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LETTER FROM THE DEAN

The Delhi Law Review, the flagship journal of the Faculty of Law, University of Delhi, has always aimed to contribute quality academic writing to the legal fraternity. It has, however, largely remained a journal receiving scholarship from senior faculty members and professors from within the academic circles. In the fall of 2016, seeing the pressing need at the Faculty for a student-driven journal, the editorial team began to work tirelessly to bring forward this volume to revive the Student Edition of the Delhi Law Review.

It is with great pride and optimism that we release the fruit of this labour, the first online issue of the Student Edition of the Delhi Law Review Journal, to the readers. This will hopefully provide a new space for students, academics, and practitioners to add quality academic research and expand the province of scholarship. I extend my best wishes to this initiative and look forward to subsequent Editorial Boards carrying forth the torch lit by the first Editorial Board working under the capable guidance of their faculty advisors.

As you will discover, the journal tries to forward scholarship from a diverse range of themes and topics, and does not confine itself to any particular field of law. All articles deal with issues of contemporary significance, and add significantly to the available insights on their respective subjects.

Dr. Ved Kumari

Dean and Head
Faculty of Law
University of Delhi

FROM THE EDITOR'S DESK

On behalf of the entire Editorial Board and faculty advisors, we are proud to present to you the first online issue of the Student Edition of the Delhi Law Review. From the outset, we were acutely aware of the enormity of the task that lay before us. Undeterred, our enthusiasm at receiving the opportunity to work on starting a student-driven academic journal motivated us to learn the ropes quickly.

Each one of the editors shared the wealth of their prior experience and skills, and wherever we required guidance with difficult matters, our faculty advisors, especially Dr. Alka Chawla, hastened the learning process. We thank all the members of the Editorial Board for their hard work, valuable contributions and for helping us put this journal in its present completed form.

The journal comprises articles from both students within the Faculty and outside of it, and we thank every author for their contribution. We hope that the journal will be as illuminating an experience for you as it has been for us. The journal has been divided into three parts, namely, articles, legislative commentaries, and short articles.

The views and opinions expressed in the journal are of the authors alone; the editorial board has limited itself to making suggestions and minor changes for improved readability, and ensuring consistent formatting. The articles have been selected following a double-blind peer review process, and the editorial board has tried its best to keep up the standard set by the previous editions of the Delhi Law Review. It is the board's collective aspiration that the efforts put into this inaugural volume should be honoured by prospective editors by enhancing student-driven academic scholarship in subsequent editions.

Despite the best efforts of the editorial board, some mistakes may have crept in inadvertently. In our capacity as editors, we take responsibility for any such oversight.

Editors-in-Chief

Delhi Law Review
Student Edition

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THEORETICAL UNDERPINNINGS OF ACQUISITION OF 'CONTROL' IN TAKEOVERS

Shreyash Santara[*] *and Kavita Sharma* [**]

Increasing cross-border takeovers on the one hand, and divergent views of adjudicatory authorities on the other, have fuelled a palpable need in India to frame a bright line test for the acquisition of 'control' over a company. Such a test is well-defined, cannot be circumvented to the detriment of minority shareholders and facilitates takeovers which are beneficial for the acquirer as well as the target company. In its quest to devise a bright line test, SEBI released a Discussion Paper in 2016 and invited suggestions from various stakeholders. However, there seems to be a lack of consensus on what may be the ideal test for the Indian takeover market. With a view to advance the academic discourse on this issue, the article discusses the theoretical underpinnings of determining control and suggests measures that may help in the framing of a bright line test.

Introduction

The test for Acquisition of 'Control' in India has been a matter of controversy, which has been an albatross-hanging-around-the-neck feature for the Indian corporate sector. SEBI re-examined the definition of control following the acquisition of 24% stake in Jet Airways (India) Ltd. by Etihad Airways in 2013.[1] In *Subhkam Ventures (I) Pvt. Ltd.*[2], SEBI's decision to hold that protective rights of acquirer, under a contractual agreement, amounted to acquisition of control, was rejected by the Securities Appellate Tribunal(SAT) on the ground that protective rights protect the investment of the investor. This has raised a question on the existing definition of 'control' and the test for acquisition of 'control'. A need was felt by the regulator to lay down a bright line test for acquisition of control under SEBI Takeover Regulations. Consequently, the regulator released a discussion paper[3] on the same in order to obtain comments of the public. The Paper provides two bright lines for control, namely, a framework for protective rights and a numerical threshold. Both are based on well-recognised approaches to acquisition of control. In order to determine which

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[1] Jayshree P. Upadhyay, "Sebi may peg M&A 'control' cap at 25%", Retrieved from http://www.livemint.com/Money/YgqtocSu1UTWcT2wiBexPP/Sebi-may-peg-MA-control-cap-at-25.html (last visited on 10/09/2016 at 10:00 p.m.)
[2] *Subhkam Ventures (I) Pvt. Ltd vs. Securities Exchange Board of India,* MANU/SC/1587/2011
[3]Discussion Paper on "Brightline Tests for Acquisition of 'Control' under SEBI Takeover Regulations", Retrieved from http://www.sebi.gov.in/cms/sebi_data/attachdocs/1457945258522.pdf (last visited on 11/09/2016 at 8:00 a.m.)

approach is suitable for Indian capital market, there is a need to analyse the theoretical underpinnings and principles of 'Control'.

While countries such as Australia, Germany, New Zealand, Russia, Hong Kong, Singapore, South Africa and the UK adopt a numerical threshold for determining control, whether or not the shareholding confers *de facto* control, countries such as Canada, France, Ghana, Norway and Spain adopt a framework of protective rights for determining control, such as right to alter the composition of the Board of Directors, right to veto key company decisions, etc. Japan, Malaysia, Switzerland and the USA have not specifically defined 'control' in their takeover regulations. Brazil, China, Denmark, Indonesia, Italy and Nigeria determined control on the basis of a numerical threshold as well as a framework of protective rights.

The authors have divided this article into segments to give a coherent and comprehensive analysis. The first deals with Mandatory Offer Rule (MOR) which is invoked when an investor gains control over a company. The second section describes the approaches to determine the trigger for Mandatory Offer Rule. Thereafter, the article deals with a quantitative approach to define control, which prescribes a numerical threshold. The penultimate section deals with the qualitative approach to define control which prescribes a framework of protective rights. The author has concluded the article by suggesting measures that may help in the framing of a bright line test for India.

Mandatory Offer Rule

The Mandatory Offer Rule (hereinafter referred to as 'MOR') is one of the basic tenets of any takeover statute. It was first discussed by William D. Andrews in 1965[4] and was recognised by the US Courts in their decisions[5] as a duty of the acquirer, as early as 1955. It has been an essential part of the takeover regulations in many jurisdictions. In the UK, it was first introduced in 1972 in The City Code on Takeovers and Mergers.[6] It is an important part of the takeover statutes of most

[4] William D Andrews, "The Stockholder's Right to Equal Opportunity in the Sale of Shares", Harv. L. Rev., Volume 78, pp. 515-56 (1965)
[5] *Perlman v Feldmann,* 219 F 2d 173 (2d Cir. 1955)
[6] The Panel on Takeovers and Mergers, The City Code on Takeovers and Mergers, London: The Panel on Takeovers and Mergers, 2013 [City Code].

of the Asian countries including Singapore[7], Malaysia[8], India[9] and Hong Kong.[10] It is an essential part of the EU Takeover Directives[11] and, therefore, has been incorporated by most of the EU countries in their takeover statutes. Australia has not made MOR a basic feature of its takeover statute but lists it as one of the procedures to be followed by the acquirer when he purchases shares in excess of 20% in the company.[12]

The rationale behind the incorporation of the MOR as a basic feature of takeover regulations is two-fold:

First, it originates from the Equal Opportunity Rule, which states that shareholders of the same class in a target company must be treated equally.[13] Thus, the MOR ensures that the opportunity to obtain benefits from the sale of shares to an acquirer, to enable him to cross the threshold, must be available to all shareholders instead of a few.

Second, it provides an exit opportunity to minority shareholders at the time of a change in the ownership of the target company. This is because the minority shareholders may not be able to exit the company on favourable terms after a takeover, if the new owner's policies are not conducive. So an opportunity to exit must be provided before the bidder takes legal control of the company and determines its management and policies.[14] It can also be said that MOR prevents hostile takeovers by increasing the cost of takeover for bidders.

Corporate lawyers have criticised MOR on limited grounds. For example, the reason that it delays efficient takeovers which are beneficial for the shareholders; and is also misused as a defence mechanism by shareholders to increase the concentration of their holding.[15] But it cannot be denied that MOR protects minority shareholders. In order to be effective, the takeover statutes must ensure that MOR is only invoked when it is advantageous to minority shareholders and not

[7] Securities Industry Council (SIC), Singapore Code on Take-overs and Mergers, Singapore: SIC, 2012, r 14.
[8] Sec. 218(2) of Capital Markets and Services Act 2007, (Malaysia) read with Securities Commission, Malaysian Code on Take-overs and Mergers 2010, Kuala Lumpur: Securities Commission, 2010.
[9] Regulation 3(1) and Regulation 4 of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.
[10] Securities and Futures Commission (SFC), The Codes on Takeovers and Mergers and Share Repurchases, Hong Kong: SFC, 2010.
[11] Commission Directive 2004/25/ECof2l April2004 on takeover bids, [2004] OJ, L 142/12.
[12] RP Austin & IM Ramsay, *FORD'S PRINCIPLES OF CORPORATIONS LAW 1219 (*LexisNexis Butterworths, Australia, 14th ed., 2010)
[13] See City Code in the UK, the current version of which came into effect on 20 May 2013 and General Principles of Singapore Takeover Code, *Supra.* 6.
[14] Lan Luh Luh, Ho Yew Kee and Ng See Leng, "Mandatory Bid Rule: Impact of Control Threshold on Take-over Premiums", *Sing. J. Legal Stud.*, pp. 433-435 (2001).
[15] Ruth Liittmann, "Changes of Corporate Control and Mandatory Bids", *Int'l Rev L & Econ*, Vol. 12, pp. 497 (1992).

when it hinders a change in control which is beneficial to the shareholders. Thus, MOR should facilitate value-enhancing takeovers instead of value-reducing takeovers for the target company.

One of the factors which determine the effectiveness of MOR is the definition of 'control' as it decides when the MOR will be triggered. If the threshold for control is too high, it will be abused, as acquirers will gain *de facto* control while keeping their shareholding below the threshold and avoiding the mandatory offer. Thus, minority shareholders will be deprived of exit opportunity. On the other hand, if the threshold for control is too low, then MOR will be triggered for acquisition of insignificant percentage of shareholding and will have a chilling effect on takeovers. Thus, M&A markets will be unable to develop, and the management and controlling shareholders will become complacent.

Determination of the 'Trigger'

The MOR is an essential part of the takeover regulation in most jurisdictions. It requires the acquirer to make an offer to the shareholders of the target company to buy their shares. Only if the shareholders accept the acquirer's offer and sell their shares to him will the acquirer get real control of the target company. There are two approaches to determine the trigger for the MOR:

a) The quantitative approach - based on a shareholding threshold which may be 30% or 20% of the total voting rights; and
b) The qualitative approach - based on the determination of control from various factors such as the shareholding pattern of the target company, the rights of the acquirer under a shareholders' agreement or the Memorandum of Association of target company, etc.

The quantitative approach gives importance to the *de jure* control whereas the qualitative approach focuses on the *de facto* control. The former is a rigid and principle-based approach while the latter is flexible and a fact-based approach. Jurisdictions such as Singapore, Hong Kong and the European Union follow the quantitative approach while Brazil, Indonesia and Spain have incorporated the qualitative approach. It is seen that most jurisdictions have adopted the quantitative approach, as it is certain, as well as easy to interpret and implement for regulators and market participants. The qualitative approach is not certain as it varies from one case to another and gives wide discretionary powers to the courts and the regulators.

TABLE								
No MOR	Quantitative Approach only						Qualitative Approach only	Combined Approach
	20%	25%	30%	33-33.33%	35%	50%		
Bermuda USA	Australia Canada, New Zealand	Croatia, Serbia, Slovenia	Austria, Belgium, China, France, Germany, Hong Kong, Italy, Russia, Singapore UK	Greece, Hungary, Japan, Malaysia, Poland, Switzerland	South Africa	Bulgaria, Saudi Arabia, Ukraine	Brazil, Estonia	Denmark (50%), Ghana (30%), India (25%), Indonesia (50%), Spain (30%)

Table 1: Initial thresholds for triggering MOR in various countries

Quantitative Approach to Control

In this approach, a numerical percentage of voting rights in the target company is specified as the threshold for control and trigger for the mandatory offer. The SEBI discussion paper mentions this approach as an option for defining the test for control by specifying a numerical percentage of voting rights as the threshold for gaining control. Countries like the UK[16], Hong Kong[17], Austria[18], Belgium[19] and Italy[20] initially followed the qualitative approach but later changed their statute in favour of quantitative approach. The EU Takeover Directive is based on the quantitative approach, although it provides flexibility to member-states in determining the numerical

[16] Chidambaram Chandrasegar, *Take-Overs And Mergers* (LexisNexis, Singapore, 2nd edn., 2010).
[17] *Ibid.*
[18] Albert Birkner & Clement Hasenauer, "A new takeover law in Austria", *European Lawyer*, Volume 69, pp. 62 (2007).
[19] Steven De Schrijver & Hans Vandendael, "Belgium implements EU takeover directive", *European Lawyer*, Volume 69, pp. 60 (2007).
[20] Marco Ventoruzzo, "Europe's Thirteenth Directive and US Takeover Regulation: Regulatory Means and Political and Economic Ends", *Tex Int'l L.J.*, Vol. 41, pp.171 (2006).

percentage based on the corporate shareholding pattern and other local factors. Due to the EU Directive, there has been harmonisation in takeover regulations of EU member-states.

