be done is that the Government must take steps towards enhancing the Healthcare facilities in the country so that as the people become aware of this fact, the Government starts getting serious on the same and may after some time consider Right to Health as a fundamental right. In the current scenario in India, it has been seen that the Government run healthcare organizations have been least bothered about the well-being of the citizens, not ignoring the fact that some of them really work sincerely. But the time has come when we need to get Right to Health under the ambit of a fundamental right because the prevention of life is of paramount importance to a Government and the Government must be such

that it can go up to far extent to avail the same using the three vital organs judiciously.

Hence, there is a need for a change in the working system in India as in regards it is working presently, because if it keeps on working on the same tone further also, then nothing more can be expected out of it as has been shown by it in the past. Precautionary measures must be taken by the Government for the enhancement of Healthcare facilities in the nation and Health must be taken as the topmost priority in the decision makings and in the coming times must try to enforce the fundamental right under the Constitution. So, the government should try to make considerable amount of changes in its National Policy as far as Right to Health is concerned and must mend its ways to implement Right to Health in the National Policy next time, the only means of which is to rise itself in the eyes of its citizens in a manner that all of us start believing that Health should be given at least this much priority such that it can be included in the list of fundamental rights. There is no other way out than this as we have not been seeing any change in this Right to Health Policy since 1983 when the first draft of National Health policy was laid out. Therefore, we should all stand up towards making India a better place to live in with respect to the healthy conditions we provide for our future generations and the government should follow strict measures to enforce Right to Health as a fundamental right.

RELIGIOUS INTOLERANCE AND ITS IMPACT – A SOCIOLOGICAL STUDY

—*Shreyashi Jha*[*]

Abstract *The word "intolerance" simply means not being ready or willing to accept the thoughts and opinions of another. And when the prefix "religious" is added to the word intolerance, it means intolerant towards another religion, not respecting the other religion, not accepting their beliefs, their norms, and their idea of life. According to records, there was no existence of religious intolerance before the rise of monotheism. Ancient polytheistic religions worshipped numerous gods but never involved doctrinally precise professions of faith. There were no such matters as orthodoxy or heresy. The gods were mutually tolerant of one another, and the worshippers were eclectic, moving from one shrine or cult to the next without the slightest feeling of inconsistency. The rise of nationalism in Europe was accompanied by state actions that led to persecution and evictions of religious communities that did not subscribe to established religions. In the 17th and 18th centuries, the British drove the Protestant minorities to the Americas. In the 19th century religious minorities throughout Eastern and Central Europe Bulgarians, Greek, Jews, Turks, Hungarians, Serbs and Macedonians were driven out of their homes. And as far as Indian civilization is concerned, all started with the arrival of Aryans and later the arrival of Mughals. The article introduces the concept of religious intolerance then presents the literature reviews of some previous works thereafter provides various theoretical framework working on the topic, further goes on to explain the need for understanding the issue, presents data analysis collected through secondary sources and concludes by giving recommendations.*

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I. INTRODUCTION

Sometimes, old ideas are the most dangerous; some are so dangerous that they have acquired a new meaning by giving a moral base to religious intolerance. In 2002, killing of Muslims by the Hindus in Gujarat, anti-Semitism in Europe, and prejudice against Muslims, Dadri killing and on and on it goes. Intolerance breeds intolerance, it permits people to see their aggression towards other as legitimate. The thought that promotes religious intolerance can be that one's own religion is good and true and other religions are false and bad.[1] Religions were formed by attainment of a connection with the law of spirit, it was founded by men who had entered into a communion with the love and power, the divinity which was supposed to bring spiritual advancement in the lives of people, which was to destroy the roots of man's self-limiting beliefs and inhumane behavior, which was to supposedly tell man as to which path is wrong and which path is right. These activities were carried out by the making of laws of life, the divine laws, core teachings which eventually took the form of codified scriptures. These scriptures were later subjected to interpretations and analysis by various philosophers and priests. Then times changed, people changed and so did religions, now religion was interpreted as per new political conditions, knowledge of world etc. The fact as to the evolution of a particular religion was explained by different philosophies. The original parent concept of religion multiplied and divided into various new ideas and each claimed the superiority of their identity and beliefs.

Change within a religion is its ability to adapt to the advancements of technology, to contact with other cultures, to get exposure to competing ideas and beliefs. When a religion has a positive influence, it finds new ways to revive its idealism and altruism, and continues to be a source of hope and meaning for mankind. When it shows its dark side, religion breeds fear, paranoia and xenophobia, instills guilt, and nurtures hatred of other religions in the minds and hearts of its followers. Religion also has a psychological impact on people's mind; one effect of it is fanaticism, where a person's individual is distorted by group mind. Fanatics are motivated by terror and a feel that the world does not understand them. Religious intolerance is an attitude produced by fanaticism. Originally the rights, dogmas and beliefs were established to guide people for their life, but gradually these led to crusade, holy war, inquisition, forced conversion and revolution. Revolution is born of psychological and social commotion, from bearing injustice and oppression for far too long. But the revolution of fanaticism is blind, and often leaves in its wake a more potent oppression than the one it succeeded. Religious mania coupled with nationalistic fervour have brought

[1] According to Jeremy Waldron (1988), an argument for toleration is "an argument which gives a reason for not interfering with a person's beliefs or practices even when we have reason to hold that those beliefs or practices are mistaken."

to power many throughout History, who crush dissent and free-thinking, who dictate oppressive law and strict morality, and lead their followers onward into needless war, misery and suffering.

There was no existence of religious intolerance before the rise of monotheism. Ancient polytheistic religions worshipped numerous gods but never involved doctrinally precise professions of faith. There were no such matters as orthodoxy or heresy. The gods were mutually tolerant of one another, and the worshippers were eclectic, moving from one shrine or cult to the next without the slightest feeling of inconsistency. The rise of nationalism in Europe was accompanied by state actions that led to persecution and evictions of religious communities that did not subscribe to established religions. In the 17th and 18th centuries, the British drove the Protestant minorities to the Americas. In the 19th century religious minorities throughout Eastern and Central Europe Bulgarians, Greek, Jews, Turks, Hungarians, Serbs and Macedonians were driven out of their homes. And as far as Indian civilization is concerned, all started with the arrival of Aryans and later the arrival of Mughals.

Religious intolerance can be divided into four forms: The first one being inter faith intolerance (for example Hindu – Muslim intolerance), the second one being intra faith intolerance (for example intolerance between two sects of Muslim community) the third one being intolerance by and from a faith group against a secular group (e.g. Christian fundamentalists vs. Agnostics, Atheists, Humanists, Homosexuals, Transsexuals, loving, committed same sex couples who want to marry etc.). Intolerance by a secular group against a religious group (e.g. feminists vs. some organized religions)

Intolerance is not a new phenomenon, it had always been present but in a passive form, now it has taken an active form with killings, atrocities and violence by one religious group over another. This project looks into the various theories that may apply to the concept of intolerance, along with looking into the instances and probable reasons for intolerance.

II. LITERATURE REVIEW

Robert W. Friedrichs (1974) has spoken of the past two or three generations as a time of cooperation between social science and religion. Although he had little to say about the contribution sociologists made to it, it seems clear that two of their contributions were essential to bringing it about. The first was their assertion that empirical science can say nothing definitive about the truth or falsity of religious beliefs. The second was their assertion that science is incompetent to make value judgments concerning religious practices and their effects. These two assertions formed the basis for a

non-antagonistic division of labour between social science on the one hand and religionists on the other. The latter were to have sole jurisdiction over theological and moral judgments. The former claimed only to be able to make non-evaluative explanations of religious behaviour.

Friedrichs has also observed that the cooperation is now in jeopardy. He has pointed to a few trends in sociology and related fields that have helped put it in jeopardy. The contradiction between the claim that the sociology of religion is value-neutral and the fact that contemporary sociological theories of religion do contain value judgments have created a problem. At the level of general theory, the sociology of religion implicitly sanctions religion, or at least some aspects of it. On the question of religious truth, however, general theory is implicitly atheistic. Theory in our field has constrained sociologists to say, in effect, that although religious ideas are not true, there is much in religion that is good.

Sisk, Timothy (2011) argues that what affects the behaviour of religious leaders is the persistence of non-democratic regimes. It argues that the problem lies in the relationship between different political leaders and that much depends on the relationship between the religious elite and the society. It seems to presume that the religious elites of any society are necessarily a factor in reflecting the social forces.

Rahman Abdul Farhana Nur & Khambali Mohd Khadijah (2013) observed in relation to Malaysia that the practice of tolerance, when it becomes a culture in the daily interaction between people of different religions, is able to produce a society with positive attitude, broad hearted and compassionate. They claim that there is a problem of people to understand religion, it depends on perceptions and thus varies at different levels or degrees and therefore it is difficult to harmonize different religions.

Derichs Claudia and Fleschenberg Andrea (2010) have debated intolerance through the triangle of gender, religion and politics. In the light of religion, they have argued in relation to religious fundamentalists and then this is linked with the status of women in relation to religion and politics. The paper compares the gender in politics and religion with respect to different religious groups. But what the paper lacks is that it seems to ignore the fact that there are some non-believers of religion, there is the third gender, and these are part of the society so what effect any instance of intolerance would have on them.

Groff Linda and smoker Paul (1996) have explained the inside out of any religion by explaining exoteric/Outer and Esoteric/Inner Aspects of Religions and Inner and Outer Aspects of Peace, the Cultures of Peace, & Non-violence (Paralleling Esoteric & Exoteric Aspects of Religion). This

study shows how religious and spiritual traditions can contribute to creating a more peaceful world via an exploration of the foundations for both inner and outer peace in the twenty first-century.

According to Powell Russell and Clarke Steve (2013), religious tolerance started with the Enlightenment. Medieval and early modern Europeans were typically not tolerant of deviant religious practices. There is a difference between prejudice and intolerance. In their explanation of religious fundamentalism, the theory explains various ideas like collective action of a group of people from a common kinship. The paper talks about orthodoxy, evolutionary anthropology etc. They state that tolerance is a notoriously difficult thing to measure through survey analysis, because in order to measure the extent to which people will accept dissent or diversity, they need to be asked about their specific attitudes and reactions, and it is always possible that an alternative subject matter or other circumstances would have elicited a different response.

They further argue that the tendency of a religion to produce tolerance or intolerance is not the only are which can be focused. Studies and instances show that religion is the net cause of intolerance, but still, this fact can be outweighed due to the reason that religion also provides many potential benefits like promoting mental health, instilling values, establishing an altruistic pattern in the society etc. It seemed to many researchers that religion has two faces when it comes to social behaviour: one that produces a sense of compassion, brotherhood and concern for others, and another darker face that leads to intolerance, bigotry and violence. Perhaps, then, there were competing inclinations associated with different dimensions of religiosity that were not adequately captured by social scientific instruments. They further explain the concept of religious fundamentalism which would include intolerance of ambiguity and uncertainty (Sidanius 1988), conservatism, dogmatism (Altemeyer 1999; Ross, Francis and Craig 2005), ethnocentricism, religious fundamentalism (Altemeyer and Hunsberger 1992) and authoritarianism (Altemeyer 1996; Duck and Hunsberger 1999).

Springs A. Jason (2012) has explored the possibility that intolerance and conflict motivated by deep moral and religious commitments and identities might be reframed and positively utilized as resources for constructive political and social purposes. This paper very well revisits and analyses the political and philosophical ideas towards intolerance then interrogated Charles Taylor's attempt to create mutual understanding between identity bases opponents and then explores the possibility of reframing religiously motivated intolerance and conflicts that often ensue therefrom.

He argues that mutual toleration of a multiplicity of options is necessary for the existence of any society in which a plurality of conceptions of the

good coincide. But still, Pluralism and tolerance tend to proclaim themselves hegemonically in such concepts. This leads many of these "cultural conservatives" to perceive the liberal framework of their society as intrinsically dismissive and even contemptuous of their most important, identity-constitutive values and commitments—in some cases, values about which they simply cannot compromise. The ethos of alienation and perception of disenfranchisement that results, in turn, fuels and exacerbates the very aggressiveness that the framework in question aims to combat.

Reychler Luc (1997) Talks about the impact of religious organizations on inter-communal and international conflicts, he states that religious institutions have a major responsibility in creating a constructive conflict culture. So the paper talks about the peace-making role of various institutions and thus provides an insight into the issues of intolerance through the eyes of religion itself. The attention for the role of religion in conflicts has been stimulated by positive and negative developments.

Ulkesi Sabah (2014) praises India for being tolerant its gives various instances which are capable to show that there was and is tolerance in India. So now this article would help to analyze that what goes wrong then that the acts of violence takes place, why in some instances there is tolerance and why in other there is intolerance.

Sullivan J. Donna (1988) Observed that in many countries, religious freedoms are viewed as analogous to political rights and hence is suspected and in such conditions, no consensus can be brought about for establishing a particular order (talks about UN declaration). She argues that in order to promote peace in the area, efforts should be made to promote the UN declarations and a prominent role that can be played in this is by the non-governmental organizations and religious communities.

Grim, J. Brian (2014) observed after his study on Asia, Middle-East and Europe, that religious freedom is good for not only societies but also for economies. Two very important constituencies are often missing from meetings like these. First, countries with success stories, like Brazil. And second, businesses, whose very self-interest would suggest they should be here. According to his research, the degree to which governments protect and respect the freedoms of religion in media or as a source of communicating religions, is also the degree to which societies are free from harassment of religious minorities, religiously biased hate crimes or terror, and violence.

He also established through his research that when governments protect and respect freedom of religion or belief for all faiths, this reduces grievances that can lead to religious intolerance and violence. He observed that freedom of religion or belief, rather than being the source of religious

hostilities, is the solution. There are other facts which reduce intolerance, these include greater respect for other important freedoms essential to a well-functioning liberal democracy such as freedom of the press, speech and assembly.

III. THEORETICAL PERSPECTIVES

Emile Durkheim's theory of functionalism where he has discussed about human tendency to separate sacred religious symbols from ordinary things, according to Durkheim, people see religion as contributing to the health and continuation of society in general. Thus, religion functions to bind society's members by prompting them to affirm their common values and beliefs on a regular basis.

Durkheim also argued that religion never concerns only belief, but also encompasses regular rituals and ceremonies on the part of a group of believers, who then develop and strengthen a sense of group solidarity. Rituals are necessary to bind together the members of a religious group, and they allow individuals to escape from the mundane aspects of daily life into higher realms of experience. Sacred rituals and ceremonies are especially important for marking occasions such as births, marriages, times of crisis, and deaths. Now a conflict also arises due to this practice of carrying religious symbols etc. for example in many places, Sikhs wearing a turban and carrying a Kripan was seen to be a problem, in many countries, Hijabs are banned due to safety and security reasons and at the same time, there are Islamic countries where wearing hijab is mandatory. A sense of group solidarity is not bad till it starts affecting other people as well. A solidarity in a group should be meant for the purpose of the spiritual and moral development of that group, but what happens is that the solidarity of one group sees other groups as a problem, as a deviance from itself and these give rise to intolerance.

Durkheim's prediction was that religion's influence would decrease as society modernizes. He believed that scientific thinking would likely replace religious thinking, with people giving only minimal attention to rituals and ceremonies. He also considered the concept of "God" to be on the verge of extinction. Instead, he envisioned society as promoting **civil religion**, in which, for example, civic celebrations, parades, and nationalism take the place of church services. If traditional religion were to continue, however, he believed it would do so only as a means to preserve social cohesion and order. But what has actually happened is different, as the society modernized; the religious influence took new turn. The scientific thinking coupled with religion gave the idea to people that they are superior and meant to make others like them.

Max Weber's theory of social change Max Weber initiated a large-scale study of religions around the globe. His principal interest was in large, global religions with millions of believers. He conducted in-depth studies of Ancient Judaism, Christianity, Hinduism, Buddhism, and Taoism. In his book *The Protestant Ethic and the Spirit of Capitalism*, Weber examined the impact of Christianity on Western thinking and culture.

The fundamental purpose of Weber's research was to discover religion's impact on social change. For example, in Protestantism, especially the "Protestant Work Ethic," Weber saw the roots of capitalism. In the Eastern religions, Weber saw barriers to capitalism. For example, Hinduism stresses attaining higher levels of spirituality by escaping from the toils of the mundane physical world. Such a perspective does not easily lend itself to making and spending money.

To Weber, Christianity was a *salvation religion* that claims people can be "saved" when they convert to certain beliefs and moral codes. In Christianity, the idea of "sin" and its atonement by God's grace plays a fundamental role. Unlike the Eastern religions' passive approach, salvation religions like Christianity are active, demanding continuous struggles against sin and the negative aspects of society. His theory highly talks about Christianity and its role in bringing Capitalism in the West.

Karl Marx's conflict theory relates to economic deprivation and to the class struggle between the haves and the have-nots to secure a monopoly control of the market forces. Political scientists view it as a power struggle. Sociologists see it as a phenomenon of social tensions and relative deprivations. Marx's views on the sociology of religion came from 19th century philosophical and theological authors such as Ludwig Feuerbach, who wrote *The Essence of Christianity* (1841). Feuerbach maintained that people do not understand society, so they project their own culturally based norms and values onto separate entities such as gods, spirits, angels, and demons. According to Feuerbach, after humans realize that they have projected their own values onto religion, they can achieve these values in this world rather than in an afterlife.

Marx once declared that religion is the "opium of the people." He viewed religion as teaching people to accept their current lot in life, no matter how bad, while postponing rewards and happiness to some afterlife. Religion, then, prohibits social change by teaching non-resistance to oppression, diverting people's attention away from worldly injustices, justifying inequalities of power and wealth for the privileged and emphasizing rewards yet to come.

Marx held that religion served as a sanctuary from the harshness of everyday life and oppression by the powerful. Still, he predicted that traditional religion would one day pass away. His theory is an alternative to functionalism. According to him, the major reason of conflict in the society is a contradiction between forces of production and relations of production. His theory was more class based than religion based. This theory talks about class in itself and class for itself and also class conflict.

Social barriers theory this theory suggests that because there is some social privileges, social systems, elites in a particular religious formation etc which give a feeling of insecurity and inferiority in the minds of less privileged people and they rebel the result of which usually is the majorities overpowering them and religious and cultural war. Social barriers can come in any form, in the form of governmental policies, the reservations, the restrictions etc.

Locke's theory of intolerance this theory is very unique in the sense that it portrays intolerance positively. This theory allows some sort of distinction between two groups. Locke founds his argument on the irrationality of using coercion to change beliefs, claiming that coercion only acts on the will and that belief is not subject to the will. Locke's rationality argument is not against coercion in general; he is only against "coercion undertaken for certain reasons." Locke uses the example of a magistrate prohibiting the slaughter of calves when discussing the magistrate's inability to restrict or impose religious rites. It would be irrational for the magistrate to ban the slaughter of calves, if his intent was to impact religious belief; however, if he is motivated by economic concerns the ban would be rational, even if it discriminates against groups unequally. Lock's theory talks about difference that exists between two groups, it explains how things are there in the society with a clear demarcation between them.

Theory of polarization and cluster effect this theory is based on three concepts- polarity, cleavage and cluster. Where polarity means affection towards any one side of an issue, cleavage means a division between any two groups and cluster refers to the habitation pattern of the people.

Eleana Jacob's theory of cultural ethnocentrism says that one's culture is superior to other cultures. This is a matter of fact that every society considers itself to be superior to the other societies. It is a meta-narrative assessment of one's society. Culture ethnocentrism can be said to be one of the reason which instills a feeling of cultural superiority in the people. And when people try to impose this superiority on other cultures, conflicts take place. Cultural ethnocentrism makes a culture centric towards itself in a way that all other cultures seem below it, spiritually as well as morally.