Quantitative approach is by far the most the widely used approach, as most of the countries which have MOR as a basic feature of their takeover statute follow it. The only difference lies in the numerical threshold of voting rights which invokes the MOR. There is no harmonisation in the threshold as it varies considerably from 20% to 50% of the voting rights. Most jurisdictions have chosen a threshold around 30% to 33.33%. And this is largely dependent on the shareholding pattern prevailing in the country. In countries where shareholding is dispersed, the threshold must be lower, and where it is concentrated, the threshold must be higher.[21] This is because in a company with dispersed ownership, change of control can take place with the acquisition of a small number of shares. Whereas in a company with concentrated shareholding, the acquirer will have to obtain at least one share more than the largest shareholder in order to gain control of that company.[22]

There are, however, some inconsistencies in the thresholds based on the quantitative approach. For example, the threshold in UK is 30%, which is high for a country with a dispersed shareholding pattern. The threshold in India is 25%, which is too low when we consider that the shareholding pattern in India is largely concentrated in nature. The approach itself is not devoid of deficiencies. The numerical threshold may be misused to gain *de facto* control over a target company. Acquirers may keep their holding below the threshold and therefore avoid a Mandatory Offer. Literature suggests that acquirers in the UK remain below the 30% threshold to avoid the MOR and exercise *de facto* control.[23] This may be the reason for the absence of block shareholdings beyond the 30% mark.[24] In Europe, acquirers avoid the MOR in order to pay less to acquire the target company and this phenomenon is called 'financial tunnelling'.[25] In China, the China Securities Regulatory Commission has wide discretionary powers to grant the acquirer exemption from the MOR and this exemption is granted quite frequently. This has led many experts to say that the MOR "exists only in name in China".

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[21] *Ibid.*
[22] Umakanth Varottil, "Comparative Takeover Regulation and the Concept of 'Control'", *Sing. J. Legal Stud.*, pp. 208-231 (2015).
[23] Paul L Davies and Sarah Worthington, *Gower And Davies: Principles of Modern Company Law* 1061 (Sweet & Maxwell, London, 9th edn., 2012).
[24] Fabrizio Barca & Marco Becht, *The Control Of Corporate Europe,* 12-36 (Oxford University Press, Oxford, 2001).
[25] Jeremy Grant, Tom Kirchmaier & Jodie A Kirshner, "Financial Tunnelling and the Mandatory Bid Rule", *European Business Organization Law Review*, Volume 10, pp. 233 (2009).

Although, a numerical threshold brings certainty and predictability, the rights of minority shareholders and the MOR are compromised for the sake of certainty. Thus, a numerical threshold may deprive the minority shareholders from getting a fair exit opportunity. An analysis of various jurisdictions suggests that the rationale for MOR is undermined under the quantitative approach. The success of the test for control is largely dependent on how regulators implement it. In many jurisdictions, implementation of the MOR based on the quantitative approach has been riddled with difficulties. That is why there is a need for a bright line rule in India, which will facilitate equal treatment of minority shareholders.

Qualitative Approach to Control

This approach avoids defining 'control' on the basis of a numerical percentage of voting rights or shareholding. Instead, it provides a definition of control based on certain factors. The SEBI Discussion Paper mentions this approach as an option for defining the test for control by specifying certain participatory and protective rights. By making the definition of control subjective in nature, courts and regulators are granted wide discretion to determine whether the acquirer has obtained control based on the individual facts and circumstances of each case. This makes it difficult for acquires to circumvent the MOR. The approach has not been adopted in many jurisdictions due to the unpredictability and uncertainty of the test for acquisition of control. There can be two types of tests for control under this approach: (i) Test for control of the Board, and (ii) Test for control of the management.

Control of the Board

In this test, the regulators determine whether the acquirer can control the Board of Directors by appointing or removing a majority of the directors. Such a test is not new and is commonly used in corporate law to determine whether a company is a subsidiary of another company.[26] The Board can be controlled in different degrees and the nature of control varies across jurisdictions. The various ways in which the Board may be controlled are as follows:

[26] Sec. 1159(1)(b), Companies Act 2006 (UK); Sec. 5(1)(a)(i), Companies Act (Cap 50, 2006 Rev Ed. Singapore); Indian Sec. 2(87) (i), Companies Act, 2013.

a) The acquirer can obtain the *right* to control the composition of the Board in two ways: (i) By obtaining a majority of the voting shares[27], and (ii) By entering into a shareholder's agreement to obtain special rights in the MOA of the target company for controlling the Board.[28]
b) The acquirer can have the *ability* to control the composition of the Board even without obtaining a majority of the voting rights. An *ability* is less than a *right* and it has been used in the takeover statutes of some countries.[29] This is possible when the acquirer exercises *de facto* control over the target company.
c) The acquirer may not have any voting rights or legal capability or *de jure* control but appoints and removes directors.[30] This is factual test based on previous conduct of the acquirer. However, even for doing the same, the acquirer must hold a minimum shareholding in the company in the form of a 'toe hold'.[31]

Out of the three ways of exercising control over the Board, most subjective way is the one wherein the acquirer has the *ability* to control the Board. In determining the same, the courts and regulators play a prominent role. The test of control of the board is prone to abuse because the acquirer can easily appoint less than half of the directors of the board and still pull the strings. In order to avoid such abuse, some jurisdictions have used the test of control of the management to define control.

Control of the Management

While the Board takes strategic decisions, it is the management of a company which takes policy decisions. Control over the management is therefore also used to determine whether an acquirer has gained control over a target company. For example, in Indonesia an acquirer is said to acquire control when he "directly or indirectly has the ability to determine in any way whatsoever the management and/or policy of the public company".[32] Similarly, in India an acquirer is said to have control over the target company if he has the right to "control the management or policy decisions" exercisable "by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner".[33] This approach is inherently

[27] Pedro Testa, *The Mandatory Bid Rule in the European Community and in Brazil: A Critical View* (LLM Dissertation), London School of Economics. Retrieved from SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=943089 (last visited on 25/09/2016, at 8:30 p.m.)
[28] Regulation 2(e), Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, Mumbai: SEBI, 2011.
[29] Yozua Makes, "Challenges and Opportunities for the Indonesian Securities Takeover Regulations: A Comparative Legal Analysis", *University of Pennsylvania East Asia Law Review*, Volume 8, pp. 83 (2013).
[30] CMS Legal Services EEIG, *"CMS Guide to Mandatory Offers and Squeeze-Outs"* (April 2011).
[31] *Supra 22.*
[32] *Supra 27.*
[33] *Supra 28.*

unpredictable and uncertain as it gives wide discretion to the regulators to determine a change in control on a case-by-case basis.

There may be a number of scenarios wherein the control over management may occur. An acquirer may obtain *de facto* control of a company without holding a majority of the voting rights. If most of the shareholders are dispersed, then a mere 20% of the holding will be sufficient to exert control over the management. Things may get complicated when financial and strategic investors obtain protective rights through shareholder agreements and the MOA. If there is no bright line test for acquisition of control, such protective rights may put the acquirer in a position of control even though he does not have any intention to seek it. In such a scenario, the investment transaction may cause undesirable regulatory issues for the parties. It is because of this ambiguity that the test of control of management is not used by most countries.

The qualitative approach may bring several transactions within its scope which do not necessarily constitute a change in control. Tests such as control over the Board and Management are too subjective, therefore, deterring many strategic and financial investors to take up positions in the target company which will benefit the company. There also exists a reasonable doubt as to when the MOR will be triggered due to the lack of bright line tests for control. The merits and demerits of the qualitative approach may be better understood by analysing the takeover code of India.

The Indian Experience

Having bright line tests for the acquisition of control is very crucial for India because it has a very active market for both domestic as well as cross-border mergers.[34] Indian takeover regulations have been subject to periodic reforms in order to keep up with the rapidly developing M&A market.[35] India follows a combined approach for defining control. Its takeover regulations contain both a numerical threshold of 25% of voting rights as well as a qualitative definition of control. The numerical threshold is very low and the subjective definition is very wide. Thus, the Indian takeover regime is very unique. It is said that the regulations are overprotective of the minority shareholders and unfavourable to acquirers.[36]

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[34] Afra Afsharipour, *"Rising Multinationals: Law and the Evolution of Outbound Acquisitions by Indian Companies",* UC Davis L Rev, Vol. 44, pp. 1029(2011); Umakanth Varottil, *"The Impact of Globalization and Cross-Border Mergers & Acquisitions on the Legal Profession in India",* Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2344272 (last visited on 29.09.2016, at 5:00 p.m.)

[35] *Supra 23.*

[36] Umakanth Varottil, *"Defining 'Control' in Takeover Regulations",* IndiaCorpLaw Blog (29 May 2013), Retrieved from http://indiacorplaw.blogspot.in/2013/05/defining-control-in-takeover-regulations.html (last visited on 1/10/2016, at 11:00 a.m.).

The SEBI Takeover Regulations were framed by the P. N. Bhagwati Committee. Though the regulations are only twenty years old, they have been revised twice. The *SEBI* (Substantial Acquisition of Shares and Takeovers) Regulations*,* 1994 was the first takeover regulation. It was first amended in 1997 and subsequently in 2007. The 1997 amendment was suggested by the same Bhagwati Committee which had originally recommended the regulations.[37] Under the regulations, the definition of control is wide. It includes the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders' agreements or voting agreements or in any other manner: **..."**[38]. It indicates that the MOR will be triggered: *firstly,* when the acquirer is the largest shareholder and obtains a substantial amount of shareholding; and *secondly*, when the acquirer has a substantial amount of shareholding but is not the largest shareholder.

The jurisprudence for determining *de facto* control has not developed in India. Yet the SEBI has not shied away from investigating the acquisition of shares where *de facto* control may have changed. Similarly, SEBI has also been critical of contractual agreements of investors while examining the acquisition of control based on the facts and circumstances of individual cases. It has been very strict against those shareholders who have obtained protective rights[39] in listed companies. Hence, SEBI enjoys wide discretion in subjective determination of control and it has a chilling effect in the market by creating an uncertain atmosphere in the capital market. Thus, the concept of control in the Indian takeover regime is very complicated. The subjective determination of control has not yet been resolved by the adjudicating authorities such as SAT and the Supreme Court. SEBI continues to regulate the capital market with great leeway and freely scrutinises transactions at will based on the individual facts and circumstances of the case.

Conclusion

The unpredictability and uncertainty surrounding the qualitative approach makes it diametrically opposite to the quantitative approach. At the same time, the stringency of the quantitative approach makes it incapable of bringing within its purview the acquisition of *de facto* control. The qualitative approach should be adopted in jurisdictions where the market regulator employs a

[37] The overhaul in 1997 was pursuant to the recommendations of the same committee that recommended the first set of regulations: India, SEBI, Justice P.N. Bhagwati Committee Report on Takeovers, (SEBI, 1997). The revamp of 2011 was pursuant to a Takeover Regulations Advisory Committee Report under the chairmanship of Mr C Achuthan: India, SEBI, Report of the Takeover Regulations Advisory Committee, (SEBI, 2010).
[38] *Supra 28.*
[39] Rights aimed to allow the investor to protect his investment or prevent dilution of his shareholding.

specialist panel, for instance, the Takeover Panel in the UK. These panels can decide cases in a timely and efficient manner, and their decision will be subject to judicial review. It will promote certainty and predictability in the capital market. However, in India, SEBI does not employ specialist panels, which lead to significant delays. Also, the decisions of SEBI are frequently appealed before the SAT, which further delays the matter.

The quantitative approach is necessary to regulate the market as a whole. Given that India has a well-developed secondary market with more and more companies getting listed every year, the corporate shareholding pattern is becoming dispersed in nature. It is important therefore to keep the numerical threshold for triggering the MOR low. The threshold under the Indian Code was initially 15 per cent when the ownership pattern was concentrated, and was increased to 25 per cent in 2011. The reverse should have happened, given that the ownership pattern has started to get dispersed after the adoption of the New Economic Policy in 1991.

It is indeed very difficult to arrive at an accurate numerical threshold. But a high threshold in a country with dispersed shareholding will only serve to defeat the purpose of MOR. Therefore, SEBI must have the power to trigger the MOR even when the threshold is not reached, albeit its usage must be sparing. While most of the companies in India have a dispersed ownership pattern, there will always be outliers. Some companies may exhibit a concentrated ownership pattern, and in their case, SEBI must have the power to grant an exemption to the acquirer from MOR after the threshold is reached and trigger it only when the acquirer exceeds its shareholding beyond that of the controlling shareholder.

The quantitative approach is not sufficient to protect the market. Generally, the acquisition of shares is supplemented by various participatory and protective rights. Such rights include the right to appoint directors to the board, veto rights in key decisions, differential voting rights, etc. A numerical threshold will not be adequate to determine the acquisition of control and this is where the qualitative approach comes in. While this approach entails the exercise of discretionary powers by SEBI, it is pertinent to provide assurance to acquirers, strategic investors and other investors so that beneficial acquisitions do take place.