Emile Durkheim's theory of collective representations talks about how an individual is fit for a particular group. Here an individual is collectively created and developed by the members of the society. This theory is about group action. This theory instills a feeling of togetherness or unity in a group. They think what they are doing as a group is correct, even if it is demeaning other groups. Basically, in this theory, one is driven by the collective thought process of the whole group. This theory brings a feeling of responsibility of people towards their groups.

C.H. Cooley's theory of looking glass self says that image of self is created by the others; self is always how other people see you. What matters here is the perception of others about you. The three important elements of this theory are that firstly, our appearance to others matters, how we look or how we behave is described by the society. Secondly, we imagine their judgment of that appearance of ours and thirdly, how we feel about their judgment. This theory encourages an individual to give importance to the opinion of others over his own, what is emphasized here is others' opinions and others' judgments.

IV. NEED TO UNDERSTAND RELIGIOUS INTOLERANCE

With the development of the world, intolerance has also developed especially religious. We have learnt to modernize ourselves, we have become more civilized, but we still are not able to adapt ourselves or welcome others' ideas and beliefs. The awareness about intolerance and its impact on the society is important. Intolerance results in hatred, riots, abuses and all these things definitely affect the society.

What we witness today in parts of Africa, Asia and Europe is a re-enactment of a similar tide of religious violence that once swept across Europe when the emotional power of religion was aroused and manipulated to intimidate, harass and oppress the people. Despite the enlightenment that education and modernization has brought, it is unfortunate that we witness yet again the negative impact of religion on our societies. Perhaps today more than ever before, religious symbols and idioms are being manipulated to promote hatred, intolerance and violence. The fact is that post cold-war period; religion has come to play a dominant role. It is also a major factor in undermining the plural basis of our societies so much so that even a country like India with its long-standing commitment to secularism and strong tradition of liberal democratic institutions is unable to escape the winds of intolerance. In fact, leaders of the religious majority in India not only in past, but regularly use the emotional appeal of religion to galvanize political power amongst the people. This has encouraged extremist religious

forces in the country to create an environment of hostility, hatred and fear vis-à-vis the religious minorities.

Religious uprising wherever they occurred have destroyed a lot of things, from Islamic Jihads to the era of the reformation in the 16th century. Such disturbances hindered economic growth in the periods they occurred. Addressing this issue is so important in that some crises are misinterpreted to be either religious wars or that religious undertones are not lacking in them. By studying about religious intolerance, this research project aims to discover some new aspects of intolerance by tracing down its history and trying to find out the reasons for this problem. By studying its impact on society, the project aims to find out as to how the society is getting silently shaped by this phenomenon of religious intolerance, whether it is becoming strong so that no attack can break it or it has become so loosely integrated that a small wind of intolerance loaded debate can blow it. This study is important because world is a place where humans reside, now when the humans are divided into various religious ideas and beliefs and when a conflict is arising at a large scale, it is important to study the root cause and consequences of this. And as far as society is concerned, sociology students can at least try to contribute to the society, so by studying about religious intolerance and its impact on the society, maybe we get some assurance that the society can still be made stable.

V. STATUS OF RELIGIOUS INTOLERANCE IN VARIOUS COUNTRIES

The problem of religious violence and intolerance is not limited to any one country or area, it is widespread. For example, in Malaysia, religious tolerance is viewed as under two distinct understandings, the first one being the presence of the Malaysian society which does not understand that there are religions in Malaysia and the second group in which of those who understands this religion is formed based on the notion of individuality and creating different levels of understanding of the religions in Malaysia. This situation is proven by the existence of religious conflicts; whether by internal conflicts (such as revenge against family members who have changed their religion, insincerity with other people's faiths and of its kind) or by external conflicts (such as incidence of riots, claims through the courts etc). But there, the ethnic-tolerance has led to the establishment of a pluralistic society.

Germany has seen the worst form of intolerance during Holocaust; there have been some disturbances in US also. Pakistan is another example of an intolerant nation. This is a fact of history that India and Pakistan divided on the basis of religion, and after the division of 1947, another split took

place in the year 1971 which led to the formation of Bangladesh. This was again due to religion based interests, a result of intolerant behavior. Pakistan faces not only external conflicts due to the problem of intolerance, but also internal conflicts which include the majority Muslims, minority Sikhs, Hindus and Sindhis. Then the very recent example of intolerant behavior is the status of Palestine and Jerusalem. The Palestinian people are left with no identity of their own, they are suppressed by Jerusalem and their country's identity is in crisis, along with intolerance, there is a continuation of grave human rights violations. Some wars with a religious dimension are as follows:

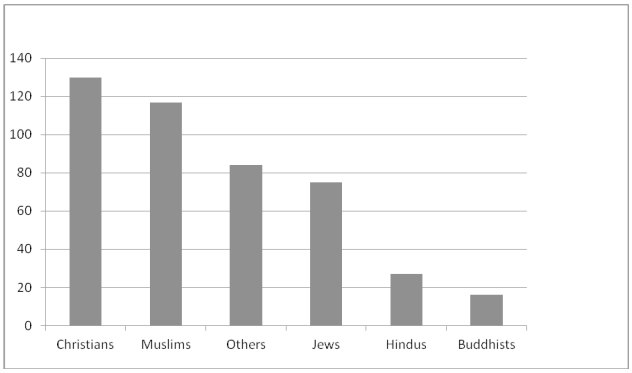
1948	Myanmar/Burma	Buddhists vs. Christians
1968	Israel/Palestinian	Jews vs. Arabs (Muslims-Christians)
1969	Northern Ireland	Catholic vs. Protestants
1970	Philippines (Mindanao)	Muslims vs. Christians (Catholics)
1973	Bangladesh	Buddhists vs. Christians
1975	Lebanon	Shiites supported by Syria (Amal) vs. Shiites supported by Iran (Hezbollah)
1976	Ethiopia (Oromo)	Muslims v. Central gov.
1982	India (Punjab)	Sikhs vs. Central government
1983	Sudan	Muslims vs. Native religions
1990	Mali-Tuareg Nomads	Muslims v. central government
1990	Azerbejdan	Muslims vs. Christian Armenians
1990	India (Kashmir)	Muslims vs. Central gov. (Hindu)
1990	Indonesia (Aceh)	Muslims vs. Central gov. (Muslim)
1991	Iraq	Sunnites vs. Shiites
1991	Yugoslavia (Croatia)	Serbian orthodox Christians vs. Roman Catholic Christians
1991	Yugoslavia (Bosnia)	Orthodox Christians v. Catholics v. Muslims
1992	Afghanistan	Fundamentalist Muslims vs. Moderate Muslims
1992	Tadzhikistan	Muslims vs. Orthodox Christians
1977	Egypt	Muslims vs. Central government (Muslim) Muslims vs. Coptic Christians
1978	Tunesia	Muslims vs. Central government (Muslim)
1988	Algeria	Muslims vs. Central government
1989	Uzbekisgtan	Sunite Uzbeks vs. Shiite Meschetes
1992	India (Uttar- Pradesh)	Hindus vs. Muslims
1983	Sri Lanka	Hindus vs. Muslims

DATA ANALYSIS

Instances of religious intolerance in India in recent years - a tabular presentation

YEAR	2012	2013	2014	2015(January)
INCIDENTS	668	823	644	72
KILLED	94	133	95	11
INJURED	2117	2269	1921	218
TOTAL	2879	3225	2660	301

Number of countries where religious groups were harassed



HORIZONTAL LINE – RELIGIOUS GROUPS

VERTICAL LINE – NUMBER OF COUNTRIES

FINDINGS OF THE STUDY

- The table shows the detail of instances of religious disturbances in India in the years 2012, 2013, 2014 and January 2015. In the year 2012, there were 668 incidents of disturbances, in 2013 823 incidents, in 2014 644 instances and in January 2015, 72 instances. Now the table shows a very less difference in the increase or decrease of the instances of religious intolerance. The growth in 2013 and decline in 2014 suggest that there are factors which trigger the riots or differences.

- The graph shows the data for the year 2011. It depicts the various religious groups which were subjected to harassments. It shows that in the year 2011, Christians were subjected to harassment in 130 countries of the world, Muslims in 117 countries of the world, other religions which include Sikhs, Zoroastrians and groups which practice tribal or folk

religions were harassed in as many as 84 countries, Jews in 75 countries, Hindus in 27 countries and Buddhists in 16 countries of the world.

- In some other Asian countries, social hostilities also involved ethnic and religious minorities, such as Malay Muslim separatists in southern Thailand, who were involved in several violent clashes with the majority Buddhist population.

- Social hostilities involving religion in the United States remained at a moderate level. In recent years, the U.S. annually has had at least 1,300 hate crimes involving religious bias, according to FBI reports. (Most of the recent controversies over the construction of mosques and Islamic centers in New York City and other communities across the country took place after the period covered in this report.

- Instances of intolerance generally trigger when there is a catalyst to worsen the situation.

- Intolerance affects not only the society of a country, but also its politics, economy and definitely goodwill are affected by it.

- Unlike Europe where Arabs and Muslims tend to be economically marginalized, American Arabs and Muslims from immigrant families are wealthier than the average American. On the whole, they are well-educated and economically integrated, but while they may have money and therefore agency, the rise of religious intolerance in instantiated political parties has proven quite a force to contest.

- It will be hard to reset religious and cultural relations that play into the hands of too many vested interests, all too keen to exploit existing prejudices.

COMBATING WITH THE PROBLEM- PEACE MECHANISMS

Spiritually-based

Nonviolence and

Meditation

Inner peace outer peace

Mythology and prayer

The above figure shows the ways of maintaining peace, both inner and outer. A widespread idea of nonviolence, meditation, prayer and the mythologies and the teachings they have are usually advised to be resorted to in order to bring calm not only in the society, but also within oneself. Religious intolerance being a big problem today, working on peace at individual level is not enough, there is a requirement of some universally applicable declarations and guidelines, which is to be met by the United Nations. In the year 1981, the United Nations adopted by consensus the declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. The declaration gives specific content to the rights of freedom of religion. Article 4 of the declaration states that states are required to "make all effort to enact or rescind legislation" and to take other effective measures to prohibit discrimination on the basis of religion or belief. Article 7 imposes an obligation by providing that "the rights and freedoms set forth in the present declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice".

In 1986, a special rapporteur was appointed by the UN with the task of examining the incidents of religious intolerance and discrimination, reporting on compliance with the standards stated in the declaration and recommending remedial measures. And later also similar steps have been taken by the UN to keep an eye on the instances. But the declarations of UN are to be applied in a straightjacket formula, whereas the instances, reasons and causes and effects of intolerance are much more complex. One rule cannot apply to all in every circumstance. Peace requires a dynamic balance between different "opposites" or "extremes", including a balance between both spiritual and material values.

VI. RECOMMENDATIONS

- Making declarations by United Nations are not enough; they need to be implemented properly. Intolerance is a sensitive issue; a constant check is required on the enforcement mechanisms to ensure that they are able to keep a control on the situations when the situations change.

- The religious leaders have a very huge responsibility on their shoulders, a responsibility to guide the followers of the religion in the right direction. They should be responsible in making people understand the difference between following a religion and imposing it on others.

- Religious intolerance is not just the effect of presence of different ideas, but when people face differentiation in government policies and benefits and role in economy, religion comes as a catalyst to trigger the feeling of insecurity towards a better placed group. The government in power of every country should be very cautious in making its policies in the light of the fact that how that policy would be accepted by the society.

- Emile Durkheim's theory of collective representations can help as it can make people of a group realize that collectively how their group can contribute to world peace and not to violence.

- "Repression is the seed of revolution", everyone should be given a chance to explain their ideas and views, shutting up does not necessarily bring peace always.

- The shift of minds towards scientific thinking and rational behavior is required. A scientific mind would always have ways to discard ideas of intolerance.

- Religious intolerance includes grave causalities to human right laws also, so legislative steps can also be taken so as to integrate the acts of violence with various laws and determining a punishment for them.

- There is a requirement of formation of an integrated civil society which intersects the dimensions of religion, politics and economy so as to establish a point of peace in the society.

VII. CONCLUSION

Religious diversity is a reality that must be acknowledged. The varieties in religion contain claims and need to be judged properly. A good approach would result in a good situation and vice versa. Mostly all religions of the world put religious tolerance as a good moral character and must be implemented in the life of religious people. When groups have no opportunity to settle their disagreements by discussion, they are prone to resort to fighting. Intolerance therefore plays a leading part in fostering civic disorders. We all recognize that tolerance is a means of evolving a broader emotional life. Should we not equally recognize that it is indispensable for the development of a truly broad intellectual life, and so for the spread of that scientific attitude among our people which must be the hope of the future?

India is a home to many religions, and this is possible in the first place due to tolerance, due to this spirit of tolerance and mutual acceptance, Islam and Muslims found a very favourable soil in India. For example, the

Sufis generally came from Central Asia and settled in various Indian cities. They established khanqahs and tried to peacefully spread the message of Islam. The Sufis never experienced any obstacle from the Indian society. They converted Hindus to Islam in large numbers and the latter did not object to this process. Jawaharlal Nehru has acknowledged this fact in these words, "It is worth noting as a rule, conversions to Islam were group conversions." (The Discovery of India) According to the Hindu thinking, if a person peacefully carries out his mission, then it is non-objectionable. Some Western scholars maintain that Islam spread by force. However, the Hindu scholars have themselves rejected this notion. For example, Swami Vivekananda maintains this in one of his writings: "Why amongst the poor of India so many are Mohammedans? It is nonsense to say they were converted by sword." (Letters of Swami Vivekananda)

On the other hand, there have been instances where a particular religious group converted to safeguard themselves as they were endangered for being what they originally were. Example is large scale conversions in Kerala, conversion of low caste people to Buddhism, a perfect example of it being Rohit Vemul's family converting to Buddhism recently.

We can live in peace and harmony and follow any religion we wish to, a religion where our heart lies, we can have at least that much freedom. Religion is meant to help people understand themselves, so let's restore the meaning of religion!

WORKS OF REFERENCE

- Waldron, Jeremy (1988). *"Locke: Toleration, and the Rationality of Persecution," in Justifying Toleration,* ed. Susan Mendus (Cambridge: Cambridge University Press, 63
- Boyd A. George (1988). Mudrashram Institute of Spiritual Studies, *Overcoming Religious Intolerance*
- Parkes, Bamford, Henry ((1960). "*Gods and Men*," Routledge and Keegan Paul,
- Ehrman D. Bart (2003). "*Lost Christianities*," Oxford University Press
- Wilson, Norman, Andrew (1998). "Paul," Pimlico
- Sisk, Timothy (2011). *Between Terror and Tolerance: Religion, Conflict, and Peacemaking* Policy Summary, Georgetown University Journal, Denever, Colorado

- Rahman, A.F., Nur & Khambali, M., Khadijah (2013). *Religious tolerance in Malaysia: problems and challenges, International journal of Islamic thought*, vol.3

- Derichs, Claudia & Fleschenberg, Andrea (2010). C.E., Sylvia, *Sanctifying Moral Tyranny: Religious Fundamentalisms and the Political Disempowerment of Women, Religious Fundamentalisms and Their Gendered Impacts in Asia*, Friedrich-Ebert-Stiftung, Berlin

- Groff, Linda & Smoker Paul (1996). *Spirituality, religion, culture, and peace: exploring the foundations for inner-outer peace in the twenty-first century*, International journal of peace studies

- Powell, Russell, Clarke, Steve & Savulescu, Julian (2013). *Religion, Tolerance and conflict: A scientific and conceptual investigation*, University of Oxford

- Springs, A. Jason (2012). *On Giving Religious Intolerance Its Due: Prospects for Transforming Conflict in a Post-secular Society*, The Journal of Religion, Vol. 92, No. 1

- Luc, Reychler (1997). *Religion and conflict*, International journal of peace studies

- Ulkesi Sabah (2014). *Religious tolerance in India,* CPS international center for peace and spirituality

- G.J, Brian (2014). *The Social and Economic Impact of Religious Intolerance*, March, Religious Freedom and Business Foundation

- Mufford, Tina (2014). *Identity Under Threat: How Religious Intolerance Threatens Burma's Future,* Georgetown Journal of International Affairs

- Ahuja, Ram (2012). *Social problems in India,* Rawat publications, New Delhi

- Sidanius, J. (1988). *Intolerance of Ambiguity, Conservatism, and Racism- Whose Fantasy, Whose Reality? A Reply to Ray.* Political Psychology 9(2)

- Altemeyer, R.A. & Hunsberger, B. (1992). *Authoritarianism, religious fundamentalism, quest, and prejudice.* International Journal for the Psychology of Religion, vol. 2

- Altemeyer, R.A., & Hunsberger, B. (2005). *Fundamentalism and Authoritarianism*. *In Paloutzian,* R.F. and C.L. Park (eds.). Handbook of the Psychology of Religion and Spirituality, New York: Guilford Press

- Sullivan J. Donna (1988). *Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*. The American Journal of International Law, Vol. 82, No. 3, July

- Grim, J. Brian (2014). *The Social and Economic Impact of Religious Intolerance,* Religious Freedom and Business Foundation, March

ARE IPR AND COMPETITION LAW IN TUSSLE? : AN INTERFACE BETWEEN IPR AND COMPETITION LAW

—*Raghvendra Pratap Singh*[*] *& Vishwanath Pratap Singh*[**]

Abstract *Is there really a tussle between the most relevant laws pertaining to innovation and market regulation? If prima facie observed, IPR and Competition law may seem to be at odds. Presumption of such opposition, and the conflicting nature has itself originated a never ending legal debate. There exists dearth of jurisprudence as far as interplay of IPR and competition is concerned. There exist limited quality cases such as the one which was filed against the Microsoft India and the other one being filed against Ericsson for abuse of dominance by Micromax, which to a certain extent portrays the interface between both the laws. Therefore, the author aims to come up with a much-refined view in this aspect, analyzing various legal regimes and plethora of cases. At present rather than analyzing both the regimes in isolation, i.e. individual effect in relevant market, the intersection between both the laws shall be emphasized upon, i.e. role of IPR in affecting competition and control thereto. There exists an imminent relation between IPR and competition law, and the same cannot be entertained when isolated. Incentive for innovation and technological advancement is as essential as fair competitive market structure and consumer welfare. At last, the author seeks to draw conclusion, suggesting factors to establish amicable relationship between both the laws.*

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I. Introduction

Had the traditional approach been analyzed, intellectual property and competition law would have most likely been construed as poles of a magnet which repel each other. But if we dissect the recent approach and development of IPR and competition law, it shall be conclusively realized that the respective fields work in consonance and play complementary roles for furtherance of innovation in the current pro-technological market structure. One such evident fact can be observed in ideologies and structures behind both the laws. On its bare perusal grant of intellectual property rights is premised on right of exclusion[1] or also quoted as a negative right, which enables the owner of the right to exercise his exclusive right to the exclusion of the universe at large, while the objective of competition law is to attain maximum possible production of resources and its maximization in terms of allocation. If seen with wider perspective both aim at producing efficiency in the market, consumer welfare. Intellectual property can be aptly recognized as dynamically pro-competitive even if it is statically non-competitive.[2] The anti-trust and intellectual property law although identical in their objective, the main conflict seems to arise in the methods these laws embrace to achieve reciprocal goals.[3] Intellectual property prima facie isn't abusive, even if it shows domination over the market, it is only doing what is authorized by law, creating incentive for further innovation.

The recent technological and market advancements in respect of patents concerning high technology areas, the existing patent protection and competition law demand advanced research on the interplay and cross-cutting between them. In the course of examining the inextricable relationship between IPR and Competition law, due emphasis shall be laid on different territorial spans of IP and Competition policy. Developed countries like U.S. and the countries of the E.U. have shown advancements in their respective laws, owing to the developments evident in their intellectual property and market competition. These can be worthwhile for developing countries such as India, witnessing shift in legal regimes and disputes, while framing laws and policies regulating intellectual property and competition sectors. Legal regimes in such developing countries are influenced by the policies and standards of such developed countries, often by means of either coercion or undue influence, for larger market access in context of FTA's (Free Trade Agreements).

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1 *Bishwanath Prasad Radhey Shyam* v. *Hindustan Metal Industries*, (1979) 2 SCC 511 : AIR 1982 SC 1444.

2 Abir Roy and Jayant Kumar, "A Comprehensive Guide to the Development of the Competition law in India", Eastern Law House, 2nd ed. 2014, p. 507.

3 *SCM Corpn.* v. *Xerox Corpn*., 645 F 2d 1195, 1203 (2nd Cir 1981).

Therefore, it is important to study and research upon laws and ideologies followed in various developed countries. The author, hence, aims to analyze the law and jurisprudence in countries such as U.S. and the European Union countries and analyze its parlance with the prevailing jurisprudence established till date in India.

II. OBJECTIVES OF IP AND COMPETITION LAW: THE GRADUAL SHIFT OF BALANCE FROM DIVERGENCE TO CONVERGENCE.

Objective of IPR is to provide negative rights to the IP holder wherein he is provided exclusive rights for exploiting the property in question, however such right is granted for a limited period. Competition law in contrary aims to uphold free, fair and effective access to the market.[4] Apparently, aim of IP laws may be construed as protection for individual rights, while competition law aims to protect market interests, i.e. consumer welfare. This conclusion brings us to prima facie conflict between the two regulatory regimes. Conception of such conflict may be tracked back to the historical emphasis of intellectual property wherein reward theory was recognized. Reward theory was based on the policy facilitating the inventor or creator with reward of his creation. The inventor was given reward as a consideration for making his work public, in furtherance of the objective of IP policy, and thereby enabling the public to access something which would have remained dormant and secret.[5] Reward included the protection which society provided to the creator for exploiting his work. Therefore, it emphasized more on the individual right of the IP holder. Therefore, it focuses on the divergence of IP from the objective of competition laws. Herein, IPR seeks to reward the IP holder by granting him exclusivity while competition law aims at protection of markets. This *prima facie* goes opposite to the exclusionary principle adopted by the IP.[6]

Gradual development in jurisprudence and market regulations led to change in ideologies, thereby reasons for protection provided to the IP holder. The basic principle of reward theory witnessed a change. It was established that it is not just the principle of making the work public as a reason behind the exclusivity of rights provided to the creator, but also the incentive provided to the inventor or creator for promoting innovation and honouring his hard work. If we wish to have a reconciliation between the IP and competition law then IP should be considered as a facet of competition law, rather than studying it in exclusion to competition law. This dynamic

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4 Richard Whish, Competition law 2 (2005).

5 The same principle was also recognized by hon'ble judges in *Bishwanath Prasad Radhey Shyam* v. *Hindustan Metal Industries*, (1979) 2 SCC 511 : AIR 1982 SC 1444.

6 *Supra* note 3.

approach brought a balance between both the laws, thereby shifting the balance from divergence to convergence of both the laws. This approach aims at bringing balance between individual rights and public interest. Such innovation directly or indirectly aims to promote more and more competition. It has been, in fact, well acknowledged that protection given to IPRs is not in contradiction to the promotion of free and fair market competition.

A. Role of IPR Law: Pro-Competition

It will be a misnomer if objective of competition law is construed to be facilitation of the interests of those competitors whose objective is to compel a successful competitor to redistribute his lawfully and hard worked wealth. Competition law has always aimed to protect competition by protecting the competitive process, rather than protecting competitors.[7] Competition law has never interfered with essence of IPR laws, i.e. to prevent free-riding of reward of innovation by the inventor or the creator. However, competition law deeply acknowledges the important role played by IP reward and encourages such free-riding as it directly or indirectly promotes other individuals or firms to produce their own products and technologies which in any way leads to growth of bona fide competition in the market. Various instances can be cited wherein mere grant of exclusion or protection of technology from rival firms under IP protection does not amount to bestowing of market power to the IP holder. There exist various technologies which may be termed as alternatives for the purpose of conferring effective constraints to effective exclusive type conduct of the IP right holders. Like, in the case of Microsoft, copyright over Windows exists with Microsoft Corp., a very well-known and successful popular operating system for the Intel based computer system. In this case since there exists alternative operating systems such as Mac, OS, etc., the possession of IP over Windows and its exclusivity with Microsoft Corp. do not give market power to Microsoft Corp. it shall be noted that what plays effective role in giving monopoly over market power is the application of entry barriers, and not the IP right, hence shifting the balance of competition in favour of Microsoft Corpn.[8] Monopolistic positions in relevant market structure, if have to be attributed to grant of IPR, can be only when there exists no alternative technology in the market for attaining the same objective.

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[7] A. Kezsbom & A. Goldman, "No Shortcut to Anti-trust Analysis: The Twisted Journey of the Essential Facilities Doctrine"", Columbia Business L. Rev. 1, 2 (1996).

[8] *Microsoft Corpn.* v. *Commission of the European Communities*, T-201/04, 2007 ECR II-1491.

B. Role of Competition Law: Rescue of IP Law

It is not necessary that every exercise of IPR, attracts competition provisions. Legal monopoly granted by IP laws not necessarily implies economic monopoly. If elaborated, the mere grant of exclusive property rights does not mean dominant position in the market, leading to its abuse, and thereby attracting competition law provisions. Cases wherein competition law interferes IPR, it does not aim at restricting free-riding of the exclusive rights of the IP holder. It only questions protection that is exercised even after the objective of IPR is fulfilled. Therefore, role of competition law shall not be construed as hostile to IPR. Its role is to ensure that the inherent objective of IPR is not defied. In each and every case wherein the IP holder exceeds the realm of exclusion provided to him, or misuses such exclusion, interference of competition law in IPR is legitimate. Certain instances describing the same can be situations where the IPR grants excessive market dominance to the IP holder which leads compulsory licensing justified.[9] These may be termed as instances wherein IP law becomes incapable of ensuring justice, and role of competition law comes to rescue the ultimate objective of IP law. In cases wherein IP such as copyright, patent provide the IP holder with market power, it may result in restriction of production process, supra-competitive prices, along with excessive losses. In legitimate furtherance of IP right and self-interest, IP holder may sue potential rivals and IP infringers, restricting entry to competition, or it may extend its market power by precluding the access necessary for next generation of products to emerge.[10] These are potential cases where competition law demands interference with IPR in order to ensure that the protection is fair and legitimate, and on the right path for the purpose of achieving welfare goal.

III. LAWS IN OTHER JURISDICTIONS

Hereinafter, the author aims to dissect various laws which are in existence in various jurisdictions, which if analyzed carefully would reveal the ideology behind coherence between IP and competition law. European and U.S. law along with international regime of TRIPS constitute one of the most developed regimes in competition and IP aspect. Moreover, it shall be noted that the similarities in essence of European and Indian jurisprudence are no mere chance, there is great possibility that the policy draftsmen took careful note of European law due to its dominant and successful regime. Therefore, an analysis of these laws is a *sine qua non* for proper understanding of the issue.

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[9] *Supra* note 2.

[10] Pham, Alice, "Competition Law and Intellectual Property Rights: Controlling Abuse or Abusing Control?", CUTS International, India, 2008.

A. International Law: Trips

TRIPS can be recognized as *grund norm* in respective of international law in regard to governance of intellectual property right issues. It played significant role in harmonizing and standardizing intellectual property rights. It also provides provisions regulating IPR in context of competition policy providing larger market and consumer welfare interests. In pursuance of the same, it provides taking of apt measures, otherwise in coherence with the broader agreement, for preventing the abuse of IPRs by right holders that pose restraints on trade or have potential to adversely affect the international transfer of secrets and technology.[11] It very well recognizes the fact that there might be some competition restraining IPR licensing practices that may adversely affect trade or impede the transfer of new technology.[12] To prevent such violations and circumvention of fair competition policies it authorizes the participating member States to take measures so as to prevent or control the abuses, provided, strictly, that such measures are in no manner inconsistent with the TRIPS agreement.[13] Further, the objective of Article 6 of the TRIPS Agreement is to provide for another important aspect of competition i.e. exhaustion of rights. It aims to balance the rights, liabilities, and duties under the respective domains.[14]

To promote interface of IPR and Competition policies, TRIPS permits national authorities to issue compulsory licenses, which in turn permits the domestic use of respective IPRs by parties other than the original right holder of the IPR.[15] It authorizes non-commercial government uses in national emergencies, however, such authorization shall be subject to judicial review.[16] Further, it also allows compulsory licensing even without causing satisfaction of such conditions for the purpose of remedying practices determined through judicial or administrative processes to be anti-competitive in nature.[17] Article 40 of the TRIPS determines the anti-competitive licensing practices or conditions. It specifically bestows discretionary powers on the member states to specify intellectual property practices which amount to abuse in their state legislature[18].

The essence of TRIPS Agreement in respect of IPR and competition interface can be enumerated as the following three guiding principles[19]:

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[11] Article 8.2, TRIPS Agreement.
[12] Article 40.1, TRIPS Agreement.
[13] Article 40.2, TRIPS Agreement.
[14] A.K. Koul, "The General Agreement on Tariffs and Trade/World Trade Organisation: Law, Economics & Policies", 2005, p. 461.
[15] Article 31, TRIPS Agreement.
[16] Article 31(b), TRIPS Agreement.
[17] Article 31(k), TRIPS Agreement.
[18] Article 40(2), TRIPS Agreement.
[19] *Supra* note 2, p. 183.

a. It is domain of each member State to formulate and reserve its own IPR related competition structure and policy framework.

b. There has to be consonance in respect of the TRIPS Agreement, in respect of IP safeguard, and the national IPR related competition policy.

c. The priority target shall be those practices which aim to restrict the dissemination of protected technologies.

B. U.S. Jurisdiction

Prior to the enactment of the TRIPS agreement, the most active program of controlling abuse through competition policy emerged in U.S. Traditionally role of IPR was not comprehensively dealt with under U.S. laws, however, the technological advancements and market growth that led to ongoing legal debates in the concerned issue have led to various developments. The anti-trust law and the Sherman Act in regard to free enterprise can be synonymously used as bill of rights for fundamental rights. The emergence of competition law with respect to U.S. can be traced back to 1890 when the U.S. Sherman Act came into force. It prohibits the monopolization and conspiracies which restrain trade and also imposed imprisonment for violating the same.[20] The U.S. Supreme Court aptly laid the rule of prudence as *whether the restraint that is imposed seeks to merely regulate and thereby promotes competition or it is of such a nature that it aims to suppress or even destroy fair competition in the market*.[21]

In its initial phase, U.S. focused primarily on building manufacturing process wherein non-residents were barred from getting U.S. invention patents.[22] IP holders could freely use their government granted rights as far as they were used in consonance with the government laws. Subsequently, it shall be analyzed as to what was permissible and not permissible with respect to patent and competition policy. In U.S. the General Electric Co. strengthened its position in the market standing by acquiring the prominent rival firms along with their patents. In addition, it entered into very strict and restrictive license regime with the other remaining rival firms, including fixation of price, customers, and issuing market share quotas. The Supreme Court held that such restrictions were acceptable if they are reasonably adapted for securing the pecuniary reward for the patentee's

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[20] Title 15, Chapter 1, United States Code (Sherman Act), 1890.

[21] *Board of Trade of City of Chicago* v. *United States*, 1918 SCC OnLine US SC 51 : 62 L Ed 683 : 246 US 231 (1918).

[22] F.M. Scherer, Jayashree Watal, "Competition Policy and Intellectual Property: Insights from Developed Country Experience: Faculty Research Working Paper Series", HARVARD Kennedy School, February 2014 RWP 14-013, p. 4.

monopoly.[23] In another instance, Xerox acquired virtual monopoly of plain-paper copying machines which was protected primarily by a portfolio which included more than 700 patents, it chose to grant rivals licences only to patents covering more expensive coated paper copying processes.[24] In this instance patent acquisition played trivial role in the company's growth. With further development in the law the regulations were made stricter. The compulsory patent licensing which were ordered under the U.S. anti-trust judgments, spread fears that incentives for innovation would be categorically jeopardized as the settlements indicated beliefs that everybody's patent shall be everybody else's.[25] Such ideology and approach may lead to lack of incentive for further innovation and technological enhancements.

Further developments were made such as anti-trust "safety zones" with respect to regulation of licensing agreements under the ambit of IP law in order to provide certainty and enhanced competition in the market structure. The above guidelines were concerning safety zones which indicate that no restrictions shall be imposed on IP licensing agreement under the below mentioned circumstances[26]:

a. In cases where the restraints and arrangements underlying the intellectual property laws are not per se anti-competitive in nature.

b. If cases where in respect of any market, the total account of restraint which is imposed by the licensor and licensees does not exceed more than 20%; and/or

c. In cases where besides the licensing parties, there exists four more specialized entities that are independently controlled and aim to promote incentive to the R&D activities of the parties to the licensing agreement.

The U.S. department of Justice (DoJ) and the Federal Trade Commission have further restricted the licensing agreements under the IP which would be subject to any liability under the competition law as:[27]

a. Licenses which cause competitive harm shall be faced with conditional refusals;

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[23] *United States* v. *General Electric Co*., 1926 SCC OnLine US SC 199 : 71 L Ed 362 : 272 US 476 (1926).

[24] *Xerox Corpn., In re*, (1975) 86 FTC 364.

[25] *Supra* note 15, p. 11.

[26] U.S. Dept. of Justice and the FTC, "Antitrust Guidelines for the Licensing of Intellectual Property" 1995, p. 23, available at: http://www.usdoj.gov/atr/public/guidelines/0558.pdf (accessed on 6th April, 2017).

[27] *Illinois Tool Works Inc.* v. *Independent Ink Inc*., 2006 SCC OnLine US SC 24 : 547 US 28 (2006).

b. Agreements which lead to the cross-licensing and patent pooling agreements (explained in detailed further) which result in price fixation, coordinated output restrictions or foreclosure of innovation and development;

c. Tying arrangements wherein the seller is equipped with the relevant market power in respect to the tying product, and the resultant arrangement leads to adverse effect in the respective market for the tied product, and the efficiency do not outnumber the anti-competitive effects.

C. European Union

Objective of the Rome Treaty, establishing European Union, was basically to promote healthy and enhanced competition in the market. The European Union established competition rules to promote consumer welfare and provide protection against absolute protection to the IP. European Union through its laws and judicial precedents provides ample instances for IP and Competition interface. Initially the approach was liberal which later due to technological advancements and market competition growth has emerged to be more interfering in nature. Article 81 of the Treaty of European Commission (EC) portrays an interface between IPR and anti-trust regime.[28] Article 81 aimed to bar the agreements which adversely affected trade among its member States. Article 82 (present Article 102) plays a pivotal role in regard to abuse associated with those enterprises or right holders who have already acquired the dominating position in the market. Soul of Article 82 lies in licensing of intellectual property rights. However, if analyzed prudently it also provides individual as well as block exemption for any agreement which aims to improve the production or distribution of goods, or promoting any economic or technical progress.[29]

If analyzed carefully 2 block exemptions can be observed under European Union which explicitly aim to provide immunity to the IPRs from the rules governing anti-competitive agreements/arrangements. These are specialization agreement and technology transfers, which shall be elaborated further in due course. The *specialization agreement*[30] specifically deals with rules governing the use and assignment of IPRs which are expressed under the said specialization agreement subject to fulfilment of various conditions mentioned therein such as:

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[28] Article 81, TRIPS Agreement.

[29] Article 81 (3), TRIPS Agreement.

[30] Commision Regulation (EC) No. 2658/2000, 29th Nov. 2000 on application of Article 81(3) of the treaty.

a. In cases wherein there is necessity of use of IPR and assignment in order to implement the specialization agreement[31];

b. In cases wherein out of the total relevant market, the accumulated market share or portion of the participating undertakings does not exceed 20%[32];

c. In cases wherein the objective of the specialization agreement is not that of fixing prices when the relevant product is further sold to third party; to limit the output or sales; or to allocate market shares or customers.[33]

The *technology transfer*[34] block exemption is related to the regulation of exemption of patents, know-how and copyright assignments and the licensing agreements in parlance to rules governing the anti-competitive agreements, subject to the conditions expressed therein such as:

a. It expressly bars the inclusion of those agreements which contain severe anti-competitive restraints;[35]

b. It fixed 30% as the upper threshold, in respect to share of the relevant market, which is individually accounted by each of the parties in case there is an agreement between non-competitors;[36]

c. It fixed 20% as the upper threshold in respect to combined share of relevant market in an agreement between the competitors.[37]

IV. IPR AND COMPETITION LAW: AN INDIAN PERSPECTIVE

The increase of complexities in IP protection and its abuse along with ever widening market structure and technological development has made it necessary to analyze the statutory structure and the judge made laws in the form of precedents to critically examine the interface between the IP protection and Competition promotion. On close examination and analysis, it can be very well be established that each and every subject under IPR doesn't require to be regulated under the competition law. The policy makers while drafting the competition law aimed to prevent such practices

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31 *Ibid*, Article 1(2).
32 *Supra* note 22, Article 4.
33 *Supra* note 22, Article 5.
34 Commission Regulation (EC) No. 772/2004, 27th April 2004 on application of Article 81(3) of the treaty.
35 *Ibid*, Article 4.
36 *Supra* note 26, Article 3(2).
37 *Supra* note 26, Article 3(1).

which potentially have an adverse effect on competition in the relevant market, the approach was pro-competitive.[38]

A. Statutory Analysis

The Constitution of India through its Directive Principles of State Policy (DPSP) gives rise to the objective to provide, promote, and secure justice which is social, economic and political for the people of India and maintenance of the social order.[39] It provides that such principles shall be fundamental in the governance of the country and thereby it casts duty on the State to ensure the same.[40] Competition in this aspect reflects the soul of Indian Constitution which aims at providing fair chance, and restricts anti-competitive market structure. The Competition Act of 2002 on bare perusal provides restriction on anti-competitive practices, not the monopolies *per se.* The guiding principles of the Act can be laid down as economic efficiency and liberalization. Although the aim was development of market structure, certain principal restrictions were imposed namely[41]:

a. The agreements/ arrangements that are anti-competitive in nature;

b. The abuse of dominant position in the relevant market, and arbitrary actions by market players;

c. Regulations of combinations which exceed the maximum limits in respect of the prescribed assets or turnovers.

The most effective principle showcasing the intermittent coherence between IPR and competition law is Section 3(5). It states that "*reasonable conditions"* as may be necessary, and are reasonable and justified, for protecting IPRs during their exercise would not constitute anti-competitive agreements.[42] However, the law nowhere defines the term *reasonable conditions* which aims at providing exemptions under Section 3 of the Competition Act, 2002. Thereby, implying that all the "*unreasonable conditions"* which are attached to an IPR will automatically attract Section 3 of the Act.[43] The term *reasonable* shall be further examined in the subsequent text. The Competition law, under Section 3, efficiently regulates the practice in order to check unreasonable and arbitrary IPR practice. It provides

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[38] *Statement of Object and Reasons*, Competition Act, 2002 [Act 12 of 2003].

[39] Articles 38, 39, Constitution of India.

[40] Article 37, Constitution of India.

[41] D.P. Mittal, "Competition Law and Practise", Taxman Publications, 2008, p. 3.

[42] Section 3(5), Competition Act, 2002: *"Nothing contained in this Section shall restrict the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred……"*

[43] *Aamir Khan Productions (P) Ltd.* v. *Union of India*, 2010 SCC OnLine Bom 1226 : (2010) 112 Bom LR 3378 : (2010) 4 Comp LJ 580.

for proving any anti-competitive activity with respect to IPR through the use of abuse of dominant position principle.[44] Therefore, if parallel is drawn with the European law, Section 4 of the Competition Act, 2002 draws its existence from Section 82 of the EC Treaty. It is well established that mere existence of dominant position is not relevant under the competition law, but the abuse of such dominant position which brings competition law in action. Herein, it shall be noted that in reference to IPR no exception has been created. The reason behind such practice is to ensure that objective of IPR law is not frustrated by imposing reasonable conditions, while securing the protection of the rights of the IP holder to a legitimate extent. Moreover, the abuse of dominant position is not itself covered under the ambit of Section 4, but its abuse which restricts competition in the market.