There is a need to draw a clear distinction between the management of the daily affairs of a company and having a say in its strategic decisions. The former may amount to control while the latter may not. Another basis of distinction can be that of general business requiring a general resolution as well as special business requiring special resolutions. Having a say in matters requiring

special resolutions do not lead to acquisition of control, as, more often than not, it is a protective right without which an investor may be handicapped in securing its investment in the long-term.

A general distinction must be made between affirmative rights and veto rights, or participatory rights and protective rights. Veto rights or protective rights generally do not amount to control, for reasons already stated. Participatory or affirmative rights may lead to acquisition of control because an investor will not be interested in these rights if his goal is merely to make an investment that offers good returns. It will be useful if an indicative list of affirmative rights be provided by the regulator which will ordinarily invite scrutiny, in which case the investor will be given adequate opportunity to defend himself.

On the whole, the application of both quantitative and qualitative approaches must be tempered with various well-defined exemptions and clearly laid-down definitions if a bright line test for the acquisition of control is to be devised in India. This will help the regulator to exercise its discretionary powers with a view to facilitate beneficial takeovers, and allow the infusion of capital for needy companies as well as the free flow of investments.

THE STATE OF BEING STATELESS - CRITICAL ANALYSIS OF INDIA'S STANCE ON REFUGEES

Sushant Shankar[*]

Today, the UNHCR is providing assistance and protection to over 15 million refugees throughout the world. The 1951 Convention relating to the Status of Refugees remains the cornerstone of that protection. However, millions of more people have fled their countries for reasons that the drafters of the Convention could not have predicted: climate change, endemic food insecurity, overpopulation and terrorism, with technical advances that allow people to communicate and move more easily. This has lined up the flow of migrants, asylum-seekers and refugees well beyond the environment in which the Refugee Convention was designed.

India is the largest host country in South Asia. In spite of having such a substantive asylum seeking and refugee population, India is not a signatory to the 1951 Refugee Convention or the 1967 Protocol. Neither has any domestic legislation been passed in India to protect refugees. The fate of individual refugees in India is essentially determined by the protections that are made available under the Indian Constitution. The question often raised is that - why India, like several other nations in South Asia, has not ratified the 1951 Refugee Convention. This paper analyses a number of arguments that have been made to explain India's refusal to accede to the Convention, and examines the existing legal set-up for refugees in India in order to arrive at an understanding of the context of non-accession. Furthermore, the paper highlights through a case study of the Chakmas and the Hajong tribe refugees, the lack of durable solutions for the refugees that the Indian State has assisted for more than 30 years. Finally, certain recommendations have been proposed for a comprehensive refugee policy for India with regard to the unique situation of the Chakmas and the Hajong tribe refugees.

I. Present Status of the Refugee Convention

Forced migration of entire populations has been a recurring feature of human history. The flight from persecution, deprivation or natural calamity with the sole intent of survival is a basic human instinct. Indeed, such exoduses have been a driving force in history, making man more resilient, and guiding socio-political development in a manner responsive to the pressing needs of the times. The Convention Relating to the Status of Refugees, 1951[1] was a watershed in the development of laws regarding the protection of refugees. Having been drafted in the aftermath of the Second

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[1] Convention Relating to the Status of Refugees, (Hereinafter 1951 Convention).

World War, the convention embodies the prevalent humanitarian spirit of the war-weary international community.[2] However, in reality, the implementation of the standards laid down in the convention proved to be difficult and led to the fragmentation of approach and opinion towards the global refugee crises.

The essence of the criticism of the 1951 Convention is that it is anachronistic. The treaty was developed in and for a different era. While Western countries' asylum systems might have coped well enough until the end of the Cold War, they were not designed with today's mass refugee outflows and migratory movements in mind. Most asylum seekers are now from the poorer countries of the Middle East, Asia, Africa, and Eastern Europe, rather than Western Europe. They are less welcome. There is no longer a need for unskilled labour in developed countries, and no longer any ideological or strategic advantage attached to conferring asylum. With rapidly increasing numbers of asylum seekers since the late 1980s, governments have therefore not been inclined towards expansion of the outdated convention grounds and criteria.

II. In Defence of the Indian Reservations to the Refugee Convention

Indian borders have been growing increasingly porous with some of the largest inflows in history ever since independence, increasing its refugee population day by day. It is looked upon as a safety haven due to the operation of a variety of factors - geographical, cultural, strategic, political and social. It is the democratic and peaceful resident of a relatively volatile neighbourhood. India's reservations to the Refugee Convention are viewed critically by the international community as well as by domestic agencies.[3] India can be viewed as an economically developing welfare state unable to fulfil every requirement of the convention and therefore choosing to not promise what it cannot deliver.

- The Concept of Burden Sharing

As citizens of the world, humanitarian concerns and those of sharing rights as well as duties have prompted the concept of burden sharing among states which appears in the preamble to the 1951 convention.[4] The concept of burden sharing is also contained in various regional agreements

[2] Ivor C. Jackson, "The 1951 Convention relating to the Status of Refugees: A Universal Basis for Protection" 3 *International Journal of Refugee Law* 403 (1991).
[3] Rajeev Dhavan, "On the Model Law for Refugees: A Response to the National Human Rights Commission" NHRC Annual Reports 1997-1998, 1999-2000 (New Delhi: PILSARC, 2003).
[4] Paragraph 4 of the Preamble, 1951 Convention reads, "The grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation.

including Organization of Africa Unity, 1969[5], Bangkok Principles Concerning the Treatment of Refugees, 1966[6] and various European Union Instruments.[7] Is India, a non-signatory to the 1951 Convention, shirking its burden?

India continues to receive refugees despite its own over-a-billion population with at least six hundred million living in poverty and limited access to basic amenities.[8] The continuously growing refugee influx creates drains on the already weak infrastructure, strained resources and the developing economy of the nation. Asylum seekers in India arrive from various countries of origin, primarily Iran, Iraq, Sri Lanka, Myanmar, Bangladesh, Somalia, Sudan, Afghanistan and Bhutan. India has provided them with land to establish educational institutions and other social programmes. Many NGOs are taking up their cause in India. Though India does not have uniform laws for the refugees, it has repeatedly claimed that its policies are in tandem with the international norms and values. These claims are not completely unfounded.

- The Lack of a Definition

The scholars have argued that the definition confines itself to the violation of civil and political rights of refugees, but does not extend to economic, social and cultural rights. The convention's definition of 'refugee' has made less sense as the nature of refugee flows has changed and their numbers have risen. Since 1980, refugee movements have been more likely to be the result of civil wars, ethnic and communal conflicts and generalised violence, or natural disasters or famine-usually in combinations-than individually targeted persecution by an oppressive regime. The refugee and internally displaced population in the world has risen dramatically following the end of the Cold War - from 10 million in 1985, to 35 million now, according to USCR estimates, and 22 million according to the UNHCR.[9] The plight and need of these people is obvious. However only a minority could demonstrate a personal 'well-founded fear of persecution' on a Convention ground.

- Unnecessary Interference

If India is to be a party to the 1951 Refugee Convention, it will also have to allow for the supervision of the national regime by the UNHCR, via Article 35. The UNHCR would also be granted permission to access detention centres and refugee camps. India has had apprehensions

[5] Article II (4) Organization of Africa Unity, 1969.
[6] Addendum to the Bangkok Principles Concerning the Treatment of Refugees, 1966.
[7] Dublin Convention, 1997.
[8] Arjun Nair, "National Refugee Law for India: Benefits and Roadblocks" Institute of Peace and Conflict Studies, New Delhi, Research Papers, 24 (2007).
[9] "World Refugee Survey" United States Committee for Refugees and Immigrants (2007).

over Article 35 of the Convention which imposes the responsibility of the supervision of refugee processing by UNHCR. This, it feels, would be a threat to its sovereignty. Also, there is an apprehension that NGOs could embarrass India before the international community by presenting negative reports that fail to take into cognizance the practical difficulties faced by a Third World nation like India.

- The Concept of Permanent Resettlement

The 1951 Convention is based on the concept of durable asylum or permanent resettlement. It puts emphasis on protection and resettlement of the refugees and does not refer to their voluntary repatriation. This line of approach seems to be out dated and was conceived during the Cold War on the principle that no person should return to a communist country in Europe. This increasing permanence of shelter-seekers does put a comparatively greater burden on the limited resources of the country. An important reason for India's refusal to accede to the 1951 Refugee Convention is that the rights that are incorporated within the Convention for refugees are entirely impractical for Third World countries like India, which can barely meet the needs and requirements of its own citizens.

- Some Other Problems

Weiner also raises the issue that the cross-border movements of people in South Asia are known to affect political stability, international relations and internal security, and not simply the provision of services to new arrivals or the composition and structure of the labour market. He also notes that it is possible that refugee flows would result in or be seen as effecting change in the religious or linguistic composition within the receiving area of the country.[10]

- India has adopted a sceptical outlook towards the political or non-humanitarian role of the UNHCR, owing to the uncooperative stance demonstrated by the UNHCR during the Bangladesh crisis of 1971.[11]

III. The Refugee Law and Its Benefits

It is because of the reasons discussed above that India should endeavour to enact a uniform domestic protection legislation to recognise the rights of these vulnerable people. The potential benefits of such a law are discussed in this section.

[10] Myron Weiner, "Rejected Peoples and Unwanted Migrants in South Asia" Vol. 28 *Economic and Political Weekly,* 1737-46.34th ed. (1993).
[11] Dipankar Sarkar, "Why India won't sign Refugee Treaty" The Times of India, Aug. 2, 2014.

1. It is patently obvious that although India grants its refugees certain rights and privileges, these are only conferred upon select groups, leaving the question of equality and uniformity unanswered. A clear case of this is the preferential treatment conferred upon the Tibetan and Sri Lankan Tamil refugees. Until the assassination of Rajiv Gandhi in 1991, Tamil refugees were 'encouraged' to enter India; even now the Sri Lankan Tamil refugees are accepted depending upon which party is in power in Tamil Nadu.[12] It is imperative that uniformity is exercised in the application of the refugee law and factors like regional politics be abandoned. The current ad hoc arrangements of dealing with refugees based on administrative, political and economic calculations should not be the policy in a country like India, which has accepted such a large refugee population. This is not in accordance with the spirit of the Indian Constitution and tarnishes the Indian image at a world stage. There is a need for legislation that uniformly protects the right to equality and non-discrimination among the refugees.
2. Security considerations rank high on India's list of priorities, given its geopolitical influence in the region and its vulnerability to cross-border infiltration due to the porous nature of its borders. The Maoists and the Islamist groups have infiltrated into India from Nepal and Pakistan respectively; organizations like the United Liberation Front of Assam are based in Bangladesh, and the LTTE has a strong presence in India.[13] Therefore, it is clear that having a stringent law to check the infusion of dangerous elements into the borders of the country will go a long way in regulating the process of refugee movement. It will also ensure that the rights of the genuine refugees are protected. The formulation listed by the 'model refugee law'[14], as drafted under the chairmanship of former Chief Justice of India, P. N. Bhagwati, and the South Asian Association for Regional Cooperation (SAARC) Anti-Terrorism Protocol of 2004, which warrants that suspected terrorists are not treated as refugees, should be considered in this respect.[15] The model law proposes that India may exclude the persons who are reasonably believed to be 'undesirable', provided that they are not sent back to the country of persecution. Article 4 of the model law provides that anyone guilty of a crime against peace, a war crime, a crime against humanity or a serious non-political crime, prior to his or her admission in India as a refugee, would not be accorded refugee status.[16]

[12] Rajeev Dhavan, "Refugee Law and Policy in India" PILSARC, New Delhi 54 (2014).
[13] Supra note 8 at 4.
[14] Former Chief Justice of India, P.N. Bhagwati, had drafted a model refugee law, based on which the Refugees and Asylum Seekers Protection Bill was framed in 2006. The Bill has not received adequate consideration yet.
[15] Supra note 12 at 6.
[16] Rajeev Dhavan, "Refugee Law and Policy in India" (PILSARC, New Delhi,2014).

3. The construction of a security database would also solve the problem of unwanted migrant workers receiving refugee status, which is a major problem faced by India. With the passage of a law and the laying down of proper procedures for the classification of aliens, and the construction of a security database, the government would not have to face this problem on as large a scale as it does currently. It is imperative to note that among the accused in the Rajiv Gandhi assassination case, half a dozen were registered as refugees.[17] The absence of a well-defined national refugee law has created a number of anomalous situations. With the enactment of such a law, refugees would not be dealt with at the discretion of administrative officials but by the establishment of a standard protocol and the logical step forward would be a security database to quell insurgencies and infiltration.
4. The most important benefit of enacting a refugee law is that it will help in improving India's bilateral relations with its neighbouring countries and the countries of origin of its refugee communities. India hesitates to sign any international convention or even accept any regional or national framework to deal with refugees as it is of the firm belief that the issue of accepting or rejecting refugees is a unilateral decision and, therefore, there is no real need to pass an entirely new law to consider multilateral and bilateral agreements. However, it may be argued as it has been by many others in this field, including the UNHCR, that the enactment of legislation for refugee protection will help to avoid frictions between the host country and the country of origin of the refugees. The act of granting asylum being governed by law, rather than an ad hoc policy, will then be better understood by other states as a peaceful, humanitarian and legal action under a judicial system, rather than a hostile political gesture.
5. Although India's past efforts in dealing with mass influxes has been commendable, its geopolitical position in the subcontinent makes it a preferred destination for asylum seekers and migrant workers. Moreover, India's economic resurgence and status as the only stable democracy in the region makes it an attractive destination for asylum seekers. This, more than anything else, explains the cross-border movement into India, which should be an incentive to frame a national refugee law, the need for which increases with every escalation in conflict in the South Asian region. Asylum seekers from Sri Lanka, Tibet and Myanmar will continue to seek refuge as the political strife in these countries has not ceased; with no viable plans to usher peace in the foreseeable future, the possibility of

[17] Robert Payas, Jayakumar, Shanti (Jayakumar's wife), Vijayan, Selva Lakshmi (Vijayan's wife), and Bhaskaran (Vijayan's father-in-law).

repatriation also remains bleak. In addition to a population of 4,35,000 refugees and asylum seekers, there are approximately 6,00,000 internally displaced persons, the majority of whom are the Hindu Pandit community, formerly resident in the Kashmir Valley.[18]

IV. Recommendations for a Comprehensive Refugee Policy

The inconsistencies in the treatment meted out by the Indian Government to different communities of refugees on its land reflect the administrative, political and economic considerations of the government in dealing with refugee flows. Several advocacy groups, such as the Human Rights Law Network (HRLN) have been pushing for a refugee law, along the lines of the 1951 Convention and the Protocol of 1967. This view has been actively supported by the NHRC, which has consistently advocated the need for a uniform policy towards the refugee communities in India and the guarantee of basic human rights including the right to work. A 'Model Law' formulated by Justice P.N. Bhagwati, based on international instruments on refugee law, and pushed forward by the NHRC has, however, not found favour with the legislature.

Steps Forward: Suggestions for the future

1. At the very outset, it is vital to state that India has no national refugee law specifying the rights and governing the treatment of refugees. In the absence of any specific laws, the presence of refugees in India is regulated essentially on the basis of The Foreigners Act, 1946 and The Foreigners Orders, 1948[19]. The Foreigners Act, 1946 (hereinafter, the Act) deals with the entry of foreigners into India, their presence therein and their departure from India. Section 2(a) of the Act provides-

"Foreigner means a person who is not a citizen of India."

As a foundation to have a new national refugee law it is advocated that an amendment to the Foreigners Act of 1946 is brought into force. In fact, as there is no reference nor any acknowledgment of a "refugee" within the text due to the fact that there is no distinction made with a "foreigner", the text should include a definition of the term refugee as well as a special category dealing particularly with this category of people, just as it has a special category for "foreigner".

[18] Arjun Nair, "National Refugee Law for India: Benefit and Roadblock" Institute of Peace and Conflict Studies, New Delhi, Research Papers 74 (2007).
[19] Foreigners Act 1946, India.

These modifications are necessary not merely to bring in line the state's practice and its legislative intent, but also to foster and respect its international humanitarian obligations. For instance, the 1946 Foreigners Act penalises non-Indian citizens who enter the country without any valid identity documents and they may be banned from entering the country. In the case of a person seeking asylum in India because of fear of (future) persecution in its country of origin, he is liable to be returned to the country he is fleeing from because Indian law does not recognize – what is perhaps the most important right of a refugee – the right to non-refoulment.

2. Article 3(2)(e) of the Foreigners Act, 1946 contains a list of nine orders embodying government regulations on rights and freedoms that the convention guarantees. For example, India can require foreigners to reside in mandated areas, thereby barring their right of movement across the country, and providing India the ability to confine foreigners to refugee camps and conduct periodic camp inspections.[20] Clauses must be inserted in the proposed Indian refugee law regarding the treatment and rights of refugees to prevent any conflict between the two countries in question.
3. Minority politics is an important factor that can be used to explain the reluctance of India's lawmakers to move towards resolving the issue. It is a fact that illegal immigrants have been used by vote-seeking parties to secure a majority in the central and the state legislatures. Opportunist sections of political parties in refugee-populated areas have tried to use these illegal immigrants as captive vote banks by trying to regularize their stay.[21] In the case of the illegal immigrants from Bangladesh in Assam, the repeal of the Illegal Migrants (Determination by Tribunals) Act of 1983 has been continuously vetoed by the ruling Congress Party to secure the steadily growing 'vote-bank' of immigrants although they are not registered as citizens of India. In fact, clauses should be inserted in the proposed Indian refugee law, ensuring that the decision to grant asylum is a humanitarian act that should be made without political considerations.
4. Having a uniform enactment would also improve the social and economic situation of refugees in India. For example, the Somali refugees compared to other group of refugees face more problems in finding employment in India for reasons of their race[22]. Having a specific legislation that clearly defines the rules regarding employment, education, etc. of the refugees shall certainly improve the present situation.

[20] T. Ananthachari, "Refugees in India: Legal Framework, Law Enforcement and Security" p. 193 (1st ed. 2008).
[21] Sumbul Rizvi,"Managing Refugees: Role of the UNHCR in South Asia" 195-196 (ILI, Delhi, 2004).
[22] Supra note 18 at 8.

5. India has so far dealt with situations of mass influx without a refugee law but with a continuously enlarging population of refugees and asylum seekers, a large section of who may not be repatriated in the near future. A uniform law would allow the government to maintain its huge non-citizen population with more accountability and order, apart from allowing them to enjoy uniform rights and privileges.
6. India hesitates to sign any international convention or national framework to deal with refugees as it is of the firm belief that the issue of accepting or rejecting refugees is a unilateral decision, and therefore, there is no real need to pass an entirely new law so it should make regional treaty that can be beneficial in improving ties with the neighbouring countries.
7. It has been observed that the negative economic impact of influx of refugees can be mitigated by the government if it proactively responds to the presence of refugees, i.e., by providing more services to that region or by focussing on improving the overall economic development of the region. The reluctance of the government to formulate a law for refugees leaves only one avenue open, which is to formulate a constructive and uniform policy towards refugees. By addressing the refugee problems and providing more resources to refugee-stuck regions of the country, it can maintain the economic stability of the country while simultaneously enabling the protection of refugee rights, thereby allowing them to seek employment. The present policy followed by the government is largely administrative in nature. However, a definite policy towards refugees will facilitate the formation of determinate rights of refugees in the due course.
8. In fact, the agency in relation with other stakeholders like local NGOs, public/private organizations such as schools, training centres, health centres, etc. could focus on elaborating long-term solutions for refugees, such as: resettlement for the ones with specific vulnerabilities, access to welfare schemes, as well as socio-economic integration.

V. Case Study: Judicial response to protection and furtherance of rights of the Chakmas and Hajongs tribal refugees in India

The judiciary has played a very important role in protecting the rights and ensuring the welfare of the refugees. In absence of a specific law on refugees, the courts' orders have filled legislative gaps and in many cases have provided humanitarian protection to the refugees. The courts have to turn towards the Constitution of India and the provisions of international law to protect the rights of the refugees as the strict application of the Foreigners Act, 1946 would put the refugees in a vulnerable position.

On August 16, 1947, Lord Louis Mountbatten announced the Boundary Commission Award. The Chittagong Hill Tracts, a deeply forested, mountainous area bordering Tripura, Mizoram and Myanmar, with a majority Buddhist population (about 97 per cent), was awarded to Pakistan, with the logic that the area was inaccessible to India and would provide a rural hinterland to Chittagong. In 1962, the Pakistani government imposed further misery on the Chakmas by building the Kaptai dam. Approximately 40,000 Chakma tribals, who had lost their homes and farmland due to flooding, immigrated to India as refugees. By the 1980s, anti-immigrant stirs in nearby Assam, along with local fears about demographic change, led to defamatory notices appearing.

By all accounts, resentment of the locals against the apparently prosperous migrants was first articulated in the Changlang district by The All-Arunachal Pradesh Students' Union (AAPSU) when its Changlang district unit enforced an 'economic blockade' upon the Chakmas in 1995, calling upon the natives not to buy anything from the refugees. In 1980, the state government banned the employment of Chakmas and Hajongs. It started dismantling the basic social and economic infrastructure in the Chakma and Hajong settlements. In October 1991, it discontinued the issuance of ration cards to the Chakmas and Hajongs, most of who lived in extreme poverty and penury. In September 1994, it began closing and burning down schools in these areas, effectively denying them their right to education. Schools built by the Chakmas using local community resources were closed down or destroyed. Health facilities in the Chakma and Hajong areas were all but non-existent.

On October 15, 1994 the Committee for Citizenship Rights of the Chakmas (CCRCAP) filed a representation with the NHRC complaining of the persecution of the Chakmas. The petition contained a press report carried in The Telegraph dated August 26, 1994 stating that the AAPSU had issued 'quit notice' to all alleged foreigners, including the Chakmas, to leave the state by September 30, 1995. The AAPSU had threatened to use force if its demand was not acceded to. The matter was treated as a formal complaint by the NHRC. On October 12, 1995, and again on October 28, 1995, the CCRCAP sent urgent petitions to the NHRC alleging immediate threats to the lives of the Chakmas. On November 22, 1994 the Ministry of Home Affairs, Government of India, sent a note to the NHRC reaffirming its intention of granting citizenship to the Chakmas.

The issue was referred to the Supreme Court and the Apex Court maintained: "*We are unable to accept the contention of the first respondent (the State of Arunachal Pradesh), that no threat exists to the life and liberty of the Chakmas guaranteed by Article 21 of the Constitution, and that it has taken adequate steps to ensure the protection of the Chakmas … The AAPSU has been giving out threats to forcibly drive them out to the neighbouring State which in turn is unwilling to accept them. The residents of the neighbouring State have also*

threatened to kill them if they try to enter their State. They are thus sandwiched between two forces, each pushing in opposite direction which can hurt them. Faced with the prospect of annihilation the NHRC was moved which finding it impossible to extend protection to them, moved this Court for certain reliefs".

On the question of rights, the Court clarified: "*We are a country governed by the Rule of Law. Our Constitution confers certain rights to every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to the procedure established by law. Thus the State is bound to protect the life and liberty of every human being, he be a citizen or otherwise, and it cannot permit anybody or group of persons, e.g., the AAPSU, to threaten the Chakmas to leave the State, failing which they would be forced to do so."*[23]

The post-verdict scenario is marked by abject discrimination and haplessness of the Chakmas. The media, interestingly, plays a paradoxical role insofar as the Chakma issue is concerned. While the national media takes a stoutly rights-sensitive stand and often pleads for accepting them as Indian citizens, the local media appears to be completely polarized along ethnic lines. On the one hand, newspapers such as The Arunachal Times and others tend to paint an alarmist picture and focus on the threat that the presence of the Chakmas along with such other communities as the Hajongs etc. poses to the demographic balance, land, ecology, culture and language of the indigenous people of the state.

In *State of Arunachal Pradesh V Khudiram Chakma*[24], it was stated that Chakmas are foreigners in accordance with the Citizenship Act, 1955 and therefore, not entitled to all fundamental rights enshrined in Part III of the Constitution. The right to enjoy asylum has to be interpreted in the light of the instrument as a whole. It implies that although an asylum seeker has no right to be granted admission to a foreign state, equally, a state which granted him asylum must not later return him to country. However, the Supreme Court in *Louis De Raedt V Union of India*[25] held that Article 21 of Constitution protects life and personal liberty of all persons. So, aliens on Indian territory shall not be deprived of those rights except according to procedure established by law.

To compound the woes of the refugees, following the Law Commission's 175th Report of 2000, the law was made stricter to treat the 'illegal entrants' harshly, overlooking the cruel circumstances that may occasion their migration. The series of judgments by the Supreme Court of India and various high courts emphasizes the need of a humane due process of law for the refugees.

[23] National Human Rights Commission v State of Arunachal Pradesh (1996 SCC (1) 742).
[24] State of Arunachal Pradesh v Khudiram Chakma (1994 1 SCC 615).
[25] Louis De Raedt V Union of India (1991 AIR 1886).

The long journey continued and it was only in September 2015 when the Supreme Court directed the Centre and State government to complete the process of citizenship did the original 7,000 surviving Chakmas and Hajongs gain access to Indian citizenship.

A Way Ahead:

India still remains a non-signatory to the 1951 United Nations Refugee Convention and the 1967 Protocol, which help define the legal obligation of states to protect refugees. Yet the legal situation of refugees remains anomalous to international standards. Any refugee, whose grant of asylum has been approved, should be given a formal recognition of his/her asylum status along with an identity document and a travel document. They should be able to apply for residence permits, and be able to choose their place of residence across India. Their documents must also enable them to seek employment in the private sector. Primary education, a powerful enabler, should be offered on no-charge basis in government schools, while primary healthcare services available to Indian citizens should be offered as well.

Simply announcing policies alone will not do anything as social sensitisation remains the key. Institutions, private and public, should be encouraged to recognise UNHCR-issued refugee cards, in addition to foreign degrees or diplomas. Local municipal corporations should be asked to sensitise neighbourhood associations to accept refugees who can pay, along with conducting integration workshops for youth and women empowerment initiatives.

Our data on refugees remain significantly deficient, preventing analysis on refugee flow and their parlous existence. Hence, we fail on various counts associated with resettlement and rehabilitation, with many refugees remaining unregistered. Such paucity of data also leads to misrepresentation and exaggeration in national and local media. Outreach should be conducted through government welfare programmes and biometric initiatives like Aadhaar, in addition to a simpler registration process.