Further, analyzing the term *reasonable conditions*, licensing arrangements which are likely to affect adversely the prices, quantities, quality or varieties of goods and services will lawfully fall under the ambit of competition law until they are not in reasonable juxtaposition with the bundle of rights that follow IPRs. Exclusive licensing, involving cross-licensing by parties collectively possessing market power, can be referred to as another such unreasonable condition. Some others can be illustrated as:

a. Patent pooling is expressly a restrictive practice. This will not constitute the bundle of rights forming part of an IPR.[45]

b. Tie-in arrangements[46], wherein a licensee may be required to acquire particular goods (unpatented materials) exclusively from the patentee, thereby foreclosing all the legitimate business opportunities of other market players.

c. Fixing of prices by the licensor at which the licensee is bound to sell[47].

d. Condition which restricts the licensee territorially or to a class of customers.

V. CRITICAL ANALYSIS IN RESPECT OF JUDICIAL PRECEDENTS

There are plethora of judgments dealing with never lasting debate with respect to competition and IPR. Courts have in various instances set up the legal principle that CCI has jurisdiction in matters which involve

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[44] Section 4, The Competition Act, 2002.

[45] *Supra* note 2, p. 538.

[46] *Ajay Devgun Films* v. *Yash Raj Films (P) Ltd*., 2012 SCC OnLine Comp AT 233.

[47] *FICCI- Multiplex Assn. of India* v. *United Producers/Distributors Forum*, 2011 SCC OnLine CCI 33.

competition while dealing with IPRs. In *Aamir Khan Productions (P) Ltd.* v. *Union of India*,[48] the Bombay High Court, while dealing in matter concerning IPR held that the CCI has statutory jurisdiction to decide every case which involves issue of competition law and IPR. It further reaffirmed that the CCI is a competent body to try each and every issue that comes before the Copyright Board.[49] It establishes the fact that the Indian Courts are well equipped and authorized to deal with the emerging cases wherein complexities of both, IPR and Competition law, are involved.

Section 3(5) acts as a blanket provision which out rightly highlights an active interface between IPR and competition law, which acts a blanket protection to any action taken for protecting an IPR, but which does not act as an anti-competitive measure. It provides for an action against any action only if it relates to abuse of any dominant position which amounts to an adverse effect on the competitive market appreciably.

In respect of priority between the Copyright i.e. an IPR and Competition policy, in *Microfibres Inc.* v. *Girdhar & Co.*[50], the Court held that the intent of the legislature was to give supremacy and better protection to original artistic works under the Copyright Act and lower protection to those activities that are specifically commercial in nature. Therefore, legislature clearly lays down the basic principle that the work that amounts to commercial activity is at a lower platform than any original artistic work. However, with changing market structure and use of dominant position forced CCI to check any anti-competitive activity involving use of dominant position and formation of cartels in film industry.

In the landmark case of *FICCI-Multiplex Assn. of India* v. *United Producers/Distributors Forum*[51], FICCI (petitioners) alleged that in order to raise revenue, the UPDF has willingly avoided to deal with the multiplex owners, aiming formation of market cartel, which is inherently anti-competitive practice. This is directly related to the multiplexes as the business of the multiplexes is wholly dependent on the film industry. While UPDF argued that a film being a subject matter of copyright under Section 14 of the *Copyright* Act, 1957, the right-holder can exclude anybody from releasing a film in any particular multiplex. It was found that the UPDF held 100% shares in the industry and therefore any involvement in an activity which limits supply of films is an activity anti-competitive in nature. The

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[48] *Aamir Khan Productions (P) Ltd.* v. *Union of India*, 2010 SCC OnLine Bom 1226 : (2010) 112 Bom LR 3378 : (2010) 4 Comp LJ 580.

[49] *Kingfisher Airlines Ltd.* v. *Competition Commission of India*, 2010 SCC OnLine Bom 2186.

[50] *Microfibres Inc.* v. *Girdhar & Co.*, 2009 SCC OnLine Del 1647.

[51] *FICCI- Multiplex Assn. of India* v. *United Producers/Distributors Forum*, 2011 SCC OnLine CCI 33.

CCI ruled that UPDF's activity of not releasing the films through the multiplexes was in violation of Section 3(3) of the Competition Act, 2002. In *Twentieth Century Music Corpn.* v. *Aiken,*[52] the U.S. court held that ideology of the Copyright law is to ensure fair returns to the author for the hard work which he has put into his original work, however, the main objective is to stimulate artistic work which ensures public good. Therefore, goal of IPR law and Competition law is to promote innovation and interest of the public at large along with furtherance of competition in the market ensuring common good. ECJ has laid down similar approach in *Hoffmann-La Roche & Co. AG* v. *Commission*[53].

In *Hawkins Cookers Ltd.* v. *Murugan Enterprises,*[54] the Delhi High Court held that even a well-known mark only on the reason of being well known or prominent cannot be left unsupervised, to enable it to create a monopoly in the market by involving itself in practices relating to the control of ancillary or incidental market. It would come under the category of abuse of dominant position, thus anti-competitive in nature.

The Supreme Court in *Entertainment Network (India) Ltd.* v. *Super Cassette Industries Ltd.*[55], elaborated the interface between the IPR and the competition law on competition in the market. It very aptly described refusal to deal principal, based on abuse of dominance, as an anti-competitive activity that is covered under the ambit of competition law. Although it recognized absolute right and monopoly of the author on the copyrighted work, but limited the same by restricting it from any transaction that unreasonably taints or limits competition, leading to refusal.

The United States court in *Image Technical Services Inc.* v. *Eastern Kodak Co.*[56] and *Independent Service Organisations Antitrust Litigation*, *In re*[57] cases, held that IPR though provides fair opportunity to the right-holders but does not provide unfettered power to the right-holder and such rights are subject to anti-trust laws. In *United States* v. *Microsoft Corpn.*[58], the Court expressly held that IPR and anti-trust law are not in exclusion of each other, but work in consonance.

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[52] *Twentieth Century Music Corpn.* v. *Aiken,* 1975 SCC OnLine US SC 122 : 45 L Ed 2d 84 : 422 US 151 (1975).

[53] *Hoffmann-La Roche & Co. AG* v. *Commission*, Case C-85/76, (1979) 3 CMLR 211.

[54] *Hawkins Cookers Ltd.* v. *Murugan Enterprises*, 2008 SCC OnLine Del 5 : (2008) 36 PTC 290.

[55] *Entertainment Network (India) Ltd.* v. *Super Cassette Industries Ltd.*, (2008) 13 SCC 30.

[56] *Image Technical Services Inc.* v. *Eastern Kodak Co.*, 125 F 3d 1195, 1218 (9th Cir 1997).

[57] *Independent Service Organisations Antitrust Litigation*, *In re*, 203 F 3d 1322, 1326 (Fed Cir 2000).

[58] *United States* v. *Microsoft Corpn.*, 38 1998 WL 614485 (DDC 1998).

Certain other problems that are faced by the competition law can be quoted as *predatory pricing* and *excessive pricing*. It also relates to refusal of license. In *Union of India* v. *Cynamide India Ltd.*[59], the Court held that over-pricing of the live-saving drugs attract prohibition under competition law, and it comes under the umbrella of price control. The branded agencies and the patented products are the major concerns for the competition law. It is hard at the current stage to bring them in the circle of price control. These are acting as potential danger apparent in the form of monopolies. Life-saving drugs in the developing countries are major concerns. Legislations in various countries still do not cover provisions to bring such drugs under the scheme of price-control.

Practicing illegal tying-arrangements involves breach of competition law. In *Canada (Director of Investigation and Research)* v. *Tele-Direct (Publications) Inc.*[60] case, it was well observed that if there is any selective refusal to license a trademark, it is abuse of dominant position. Further, the *Microsoft* v. *Commission*[61] case is also a good example that elaborately deals with the issue of abuse of dominant position and refusal to deal with third parties and inclusion of tying-arrangements. Tying-arrangement can be understood as a case wherein a highly usable product is tied with a product that is less marketable and irrespective of the choice of the potential buyer, the seller agrees to sell the same.

VI. CONCLUSION

From the extensive research laid down, it can be very well be inferred that rather than studying both the laws in isolation, middle path is being developed through perusal of statues and interpretation of statues through judgments of the Courts so that incentives to the IP holder are secured without any compromise on consumer welfare. There are certain guiding principles which can be deduced from the extensive research laid down with respect to the interface of IPR and competition law. Firstly, umbrella regulation shall not be imposed on IPR. It shall be interfered with only in cases wherein it causes adverse effect on the market competition. Secondly, enterprises dealing with IPR shall be properly regulated to avoid any concentration of market strength resulting in abuse of market dominance. Thirdly, the Competition Commission of India must be given sufficient jurisdiction to decide cases wherein competition is affected involving IPR issues. Fourthly, jurisdiction of CCI shall be extended to cases which involve excessive pricing and also refusal to deal on frivolous and unreasonable grounds. Fifthly,

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[59] *Union of India* v. *Cynamide India Ltd*., (1987) 2 SCC 720 : AIR 1987 SC 1802.

[60] *Canada (Director of Investigation and Research)* v. *Tele-Direct (Publications) Inc*., (1997) 73 CPR (3d) 1.

[61] *Microsoft Corpn.* v. *Commission of the European Communities*, T-201/04, 2007 ECR II-1491.

developing countries, while framing their legal framework in respect of IPR and competition, should carefully analyze the jurisprudence in U.S. and European Union as they are the only major jurisdictions which have addressed the issue in such depth. The inference from the above discussion brings forth an idea that intersections of the IP and competition rules would be a wrongful comprehension if it is attributed to the latter, the direct objective of enhancing innovation or in case of the former, the direct objective of enhancing competition. It must be noted that though the two objectives target different objectives, but they are synergies; each in turn potentially serves the other by fulfilling its function. The main challenge in promoting a consonance between the two and fair market regulation is to formulate and implement laws both within the IP law as well as outside IP laws, i.e. substantive competition law in such a manner that it in effect promotes dynamic competitive markets.

As discussed earlier, the pro-competitive approach of IPR law promotes competition. Pro-competitive interpretation of IPR law should be preferred, rather than challenging the integrity of such rights. Interpretation should not be made the basis for expanding IPRs, only legislation. IPR for proper and cogent understanding should be determined in a way that is in consonance with the competitive dynamism. IP deals with the grant and functioning of exclusive rights, and competition law aims to deal with the manner and extent of exercise of such rights. Competition law should keep itself focused only to the effect on relevant market in exercise of such exclusive rights. General policy making should be separated from individual cases. Such differentiation is very vital for fulfilling the objective of respective laws. In conclusion, while coordinating the interplay between both the laws, the difference between legal and economic monopoly should be maintained. While legal monopoly falls in ambit of IPR related legal regime, the latter falls under the jurisdiction of competition law.

PREVENTING FURTHER NORMALISATION OF "EXTRORDINARY" ORDINANCE-MAKING POWERS

—*Shorya Choudhary*[*] *& John Sebastian*[**]

Abstract *The Ordinance debate has been re-ignited by the recent Krishna Kumar Singh case in the Supreme Court. This paper tries to address the misuse of the Constitutional provisions giving Ordinance-making powers to the Executive and how they have been normalized to be used as simply an alternative path for passing laws, which remain stuck in legislatures due to party politics. The Constituent Assembly debates reveal certain intent on the part of the drafters to use Ordinances for emergent situations requiring immediate action, while the legislatures were unable to. This has been trivialized to a great extent by various political parties, which try to pull the wool over the eyes of the Constitution, the most sacred principles of any nation, and have continued doing so with impunity.*

Certain case laws have been examined and comparisons with similar provisions in other Constitutions to provide a clearer picture of the purpose and object of such provisions in Constitutions[1].

We have suggested some reforms to Articles 123 and 213 of the Indian Constitution, which if included would make the intention of the drafters of the said provisions clear and specific. These are as follows – (i) a heading which makes clear that the provisions are meant for emergent situations, (ii) a provision making it the duty of the President (or Governor) to call for the Legislature into session to consider, except under special circumstances, (iii) making

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1 However, the judgments fail to provide measures to stop the misuse.

it necessary for the Ordinance to be tabled before the houses of the Legislature as soon as they re-assemble and the lapse of the Ordinances if they are not accepted, (iv) an explicit statement that Article 123(2) shall be read as a restrictive and not permissive power, (v) a special provision incorporating the sentiments of the Supreme Court in the abovementioned judgments which held that re-promulgation is a fraud on the Constitution.

I. INTRODUCTION

Articles 123 and 213 of the Indian Constitution give power to make laws by way of "ordinances" to the President and the Governor respectively when the Parliament (or State Legislature) is not in session. The intention behind these articles was to provide for extraordinary and emergency situations. However, like many other provisions of the Constitution (Emergency under Article 352, President's Rule under Article 356, and the likes), these provisions too have been misused. And in the recent times, these have been normalized and used as alternative ways to pass laws when party politics comes in the way. This is a violation of the intention and the objective behind these provisions and therefore, I would recommend slight changes to the same to overcome this problem and bring the Articles into conformation with the intentions of the Constituent Assembly.

The paper has been divided into four sections. The first tries to identify the different circumstances in which the Ordinances can be put to use through an examination of cases and Constitutions of other parliamentary democracies. The second section looks at the problems relating to the life span of the Ordinance. The third section focuses on the recent Krishna Kumar Singh case, its effects and inadequacies. The final section summarizes the changes proposed in this paper to prevent the misuse of the provisions.

A recent example of the misuse is the Enemy Property (Amendment and Validation) Ordinance, which has been promulgated five times till now. The Ordinance was passed by the Lok Sabha in March, 2016 and then was referred to a select committee of the Rajya Sabha. Even while it was being reconsidered by the Rajya Sabha, the Ordinance was re-promulgated for the second time in April, 2016.[2] Ordinances have been used in a similar fashion

[2] The Wire, *Why the Enemy Property Ordinance Needed Parliament's Reconsideration* (December 26, 2016), available at https://thewire.in/89572/pranab-mukherjee-enemy-property-ordinance/.

without any fear by the incumbent political parties to get their ways without subjecting themselves to the regular parliamentary procedures.

The current Article 123 has the following criteria – (a) any time except when both houses of Parliament are in session, (b) satisfaction of the President (here we have to bear in mind that it is not the personal satisfaction, but the 'constitutional satisfaction' of the President as laid down in the Samsher Singh case[3]. This would mean that it has to be on the aid and advice of the Council of Ministers as laid down in Article 74 of the Constitution.)

Article 123(2) specifies the life of an Ordinance as being six weeks from the reassembly of the Parliament. This implies that an Ordinance can stay intact for seven and a half months (subject to Article 85(1)).

The current use (or misuse) of these provisions is unfortunate and it seems amending the provisions could help and eradicate this practice. What is argued in this paper is that the root of the problem regarding the misuse of Ordinance-making power is largely in the framing of the Article itself, which was premised on a certain understanding of the way in which the Executive will use these provisions. It is argued here that the Constitutional practice post-Independence of the Executive has belied this simplistic understanding and that there is hence a need to revisit the very framing of the provisions themselves in order for us to actually control the abuse of Ordinance making power.

II. SPECIFICATION OF THE REQUIREMENTS TO BE MET FOR USING ORDINANCES

Firstly, there should be explicit specification that the power is meant for meeting extraordinary circumstances which need immediate action. The heading of the Part is itself problematic as mentioned by Dr. B.R. Ambedkar in the Constituent Assembly debates. However, I disagree with his suggestions equally, which were "legislative powers of the President when Parliament is not in session". This would not in any way curb the provision from being misused but only be construed to mean what is already mentioned in Article 123(1). In the Constituent Assembly debates, Pandit Hirday Nath Kunzru and Prof. K. T. Shah kept referring to it as an extraordinary or emergency power and this was not denied. On the contrary, the provision employs the words "at any time" except when the houses are in session. Therefore, it should be explicitly stated this provision is to be resorted to during extraordinary times or during emergencies. In the alternative, it should be brought under Part XVIII of the Constitution.

[3] *Samsher Singh* v. *State of Punjab*, (1974) 2 SCC 831 : AIR 1974 SC 2192.

In A.K. Roy case[4], Chandrachud C.J. talked about this Article. He stated that the power was given for "peace and good government" for "urgent situations which cannot brook delay" and therefore, should not be subjected to the "comparatively" tardy and time-consuming process of the Parliament. He stated that the intention behind the provision was not so that it would be used "recklessly" or in a mala fide manner. It was enacted as a necessary evil and not to meet political ends and the same shall not be used to perpetuate fraud on the Constitution.

These words effectively spell out the reasons and the expectations of the Constituent Assembly about the current provision. It would seem like ordinances are to be resorted only in cases where there is danger to life, liberty or the general maintenance of peace and the government cannot wait for the Parliament to come back in session as it would cause delay which is unaffordable. Even when it is used for civil cases, the standard should be set high enough that "grave public inconvenience would result otherwise"[5].

However, disturbingly enough, in R.K. Garg[6], the Supreme Court had very complacently held "If Parliament can by enacting legislation alter or amend tax laws, equally can the President do so by issuing an Ordinance under Article 123", referring to Article 123(3). It held that it was difficult to read any limitations into the power accorded under the Article. It also stated that it is not an undemocratic power as the Parliament could pass a power of no confidence against it. This type of view is problematic in two senses. Firstly, that it views Article 123(3) as permissive whereas what would sit right with the intentions of the Constituent Assembly would be seeing it in a restrictive light conferring negative duties to not overstep the limits specified for the legislature. For instance, if someone is to be detained, Article 123(3) should be used to say that the same "fair, just and reasonable, not fanciful, oppressive or arbitrary" as laid down in Maneka Gandhi case[7]. It should not be read to confer powers on the President to enact tax laws or the likes. Secondly, that it renders the check on such a power completely reactive. For instance, if some persons are detained in a manner not "fair, just and reasonable", any action like a no confidence vote, can only be taken once the Parliament comes back into session and where the persons would have been languishing in detention which can extend up to seven and a half months.

Due to lack of any such standards, this has normalized and is now seen as an alternative to pass laws. In 2014 itself, the Modi government became

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4 *A.K. Roy* v. *Union of India*, (1982) 1 SCC 271 : AIR 1982 SC 710.
5 H.M. Seervai, *Constitutional Law of India,* 16 (2nd edn).
6 *R.K. Garg* v. *Union of India*, (1981) 4 SCC 675 : AIR 1981 SC 2138.
7 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248 : AIR 1978 SC 597.

the sixth most frequent user of this method.[8] This is done to ensure that Bills are not blocked by the Opposition in the Parliament and often, Congress itself is seen as setting the precedent for such a route of passing laws.[9] More recently, the Union Cabinet passed an Ordinance, Specified Bank Notes Cessation of Liabilities Ordinance, on December 28th, 2016 to make holding of the demonetized notes beyond the deadline of March 31st, 2017 an offence[10], to legally terminate RBI's liability on the banned currencies to prevent any litigations that might arise due to the promise of the RBI to pay the bearer of the note the value printed on it as per the statutory requirement.[11]

As laid down in D.C. Wadhwa case[12], the primary law making body is the Legislature and for Executive to have that power would be contrary to all democratic norms, except in cases of emergent situations – "A constitutional authority cannot do indirectly what it is not permitted to do directly."

Even if we look at the German Constitution[13], the Reich President is given extraordinary powers to take measures necessary, which might include a similar power as Ordinance-issuing power of the Indian President. However, it is in clear terms specified in the Article that this power has to be exercised "in the event that the public order and security are seriously disturbed or endangered". Similar powers are given to the President of Philippines under their Constitution.[14] Such qualifying words are therefore necessary when vesting such extraordinary powers in any authority. An overview to the Australian Constitution[15] by the Government Solicitor emphasizes the separation of powers. It states that Legislative power is to make laws and Executive's is to carry them out. No legislative powers or power to issue directions have been given to the President, like under the German Constitution, except when there is a state of emergency. If we look at the Israeli Constitution, another parliamentary democracy, no such power

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8 The Wall Street Journal, Suryatapa Bhattacharya, *Why Modi Is Opting for the Ordinance Route to Pass Laws* (December 31, 2014) available at http://blogs.wsj.com/indiarealtime/2014/12/31/ordinance-route/.

9 Business Standard, Kavita Chowdhary, *Govt points to Ordinance route for crucial bills* (December 23, 2014) available at http://www.business-standard.com/article/politics/govt-points-to-ordinance-route-for-crucial-bills-114122200851_1.html.

10 Firstpost, *Demonetisation Ordinance Passed: Holding Old Notes A Criminal Offence Post 31 March*, (December 28, 2016), available at http://www.firstpost.com/politics/demonetisation-ordinance-passed-holding-old-notes-a-criminal-offence-post-31-march-3177334.html.

11 Firstpost, *Demonetisation Ordinance: Beyond Technicality, It Means Little For Public And Govt* (December 28, 2016), available athttp://www.firstpost.com/india/demonetisation-ordinance-beyond-technicality-it-means-little-for-public-and-govt-3177670.html.

12 *D.C. Wadhwa* v. *State of Bihar*, (1987) 1 SCC 378 : AIR 1987 SC 579.

13 German Constitution, Article 48.

14 The 1987 Constitution of the Republic of Philippines, Article VII, section 23.

15 Australia's Constitution, Parliamentary Education Office and Australian Government Solicitor, Canberra, 2010.

has been given to the President. Even the emergency regulations are passed by the Prime Minister.[16]

III. LIFE TIME OF AN ORDINANCE

Second problem with Article 123 appears to be the life of the Ordinance. It was an issue debated over in the Constituent Assembly debates and yet was passed without amendments giving any ordinance a lifetime that can extend up to seven and a half months. Pandit Hirday Nath Kunzru had suggested immediate calling of the Parliament into session once the Ordinance is passed. This could be a very useful incorporation. The President can summon the Houses of the Parliament under Article 85 and it is the duty of the legislators to pass laws to ensure justice, liberty, equality, etc.[17] There is no reason, where the situation is such that requires immediate action, that the Parliament cannot be called in quickly to ratify the proposal by the President (or Council of Ministers) unless such dire circumstances exist in the country that the Houses cannot even meet or that the delay would be too much to afford. He suggested reducing the time from six months and gave the example of the French Constitution.[18]

Further, K.T. Shah suggested that the ordinance should be presented before the Houses immediately once they reassemble. As he rightly pointed out, it was a 'negation of the rule of law' and therefore, should be dealt with by the elected representatives of the public right away and cease to be effective if disapproved. There are some arguments that state that the legislature might have a busy session and so would be unable to consider the Ordinance. However, it should be noted that an Ordinance is only for emergent situations and any other legislative business should only be dealt with after the emergent situation and the Ordinance has been reviewed. As laid down in Krishna Kumar Singh v. State of Bihar[19] by Justice Chandrachud, "emergent" conveys a sense of "necessity" and "immediate action", as distinguished from mere "desirability". Over the years, this provision has been misused to wait for the session to end and even prorogue the next one before six weeks (President also has the power to prorogue the sessions under Article 85), and then re-promulgate the Ordinance due to reasons of petty party politics. The stand taken by Dr. B.R. Ambedkar seems too optimistic and the current political scenario does not fit in the future he had imagined. Further, it should be mandatory for the Ordinance to lapse if the Legislature on re-assembly does not approve it, unlike in the D.C. Wadhwa case[20], where a situation of "Ordinance-Raj" had come about with the State

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16 Constitution of Israel, 1958, provision 39.
17 Preamble to the Indian Constitution.
18 French Constitution of 1958, Article 38.
19 *Krishna Kumar Singh* v. *State of Bihar*, (2017) 3 SCC 1.
20 *D.C. Wadhwa* v. *State of Bihar*, (1987) 1 SCC 378 : AIR 1987 SC 579.

Executive re-promulgating Ordinances again and again for years after proroguing the State Assembly sessions before six weeks every time. The Supreme Court in that case called it "a fraud on the constitutional provision", "colourable exercise of power" and "repugnant to the constitutional scheme".

IV. THE KRISHNA KUMAR SINGH CASE

This position has been further strengthened by the verdict of a seven judge Constitutional Bench of the Supreme Court in the abovementioned Krishna Kumar Singh v. State of Bihar case. The 6-1 majority held that re-promulgation of ordinances was a "fraud" on the Constitution. Justice D.Y. Chandrachud, delivering the majority judgment, said that it should "unavoidable" for an Ordinance to be placed before the Legislature and failure to do so is a serious constitutional infraction. Justice Chandrachud pointed out the word "shall" in Article 213(2)(a) (and Article 123(2)(a)), which implies a mandate. The dissenting opinion by Justice Madan B. Lokur stated that there might be situations which prevent placing of the Ordinance before the Legislature and the same could not be said to illegal and a *per se* fraud on the Constitution.[21] Justice Lokur stated that whether it is fraud or not would depend on the situations in which such an event happened, calling the placing of an Ordinance before the Legislature moral and ethical but not mandatory, and failure would not make the Ordinance void. However, if we were to look at the statistics, it is quite clear that the matters which have been the subject of such ordinances can hardly be said to be of any emergent nature. Shubhankar Dam after studying the 615 ordinances issued by Parliament between 1952 and 2006, concluded that this facility has been used by governments to "subvert Parliament" and added that "with the exception of a single ordinance", every other law could have waited for the next legislative session.[22] Further, as I have suggested above in my paper, that an Ordinance is supposed to be passed only when the situation is so emergent that it could not have waited for the Legislative Assembly to convene. Therefore, it is only natural that once the Assembly convenes, the Ordinance should be one of the first things, if not the first, to be tabled before the Assembly. Justice Lokur even opined that D.C. Wadhwa v. State of Bihar did not put a blanket ban on re-promulgation of Ordinances, but that it would depend on the circumstances and satisfaction of the Governor (or President). A re-promulgation should be seen as circumventing or

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[21] SCC Online, *Re-Promulgation Of Ordinances Is A Fraud On The Constitution And A Subversion Of Democratic Legislative Processes* (January 3, 2017) available at http://blog.scconline.com/post/2017/01/03/re-promulgation-of-ordinances-is-a-fraud-on-the-constitution-and-a-sub-version-of-democratic-legislative-processes/.

[22] Shubhankar Dam, *Presidential Legislation in India: The Law and Practice of Ordinances,* Comparative Constitutional Law and Policy, Cambridge University Press, (2013).

undermining the authority of the Legislative bodies, and the majority in this case agreed that it was a fraud.

The Krishna Kumar Singh v. State of Bihar case even overruled the previous judgments in State of Orissa v. Bhupendra Kumar Bose[23] and T. Venkata Reddy v. State of A.P.[24], of 5 benches each, laying down that an ordinance cannot create an 'enduring' or 'irreversible' right in a citizen. Justice Lokur elaborated on this stating that there are certain "physically irreversible" acts like demolition of a monument and that these acts are distinguished from the "legally irreversible" ones. He even distinguished between "irreversible" acts and those that are burdensome to do so but can be reversed. Justice Chandrachud laid down that such a situation should be judged from the angles of public interest and Constitutional necessity and laid down the discretion with the court to mould the appropriate relief.

This judgment has gone a long way to ensure that the Executive is deterred from re-promulgating Ordinances without tabling them before the respective Legislative bodies, but it still does not sufficiently deter the Executive from passing the Ordinances as if it were simply an alternative route for passing ordinary laws. Time and again judgments have been passed keeping good faith in the legislature, and it has many a times been undermined for party politics. The very recent example is the demonetisation Ordinance, which shows that this route of passing laws is not reserved for any special circumstances that threaten the Indian sovereignty or democracy, but simply because it was already assumed by the ruling government that the law would face opposition from the certain rival political parties. So, even though a Bill could have been placed before the Lok Sabha when it was in session, the ruling party simply took the Ordinance route as if it was an easier way provided to pass laws. And the blame does not rest with the current government only, it lies with all those governments which have laid this act as a precedent. Hence, even though this particular case is a step in the right direction, it clearly would not do enough and does not go into the root causes behind the misuse of Ordinance making powers.

V. SUMMARY OF THE SUGGESTIONS

Therefore, summarizing the changes that I propose to be incorporated in the Article so as to make it conform to the intentions of the Constituent Assembly –

(i) An explicit statement, in the heading and the provision, that this is an extraordinary power to be reserved for situations requiring utterly immediate actions.

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[23] *State of Orissa* v. *Bhupendra Kumar Bose*, AIR 1962 SC 945 : 1962 Supp (2) SCR 380.
[24] *T. Venkata Reddy* v. *State of A.P.*, (1985) 3 SCC 198.

(ii) A provision making it a duty for the President to call the Houses of the Parliament into session as soon as such an Ordinance is passed for the purpose of reviewing it, unless such circumstances (say a war or riotous situations threatening life and property) exist that do not allow even a moment's delay. This would therefore, reduce the life that an Ordinance can have till the Assembly meets as under the current position, which can go up to six months.

(iii) A provision for the Ordinance to be immediately tabled before the Houses as soon as they re-assemble and a decision forthwith, and that if it is not accepted in that session, the Ordinance lapses and cannot be re-promulgated. This would aim at the life of the Ordinance once the Assembly comes into session, which as per the current law can extend up to six weeks.

(iv) An explicit statement that Article 123(2) shall be read as a restrictive and not permissive power.

(v) A special provision incorporating the sentiments of the Supreme Court in the abovementioned judgments which held that re-promulgation is a fraud on the Constitution.

Such similar changes should also be incorporated in Article 213 as regards the Governor and the State Legislature.

Incorporating the above into the Articles would bring the powers granted by the provisions along the lines that had originally been desired by the Constituent Assembly and would make misuse and normalization of the same a thing of the past. Such an action has become necessary, for even though the Constituent Assembly had been too optimistic of the future parliamentarians of the country, their prediction has turned out to be not even remotely close to what has happened – where the Government, despite being fully aware of the limits of the powers granted, uses the procedure of Ordinances to equip itself to jump over the regular parliamentary process as if they were merely hurdles. Amending the provisions could help to rectify this erroneous practice that has gained popularity over the years.

GLOBAL JURISPRUDENCE: THE RISE OF A PERSUASIVE AUTHORITY

—*Shridul Gupta*[*]

Abstract *Judicial globalization means increasing global constitutional jurisprudence. Judges from all around the world are referring and exchanging opinions on important issues of each other's decisions on issues ranging from free speech to privacy rights, from death penalty to terrorism. Judges are meeting face to face in the seminars and judicial conferences. This judicial cross-fertilization was well recognized among imperial powers and their colonies and is also well established in commonwealth. There is plenty of evidence of borrowing from English law. Now Constitutional courts around the world are borrowing heavily from the U.S. Supreme Court jurisprudence.*

Judicial globalization means that judges in different countries will have to decide more and more cases involving issues governed by international or foreign law. So, they must familiarize themselves with those bodies of law, just as they must know the general dimensions of different areas of their national laws. The extraordinary increase in information availability through the Internet has also become a driver of judicial globalization. Global jurisprudence mostly involves issues of basic human rights. Judges feel a common bond in adjudicating human rights cases because such cases engage a core judicial function in most of countries around the world. Courts protect individuals against abuses of state power, and required to determine the appropriate level of protection in light of a complex matrix of historical, cultural, and political needs and expectations.[1]

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[1] My article sums up the opinions of different judges on this issue and its importance especially when the courts are seriously burdened by the human rights issues and terrorism.

Globalization is generally used in terms of trade or corporations rather than for court, judges and justice. But now judges from all around the world are exchanging opinions on important issues by meeting face to face in the seminars and judicial conferences. They are discussing the outcome of specific cases which concern the public interest of international community. Judicial globalization means increasing global constitutional jurisprudence, in which judges are referring to each other's decisions on issues ranging from free speech to privacy rights to the death penalty to terrorism. Unlike past legal borrowings across borders; judges are now engaged not in passive reception of foreign decisions, but in active and ongoing dialogue.[2]

Justice Forest of the Supreme Court of Canada said:

> "The greater use of foreign material affords another source for the construction of better judgments… The greater use of foreign materials by courts and counsels in all countries enhance their effectiveness and sophistication."[3]

In the United States, Judges are beginning to develop a distinct doctrine of *judicial comity*: a set of principles designed to guide courts in giving deference to foreign courts as a matter of respect owed to judges by judges, rather than of the mere general respect owed by one nation to another.

Justice Stephen Breyer of U.S. Supreme Court cited cases from India, Zimbabwe, South Africa and Canada[4] and along with Justice Sandra Day O'Connor urged American lawyers to know and cite more foreign and international law in their arguments and briefs to U.S. Courts.[5]

Justice William Rehnquist urged all U.S. judges to participate in international judicial exchanges as it is important for judges and legal communities

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Westbrook, Jay Lawrence. "International Judicial Negotiation," *Texas International Law Journal 38 (2003), 567.*

[3] Forest, G.V.La "The Use of American Precedents in Canadian Courts," *Maine Law Review* 46 (1994): 216.

[4] *Knight* v. *Florida*, 145 L Ed 2d 370 : 528 US 990 : 120 SCt 459, 464 (1999). (Citing *Sher Singh* v. *State of Punjab*, (1983) 2 SCC 344 : AIR 1983 SC 465; *Catholic Commission for Justice and Peace in Zimbabwe* v. *Attorney General*, (1993) 1 Zimb LR 242 (S); *Pratt* v. *Attorney General of Jamaica*, (1994) 2 AC 1 : (1993) 3 WLR 995; *Kindler* v. *Canada (Minister of Justice)*, (1991) 2 SCR 779; *Soering* v. *United Kingdom*, 11 Eur.Ct. H.R. (ser A) 439 (1989).

[5] Sandra Day O'Connor, Keynote address, *American Society of International Law Proceedings* 96 (2002):348; Stephen Breyer, Keynote address, *American Society of International Law Proceedings* (2003).

of different nations to exchange views, share information and learn better understand one another and our legal system.[6]

In United States, the Federal Judicial Conference established a Committee on International Judicial Relations to conduct exchange and training programmes with foreign courts. The United States Supreme Court has regular summits with the European Court of Justice and regularly visits House of Lords, the German Federal Constitutional Court, the French Conseil d'Etat, the Supreme Court of India, and the Mexican Supreme court.

United Nations Environmental Programme (UNEP) and the International Network for Environmental Compliance and Enforcement (INECE) organize Global Judges Symposium in collaboration with the UN Conference of Sustainable Development in Johannesburg where senior judges from more than hundred countries discuss the improvement of the adoption and implementation of environment related laws.

These movements represent the gradual construction of a global legal system – a system entirely different from the system traditionally envisaged by international lawyers. This vision assume a global legal hierarchy, with a world Supreme Court like the International Court of Justice resolving disputes between States and pronouncing on rules of international law that would then be applied by national courts around the world.[7]

The new system is composed of network of national and international judges who recognize each other as participants in a common judicial enterprise. They see each other not as servants and representatives of a particular government or party, but also a fellow member of a profession that transcends national borders. They face common substantive and institutional problems; they learn from another's experience and reasoning. They cooperate directly to resolve specific disputes and conceive themselves as capable of independent action in both the international and domestic realms.

A 1993 resolution by the French Institute of International Law call upon national courts to become independent actors in the international arena and to apply international norms impartially, without deferring to

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[6] William Rehnquist, Chief Justice, Court of Appeals at *Federal Circuit Twentieth Anniversary Judicial Conference*, 8 April, 2002 available at http:// www.supremecourtus.gov/publicinfo/speeches/sp-04-08-02a.html.

[7] Franck, Thomas M., and Gregory H. Fox, eds. *International Law Decisions in national Courts*. New York: Transnational Publishers, 1996,383. This study of the "synergy between national and international judiciaries" emphasizes the joint role that national and international courts play in monitoring and implementing international law rules.

their governments.[8] These judges are creating a system that can be better described as 'a community of courts' than as a centralized hierarchy.[9]

The Chief Justice of the Norwegian Supreme Court Carsten Smith said: "It is the duty of national courts- and especially of the highest court – to introduce new legal ideas from the outside world into national judicial decisions."[10]

Judges of the appellate courts are now engaging in a dialogue with their counterparts around the world on the issues that arise before them. They conduct these dialogues through mutual citation and direct interactions, often electronically. In this process, they contribute both to global jurisprudence on particular issues and also in improving the quality of national decisions. They import ideas from abroad or sometimes resist them, insisting on an idiosyncratic national approach for specific cultural, historical, or political reasons. These judges are self-conscious about what they are doing, by engaging in uses and abuses of "persuasive authority" from fellow courts in other countries.

Justice L'Heureux-Dube of Canadian Supreme Court observed:

> "More and more courts, particularly within the common law world, are looking to the judgments of other jurisdictions, particularly when making decisions on human rights issues. Deciding on applicable legal principles and solutions increasingly involves a consideration of the approaches that have been adopted with regard to similar legal problems elsewhere."[11]

Lord Brown-Wilkinson of U.K. comment that

> "Several senior members of the British judiciary are increasingly willing to accord persuasive authority to the constitutional values of other democratic nations when

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8 Benvenisti, Eyal. "Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on Activities of national Courts and the International Relations of Their States. *"European Journal of International Law* 5 (1994): 424.

9 Burke-White, William W. "A Community of Courts: Toward a System of International Criminal Law Enforcement." *Michigan Journal of International Law* 24 (2002): 1.

10 Smith, Carsten. "The Supreme Court in Present-day Society." *The Supreme Court of Norway* edited by Stephen Tschudi-Madsen. Oslo: H.Aschenhoug and Co. (1998), 135.

11 L'Heureux-Dube, Clairc."The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court.' *Tulsa Law Journal* 34 (1998); 15, 16.

> dealing with ambiguous statutory or common law provisions that impact upon civil liberties issues."[12]

The South African Constitution requires the South African Constitutional Court to consider international law and permits it to consult foreign law in its human rights decisions.[13] In a landmark decision holding the death penalty unconstitutional, the South African court cited decisions of the U.S. Supreme Court, the Canadian Constitutional Court, the German Constitutional Court, the Indian Supreme Court, the Hungarian Constitutional Court, and the Tanzanian Court of Appeal.[14] Scholars have documented the use of comparative material by Constitutional Courts in India, Israel, Ireland, New Zealand, Zimbabwe and South Africa.[15]

I. IS CROSS-FERTILIZATION REALLY NEW?

Cross-fertilization is well recognized among imperial powers and their colonies and also well established in commonwealth. There is plenty of evidence of borrowing from English law. Constitutional courts around the world have borrowed heavily from the U.S. Supreme Court jurisprudence.[16] Comparative materials in constitutional adjudication has in fact increased.[17]

On the other hand many judges and scholars believe that current cross-fertilization is new.[18] Justice O'Connor explain why should judges and lawyers concerned about issues of foreign law and international law? The reason is globalization. No institution of government can afford now to ignore the rest of the world.[19]

Justice O'Connor's argument is a reality. Globalization means that judges in different countries will have to decide more and more cases involving issues governed by international or foreign law. They must thus familiarize

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[12] Loveland, Ian. "The Criminalization of Racist Violence" In *A Special Relationship? American Influences on Public Law in the UK, edited* by Ian Loveland. Oxford: Clarendon Press, 1995.*257* (citing comments by Lord Brown Wilkinson).

[13] Constitution of South Africa, Sect. 39.

[14] *State* v. *T. Makwanyane*, 1995 SCC OnLine ZACC 2.

[15] McCrudden, Christopher. "A Common Law of Human Rights: Transnational Judicial Conversations on Constitutional Rights." *Oxford Journal of Legal Studies* 20:2000:499.