We need a system that enables the management of refugees with greater transparency and accountability, replacing one that offers arbitrary decision-making to a vulnerable and victimised population. While the security interests of India must remain paramount, taking care of refugees in India is a moral duty of the state.

VI. Conclusion

As per the 'World Refugee Survey 2009- India' undertaken by the United States Committee for Refugees and Immigrants (hereinafter, USCRI), India hosted around 4,11,000 refugees.[26] Even with such a huge refugee population, the country has no specific laws or cohesive set of policies for the refugees. Absence of specified legal framework for the safety and welfare of refugees leads to varying treatment of refugees at the hands of authorities resulting in violation of their civil and political rights. Some groups are granted a full range of benefits including legal residence, and the ability to be legally employed, whilst others are criminalized and denied access to basic resources.[27]

In absence of a defined statutory framework for refugees, India has opted to deal with the refugee problems on political equations rather than humanitarian and legal obligations. On one hand, its track record in dealing with the Tibetan, the Sri Lankan and the Chakma crises has been exemplary while on the other, the government has not accorded equal protection and welfare to other groups of refugees as is evident from the cited report.[28] It is imperative that a uniform legislation is enacted which ensures the consideration of refugee problem on humanitarian grounds rather than on political equations.

India is a country having a long historical tradition of welcoming refugees from all over the world.[29] And yet, the law applicable and practice provides distorted and incomplete protection to refugees. Justice Bhagwati has correctly questioned the current legal scenario in these terms -

"Would the setting up of an appropriate legal structure or framework not help to provide a measure of certainty in the States dealing with the problem of refugees, and provide greater protection for the refugees?"[30]

[26] United States Committee for Refugees and Immigrants, *World Refugee Survey* 2009, India (17th June 2009).
[27] Human Rights Law Network, *Report of Refugee Population in India* (November, 2007).
[28] "Some Refugees are More Equal" *The Telegraph*, Kolkata, December 26, 2012.
[29] Markandey Katju, "India's Perception of Refugee Law", ISILYBIHRL *14 ISIL Yearbook of International Humanitarian and Refugee Law* (2001).
[30] SAARCLAW and UNHCR, *Refugees in the SAARC Region: Building a Legal Framework*, p.23, Seminar Report, New Delhi,1997.

THE CONSTITUTION AND THE WORKING OF THE EXECUTIVE SINCE INDEPENDENCE

Yashdeep Chahal[*]

Our Constitution provides for a strong connect between the Legislature, the Executive and the Judiciary. It is of importance, however, to appreciate the fine differences between these three elements. An attempt has been made to closely examine the working of the Executive under the Constitution. An examination of its working during the 70 years of Independence according to the Constitution is the basic essence of this paper. The paper also covers how these three components come close to each other at various stages and how our Constitution deals with a conflict between these elements.

The paper goes on to find that the Executive plays a vital role in the correct functioning of both the Legislature as well as the Judiciary. It has also been found that the Executive runs into a practical confrontation with the Judiciary in certain cases and examples for the same from the working of our Constitution since Independence have been cited.

It also covers an analysis on how the powers of the President and the Council of Ministers, on account of both being the Executive, interact with each other, and the Constitutional provisions for these situations. The paper also discusses the Executive in the wake of its power to implement or execute the laws which are framed in our country. Considering implementation as a great challenge in front of these three components of the Constitution, it also mentions how an effective cooperation between these elements is the way forward.

Constitution and the Working of the Executive since Independence

President of India

In the constitutional scheme and structure of India, the President is a must in the Union Executive. As per the constitution of India, there can be no exception to this rule. In the furtherance of this situation, the vacancy must be filled as soon as possible and in any case within a period of six months.[1] The office of the President came into existence immediately after the Constitution was adopted on 26th November 1949.[2]

- **Powers vested with the President**

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[1] The Constitution of India, art. 62 (2)
[2] The Constitution of India ,art. 394

The Executive Power of the Union is vested in the President which he may exercise either directly or through officers subordinate to him, in accordance with the Constitution of India. However, the expression 'executive power' is nowhere defined in The Constitution of India. Article 73 of The Constitution of India[3] merely defines the matters with respect to which the executive authority of the Union extends. Executive authority is primarily the authority to carry out the executive functions of the government.

However, our main point of contention is: What does the 'executive function' of the government mean? It is logically not possible to frame an exhaustive definition of this phrase. In common parlance, it relates to the residual governmental functions after the legislative and judicial functions are taken away. In a broad sense, executive functions of the government include both determination as well as the execution of policy. Evidently, initiation of legislation, maintenance of order, promotion of social and economic welfare, direction of foreign policy and the general administration of the state are all attributed to be in the ambit of executive.[4]

Citing the work of *Wade and Bradley: Constitution and Administrative Law*[5], which talks about the executive as follows: *"Broadly speaking the executive function comprises the whole corpus of authority to govern, other than that which is involved in the legislative functions of Parliament and the judicial functions of the courts"*.[6]

As per Article 53[7] of the Constitution, the executive power vested in the President is to be exercised in accordance with the authority providing it, i.e., the Constitution.

Clause (2) of Article 53 vests the supreme command of the Defence forces in the President.[8] However, two crucial limitations in clause (2) shall be carefully noted. Firstly, this function of the President is exercisable "without prejudice to the generality of the foregoing provision".[9] It means that the military power of the President is subject to the general executive power of the President vested in him by clause (1) and which is exercisable in accordance with the Constitution. Thus, military power is subordinate to civil power. Secondly, the exercise of the Supreme Command can be regulated by law. It is the clause (1) that limits the powers of the executive and makes it exercisable strictly as per the constitution, whereas clause (2) subjects it to the laws made by

[3] The Constitution of India, art. 73
[4] Ram Jawaya Kapur v. State of Punjab, AIR 1955 SC 549
[5] Wade and Bradley, *Constitution and Administrative Law*, (London ; New York Longman, 11th Edn., 1993)
[6] Mahendra P. Singh & V.N Shukla, *Constitution of India* (Eastern Book Company, New Delhi, 2015)
[7] The Constitution of India, art. 53
[8] The Constitution of India, art. 53(2)
[9] The Constitution of India, art. 53(1)

Parliament. Therefore, the power of war vested in Parliament enables it to give directions to the President as to the exercise of the power of command of the defence forces.

Clause (3) makes a unique distinction between the vesting of powers to the President and the powers of the government.[10] It makes clear that the executive power of the Union shall be vested in the President, it shall not be inferred that the functions conferred by any existing law on the government of any State or other authorities have to be transferred to the President. On similar lines, sub-clause (b) of clause (3) leads us to the conclusion that though the executive power is vested in the President, the Parliament will not be prevented from conferring functions on authorities other than the President.[11] But the beauty of our Constitution can be further inferred from the fact that the powers which are expressly conferred on the President by the Constitution cannot be transferred by the Parliament to any other authority.

- **Constitutional Position of the President**

The President is vested with vast legal powers. Still, he is meant to stand in accordance with the Union administration, substantially in the same position as does the King under the English Constitution. He is the nominal or constitutional head of the government. His position, however, is not like that of the President of the United States of America - the real executive head who exercises the powers vested in him under the Constitution on his own initiative and responsibility.

- **Matters related to the Election of a President or Vice-President**

Under the ambit of this Article 71 of the Constitution of India, the Supreme Court has been given the exclusive authority to decide all doubts and disputes connected with the election of the President or the Vice President. As per the provisions of the Constitution, Parliament may by law regulate any matter concerned with the election of the President or the Vice-President. By the Constitution (Thirty-ninth Amendment) Act, 1975, a new clause (2) was inserted which authorized the Parliament to provide for by law an authority to decide the doubts and disputes about the election of the President or the Vice President.[12] The then existing clause (3) was replaced by a new clause which provided immunity to the law of Parliament referred to the decision of the authority envisaged under such law from challenge in any court of law. A very interesting case called *Charan Lal Sahu v. Neelam Sanjeeva Reddy*[13] came to the fore after this amendment, under

[10] The Constitution of India, art. 53(3)
[11] The Constitution of India, art. 53 (3)(b)
[12] Constitution 39th Amendment Act, 1975 (2)
[13] AIR 1978 SC 499, 1978 SCR (3) 1

Section 14 of the Presidential and Vice Presidential Elections Act, 1952.[14] In this case, the petitioner challenged the election of Shri Neelam Sanjeeva Reddy as President of India at the presidential election held on July 19, 1977. A question was raised whether the petitioner had *locus standi* to maintain the petition in view of Sections 5-B and 5-C of the Act and whether he could challenge the validity of these sections. It was held by the Supreme Court that the petitioner was not duly nominated nor was one who could claim to be so nominated and that his nomination paper was rightly rejected by the returning officer as required under the Act. It was specifically pointed out by Beg, C.J. that, unlike in *Indira Nehru Gandhiv. Raj Narain*[15] where the SC struck down Article 329-A clause (4) of the Constitution on the ground that it violated the basic structure of the Constitution, clause (3) of Article 71 did not affect the basic structure.[16] In the present case, it was held by the court that the impugned amendment only refers to a law by which parliament may regulate matters connected with the Presidential election including those relating to election disputes arising out of such an election. The jurisdiction of the Supreme Court to decide any matter which may be pending before it can in no way be taken away.

Clause (4) of Article 71 also provides that the election of a person as President or Vice President shall not be called in question on the ground of the existence of any vacancy for whatever reason among the members of the electoral college electing him.[17] This clause was introduced by the Constitution (Eleventh Amendment) Act, 1961 to foreclose any challenge of the kind made in the case of *N.B Khare v. Election Commission of India*[18], that the Presidential election should be stayed till all vacancies in the Parliament and the State Legislatures are filled. Though the challenge was rejected by the Supreme Court, the clause put the matter beyond any doubt.[19]

- **Procedure for impeachment of the President**

Under Article 56 of the Constitution, the President can be removed from his office for violation of the Constitution by impeachment.[20] Article 61 describes the procedure for impeachment.[21] Important provisions of this article include-

i. The motion to prefer a charge against the President for violating the Constitution may be initiated in either House of Parliament,

[14] Presidential and Vice Presidential Elections Act, 1952, S. 14
[15] 1975 AIR 865, 1975 SCR (3) 333
[16] The Constitution of India, art. 71
[17] The Constitution of India, art. 71(4)
[18] AIR 1958 SC 139, 1958 SCR 648
[19] Mahendra P. Singh & V.N Shukla, *Constitution of India* (Eastern Book Company, New Delhi, 2015)
[20] The Constitution of India, art. 56
[21] The Constitution of India, art. 61

ii. The motion must have the support of not less than one-fourth of the total number of members of the House,

iii. Fourteen days' notice of the intention to move the motion should have been given,

iv. The motion must be passed by a majority of not less than 2/3rd of the total membership of the House.

Vice President

- **Vice President to be the Ex-Officio Chairman of the Council of States**

According to Article 64, the Vice President shall be the ex-officio Chairman of the Council of States and shall not hold any other office of profit. The office of the Vice president is created by Article 63.[22] Whenever there occurs any vacancy in the office of the President by reason of his death, resignation, removal or otherwise, the Vice President shall act as President until a new President is elected.[23]

Judicial functions of the Executive

- **Power of the President to grant pardons**

Apart from Article 53 of the Constitution, which vests in the President all executive authority, including the supreme command of the defence forces, there are several other provisions in the Constitution which mention specific functions of the President. The Constitution vests in the President the power to grant pardon and remit punishments.