[16] Ackerman, Bruce. "The Rise of World Constitutionalism," *Virginia Law* Review 83 (1997): 771.

[17] Watson, Alan. *Legal Transplants*. Edinburgh: Scottish Academic Press 1974; and "Legal Change: Sources of Law and Legal Culture." *University of Pennsylvania Law Review* 131 (1983): 1121-46.

[18] Choudhry, Sujit, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation." *Indiana Law Journal* 74 (1999); 819.

[19] Sandra Day O'Connor, Keynote address, *American Society of International Law Proceedings* 96 (2002).

themselves with those bodies of law, just as they must know the general dimensions of different areas of their national laws.

The extraordinary increase in information availability through the Internet has also become a driver of judicial globalization. Two principal electronic legal databases, Lexis-Nexis and West Law include legislation and decisions from various countries.[20] The expressed purpose of CODICES is instructive. It allows judges and constitutional law experts in the academic world to be informed quickly about the most important judgments in constitutional law. But the reason is explicitly political: to build democracy through law. According to CODICES website, The exchange of information and ideas among old and new democracies in the field of judge made law is of vital importance. Such an exchange and cooperation will not only benefit the newly established constitutional jurisdiction of Central and eastern Europe; but will also enrich the case law of the existing courts in Western Europe and North America.[21] The aim is to strengthen the new constitutional courts and facilitate convergence of constitutional law across Europe.

Similarly, LawAsia is a type of regional bar association, which publishes law bulletins and offer different venues to its members for get-together and to exchange information and ideas. Its aims are to offer network opportunities to its members and to promote rule of law through 'disseminating knowledge of the law of member countries'; 'promoting the efficient working of the legal system of member countries'; 'promoting development of the law and uniformity where appropriate'; other goals are promotion of human rights and the administration of justice in the region.[22]

The Taiwanese Constitutional Court has translated large portion of its case law into English and made them available on its website to ensure that it is a part of this global dialogue.[23]

The process of international influences has changed from reception to dialogue. Judges no longer simply receive the cases of other jurisdictions and then apply them or modify them for their own jurisdiction. They are engaging in self-conscious conversation.[24]

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[20] Lexis/Nexis available from http:// www.lexis-nexis.com; and West Law at http://web 2.westlaw.com/signon/default.wl? newdoor=true.

[21] CODICES home page http:// codices.coe.int/cgi-bin/om-isapi.dll?client Id=292647.

[22] The Law Association for Asia and the Pacific. Homepage (cited 9 June 2003) at http:// www.lawasis.asn.au.

[23] In the Republic of China Constitutional Court Grand Justices Council Reporter cited 1 June 2003); available from http:// www.judicial.gov.tw/j4el.

[24] L'Heureux-Dube, Claire."The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court." *Tulsa Law Journal* 34 (1998):15, 17.

Is it legitimate for a judge to consult foreign case law to help him or her decide a case? A judge can do this in the privacy of chamber, without revealing actual process of decision of a particular case. But in common law legal systems, judges are required to provide an explicit account of that process in a written opinion by citing previous cases that support the conclusion reached and distinguishing previous cases that do not. If the previous cases have been decided by the same court or by a higher court in the same legal system, they are binding as precedent. In this context the question of drawing on and actually citing foreign cases becomes one of the legitimacy of "persuasive authority". The question is where should an individual court draw a line between the requirements of their own legal systems and the resources of others?

Justice O'Connor's observes, "Although international law and the law of other nations are rarely binding, but conclusions reached by other countries and by the international community should at times constitute persuasive authority. This is sometimes called 'transjudicialism.'[25]

Justice Thomas in *Knight* v. *Florida* observed:[26] it would be unnecessary for proponents of the claim to rely on other country's decision, unless there is any support in our own jurisprudence.

Justice Breyer, however, observed that "Although the view of the foreign authorities are not binding, the willingness to consider foreign judicial views in comparable case is not surprising in a nation that from its birth has given a decent respect to the opinions of mankind."[27]

Justice Antonin Scalia took a strong stand on this issue in *Thompson* v. *Oklahoma*.[28] when confronted with evidence of how other countries view the death penalty, he wrote, "We must not forget that it is the constitution of the United States that we are expounding".

However, a decade later, Justice Breyer joined the issue in *Printz* v. *United States*[29] he admitted that

> "We are interpreting our own constitution, not that of other nations and there may be relevant political and structural differences between foreign and U.S. legal systems. Nonetheless, their experience may cast an empirical light

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[25] Sandra Day O'Connor, Keynote address, *American Society of International Law Proceedings* 96 (2002): 350.
[26] 145 L Ed 2d 370 : 528 US 990 : 120 SCt 459 (1999).
[27] *Ibid*, 997.
[28] 1988 SCC OnLine US SC 163 : 101 L Ed 2d 702 : 487 US 815, 869 (1988).
[29] 1997 SCC OnLine US SC 83 : 155 L Ed 2d 1066 : 521 US 898, 977 (1997).

> on the consequences of different solutions to a common legal problem."

However, Justice Scalia remained unconvinced. He reaffirmed that such comparative analysis is inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing constitution.[30]

Justice Ruth Bader Ginsburg, while writing about deficiencies in the U.S. affirmative program, notes India's experience with affirmative action, including a decision by the Supreme Court of India imposing a ceiling on the number of positions that can be reserved for disadvantaged citizens. She observes that in the area of human rights, experience in one nation or region may inspire or inform other nations or regions.[31]

Judges favouring the use of persuasive authority look abroad simply to help them do better. They can then approach a problem more creatively or with greater insight. Foreign decisions are persuasive because they offer new information and perspectives that may cast an issue in a different and more tractable light.[32]

Justice Albie Sachs of the South Africa Supreme Court writes:

> "I draw on statements by United States Supreme Court justices not because their decisions are precedents, but because their *dicta* articulate in an elegant and helpful manner problems faced by any modern court. Though drawn from another legal culture, they express value and dilemmas in a way most helpful in elucidating the meaning of our own constitutional text."[33]

Justice Ginsburg note that "As the problems of irrational prejudice and rank discrimination are global, all societies can usefully learn from one another about various solutions."[34]

When judges cite foreign decisions as persuasive authority, constitutional cross-fertilization begins to evolve resembling global jurisprudence. The simple desire to look around the world for good ideas, reflects a spirit

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30 *Ibid*, 921

31 Ginsburg, Ruth Bader. "Affirmative Action as an International Human Rights Dialogue." *Brookings Review* 18 (2002):2 3.

32 *United States* v. *Then*, 56 F 3d 464, 418-69 (2nd Cir 1995). Judge Calabresi added, "Wise parents do not hesitate to learn from their children."

33 *S.* v. *Lawrence; S.* v. *Negal; S.* v. *Solberg*, 1997 SCC OnLine ZACC 11 : (1997) 4 SA 1176, 1223.

34 *Ibid*.

of genuine transjudicial deliberation within a newly self-conscious transnational community.[35]

II. GLOBAL JURISPRUDENCE OF HUMAN RIGHTS LAW

Global jurisprudence mostly involves issues of basic human rights. Judges feel a common bond in adjudicating human rights cases because such cases engage a core judicial function in most of countries around the world. Courts protect individuals against abuses of state power, and required to determine the appropriate level of protection in light of a complex matrix of historical, cultural, and political needs and expectations.

One more basic reason is that these basic human rights issues are not only regulated by national constitutions, but also by international human rights treaties. The interpretation and application of each of these treaties falls to an international tribunal, generally established by treaty itself. The international tribunal most frequently cited is the European Court of Human Rights (ECHR).[36] The European Court of Human Rights established itself as the exclusive interpreter of the convention's provisions.[37] The European Convention on human rights sets forth a substantive catalogue of human rights and creates an intricate enforcement mechanism to permit individuals and groups to file complaints against their national governments.[38]

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[35] L'Heureux-Dube, "The Importance of Dialogue,' 17.

[36] The European Convention on Human Rights codifies a basic catalogue of civil and political rights and confirms the desire of its signatories to achieve a common understanding and observance of these rights, 4 Nov.1950, 213 U.N.I.S. 222.

[37] The ECHR declared its principal text, the European Convention, a "Constitutional instrument of European Public Order in the Field of Human Rights."

[38] *Chrysostomos* v. *Turkey*, App. No. 15299/89, 68 Eur. Com. H.R. Dec. & Rep. 216, 242 (Eur.Com.H.R.1991).

GITHA HARIHARAN V. RESERVE BANK OF INDIA: IMPACT ON HINDU GUARDIANSHIP LAW

—*Harpreet Singh Gupta*[*]

I. INTRODUCTION

While Article 14[1] of the Constitution of India envisages equality before law and equal protection of laws to all its citizens, there still exist laws which clearly discriminate against women on the basis of gender alone, which is a prohibited marker under Article 15.[2] In a society like India which eulogises motherhood, a mother was considered to be natural guardian only after the father and did not have legal authority of the law to take decisions on behalf of her minor children. The law of guardianship was clearly oppressive towards women. The two sections that were challenged in the petition before the Supreme Court were Section 6 of the Hindu Minority and Guardianship Act, 1956[3] and Section 19 of the Guardians and Wards Act, 1890[4]. The first provision states that *"the Hindu father is the natural guardian of his legitimate minor son and minor unmarried daughter. He is the guardian of the child's person and property to the exclusion of the mother"*. The right of the mother enters the picture only on the death of the father. The second provision which is section 19 of the Guardians and Wards Act, 1890 "*debars the court from appointing the guardian of a person who father is living and is not deemed unfit for guardianship by the court"*.[5] The legal interpretations and the decisions of the various high courts prior to *Githa Hariharan* v. *RBI*[6] (hereinafter '*Githa Hariharan case'*) have held the father to be the natural guardian of a minor child. All

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1 Article 14, CONSTITUTION OF INDIA.

2 Article 15, CONSTITUTION OF INDIA.

3 Section 6, The Hindu Minority and Guardianship Act, 1956.

4 Section 19, The Guardians and Wards Act, 1890.

5 This section has been amended by The Personal Laws (Amendment) Act, 2010.

6 *Githa Hariharan* v. *RBI*, (1999) 2 SCC 228.

this resulted in stripping the mother of her right to be an equal partner in parenthood.

On 10th December, 1984, Githa Hariharan and her husband applied to the RBI for relief bonds in the name of their minor son, along with intimation that Githa would act as the natural guardian for the purposes of investment. The RBI however, returned the application, advising them to resubmit the application signed by the father of the minor. Only the father of the minor, not the mother could sign an application for either purchase or repayment. It was not sufficient that Githa Hariharan and her husband had agreed that she would function as the guardian of the minor child. The bank suggested that in light of the requirements of the Hindu Minority and Guardianship Act, 1956, she would have to produce a certificate that her husband was either dead, had renounced the world by becoming a sanyasi, or declared unfit before she could be authorised to apply for the bonds on behalf of the minor.

Githa Hariharan and her husband with the help of Lawyers Collective filed a writ petition in the Supreme Court of India challenging the constitutional validity of section 6 of the Hindu Minority and Guardianship Act and section 19 of the Guardians and Wards Act. On 17th February, 1999, the Supreme Court reinterpreted section 6 of the Hindu Minority and Guardianship Act and held that the mother of the minor children is also their natural guardian.

The researcher in this paper will analyse the impact that *Githa Hariharan* case has had on natural guardianship in Hindu law. The researcher has divided this paper into three parts. In the *first* part the researcher will present the position of law before the case of Githa Hariharan and the recommendations of the law commission regarding the laws relating to guardianship in Hindu law. In the *second* part the researcher will discuss the arguments that were raised in the case of Githa Hariharan and will also analyse the judgment given by the Supreme Court. In the *third* part the researcher will present the change in position of law after the Githa Hariharan judgment.

II. POSITION OF LAW BEFORE THE CASE OF GITHA HARIHARAN

The law prior to *Githa Hariharan* case was that natural guardian of the minor child was first the father and after him the mother.[7] This is primarily contained in section 6 of the Hindu Minority and Guardianship Act. This section of the Hindu Minority and Guardianship Act is supplemental to

[7] Sir Dinshaw Fardunji Mulla, Mulla on Hindu Law, 1211, (2013).

section 19 of Guardians and Wards Act. These sections must be read with section 13[8] which states that welfare of the child should be of paramount consideration. The courts had changed the parameters for awarding custody from natural guardianship to best interest of the child.

Institutions such as schools, etc. did not recognise mothers as natural guardians of their minor child.[9] Banks and passport offices also recognised father as the natural guardian of the child and remained conservative in their approach. Mother of the minor child could neither operate bank account on the name of the minor child nor deal with his/her property. Father was viewed as the only parent who had the ability to act on behalf of minors and the action taken by mothers on behalf of the minors was considered to be invalid.[10]

The researcher in this part will also highlight various cases prior to the *Githa Hariharan* case in order to highlight the position of law with regard to natural guardianship.

In *Panni Lal* v. *Rajinder Singh,*[11] the mother sold the property of her minor children and the father attested it, it was contended by the appellants that the sale was not void as it was attested by the father. The respondents contented that the sale was void as the sale was not by the father, i.e. the natural guardian. It was held that the sale deed was not valid as the requirement of section 8 of the Hindu Minority and Guardianship Act was not met.

In *Indira Kumari* v. *B. Ramakrishnan,*[12] the court observed that the parties are governed by the Hindu Minority and Guardianship Act, 1956; the father is natural guardian of the minor. After the father, mother is the natural guardian. In *Narain Singh* v. *Sapurna Kuer,*[13] the mother was not allowed to transfer the title of the property on behalf of the minor child and it was observed that as long as the father of the minor child is living, mother cannot act as a competent natural guardian of the minor child.

In *Jijabai Vithalrao Gajre* v. *Pathankhan*,[14] it was held that as the father was not taking any interest in the minor daughter's affairs, the mother is the natural guardian of the minor. The court observed that the father was as

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8 Section 13, The Hindu Minority and Guardianship act, 1956.

9 Flavia Agnes, *Custody and guardianship of minors*, The Asian Age (May 31, 2005), *available at* http://el.doccentre.info/website/DOCPOST/Legal_Rights/Jun05/RF00-Custody%20and%20guardianship.pdf (Last visited on 13 April, 2017).

10 It is in this area that the Supreme Court judgment has brought a significant change; this will be discussed in the later part of this paper.

11 *Panni Lal* v. *Rajinder Singh*, (1993) 4 SCC 38 : (1993) 3 SCR 589.

12 *Indira Kumari* v. *B. Ramakrishnan*, 1995 SCC OnLine Mad 123 : (1995) 2 MLJ 273.

13 *Narain Singh* v. *Sapurna Kuer*, 1967 SCC OnLine Pat 64 : (1968) 16 BLJR 898.

14 *Jijabai Vithalrao Gajre* v. *Pathankhan*, (1970) 2 SCC 717 : AIR 1971 SC 315.

good as non-existent. The court held that in these peculiar circumstances mother can be considered as the natural guardian of the minor child. However the finding in *Jijabai* was fact-specific rather than a general proposition of law.

Therefore from the abovementioned cases it is clear that the law prior to *Githa hariharan* case was that the mother can be considered as the natural guardian of the minor child only after the lifetime of the husband.[15] Although the statute recognises the welfare principle in section 13,[16] it is observed that the important principles for the application of the welfare principle have not been stated in the statute. As a result, particularly in the trial courts the welfare principle is not interpreted properly and important question regarding the guardianship remains in a hazy condition and the guardianship of the child remains with a person with whom it should not be according to the welfare principle.[17]

III. RECOMMENDATIONS OF THE LAW COMMISSION

In this part of the paper the researcher will highlight the recommendations of the 83rd and 133rd law commission reports.

The law commission in its 133rd report indicated that the most serious infirmity in the existing law is indicated by section 6(a) of the Hindu Minority and Guardianship Act of 1956. This provision gives statutory recognition to the objectionable proposition that the father is entitled to the guardianship of the minor child in preference to the mother. The proposition laid down by this section is vulnerable to challenge on various grounds. They recommended that there is no reason for continuing with such a clause especially after the coming into force of the Constitution of India which proclaims the right of women to equality under section clause (3) of Article 15.[18]

The Law Commission of India also suggested that section 19(b) of the Guardians and Wards Act, 1890 which states that "*the court shall not appoint the guardian of a person whose father is living and is not unfit*", should be amended to recognise the fact that not only a father but also a

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[15] Only exception being the *jijabai* case which was a fact specific finding and not a general proposition of law.

[16] Section 13, The Hindu Minority and Guardianship Act, 1956.

[17] 133rd report of the Law Commission of India, Removal of Discrimination Against Women in Matters related to Guardianship and Custody of Minor children and elaboration of welfare principle, 1989.

[18] They cite the example of Britain where the laws relating to guardianship and custody give equal rights to women.

mother has the right to be appointed as a guardian of a minor child to the exclusion of others unless considered to be unfit by the courts.[19]

The Law Commission of India in its 133rd report also suggested that the welfare principle projected in section 13 of Hindu Minority and Guardianship Act and section 17 of the Guardians and Wards Act needs to be amplified to make it clear that- the guardianship of the child should not be granted to the father merely on the ground that he is in more affluent circumstances than the mother.

IV. ARGUMENTS RAISED

In matrimonial disputes the courts are supposed to decide the question of guardianship based on the welfare of the child. However, since the father is considered to be natural and preferred guardian in law, the general presumption of the courts is that the interests of the child are best served by father being made the guardian of the minor. This conferment of the natural guardianship of the minor child on the father puts the mother at a disadvantageous position.[20]

It is contended that if the proper interpretation of various provisions of the Hindu Minority and Guardianship Act including section 4[21] and the intention of the legislature behind the formulation of this Act is considered, then barring the mother from acting as guardians of the minor child or giving father a preferential right to act as the natural guardian does not arise. But the language used in section 6 is not in consonance with the equality of the rights of parents to act as guardians of the minor child.

On one hand statute declares that father is the natural guardian of the minor child and that the interest of the child is best served when he/she remains with the natural guardian and on the other hand the mother is forced to fight for guardianship of her children and the onerous burden to prove that the father is unfit is also cast on her. The provisions of the law in case of illegitimate children is that the mother is preferred guardian and after her, the father. Thus, the provisions of the law are all the more illogical and these provisions make it clear that the law does not consider mother incapable of handling parental responsibility, why else would she be preferred guardian of her illegitimate child. But when it comes to legitimate children father is considered to be the preferred natural guardian. The only basis of classification that can be seen is the marital status of a woman that is a married woman is not a preferred guardian whereas an unmarried

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[19] This suggestion has been incorporated by the Personal law (Amendment) Act 2010.

[20] Shilpa Bhandarkar, "*Mum's the word?"- Understanding the Githa Hariharan Judgment*, 10, National Law School Journal, 159 (1999).

[21] Section 4, The Hindu Minority and Guardianship Act, 1956.

woman is a preferred guardian. There is no connection between the classification and the aim that it seeks to achieve, which is that of protection of best interests of the minor. Therefore, in this case it was prayed that the guardianship of the child should be based on the principle of welfare only and that the welfare of the child would be best served if both the parents are considered equal guardians.[22]

V. ANALYSIS OF THE JUDGMENT

The court in this case held that the phrase natural guardian includes both father and mother of the minor. The general impression that we get from the phrase *the father, and after him, the mother* is that father is the natural guardian of the minor child and only after his lifetime, the mother of the minor child can be considered natural guardian. However, the paramount interest in the matter of appointment of the guardians is the welfare of the child.[23]

The definition of the expression *natural guardian* in section 4(c) is given to mean any of the natural guardians mentioned in section 6 of the Hindu Minority and Guardianship Act. Father and mother both are included in the three classes of guardians provided in section 6 of the Act. While interpreting any statute, the meaning that needs to be attributed to a word should be the one given in the definition clause. Therefore, mother's right to be natural guardian does not stand eliminated during the lifetime of the father. So, the court can even during the lifetime of the father, replace him as the guardian. It was held that to interpret *after* in this section to mean after the lifetime would be against the principle of gender equality provided in the Constitution of India. The word *after* was thus interpreted to mean *in the absence of* where the word *absence* refers to the *"father's absence from the minor's property or person for any reason whatsoever"*.[24] The court in this case noted that whenever there is a dispute for guardianship between the father and the mother concerning the guardianship of a minor, the word *after* in section 6(a) of the Hindu Minority and Guardianship Act has no significance at all.

The reality is that courts are generally reluctant to grant the natural guardianship to the mother, unless she proves that father is unfit - the father does not have to prove his capacity as he is the preferred guardian under

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[22] *Supra* note 21, at 162.

[23] Section 13, The Hindu Minority and Guardianship Act, 1956.

[24] The father is considered absent: where he is indifferent to the interests of the minor; where there is a mutual agreement between the father and the mother of the minor child to give the exclusive charge of the child to the mother; where father is physically unable to take care of the minor child.

law. The judgment at the end clarifies that it will operate prospectively and any decision rendered already will not be reopened.[25]

The significance of the judgment seems to be in terms of decision making where both father and mother of the minor enjoy equality.[26] The proper interpretation of the judgment seems to be that neither party's decisions taken on behalf of the minor are absolute. The researcher believes that although the ideal would have been to strike down section 6 of the Hindu Minority and Guardianship Act and section 19 of the Guardians and Wards Act, this judgment which has reinterpreted the word *after* in section 6(a) of the Hindu Minority and Guardianship Act is a definite step in the positive direction.

VI. POSITION OF LAW AFTER THE CASE OF GITHA HARIHARAN

The law through the case of *Githa Hariharan* has recognised that the mother can be the guardian of the minor child even during the lifetime of her husband. The Supreme Court by reinterpreting the relevant provisions of the law has altered the balance of power towards the mothers.[27] Since both father and mother are natural guardians; both have the right to be equally involved in the decision making in the matters of upbringing of the minor child including health, education. This means that the mother will be able to make investment in the name of her minor child; her signatures would count in school application forms, passport forms or can at least participate in the decision making about the welfare of her child.[28]

The researcher in this part will highlight various cases after Githa Hariharan which have rationalised the approach towards guardianship and have tilted the balance of power towards women.

In *Alamelu Sockalingam* v. *V. Venkatachalam,*[29] the court rejected the respondent's contention that the father is the natural guardian of the child, relying on the provisions of Hindu Minority and Guardianship Act, and that the right of the father to be a guardian cannot be rejected. In this case the

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[25] *Supra* note 21, at 164-165.

[26] *Supra* note 21, at 164-165.

[27] Githa Hariharan, *Rehabilitating Unnatural Laws*, The Lawyers Collective (May 1999), *available at* http://www.lawyerscollective.org/mag/1999/5-may.pdf (Last visited on 13 April, 2017).

[28] Indira Jaising, *One step forward many more to go,* The Lawyers Collective (May 1999), *available at* http://www.lawyerscollective.org/mag/1999/5-may.pdf (Last visited on 13 April, 2017).

[29] *Alamelu Sockalingam* v. *V. Venkatachalam*, 2012 SCC OnLine Mad 4501 : (2012) 6 CTC 907.

mother was declared natural guardian of the minor child, even when the father of the child was alive as it was held that she was the one who was actually contributing to the growth and maintenance of the child.

In *Jeyam* v. *Rejimoon*[30] the mother executed a sale deed as a natural guardian of the child. The contention raised was that as mother was not the natural guardian of the minor children she cannot execute a sale deed and therefore the sale deed executed by the mother is invalid.[31] The court rejected the contention and held that the mother can be natural guardian of the child even during the lifetime of the father.

In *Anju Mehra* v. *Union of India*,[32] the constitutionality of Clause (a) of Explanation to Section 64(1A) of the Income Tax Act, 1961 which provides "*that for the purposes of this sub-section, the income of the minor child shall be included in the income of that parent whose total income is greater*" was challenged as it was contended that it was against section 6 of the Hindu Minority and Guardianship Act, 1956 and violates article 14 of the Constitution. It was held that as both father and mother are natural guardians therefore the section cannot be said to be arbitrary. The court in this case held that it cannot be said that mother is not the natural guardian of the minor child during the lifetime of the father or until he is disqualified from being the natural guardian. Both father and mother are natural guardians of the minor child.

Therefore, from the abovementioned cases it is clear that both mother and father are natural guardians. Now the mother can act as the natural guardian of the minor child even during the lifetime of the father. Now neither party's decisions taken on behalf of the minor are absolute.[33] After the judgment in *Githa Hariharan* case in case of absence of father for any reason, mother will have the right to act on behalf of the minor.

VII. CONCLUDING REMARKS

The Supreme Court judgment in *Githa Hariharan,* where it observed that mothers are also natural guardians of their minor children is correcting the wrong that has been continuing for decades. Women have had to suffer because of the law's emphasis on the right of the father to be a natural guardian of the legitimate children whereas mother could become a natural

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30 *Jeyam* v. *Rejimoon*, 2013 SCC OnLine Mad 2112 : 2013 Indlaw Mad 1750.

31 The court endorsed the analysis of the *Githa Hariharan* case that the word 'after' should be interpreted to mean *'in the absence of'* and observed that the father was not taking care of the interests of the minor children and therefore mother can be considered as the natural guardian.

32 *Anju Mehra* v. *Union of India*, 2012 SCC OnLine P&H 5966 : (2013) 356 ITR 149.

33 *Supra* note 21, at 164.

guardian only *after* the father. Women were given the responsibility of caring for their minor children but they were rarely recognised as mature parents who would manage the minor children and their property.

Before *Githa Hariharan*, institutions like banks, passport offices recognised father as the natural guardian of the minor child and remained conservative in their approach; father was considered as the only parent who had the ability to act on behalf of minors and the actions taken by mothers on behalf of the minors were not considered to be valid. Although the statute recognises welfare principle and states that welfare should be the paramount consideration in declaring any person as the guardian of the minor, yet the welfare principle was not interpreted properly and the question regarding guardianship remained in a hazy condition and generally father was considered to be the natural guardian, and it was only after[34] him that the mother came into picture.

The Supreme Court through *Githa Hariharan* has recognised that mother can be natural guardian of the minor child during the lifetime of her husband also. The Supreme Court reinterpreted the word *after* to mean in the absence of, which has resulted in altering the balance of power towards the mothers. The researcher believes that if the parties in a dispute move to the court for the declaration of the guardian of the minor child, the onus to prove the absence of the father is still on the mother. The judgment clarifies that it will operate only prospectively and any decision that has already been rendered will not be reopened. Thus, the correct interpretation of the judgment seems to be in matters of decision making, where both the father and mother of the minor enjoy equal treatment. This means that the mothers will be able to make investments, their signature will count in application forms, and passport forms or at least can participate in the decision making. This interpretation properly realizes the natural guardianship of the mother and her role in the decision-making process with respect to her child's person and property.

The researcher believes that although the ideal action would have been to strike down section 6 of the Hindu Minority and Guardianship Act and section 19 of the Guardians and Wards Act, this judgment which has reinterpreted the word *after* in section 6(a) of the Hindu Minority and Guardianship Act is a definite step in the positive direction. The researcher believes that this judgment is a first definite step and now the responsibility is of the legislature to amend this section so that there is no scope of ambiguity, even in terms of interpretation, and equality between father and mother is maintained in terms of natural guardianship in Hindu law.

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[34] 'After' was also interpreted literally to mean after the lifetime of the father.

CASE ANALYSIS: PURUSHOTTAM DASHRATH BORATE V. STATE OF MAHARASHTRA

—Vasundhara Kanoria

I. FACTS OF THE CASE

The deceased worked in a B.P.O. in Pune as an Associate Manager. The company provided a cab service to ferry the employees from their place of residence to the office. The Company took special care of the female employees and ensured that there was a guard present especially during the night shift. On the fateful day the deceased was escorted to the cab by her brother (PW 12) and his son. She sat in the cab which had the cab driver and the guard. During the course of the cab ride the deceased got a call from her friend (PW 14). The cab driver instead of picking the next employee of the BPO diverted the car to a jungle. PW 14 heard the deceased ask the cab driver as to why the cab was being diverted, there upon the phone got disconnected. Later on when the deceased did not reach home her sister filed a complaint with the police it was then discovered that a body was found in a field and the deceased's sister identified the body. Chemical analysis revealed that the deceased had been raped and then strangulated with her scarf. The police conducted a test identification parade and both the accused were identified by PW 12. Based on the confession of the accused the police was also able to recover the blood stained scarf and the jewellery of the deceased. The Sessions Court convicted the accused under Sections 302[1], 376(2)(g)[2],

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[1] §302. Punishment for murder.—Whoever commits murder shall be punished with death, or [imprisonment for life] and shall also be liable to fine.

[2] §376(2)(g)- Whoever commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

364[3] and 404[4] read with section 120-B[5] of the Indian Penal Code, 1860 and awarded the death penalty. The same was confirmed by the High Court. The appeal to the Supreme Court had only been allowed on the quantum of sentencing and the arguments of the counsels were restricted to the same. In the present matter there was no discrepancy in application of law in terms of conviction of the accused. The trial court appreciated the evidence and the testimonies according to the settled position of law. Therefore the case analysis would also restrict itself on the issue of sentencing and would try to analyse whether the death penalty was justified in the present matter or not.

II. PRINCIPLES OF SENTENCING

There is no universal principle of how an ideal Criminal Justice System should function. Many scholars offer a plethora of views regarding the same. Another approach would be to justify the State's role in punishment by reference to the need to displace individual revenge and retaliation by maintaining a social practice that constitutes an independent and authoritative response to crime.[6] Some argue that the Criminal Justice System is an objective arbitrator of universal principles of morality. It should be bereft of subjective values as subjectivity necessarily leads to diversity and then to arbitrariness. And this arbitrariness violates the Rule of Law.[7] But is it so? Is Criminal Justice system objective more importantly should it be objective? To understand how Criminal Justice System should function it is important to go the basics and understand why we need a Criminal Justice System at all and why do we discriminate between crime and civil wrong.

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[3] §364. Kidnapping or abducting in order to murder.—Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with 1[imprisonment for life] or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

[4] §404. Dishonest misappropriation of property possessed by deceased person at the time of his death.—Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

[5] §120-B. Punishment of criminal conspiracy.—

(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, 2[imprisonment for life] or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.]

[6] Gardner (1998).

[7] A.V. Dicey, Introduction to the Study of the Law of the Constitution (1885).

I think the idea that crime and civil wrongs differ on punishment is fallacious. You can just have merely a fine in a criminal dispute and you can have civil imprisonment in civil dispute. Also the argument that the crime is against the State and that civil wrong is between two people is not necessarily true in all cases. The State constructs its presence in many criminal offences even though it has no privity in the same because it believes that the said act is morally reprehensible and affects the society therefore it should intervene in the same. It is important to understand that in case of theft for example the accused has stolen the property of one person only but the reason why the state constructs its presence to give itself privity in the situation. The reason is that the State believes that fear psychosis is at play here. When theft is committed it creates a fear in the minds of the people and sends a message that their property is not safe. This leads to the involvement of the State as it believes that safety and security of property is one value that it should actively propagate. But at the same time it doesn't mean that the State cannot construct its presence in case of violation of contract law. Because after all the value of trust based on contract is important for the society to function. One exclusive difference between a crime and a civil wrong is the degree of reproach that the State attaches to the said wrong. A criminal wrong is morally more reprehensible than a civil wrong. It showcases the censure attached by the court to the same act. And this in turn is done to prevent that particular act from happening in the society and shape the society's behaviour in the same way. Conviction involves the public labelling of people as Offenders.[8]

This is the reason why certain states have drunk driving as a crime and some don't. This is the reason why dishonour of cheques attracts criminal liability. Therefore the idea is that Criminal Justice System is not just an objective arbitrator but a tool to shape public behaviour through what the State believes to be public morality and public consciousness. And when the Criminal Justice System` tries to transform the way people behave I think it becomes an important consideration for the State to take into account what people think the societal perception of a crime is and what effects would the sentence have on the crime and criminal behaviour. One major contention in this case was whether the court was right in taking into account the public perception of rape and also how the crime especially in city like Pune has an effect on the society which is and IT hub. This aspect of the judgment has been criticised that morality of the society is subjective and therefore it shouldn't be a consideration while adjudging the sentence of the criminal. I reject this premise. I contend that even though morality is subjective it has always been an implicit consideration in Criminal Justice System. It can be seen from the discretion that judges have while deciding a

[8] Andrew Ashworth, Sentencing and Criminal Justice 74 (5th ed. 2010).

case or how *Bachan Singh*[9] explicitly argued against standardization of The Criminal Justice System. The social impact o sentencing cannot be denied. It would be extremely erroneous to not consider this important facet of sentencing. Considering this I think it is justifiable when the courts reliance on *Dhananjoy Chatterjee* v. *State of W.B.*[10]

III. RELIANCE ON VARIOUS PRINCIPLES OF SENTENCING

A criminal sentence takes into account many principles that are reformation, deterrence, rehabilitation and incapacitation.[11] To what extent which principle should be applied is not fixed. In any sentence the court gives value to one principle over the others or uses the principles in combination depending on the factual matrix of the case, the offence that is committed and the society in which the said crime is committed. Therefore in a case of terrorism, the court might apply the principle of deterrence and in a case of juvenile crime the court might focus on reformation. There can be no monolithic principle of sentencing and even though that might lead to different trends and in sentencing it is still a better situation than having a rigid principle of sentencing. When there is a monolithic principle behind sentencing that implies that sentencing can perform just one function i.e. if the court takes retribution to be the dominant principle then that is the only principle that it would apply. It might lead to uniformity in terms of trend of the judiciary but it would not lead to equality as all the cases are not the same and hence should not be treated similarly on with the same principle. Further it would also restrict the purpose of sentencing. As already established sentencing performs a core public function by shaping the behaviour of the society. Thereby restricting the principles and the considerations that it can involve can unduly restrict the objective of sentencing.

The second claim of this paper is that it is justified if the court takes into account the society that the crime was committed and how the offence committed impacts the society and other members of the society. The state has the duty to act with justice and with humanity in discharging the function of punishment, and often there may be a 'displacement gap' between what the public or the media would like to see by way of punishment, and what the state's institutions can and should provide.[12] One of the most important reasons for awarding any punishment is to deter anyone else from the committing the same.[13] When the disease is social, deterrence through court

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[9] *Bachan Singh* v. *State of Punjab*, (1982) 3 SCC 24.

[10] *Dhananjoy Chatterjee* v. *State of W.B.*, (1994) 2 SCC 220.

[11] Alec Walen, *Retributive Justice,* Stan. J. Phil. *available at* http://plato.stanford.edu/archives/sum2015/entries/justice-retributive. (Last accessed on 13/09/2016).

[12] Andrew Ashworth, Sentencing and Criminal Justice 75 (5th ed. 2010).

[13] *Charles Sobraj* v. *Supt., Central Jail,* (1978) 4 SCC 104 : (1979) 1 SCR 512.

sentence must, perforce, operate through the individual culprit coming up before court. Social justice has many facets and Judges have a sensitive, secular and civilising role in suppressing grievous injustice to humanist values by inflicting condign punishment on dangerous deviants.[14] In this instance the court realised that the crime took place in a city like Pune where a women being raped really shocked the ethos of the society. And this rape could very well lead to a fear psychosis which would make women question whether they should go out and work or not. The court also took into account the menace of rape and how it was important that the principle of deterrence needs to be applied in this situation.

IV. BALANCE SHEET PREPARED IN THIS CASE

The reason why this judgment is criticised is because it did not give due value to family conditions and age of the criminals. Balance sheet is basically a cost benefit analysis where the judge ways every aggravating and mitigating circumstances to come to the conclusion as to what punishment is justified. In this the court weighed the circumstances and concluded that death penalty is justified as it wanted to focus on deterrence in this case given the crime and society that the said crime affected. As already established which principle the court should use should depend on the courts discretion. And the problem of what weight a particular factor should be given is not a problem exclusive to this judgment. In *Sangeet,*[15] which was a 2-judges' Bench decision, went on to observe that there has been no uniformity in application of the 'aggravating and mitigating circumstances' in *Bachan Singh*.[16] It also held that a balance sheet of aggravating circumstances relate to the crime and mitigating circumstances relate to the criminal and therefore a balance sheet of the two cannot be drawn up. The Bench observed that the balance-sheet theory warrants a review.[17]

V. CONCLUSION

This judgment looks into the relevant ethos and needs of the society to determine the quantum of punishment. This consideration is relevant for determining the quantum of sentence as sentencing also performs the public function of shaping people's behaviour and deterring crimes from happening. Uniformity for the sake of objective justice will lead to injustice and in sentencing it is important the judge has the discretion to determine which principle to apply and to what proportion.

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[14] *Paras Ram* v. *State of Punjab*, (1981) 2 SCC 508 : 1981 SCC (Cri) 516.

[15] *Sangeet* v. *State of Haryana*, (2013) 2 SCC 452.

[16] *Bachan Singh* v. *State of Punjab*, (1982) 3 SCC 24.

[17] The Live Law Network, *The unending uncertainty in the Death sentencing Policy of Indian Courts,* http://www.livelaw.in/the-unending-uncertainty-in-the-death-sentencing-policy-of-indian-courts (Last accessed on 08/09/2016).

HARYANA'S DROUGHT OF BRIDES AND SAGA OF EXPLOITATION

—*Priya A. Sondhi*[*] *and Sarat Chandra Ponnada*[**]

Abstract On September 16, 2013, a 23-year-old was working in the kitchen, she heard someone shout her name. It was her sister accompanied by Haryana Police and NGO Shakti Vahini[1]*. When the villagers learned about the joint rescue operation, a huge crowd gathered around her house with knives and sticks, shouting that they wouldn't let anyone take their bride (molki) away because they had paid for her and she was their property. The 23-year-old was brought to the local thana under police protection*[2]

Incidents like this are now not a rarity in Haryana and some other northern states. They relate to a girl or woman, kidnapped, purchased and forced into a marriage. These purchased girls imported in Mewat region are called paro (meaning from across) and those in Jatland are called molki (the purchased one). Unfortunately, this practice of bride trafficking, seems to be around 50 yrs old.[3] *A study conducted by the United Nations Office on*

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1 Shakti Vahini, is a Delhi based voluntary organisation working in defending and promoting Human Rights, anti-trafficking etc.

2 http://www.livemint.com/Politics/7cSn08nD9gvIEAbZcQrP7I/Human-trafficking-caters-to-demand-for-brides.html visited on August 8, 2016.

3 M. Shafiq Ur Rahman Khan, " Bride Trafficking in India" , in Veerendra Mishra (ed), *Human Trafficking: The Stakeholders' Perspective*, 46 (2013) Also available at https://books.google.co.in/books?id=892GAwAAQBAJ&pg=PA396&lpg=PA396&dq=police+response+to+molki&source=bl&ots=Ma_Oeih8PW&sig=_xZNrHJVQVbp9sl3H4qzj-1VE4OM&hl=en&sa=X&ved=0ahUKEwjf-ZSqr5vPAhUIOSYKHb_1AQQQ6AEIMzAE#v=onepage&q=police%20response%20to%20molki&f=false

Drugs and Crime[4] *covering 10,000 households mentions that 9,000 women in Haryana had been bought from other states.*[5]

Import of women to Haryana for bride trafficking from far-off regions outside the State is by now a well known reality. Recent studies on the social status and rights of these women, usually referred as paro or molki, reveal the personal disorganization faced by these women who have been kidnapped and sold into a forced marriage. They become property of all the male members, have no property rights, they are generally not accepted in any social or family function and face the worst form of slavery of modern age. Even the police, the media and society at large turns its back to the issue. The trend of bride trafficking is also linked to age-old custom of *karewa* (sexual relations of more than one male with a single woman) that has been in existence in the region for ages, but was gradually on decline due to sanskritisation. Some scholars believe that the custom is now being revived in a degraded form through this practice and the *molki* women are sexually exploited by all the males of the family[6]. In this article the authors wish to explore the reasons for the growth of practice of molki, response to the practice at various levels and legal issues. The article is divided into three parts. Part I- Missing girls; addresses the reasons behind growth of the practice. Part II Molki lives; explores the extent and dimensions of the problem. Part III Molki's rescue?; discusses various legal issues followed by Conclusion.