This power of the President has been expressly stated in Article 72 of the Constitution.[24] A pardon is considered as an act of grace. It cannot be demanded as a matter of right. Interestingly, a pardon not only removes the punishment but, in contemplation of law, places the offender in the same position as if he had never committed the offence. In the words of Field J. in *Ex Parte Garland Case,*[25] a pardon has been set out in the following terms: *"A pardon reaches both the punishment prescribed for the offence and the guilt of the offender, and when the pardon is full, it releases the punishment and blots out the existence of the guilt, so that in the eyes of law, the offender is as innocent as if he had never committed the offence".* The pardoning power of the president may be exercised at any time after the commission of an offence, either before legal proceedings are taken or during their pendency or either before or after conviction.[26]

[22] The Constitution of India, art. 63
[23] The Constitution of India, art. 65
[24] The Constitution of India, art. 72
[25] 4 Wall. (71 U.S.) 333, 381 (1867)
[26] Channugadu, Re, AIR 1954 Mad 911, 917

The power to grant pardons is purely an executive function. In *Balmukund v. King Emperor*, the Judicial Committee said: *"The tendering of advice to his Majesty as to the exercise of his prerogative of pardon is a matter for the Executive Government, and is outside their Lordships' province."* [27]

Here, it is interesting to note that the granting of pardon after conviction seems like a judicial prerogative, but in reality, it is an executive act and not a judicial one. However, it follows from the provisions that the exercise of this power would not in any way alter the judgement of the court *qua judgement,* and the exercise of such right would not in any way interfere with the course of justice and the courts are free to adjudicate upon the guilt or otherwise of the person concerned. [28]

This is a beautiful demonstration of how the Executive and the Judiciary cross paths without infringing upon the other's powers. In order to explain the reason behind this power of the Executive to grant pardons and reprieves etc., we can refer to Taft, C.J. in an American case[29] as follows: *"Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. Hence, it is check entrusted to the Executive for 'special cases".*[30]

- **Limits on the Powers of the President to grant Pardons and Reprieves**

The President can grant pardons and reprieves only in the following cases-

i. Offences against Union laws,
ii. In all cases where the punishment or sentence is by a Court Martial and,
iii. In all cases of sentence of death. The scope of the power of the President under article 72, particularly to commute a death sentence into a lesser sentence has been left open by the court after observing that whether a "case is appropriate for the exercise of power conferred by Article 72 depends upon the facts and circumstances of each particular case."[31] The court also observed that this power can only be exercised to

[27] AIR 1915 PC 29
[28] Channugadu, Re, AIR 1954 Mad 911, 917
[29] Grossman, Ex p., 267 US 87:69 L Ed 527
[30] Mahendra P. Singh & V.N Shukla, *Constitution of India* (Eastern Book Company, New Delhi, 2015)
[31] The Constitution of India, art. 72

reduce and not to enhance the sentence. However, the constraints subject to which this power has to be exercised, have not yet been judicially laid down.[32]

Declining to lay down any specific guidelines for the exercise of his power in *Kehar Singh v. Union of India,* [33] the Court unanimously held: *"It may not be possible to lay down any precise, clearly defined and sufficiently channelized guidelines, for we must remember that Article 72 is one of widest amplitude and can contemplate myriad kinds and categories of cases with facts and situations varying from case to case."*

- **Judicial Review of the Powers of the President under Article 72**

In *Maru Ram v. Union of India*[34], the Supreme Court expressly stated that the power of pardon, commutation and release under Article 72 (also under Article 161)[35] cannot run riot and must keep sensibly to a steady course and that public power "*shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power."* The same position was reiterated by the Court in the case of *Bikas Chatterjee v. Union of India*[36], which said that, "it appears to us clear that the question as to the area of the President's power under article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review."

In furtherance of the judgements laid down in these two cases, the Supreme Court invalidated the remission of sentence by the Governor of U.P in *Swaran Singh v. State of U.P*[37] because some material facts were not brought to the knowledge of the Governor under Article 161.[38]

Powers of the Executive in Adjudication of Administrative Matters

The Executive has been provided with some added powers of jurisdiction in matters concerning administration and such power has been conferred by the Administrative Tribunals Act, 1985.[39] This act covers all the matters falling under article 323-A clause (1) and empowers the executive to adjudicate upon such matters.[40] From the date of establishment of tribunals, all the courts except

[32] Kuljit Singh v. Lt. Governor of Delhi, (1982) 1 SCC 417: AIR 1982 SC 774
[33] (1988) 3 SCC 609: AIR 1988 SC 1883
[34] (1981) 1 SCC 107: AIR 1980 SC 2147
[35] The Constitution of India, art. 161
[36] Bikas Chatterjee v. Union of India, (2004) 7 SCC 634
[37] (1998) 4 SCC 75, 79: AIR 1998 SC 2026
[38] The Constitution of India, art. 161
[39] The Administrative Tribunals Act, 1985
[40] The Constitution of India, art. 323-A(1)

the Supreme Court under Article 136 and Article 2 of the Constitution of India, lost their powers of jurisdiction upon matters falling under the ambit of these tribunals.[41]

Central Administrative Tribunal (CAT), Election Commission (EC), Income Tax Appellate Tribunal, etc., are some examples of these tribunals. In the case of *S.P Sampath Kumar v. Union of India*[42], it was held by the Supreme Court that Administrative Tribunals do not violate the basic structure of the Constitution and can be held to be at par with the existing High Court apparatus of the country.[43]

Extent of Executive Power of the Union

Article 73 of the Constitution talks about executive powers and matters that are to be controlled and administered by the Central Executive. Subject to the provisions of the Constitution, executive power of the Union extends to matters with respect to which Parliament can make laws. Thus, the executive power is executed in accordance with the legislative powers. The executive power of the Centre and the Parliament can be exercised for making laws on matters which are mentioned in List 1 (Union List) and List 2 (the Concurrent List) in the Seventh Schedule of the Constitution. On similar lines, the executive power of the State, as is enshrined in Article 226 of the Constitution[44], extends to matters on which the State Legislature can make laws. Such matters are mentioned in List 2 (State List) and List 3 (Concurrent List).

The executive power of the Centre is not limited exclusively in respect of the matters on which Parliament can make laws. Under sub-clause (b) it extends also to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. An administrative instruction or order is not a statutory rule. The administrative instructions can be changed by the government by reason of Article 73 (1)(a) itself.[45]

Council of Ministers

Articles 53, 74 and 75 are important provisions in context of the executive powers under the Constitution. Where Article 53 vests the executive power of the Union in the President[46], it is the

[41] The Constitution of India, art. 136
[42] AIR 1987 SC 386
[43] *S.P Sampath Kumar v. Union of India* (AIR 1987 SC 386
[44] The Constitution of India, art. 226
[45] Union of India v. Majji Jangamayya, (1977) 1 SCC 606
[46] The Constitution of India, art. 53

Article 74 of the Constitution which says that there shall be a Council of Ministers to aid and advise the President in the exercise of his functions and he has to act in accordance with such advice.[47] Article 75(3) further lays down that the Council of Ministers shall be collectively responsible to the House of the People.[48] Under the Parliamentary form of government that exists in India, the President is the constitutional or formal head of the Union and he exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers.

In *U.N.R. Rao v. Indira Gandhi*,[49] it was emphasized that our Constitution is modelled on the British Parliamentary system. Under this system, the Council of Ministers enjoying a majority in the legislature concentrates in itself the virtual control of both executive and legislative functions. Article 74(1) which provides for a Council of Ministers to aid and advise the President in the exercise of his functions is mandatory under the Constitution. A harmonious reading of this article brings us to the conclusion that the functions of ministers or Council of Ministers is not of merely giving advice; they can take decisions which are expected to be binding. Article 74(1) and Article 75(3) can be safely interpreted in the sense that for the policy decisions of the government, the Council of Ministers is answerable to the Parliament.[50] There is no provision in the Constitution which makes the President responsible for the acts and policies of the government in the making of which they only give advice, while the final decisions are taken by the President.

Judicial Independence and the Executive

The confrontation between the Judicial Independence and Parliamentary Supremacy has been a crucial point of discussion under the Constitution. The period of Indira Gandhi witnessed a unique flux between these two components of the Constitution. In order to understand this aspect, let us refer to the much coveted judgement of Supreme Court in *Golak Nath Case*[51] (27th February, 1967). The Supreme Court in this case held that the Parliament's power to amend the Constitution could not be used to abridge the Fundamental Rights, in part because an amendment was deemed to be a 'law' under Article 13 which prohibited the Parliament from making any law abridging the

[47] The Constitution of India, art. 74
[48] The Constitution of India, art. 75(3)
[49] (1971 2 SCC 63: AIR 1971 SC 1002: 1971
[50] The Constitution of India, art. 74(1) read with art. 75(3)
[51] AIR 1967 SC 1643, 1967 SCR (2) 762

Rights.[52] The judges further held that all parts of the Constitution are subject to amendments and an amendment is not a 'law' under Article 13.

The Court's decision in this case reversed the precedents and gave Mrs. Gandhi a cause and an enemy in her quest for renewed power. Within several days of the decision, Congress had to face political blows in several elections and the *Golak Nath case*[53] started a great war. The war was one of political skirmishes which went on to become one of Executive 'versus' Judicial supremacy.

- **The Pre-Emergency theatrics of the Executive**

The pre-Emergency period was one of radical amendments in the laws of the country, both in the Constitution and otherwise. During the 1970-71 Period, the Congress Government led by Indira Gandhi took a radical stand and proposed various amendments to the extent that electoral gains were based upon those promised amendments. It was a time when the inheritance of the *Golak Nath case*[54] was on the verge of being neutralized by the Executive. In fact, the controversial Article 31 related to property was to be amended in order to keep the Courts away from the property acquisitions and compensation issues.[55] A unique contention regarding the Directive Principles of State Policy enshrined in the Constitution was also made out. It was proposed that these directives should be given precedence over the Rights, even though it was held without doubt that the Constituent Assembly had made these principles non-justiciable.[56]

- **The Outcome of Kesavananda Bharati Case**

The *Kesavananda Bharati case*[57] embodied two important issues which are very critical in parliamentary democratic governance: substantive and institutional. Substantially, the view that the Constitution had given Parliament unlimited constituent power, that is, unlimited power to amend the constitution - confronted the view that it is the Judiciary with the Supreme Court as its head is the ultimate interpreter of the Constitution, and hence its protector.

Institutionally speaking, the confrontation took place, as it happened before too, between the Executive backed by the Parliament and the Court. This period holds important value when we talk about this popular confrontation because it was Mrs. Gandhi who led the government at that stage, and was someone who had a history of confronting with the Judiciary. In *Kesavananda*, the

[52] The Constitution of India, art. 13
[53] Supra at 51
[54] Supra at 51
[55] The Constitution of India, art. 31 (amended)
[56] Granville Austin, *Working of a Democratic Constitution* (Oxford University Press, 2003)
[57] Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr. AIR 1973 SC 1461

Court emerged victorious in both confrontations, thus asserting its institutional role *vis-à-vis* the Parliament in constitutional matters and strengthening its power of judicial review through the doctrine of basic structure. Therefore, the Court rescued the democratic strand of the seamless nexus from those who may have sacrificed it to genuine or pretentious social revolutionary intentions.

- **The Unresolved Issue of Judicial Appointments and the Role of the Executive**

This issue came to the fore last year when the Apex Court struck down the 99th Constitutional Amendment Act as unconstitutional. The Act called for the formation of a National Judicial Appointments Commission (NJAC)[58] and abolishment of the existing Collegium System. It was a means to create a joint body of the Executive and the Judiciary for the appointment of judges. The issue at the core here is the concern of 'interference of the Executive in the independence of the Judiciary.'

In *Supreme Court Advocates-on-Record Assn. v. Union of India*[59], it was held by the court that in the matter of appointment of judges of the Supreme Court[60] and the High Courts[61] under Articles 124(2) and 217(1) respectively, the advice of the Council of Ministers must bind the President only if it is in accordance with the requirement of mandatory consultation with the Chief Justice of India as interpreted in that case. Whether 'independence of judiciary' is a part of the basic structure of the Constitution - is something that has called for a debate since decades in our country and is still under contention.

The issue has recently been invoked by Chief Justice Tirath Singh Thakur on the occasion of the Constitution Day. However, it is important to understand that within the ambit of the Constitution and the Parliamentary form of democracy that India has, it is inherent in the three organs of the government to interfere in each other's functioning. The true spirit of the doctrine of 'Separation of Powers' is something that is not only difficult to achieve but administratively impractical as well. Certain powers regarding the Judiciary, including judicial appointments and transfers, vested with the Executive are bound to give it an upper hand in certain matters and a fair amount of interference is inherent. In a similar manner, the power vested with the Judiciary to 'review' the laws made by the legislature is something that has been conveniently described by some as an

[58] The 99th Constitutional Amendment Act, 2014
[59] (1993) 4 SCC 441: AIR 1994 SC 268
[60] The Constitution of India, art. 124 (2)
[61] The Constitution of India, art. 217 (1)

interference in the matters of legislature but the importance of such power to the Judiciary is important to maintain the principle of 'checks and balances' in a democracy.

Executive Powers and their Challenge to the Democracy

- **The Emergency**

After the ruling of Justice Krishna Iyer in the *Indira Gandhi case*[62], it was assured that she could continue being in the office. With this, the Opposition led by Jayaprakash Narayan and Morarji Desai got impatient and tried to force her from it. Certain Chief Ministers were summoned to Delhi and drastic actions were proposed, as indicated by the testimonies before the Shah Commission. The Prime Minister chose to impose 'internal emergency' under Article 352 of the Constitution of India and thus began the darkest period of the supremacy of the Executive.[63]

Interestingly, Indira Gandhi thought of taking a bye-pass route and declared emergency without consulting the cabinet. It was backed by a category in the Government of India (Transaction of Business) Rules, 1961- Rule 12- allowed the Prime Minister to depart from the rules and thereby take actions to be ratified by the Cabinet subsequently.[64]

- **Constitutional Amendments as a tool to impose the Executive's Domination**

The first step came on 22nd July, 1975 in the name of the 38th Amendment which barred judicial review of proclamations of emergency whether made to meet external, internal or financial threats.[65] The second one was the 39th Amendment which was basically brought up to protect Mrs. Gandhi from any action that the Supreme Court might have taken in her case. Citing this amendment, the Lok Sabha passed it within 2 hours of 'debate', which is an interesting indication of how the Executive overpowers the Legislature because of the lack of competence of the latter as compared to the former.[66]

One of the most interesting amendments was the addition of Article 329-A which removed from the Supreme Court the authority to adjudicate on election petitions.[67] It further held that the election of the Prime Minister or the Speaker of Lok Sabha can only be adjudged by a separate 'body' established by the Parliament.

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[62] Indira Nehru Gandhi v. Raj Narain 1975 AIR 865, 1975 SCR (3) 333
[63] Granville Austin, *Working of a Democratic Constitution* (Oxford University Press, 2003)
[64] Government of India (Transaction of Business) Rules, 1961
[65] The 38th Constitutional Amendment Act, 1975
[66] The 39th Constitutional Amendment Act, 1975
[67] The Constitution of India, art. 329-A

Execution of Laws as an Integral Aspect and Challenge for the Executive

Out of all the functions that the Executive performs under the Constitution, the execution of laws and orders is by far the most challenging one. In India, most of the policies, laws and orders face a direct assault on their credibility because of their lack of performance and implementation at the ground level. As a conclusion to this paper, it should be carefully thought upon that the Executive exercises its discretionary powers enshrined in the Constitution to ensure that the laws framed by the Legislature and orders passed by the Judiciary are not left to be in vain.

CHANGING PARADIGMS IN DRUG CONTROL – AN OPPORTUNITY FOR DRUG POLICY REFORM IN INDIA

Narayani Anand[*]

If the doors of perception were cleansed, everything would appear to man as it is – Infinite.

\- *William Blake*

I. INTRODUCTION

Stimulation of the senses is a driving force behind human endeavour. Stimulus – whether visual, auditory, tactile or gustative – propels human action. The attainment of altered states of consciousness (ASC) is one such stimulation that human beings have sought since time immemorial. Our desire to alter our consciousness may be as fundamental as our desires for food, companionship and sex. [1]

The induction of ASC through stimulus provided by psychotropic substances goes back to ancient times. For people in the past, psychotropic plant substances were as much a mundane everyday item as they are for many people today.[2] Drugs have been used for medicinal, ceremonial, religious, spiritual and recreational purposes in cultures across the globe. The use of entheogens – substances, such as plants or drugs, taken to bring on a spiritual experience – is well documented among the shamans of the Americas. Closer home in India, the consumption of *bhang* during festivities and the smoking of *ganja* by ascetics are some forms of popularly known drug use.

However, the Indian society presents a unique case where in-spite of a long-standing customary sanction for drug use, the statute regulating it aims at the contradictory objectives of rehabilitation and deterrence, thereby rendering itself strikingly ineffective.[3]

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[1] Ethan Nadelmann, Ph.D**.,** Testimony before the U.S. Senate Committee on Homeland Security and Governmental Affairs hearing in reference to "America's Insatiable Demand for Drugs: Examining Alternative Approaches", *available at:* https://www.hsgac.senate.gov/hearings/americas-insatiable-demand-for-drugs-examining-alternative-approaches (Last Modified June 15, 2016)

[2] R. J. Sullivan1 and E. H. Hagen, "Psychotropic substance-seeking: evolutionary pathology or adaptation?" 97 *Addiction* 389–400 (2002)

[3] Neha Singhal and Sakshi, "India's Anti-Narcotics Law is in Urgent Need of Rehab" *The Wire,* Jan. 26, 2016

The prohibition regime brought about by the Narcotic Drugs and Psychotropic Substances Act (NDPS) in 1985 was the result of India's international obligations under three UN treaties. The prohibitionist sentiment became further entrenched by way of Article 47 of the Constitution which states: "The State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health".[4]

It is in this context that this paper addresses the need to analyse the effectiveness of the NDPS Act in achieving its objectives. While evaluating its successes and failures, the paper highlights alternate approaches to drug control being employed by countries such as Switzerland and the Netherlands. In light of the existing situation in India, the paper attempts to highlight constructive approaches to bring about a positive change in the existing legal framework.

II. HISTORY OF DRUG USE IN INDIA

The consumption of plant-based drugs in India has a long and colourful history. Serving drinks made of opium and poppy husk, locally known as *Doda Post*, has been a long-standing custom during ceremonies like marriages in the Marwar region of western Rajasthan, which mainly comprises border districts like Jodhpur, Barmer and Jaisalmer.[5] Another tradition among the rural families of Barmer is the opium communion, wherein a small ball of dry opium is smashed and mixed with water and offered to guests as a show of generosity. Refusing this precious mixture called *amal*, is seen as a churlish gesture.

According to one estimate, by the year 1000 A.D., opium was cultivated, eaten, and drunk by all classes as a household remedy - used by rulers as an indulgence, and given to soldiers to increase their courage.[6] With the foundation of the Mughal dynasty in 1526, poppy cultivation and opium sales became a state monopoly. The British too commercialised opium production and cultivation of poppy on a large scale through landmark legislations – the Opium Act, 1857 and 1878.

Cannabis has been consumed for spiritual, medicinal and recreational purposes in India since the classical era, with the earliest documented references to cannabis use dating back to 2000

B.C.[7] It has been used along with other ingredients to treat rheumatism, migraine, malaria and cholera; to relieve fluxes; facilitate surgical operations; to relax nerves; restore appetite; for general

[4] Tripti Tandon, "Drug policy in India" *IDPC Briefing Paper* 2 (2015)
[5] Abhishek Gaur, "Rajasthan in a bind over tradition, addiction" *Deccan Herald*, Oct. 12, 2014
[6] Austin G., "A Chronology of Substance Use" ERIC 319 (1978)
[7] *Supra* note 4 at 1.

well-being; and it is also considered beneficial for the functioning of the heart and liver. Additionally, the cannabis plant provides food grain, oil seed and fibre for manufacture of fibrous products in select parts of India.[8]

Different forms of cannabis products such as *bhang, charas* or *ganja* find recreational users and others who use them to alter consciousness. *Bhang* (dried cannabis leaves, seeds and stems) is mentioned in the Hindu sacred text *Atharva -veda* as "Sacred Grass", one of the five sacred plants of India, used medicinally and ritually as an offering to *Shiva*, around 1200-800 B.C. [9] Today, *bhang* is consumed especially during *Holi* – the festival of colours in the Spring, as well as during *Mahashivratri* in late Winter – celebrated annually in praise of *Shiva.*

The consumption of *bhang* on select occasions has traditionally remained open to women and younger generations, thus indicating a strong socio-cultural acceptance of the substance. Owing to these customary associations, there is some amount of religious sanctity that cannabis use has attained in the Indian society.

III. DRUG CONTROL POLICY IN INDIA

Prior to the present drug control legislation, the focus of Indian drug policies was control of the drug trade and the collection of revenues through licensed sales.[10] In fact, the commercially driven drug policy of the colonial government was a subject of strong criticism within the nationalist movement by the 1920s. Thereafter, the Dangerous Drugs Act, 1930 was enacted as a control measure for drugs derived from poppy, hemp (cannabis) and coca plants through regulating the cultivation, possession, manufacture, sale, domestic trade and external transactions through licensing and penalising unlicensed activities.[11] While this law continued to apply, The Drugs and Cosmetics Act, 1940 was enacted to regulate medicinal drugs including opium and cannabis.

Post-independence, "Drugs and poisons" was placed in the concurrent list of subjects, allowing both the Central and state governments to legislate. This division of legislative powers is significant because it determines state governments' ability to 'break' from national drug policies and employ alternatives in areas where they are empowered to frame policy.[12]

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[8] Molly Charles, Dave Bewley-Taylor and Amanda Neidpath, "Drug Policy in India: Compounding Harm?" 10 *BFDPP* 2 (2005)
[9] David T Courtwright, "Forces of Habit: Drugs and the Making of the Modern World" 29 *HRNB* 2001
[10] Hasan A Khwaya, "Social Aspects of the Use of Cannabis in India" CC 235-246 (1975)
[11] The Dangerous Drugs Act, 1930 (Act 2 of 1930)
[12] *Supra* note 4 at 2

A. BACKGROUND TO THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985

The current legislation on drug control in India was enacted due to the country's international obligations under three UN treaties, viz., the 1961 Single Convention on Narcotic Drugs (1961 Convention), the 1971 Convention on Psychotropic Substances (1971 Convention) and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Convention). Under these treaties, India was compelled to eradicate drug use patterns that were culturally ingrained and included opium and cannabis.

The proposed policy of an international prohibition on cannabis had long been objected to by Indian delegations at the UN, but made little headway against the massive, predominantly Western and US-led, anti-cannabis bloc.[13] In the final draft of the 1961 Convention were embedded certain transitional grace-periods allowing countries to phase out traditional drug use. The Convention granted 15 years to abolish quasi-medical use of opium and 25 years for all non-scientific, non-medical use of cannabis. The timetable for cannabis was critiqued as being highly optimistic when matched against three thousand years of use by untold millions.[14]

The religious and cultural connotations of cannabis and opium use, however, lent a level of political sensitivity to the issue within the country. Consequently, insofar as Article 253 of the Constitution of India[15] confers upon the Parliament the "power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention or any decision made at any international conference," the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985 was enacted by the Indian Parliament hastily, without much debate.[16]

The NDPS Act replaced the Opium Acts of 1857 and 1878 as well as the Dangerous Drugs Act, 1930. The Drugs and Cosmetics Act, 1940 continues to apply.[17]

B. THE NDPS ACT – A PROBLEMATIC STATUTE

The preamble to the NDPS Act, 1985 states its purpose as making stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, for

[13] Kettil Bruun, Lynn Pan, *et.al., , The Gentlemen's Club: International Control of Drugs and Alcohol* (The Chicago University Press, Chicago, 1975)
[14] Bewley-Taylor, et al, "Incarceration of drug offenders: costs and impacts" 7 BFDPP (2005)
[15] The Constitution of India, 1950
[16] *Supra* note 12 at 4
[17] The Narcotic Drugs and Psychotropic Substances Act, 1985 (Act 61 of 1985)

forfeiture of property derived from or used in illicit trafficking, as well as implementing the provisions of the international conventions on narcotic drugs and psychotropic substances.

A reading of the bare act when taken in context of the Law Commission's 155th Report[18] highlights its objectives of consolidating existing drug laws, strengthening existing controls over drug abuse and "considerably enhancing penalties particularly for trafficking offences".

a) The NDPS (Amendment) Act, 1989

The changes brought about in the NDPS merely four years after its enactment were said to be influenced by developments in the domestic, regional and international arena. With the increase of terrorism in north Indian states, particularly Punjab, there was growing political opinion that illicit drug trafficking was fuelling the fire by injecting vast sums of money into terrorist activity. At the same time, there were deliberations at the regional level, with the South Asian Association for Regional Cooperation (SAARC) declaring 1989 as the "Year Against Drug Abuse". Moreover, with the signing of the UN Convention on Illicit Traffic in Narcotic Drugs in 1988, the 'tough on drugs' rhetoric became further cemented.

A Cabinet Sub-Committee on combating drug trafficking and abuse recommended a host of measures to heighten the stringency of existing drug laws. As a result, provisions as harsh as 10 years' mandatory minimum sentences, forfeiture of property, bail restrictions, barring of sentence commutation and suspension, and, perhaps the most controversial, mandatory death sentence for certain repeat offenders were introduced.

In *Raju v. State of Kerala* [19], the appellant had served 10 years of rigorous imprisonment and had had a fine of Rs 1 lakh imposed for possession of 100 mg of heroin worth Rs 25 in year 1999. Absence of withdrawal symptoms was seen as evidence that the appellant was not drug dependent and therefore, the heroin was not meant for personal use. The Supreme Court finally held that such a small quantity could not have been meant for sale or distribution and reduced the sentence to that for possession for personal consumption.

b) The NDPS (Amendment) Act, 2001

[18] Law Commission of India, 155th Report on The Narcotic Drugs and Psychotropic Substances Act, 1985 (July, 1997)
[19] AIR 1999 SC 2139

Some space for reform was created due to criticism of the disproportionately harsh structure of sentencing introduced by the preceding amendment. Amendments to the Act were submitted in 1998 and adopted in 2001, paving way for a sentencing mechanism based on quantity under possession, classified into three categories: "small", "commercial" or "intermediate".[20] The central government specified thresholds through a notification in October 2001.[21]

The Statement of Objects and Reasons for the NDPS Amendment Act, 2001 is significant for its differentiation between those engaged in trafficking large quantities and those committing less serious offences, or showing drug dependency. It sought to curtail trafficking-related offences through deterrent sentences and imposing lighter forms of sentences for offences involving personal use.

c) The NDPS (Amendment) Act, 2014

The latest amendment in 2014 inserted various structural, procedural and other provisions into the Act. Some of these can be seen in the light of the changing paradigm in drug control globally.

Most notably, the objective of the law was widened to include "promoting the medical and scientific use of narcotic drugs and psychotropic substances"[22] to provide a balance between control and availability. "Essential narcotic drugs" was created as a new category to be regulated uniformly by the Central government.[23] Medical interventions based on evidence and legally binding standards of treatment were also established by way of including the terms "recognition and approval" of treatment centres and "management" of drug dependence.[24] The harsh and widely criticised provisions for 'mandatory' death penalty for certain repeat offenders was amended to 'discretionary'. It also enhanced the maximum sentence for small quantity offences to one-year imprisonment, from the earlier six months.[25]

In this context, the salient features of this Act need to be examined and thereby evaluated in achieving its stated objectives.

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[20] *Supra* note 17
[21] Notification S.O 1055(E), dated 19th October 2001 published in the Gazette of India, Extra. Pt. II, Sec 3(ii), dated 19 October 2001
[22] The Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2014 (Act 16 of 2014), ss. 4(1), 4(2)(da)
[23] The Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2014 (Act 16 of 2014), ss.9 (1)(va), 9(2)(ha)
[24] The Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2014 (Act 16 of 2014), s. 71(1)
[25] The Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2014 (Act 16 of 2014), ss.15(a), 17(a), 18(a), 20(b)(ii)(A), 21(a)
22(a)23(a)

1. Sentencing based on quantity

A unique provision in the NDPS Act allows for level of fine and sentencing to be determined by the substance and quantity recovered. As a result, it becomes pivotal to determine the quantity of drugs that have been found and consequently, this question leads to a lot of litigation. The Act itself is lacking in guidelines to ascertain the quantity of drugs, thus leading to some courts simply relying on the statutory definition of the word 'drugs,' which in turn leads to inconsistency in interpretations and decisions, even for the same substance.