I. PART I- MISSING GIRLS

Sex Ratio in Haryana is 879 i.e. for each 1000 male there are 879 females. This is much below national average of 940 as per census 2011. In 2001, the sex ratio of female was 861 per 1000 males in Haryana.[7] The district wise data is equally disturbing. Haryana has 21 districts which are divided into four divisions – Ambala, Gurgaon, Hisar and Rohtak. As per the census 2011 data of sex ratio is as follows:

1. Ambala Division: Ambala (885:1000), Kaithal (881:1000), Kurukshetra (888:1000), Panchkula (873:1000), Yamuna Nagar (877:1000)

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4 The report on human trafficking of year 2013.

5 When motherhood comes for a huge social price, available at: http://www.tribuneindia.com/news/haryana/when-motherhood-comes-for-a-huge-social-price/96797.html (Visited on September 8, 2016).

6 Social acceptance of karewa and its prevalence can be seen in folklore and local proverbs.http://www.thehindu.com/news/national/other-states/bonded-brides/article4307384.ece (Visited on August 5, 2016).

7 http://www.census2011.co.in/census/state/haryana.html (Visited on August 5, 2016).

2. Gurgaon Division: Faridabad (873:1000), Palwal (880:1000), Gurgaon (854:1000), Mahendragarh (895:1000), Mewat (907:1000), Rewari (898:1000)
3. Hisar Division: Bhiwani (886:1000), Fatehabad (902:1000), Jind (871:1000), Hisar (872:1000), Sirsa (897:1000)
4. Rohtak Division: Jhajjar (862:1000), Karnal (887:1000), Panipat (864:1000), Rohtak (867:1000), Sonipat (856:1000).[8]

In so far as child sex ratio is concerned the national child sex ratio is 914:1000 and Haryana's average is 830:1000. Out of 21 districts, 11 districts of the state having child sex ratio below state average. Amongst them, Jhajjar district of central Haryana has got the distinction of having lowest child sex ratio of 774 female children per 1000 male children, not only in the state but also in the country as a whole. 10 districts have recorded child sex ratio above state average.[9]

As per the study conducted by the Central Statistical Organization, the population of girl child was 15.88 per cent of the total female population of 496.5 million in 2001. It has declined to 12.9 per cent of 586.47 million women in 2011. The data clearly shows that we have 3 million missing girls in 10 years. The SRS statistical report in 2012 shows the sex ratio in Haryana to be 857 women to a 1000 men. This makes Haryana the most sex ratio-skewed state in the country[10]

The main reason is undoubtedly female foeticide in this land where people say "*Chora mare nirbhag ka, chori mare bhagwaan ki"* (son of a doomed dies, daughter of a blessed dies)[11]. Haryana like other North Indian states, also has a legacy of girl child neglect. It is an overall issue of very strong preference for a male child, discrimination against daughters, dowry and exclusion of females from production (dry plough cultivation doesn't require many females unlike wet rice cultivation where lot of female labour are required).[12] The women have less role in agrarian economy of Haryana's patriarchal society. Their role is largely restricted to the domestic sphere with very less or no recognition to their work, thus resulting into devaluation of their labour and appropriation of it by the male heads. This devaluation results into low status of women and overlooking patriarchal violence

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8 http://www.census2011.co.in/district.php (Visited on August 6, 2016).

9 http://rspublication.com/ijst/2015/feb15/1.pdf (Visited on August 6, 2016).

10 "Zoya Sham", ""Grooms Pay Anywhere From Rs. 50,000 And Rs. 3,00,000": Story Of Haryana's Imported Wives" available at https://www.youthkiawaaz.com/2015/06/imported-wives-in-haryana/ (Visited on November 18, 2017).

11 http://indiatoday.intoday.in/story/haryana%C3%A2%E2%82%AC%E2%84%A2s-bias-against-girls-keeps-its-sex-ratio-skewed/1/136636.html (Visited on August 6, 2016).

12 http://www.livemint.com/Opinion/bwkbOymTzIYTZkAInEjXQI/Why-riceeaters-are-from-Venus-and-others-from-Mars.html (Visited on August 5, 2016).

and abuse of any kind.[13] The above mentioned reasons put together with and ever decreasing sex ratio are now showing its results. The eligible bachelors of Haryana don't have brides to marry![14]

This issue of 'missing girls' is cited as one of the primary reasons for beginning of evil practices like molki. Many people in Haryana, however, claim that the shortage of brides is not caused by the skewed sex ratio as much as the rising levels in women's education. According to Vinod Bala Dhankar, a social activist and woman khap leader based in Jhajjar district of Haryana, educated women look for educated grooms, thus lesser educated men find it difficult to find a bride. One more reason cited by her is the fact that molki is not given the gifts like a Haryanavi bride.[15] Therefore poverty and lack of proper education are also cited as the reasons for the beginning and continuation of the practice of molki.

II. PART II- MOLKI LIVES

This part traces the life of a molki, which is devoid of any rights and the response of society, police, NGO'S to their undignified existence. It also unveils the essential contradiction wherein the act of bride purchasing has approval of society but not the bride herself. In case of rescue the entire society stands in opposition but nobody stands for her when she is treated like a slave.

A. Molki – a slave

The practice is essentially trafficking of women in the name of marriage. A molki leads a life of animal existence, modern form of slavery in the name of marriage. She is sold in marriage to one, but is common property of all the male members and exploited by female members too. She can also be resold, made to do any work or made to have sexual relation with anyone; since she is a slave.

An extensive research on the life lead by molki was conducted by Shafiq Ur Rahman Khan, an Anti trafficking Activist, founder of non profit organization EMPOWER PEOPLE and Campaign Against Bride Trafficking

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[13] "Deeksha Sharma", "The ugly truth of bride trafficking and Agrarian labour in Haryana" available at https://feminisminindia.com/2017/09/14/bride-trafficking/ (Visited on November 18, 2017).

[14] http://www.firstpost.com/india/haryanas-crisis-bridegrooms-decked-one-marry-1626691.html8/8 (Visited on August 18, 2016).

[15] http://www.livemint.com/Politics/7cSn08nD9gvIEAbZcQrP7I/Human-trafficking-caters-to-demand-for-brides.html (Visited on August 8, 2016).

India.[16] According to research conducted by him the following propositions emerge-

1. There are majority of the panchayat members (73%) and other stakeholders (72%) said that these women are not socially accepted
2. A molki has not say in household matters. 76% of molki women accepted that they did not interfere in any of the family matters. Only 24% molki enjoyed family rights. It was observed that these 24% women belonged to nuclear families.
3. Their relationship with their children is limited to feeding. Both, mother and child are devoid of the rights to care and be cared and nurtured.
4. 71% of the molki women flatly denied their participation in the local functions or festivals. Their participation is confined to the family.
5. They are viewed suspiciously and never relied upon. The valuables in family are generally kept away from molki and the families always keep an eye on them.
6. Most of them are unable to maintain their original food habits and dressing style
7. In some cases the families force "Paro" to maintain sexual relationships with the influential people and the dominant farmers of the village. Thus in addition to exploitation at home molki women become the means of income
8. They can be sold multiple times. A paro named Mamta Ghosh, ultimately reached in the village Dhanora Jatan of Kurukshetra after being sold 6 times.
9. Majority of molki women accepted being addressed according to their respective regions viz. Bangalan or Biharan or by a changed name.
10. It can be inferred from the responses of Panchayat representatives and the molki women, it can be clearly inferred that molki women are not accepted as permanent member of the families and are thus denied of any of the rights that a female family member deserves For ex registration of name in the ration card.
11. They are victimized and looked down upon by local female members of the family also.[17]

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[16] http:// www.empowerpeople.org.in/founder.html (Visited on October 8, 2016).

[17] http://bringtoanend.blogspot.in/2009/12/molki-women-is-it-marriage.html (Visited on September 16, 2016).

Thus, it means worst form of modern slavery. Abducted from her safe home and people she is sold in the name of marriage in which she has no rights and might also face the indignation of having multiple partners. What makes living even more difficult is the fact that they have to learn to adapt to a totally different lifestyle. They are expected to live in veil, bear the scorching summers and freezing winters of Haryana and develop strictly vegetarian food habits. These girls are generally natives of states like Odisha, Bihar, Jharkhand, West Bengal, Kerala, Assam, Uttar Pradesh, Andhra Pradesh. The weather and lifestyle of Haryana only adds to their miseries.

B. Response of society of Haryana

The society in Haryana seems to have accepted this modern form of slavery in the name of marriage. The molki phenomenon is now so common that these areas even have common sayings that refer to the condition of these women — like the one that says it's impossible to find a paro's grave as she is passed on from man to man and so doesn't stay in one place for long.[18]

According to Dr Anita Yadav, Director, Women Studies Centre (WSC), Maharishi Dayanand University, Rohtak, a molki can be procured for 25,000-30,000 rupees, they are a common property of all males and live in inhospitable conditions. The situation has reached such proportions that there are at least 6-7 brides from outside the state in almost all of the 6,000 villages of Haryana.[19] Thus, the society in general seems to have accepted the practice of purchasing a woman for marriage.

Insofar as the caste distribution is concerned a study conducted in Haryana's Jind and Kurukshetra districts, reveals that 66 per cent of the families practising bride trafficking are Jats, followed by 15 per cent Sainis, though the custom is prevalent among almost all other castes.[20]

The only saving grace is the fact that the prosperous and socially dignified families totally reject the authenticity of this type of marriages and generally have a narrow vision towards the families who bring "molki" girls and consider them as socially unrecognised and backward.[21]

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[18] http://www.hindustantimes.com/india/when-women-come-cheaper-than-cattle/story-EJD-38cJ4kaTGVn03LJzUkJ.html (Visited on August 8, 2016).

[19] http://www.firstpost.com/india/haryanas-crisis-bridegrooms-decked-one-marry-1626691.html (Visited on August 8, 2016).

[20] http://www.thehindu.com/news/national/other-states/bonded-brides/article4307384.ece (Visited on August 5, 2016).

[21] http://bringtoanend.blogspot.in/2009/12/molki-women-is-it-marriage.html (Visited on September 16, 2016).

Thus, the society seems to have accepted the practice but not the person involved. This has resulted into serious human rights issues because the purchaser gets support of society and the purchased molki, who has no support or protection of society, is a property of the purchaser. This ownership gives him unlimited rights protected by society.

C. Response of Police

Local police officers accept their condition as that of a 'gifted sex-toy but refuse to consider it to be a case of trafficking or bonded labour.[22] There are instances where the police counselled a hospitalized molki (a victim of violence) to go back to her buyer.[23]

The rescue operation can be life threatening. In August 2016 a team of four police officials from West Bengal, NGO Shakti vahini and local police conducted a joint operation to save three girls. The small team was hounded by some 600 villagers who kept demanding "public Justice" for kidnapping "their women". They had to request the Haryana cops to fire in the air to save their lives.[24]

The rescue operation can become tougher if the women involved wisher to stay back with purchaser[25]; whether out of fear or stress of staying away from her children or their upbringing.

D. Response of N.G.O'S and Others

The NGO'S and other organisations currently aim at human rights of molki's. They look forward to a society which would accept them and treat them at par with local women.

According to Dr Santosh Dahiya, one of the leading woman Khap leaders of the state and national president of Akhil Bhartiya Mahila Shakti Manch, the following issues are important; firstly, there is lot of shortage of girls; secondly, they are carrying out an aggressive campaign for the last few years to give women bought or brought from outside the same

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[22] *Supra* note 4.

[23] Sumedha Sharma, "Return their names, dignity", available at: http://www.tribuneindia.com/news/sunday-special/perspective/return-their-names-dignity/293373.html (Visited on September 19, 2016).

[24] Dwaipayan Ghosh "Women cops from Bengal face Haryana mob to rescue minor girls" available at: http://timesofindia.indiatimes.com/city/kolkata/Women-cops-from-Bengal-face-Haryana-mob-to-rescue-minor-girls/articleshow/53867150.cms (Visited on September 19, 2016).

[25] Sushil Manav "This 'molki' lives a contented life" available at: http://www.tribuneindia.com/news/haryana/when-motherhood-comes-for-a-huge-social-price/96797.html (Visited on September 8, 2016).

`maan-samman' (dignity) as any local woman; thirdly, they are also campaigning for the marriages to be solemnized in a proper manner rather ten a purchase; fourthly, there are organized gangs operating in the state, which work like a mafia and never come out in the open.[26]

According to Shafiq R. Khan, there are lot challenges faced by NGO's. These girls are sold many times and in the process they end up losing their name, identity and at times, sanity. They might be scared to leave their buyers.[27]

This situation is a total contrast to the commitment made in the Target 8.7 of the United Nations Sustainable Development Goals by the world leaders in 2015 to end forced labour, modern slavery, human trafficking and child labour. ILO and Walk Free Foundation have also included forced marriage in the Global Estimates of Modern Slavery.[28]

III. PART III: MOLKI'S RESCUE – LEGAL ISSUES.

The gap in law relating to bride trafficking makes it difficult for the legal enforcement agencies and NGO's to take effective measures. Forced marriages are by and large a either a forgotten issue or overlooked by the best of law makers. They tend to overlook that the cover of marriage changes the entire situation. It becomes a case different from a case of abduction and trafficking.

The Immoral Trafficking Prevention Act is a special law focused on prostitution, but will not cover the case of molki because the situation lacks sexual exploitation for commercial purposes. S. 366 of the Indian Penal Code which deals with "kidnapping, abducting or inducing a woman to compel her marriage, etc." is the lone remedy that can be used.

There are complex legal issues of abduction or kidnapping, forced marriage, systematic sexual exploitation, financial exploitation, mental and physical cruelty, forced pregnancy etc. in such cases. The most important issue here is marriage. In so far as the marriage is concerned, Hindu Marriage Act, Sec 12 deals with void marriages where consent is obtained by force. But it is stated in Sec 12(2) that . . . no petition for annulling a marriage . . . shall be entertained if-

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[26] http://www.firstpost.com/india/haryanas-crisis-bridegrooms-decked-one-marry-1626691.html (Visited on September 16, 2016).

[27] *Supra* note 22.

[28] "Fiona David", Why did we include forced marriage in the Global Estimates of Modern Slavery? https://www.huffingtonpost.com/entry/why-did-we-include-forced-marriage-in-the-global-estimates_us_59c50816e4b08d66155041c0 (visited on November 18, 2017).

(i) the petition is presented more than one year after for force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate . . .

It is a well settled law since the case of *Appibai* v. *Khimji Cooverji*[29] that if the petitioner was reduced to a state in which he was incapable of offering resistance to coercion or threats, it vitiated the consent. Therefore, case that the molki neither consented to marriage nor to cohabitation can help a molki obtain annulment of marriage within a year of such exercise of force on her.

In case the parties to marriage belong to different religion similar provision is there in Sec 25 of Special Marriage Act. . In case of muslim marriage a molki can demand Khula.

If it is a case of child marriage that Sec 13(2)(iv) can be of aid for repudiation of marriage in case the molki is less than 18 yrs of age. It might also be a case of bigamy, thus a void marriage under Sec 11

The issues about custody of children can also be solved with the help of personal laws. 'welfare of the child' doctrine will be of much aid for the children of molkis.

Moreover, Protection of Women from Domestic Violence Act, 2005 (Hereinafter referred to as PWDVA) essentially protects the interest of a molki in cases of violence. Under Sec 12 of the PWDVA an application for reliefs can be made to the magistrate by any person on behalf of the woman, if she consents. This can aid a molki since she does not have the freedom to file a complaint herself. PWDVA also allows complaint during night or over a telephone or via an email.[30]

The issue of relationship that is in the nature of marriage was examined by the Supreme Court in *D. Velusamy* v. *D. Patchaiammal*[31]. It was held that `relationship in the nature of marriage' under the PWDVA must fulfil the four prerequisites like a common law marriage i.e.

(a) The couple must hold themselves out to society as being akin to spouses.

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[29] 1934 SCC OnLine Bom 62 : ILR (1936) 60 Bom 455.

[30] http://www.lawyerscollective.org/files/FAQonProtectionOfWomen1.pdf (Visited on March 14, 2017).

[31] (2010) 10 SCC 469.

(b) They must be of legal age to marry.

(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

Here, in so far as a molki's case is concerned there are chances that conditions (b) and (c) might not get fulfilled in every case. A molki might be underage or already married or the man might be married. Thus, in such case the entire purpose of PWDVA will get frustrated which was enacted with a purpose to protect women from violence. The issue was examined again in *Indra Sarma* v. *V.K.V. Sarma*[32] wherein it was stated in clear terms that the PWDVA does not take care of status of concubine, thus if the molki is a concubine, she will not receive any protection.

Here, the assumption on which the court proceeds, has certain issues. It guarantees the protection of PWDVA only to those women who are either lawfully wedded wife or in live-in- relationship. This reasoning flies in the face of the purpose and policy of the PWDVA which is designed to protect women from violence in domestic setting. To say that law protects only virtuous women and not those of easy virtue appears to strike at the very heart of gender justice. Justice aims at eliminating all prejudices and stereotypes which treats women as subordinate and as an object of man's desires.

The fallacy of reasoning reflects itself more on the lives of molki because they lead the life of 'less than wife and more than concubine' involuntarily.

In the opinion of the authors this issue needs to be re examined in case of molkis because they enter into marriage due to force and not voluntarily. Law must protect the interests of a woman who is forced to live life of a sexual slave and who could have otherwise lead a dignified life.

At international level also the choice to marry has been acknowledged in several key international instruments as a human right. Free and full consent was considered as a prerequisite to marriage under Article 16(2) of the 1948 Universal Declaration of Human Rights (UDHR) and reiterated in Article 23(3) of the International Covenant on Civil and Political Rights (ICCPR) in 1966 and Article 1 (1) of the Convention on Consent to Marriage in 1962. The International Covenant on Economic, Social and Cultural Rights (ICE SCR) in 1966 also recognizes the requirement of 'free consent' in Article 10(1). In 1979, the Convention on the Elimination of all

[32] (2013) 15 SCC 755.

Forms of Discrimination against Women (CEDAW) addressed the issue of 'free and full consent' in Art 16(1)(b).

Thus, issue of molki needs to be addressed urgently by the judiciary so that her human rights get protected.

IV. CONCLUSION

Bride trafficking is not a very recent practice. To be able to bring transformation while dealing with a social evil which has society's approval seems to be a herculean task in the beginning. There are two main issues firstly, the issue of missing girls. This issue can only be handled by strict implementation of the PC and PNDT Act. Secondly, a time gap of around 20 years in which we will not have women of childbearing age even if the PC and PNDT Act is strictly implemented today with fruitful results.

The second issue requires a phased intervention. Firstly, we need to spread awareness for basic human rights of the molki's who wish to remain in their marital houses. Secondly, since this is an urgent need a public interest legislation in the Supreme Court of India or High Court of Punjab and Haryana must be filed by the organizations who have experience of working in this field. At normative level norms for protection exists, but the issue needs re examination by the judiciary only in the case of molkis. Moreover, we need urgent directions for appropriate authorities about sensitive handling of such matters and protection of molki's and aid in rescue of others. Thirdly, rescue and rehabilitation must include financial security which can come only by vocational training and divorce if the women so desires.

This existence of this practice since a long time and the approval of society for worst form of modern slavery necessitate intervention by the judiciary.

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