2. Death penalty

Certain repeat offences such as import and export, transportation, manufacture, possession and production of large quantities can lead to the death sentence.[26] In the *Ghulam Mohammed Malik* case[27], the accused was sentenced to death by NDPS special court in Mumbai. Similarly, in *Omkarnath Kak v. State of Gujarat*[28], the prime accused was sentenced to death in Ahmedabad. Ironically, both these sentences involved the peddling of cannabis (*charas*).

A constitutional challenge followed, which led the Bombay High Court to declare the mandatory provision unconstitutional and read the same as discretionary, that is, in a manner where the sentencing court will hear the offender on punishment and have the power to impose a prison sentence instead of the death penalty.[29] However, the fate of a fourth convict sentenced to death under NDPS Act in Punjab is unknown.[30]

Internationally, drug offences are not considered to be the 'most serious crimes' for which capital punishment may be invoked. The Indian government, however, maintains that a narcotic offence is more heinous than murder because the latter affects only an individual while the former leaves its deleterious impact on society.[31]

3. Treatment for drug dependence

The Act provides for the establishment of a National Fund (for the Control of Drug Abuse) which can receive contributions from private donors, the Central government, as well as through

[26] The Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2014 (Act 16 of 2014), s. 31A
[27] NDPS Special Case No. 60 of 2002
[28] GJH (2012) 3 126
[29] *Indian Harm Reduction Network v Union of India* 2012 Bom CR (Cri) 121
[30] Times News Network), "Drug peddler gets capital punishment" *Times of India,* Jan. 29, 2012
[31] *Supra* note 4 at 6

proceeds obtained through the sale of property forfeited under the NDPS Act. It is established as a source of grants for government departments and NGOs working towards drug control activities, which include treatment. Preventive education and awareness on the 'ills' of drug dependence have been prioritized for funding.[32]

Additionally, the Act provides for 'treatment centres' to be set up by voluntary organisations as well as by the Central and state governments. However, with the government failing to fulfil its statutory responsibility in make rules regarding the establishment and regulation of such centres, numerous unauthorised 'de-addiction centres' have mushroomed to monetise on the desperation of drug addicts and their families. Punishments are meted out to patients instead of counselling and medical care, resulting in severe cases of torture and death *(as discussed in Section V)*

IV. DRUG CONTROL AROUND THE WORLD

Couched with the lofty aim of concern for "the health and welfare of mankind," the guiding principle of the 1961 Convention was to limit the use of drugs exclusively to medical and scientific purposes, because, as the preamble continues, "addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind."[33]

Where many countries have enacted domestic legislation in line with the treaty's obligations, some others have stood out in their unique and counter-intuitive approaches to drug control. It is, therefore, necessary to examine some of these lesser-known experiments in considering alternate drug policies for the Indian context.

A. SWITZERLAND

Stringent drug controls based on policing formed the basis of the Swiss drug policy until the 1980s. The counterculture movement of the 1960s that took over popular imagination of the Western world was associated with an audaciously public use of cannabis and other narcotic drugs. The West-Central European nation of Switzerland was no exception to its influence. Heroin came into Switzerland significantly only in the 1970s, assisted partly by transit points at US military bases in neighbouring Italy.[34]

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[32] Guidelines for funding from narcotic drugs and psychotropic substances (National Fund for Control of Drug Abuse) Rules -2006

[33] The Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol, Preamble

[34] Joanne Csete, "From the Mountaintops: What the World Can Learn from Drug Policy Change in Switzerland" *OSF* 15 (2010)

In response to the growing use of narcotics, the federal law on illegal drugs was revised by Swiss authorities to include increasingly rigorous criminal sentences. The 1975 federal drug law led to a notable increase in the number of arrests and registrations of drug sellers and users. Even as the abstinence-oriented 1975 law placed an increased emphasis on and provided more resources for policing, the rise of drug injection in German-speaking Switzerland became a visibly social phenomenon. Zurich in particular became a hub of a "youth revolution" movement that united proponents of alternative culture, students, and people who used illicit drugs.[35]

HIV prevalence and AIDS related deaths were the most serious scourge haunting Swiss public health authorities during the late 1980s and early 1990s drug scene. In 1986, one of the first years when most Western European countries reported HIV data, Switzerland's estimated reported prevalence of about 500 cases per million population was the highest in Western Europe.[36] The problem spiralled out of control to the extent that it became the prime motivating factor behind the radical revision of Swiss narcotic drug policy undertaken by commune, cantonal and federal drug authorities in the 1990s.

By 1990, there was also considerable interest among drug addiction experts in German-speaking Switzerland in the possibility of closely supervised administration of injected heroin as therapy for the subset of people living with opiate dependency who did not have satisfactory outcomes from other forms of treatment.[37] This form of treatment, referred to as Heroin-Assisted therapy (HAT) went on to be recognized as a political lightning-rod in the history of Swiss drug control. In 1992, the Swiss government passed a law that provided the legal framework for prescription of narcotics, including heroin and methadone, and mandated the federal government to conduct rigorous scientific studies of initiatives in this area.[38]

THE FOUR PILLARS DRUG POLICY

A new drug policy was announced by the Federal Council in 1994 after various consultations with health experts and the cantons. This policy was based on the idea of the "four pillars," namely:

i. prevention of drug use;
ii. therapy for drug dependence;

[35] H.K.H Klingemann, Drug treatment in Switzerland: harm reduction, decentralization and community response. *Addiction* 91: 723–36 (1996).
[36] *Supra* note 35 at 19
[37] *Id.* at 20
[38] *Ibid.*

iii. harm reduction[39], and

iv. law enforcement or policing.

Rhis-Middel and Hämmig [40] describe this change, thus: "The process of making the policy brought about a shift in perspective from public order to public health, and this resulted in allocating of proper resources to the department response for health policy. Here, problematic and dependent drug use is seen primarily as a disorder and/or illness, and it is this view that guides the development of concepts and any discussion of measures."

In spite of widespread opposition from the political Right as well as criticism from stringently abstinence-oriented neighbours such as Sweden, by 1999 the Swiss government proceeded to normalise HAT. The heroin used in HAT was registered for medicinal use in Switzerland in 2001.[41]

RESULTS

A steep reduction in both prevalence and incidence of the use of illicit heroin was observed in Switzerland, after both of them peaked in the early 1990s. The results proved to be paradoxical to fears perpetuated by anti-harm reduction groups that free availability of legally sanctioned heroin would fuel more opiate use. The expansion of these treatment programs was associated in time with the opposite phenomenon of dramatic reductions in the apparent attractiveness of heroin use.[42] The European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) credits the Swiss experience with opening discussion of harm reduction programs in virtually all member states of the European Union.[43]

B. THE NETHERLANDS

The Dutch system for drug control bases its core features on harm reduction. Keeping in mind this key principle, clear priorities are set out by the government based on the risks associated with

[39] Harm reduction is the concept of minimization of the risks and hazards of drug use rather than the suppression of all drugs
[40] *Infra* note 42
[41] A. Uchtenhagen "Heroin-assisted treatment in Switzerland: a case study in policychange" *Addiction* 105: 29–37 (2009).
[42] T. Decorte, Dirk Korf (eds.) *European studies on drugs and drug policy: selected readings from the 14th International Conference of the European Society for Social Drug* Research 21-47 (VUB Press, Brussels, 2004)
[43] European Monitoring Centre for Drugs and Drug Addiction, Annual report on the state of the drugs problem in the European Union (2000)

particular drugs. Public health is the main concern in this model. The key elements as established in the 1976 parliamentary debate are summarized by Grapendaal *et al.* as:[44]

i. the central aim is the prevention or alleviation of social and individual risks caused by drug use;
ii. there must be a rational relation between those risks and policy measures;
iii. a differentiation of policy measures must also take into account the risks of legal recreational and medical drugs;
iv. repressive measures against drug trafficking (other than trafficking of cannabis) is a priority; and
v. the inadequacy of criminal law with respect to other aspects (i.e., apart from trafficking) of the drug problem is recognized.

Another key feature is the "normalisation" policy. Where the deterrence model causes isolation and removal of the user from the social mainstream, the integration and depolarisation of deviant behaviour achieves social control. This paradigm encourages viewing drug problems as normal social problems rather than extraordinary situations requiring commensurate action.

On the supply side of the narcotics market, the Dutch drug policy follows the repressive norm practiced internationally. However, it is on the demand side that the policy adopts a unique approach, recognizing that drug use may often just be a youthful dalliance but emphasizes compassion and treatment for those who develop drug use problems.[45]

According to the official website of the Government of the Netherlands[46] :

> A coffee shop is an establishment where cannabis may be sold but no alcoholic drinks may be sold or consumed. The sale of soft drugs in coffee shops is a criminal offence but the Public Prosecution Service does not prosecute coffee shops for this offence.
>
> Neither does the Public Prosecution Service prosecute members of the public for possession of small quantities of soft drugs. The government allows the sale of soft drugs

[44] M. Grapendaal, Ed Leuw, *et.al., A World of Opportunities: Life-Style and Economic Behaviour of Heroin Addicts in Amsterdam* ((S.U.N.Y. Press, New York, 1995)
[45] Law and Government Divison – Parliament of Canada, National Drug Policy: The Netherlands (The Senate Special Committee on Illegal Drugs, 2001)
[46] Toleration policy regarding soft drugs and coffee shops, Government of the Netherlands, *available at:* https://www.government.nl/topics/drugs/contents/toleration-policy-regarding-soft-drugs-and-coffee-shops (last visited on June 27, 2017)

in coffee shops in order to prevent people who use soft drugs from coming into contact with hard drugs.

RESULTS

Education and government information have traditionally kept drug-related health problems in the Netherlands low, compared with the rest of Europe; one in five Dutch young people say they have tried cannabis, which is the European average – but the figures are much lower than average when it comes to hard drugs.[47]

The government has introduced measures such as 'weed passes' for Dutch nationals and banned drug tourists in an attempt to contain crime and reduce drug trafficking, and avoiding mass incarceration for offences as miniscule as being found with a few grams of cannabis.

It is estimated that nearly 20% of the 7 million foreign visitors who come to the Netherlands each year visit an Amsterdam coffee shop, pouring millions of Euros into the local economy. [48]

V. DRUG POLICY IN INDIA – A PRESSING NEED FOR CHANGE

According to Chris Stone, President of the Open Society Foundation, the prohibitionist drug policies promoted by many countries, including the United States, have exacted a tremendous toll, worldwide.

Under the 1961 Convention, many developing countries such as India were forced to abolish all non-medical and non-scientific uses of the cannabis, coca and poppy plants that had been embedded in religious, cultural and social traditions for thousands of years. As a result, local medicinal practices of these countries were dismissed by modern medical science as developed and accepted in the global North. Aside from this cultural asymmetry, there is a lack of rational, evidence-based scaling of substances on the basis of harm between Schedule I and IV substances.[49]

Home to one of the largest populations in the world, the existing legal system in India traps the poorest of drug users in a vicious cycle between the street and prison, cutting them off from legal, medical or social assistance. Drug addicts are dismissed as a social nuisance with attitudes of

[47] Shirley Haasnoot, "Dutch drug policy, pragmatic as ever" *The Guardian,* Jan. 3, 2013
[48] *Ibid.*
[49] David Bewley-Taylor, Martin Jelsma, "Regime change: Re-visiting the 1961 Single Convention on Narcotic Drugs 23 *IJDP* 72-81 (2012)

disdain and contempt, taking colour from the law which imposes harsh sentences even for small offences.

Although provisions for treatment for drug dependence have been incorporated into the law, they are not given due priority. The NDPS Act supports treatment both as an alternative to, and independent of penal measures. Yet, provisions for depenalisation and diversion into treatment are rarely applied.[50]

An issue of serious concern are human rights violations that have become synonymous with 'de-addiction' centres and treatment. Although some institutions serve as exceptions, most rehabilitation and treatment centres follow unscientific methods without giving due attention to sound clinical practices, thus causing a deep affront to the humanity and dignity of drug users.

Several instances of human rights abuses including torture and death of persons using drugs have come to light in the State of Punjab.[51] An intervention application was filed in 2009 in *Talwinder Pal Singh v. State of Punjab*[52] in the High Court of Punjab and Haryana wherein the State was asked to frame rules for human rights compliant, evidence-based and voluntary treatment for drug dependence.

The inadequacy of accompanying institutional mechanisms for rehabilitation – in terms of training of the judiciary, essential rehabilitation systems, etc – has rendered the reformatory objective of the statute nugatory. This, coupled with the problematic implementation of the legislation by multiple authorities and the absence of government established rehab programmes, has hindered effective implementation of the statute.[53]

VI. REFORMS – THE WAY FORWARD

The historic failures of the UN Conventions in tackling illicit trafficking, drug addiction and dismantling the demand-supply chain of narcotic substances has led to striking critiques of the existing framework. Recalling the history of the Single Convention should do much to remove the misplaced aura of sacred immutability that currently shrouds the contemporary UN treaty framework for drug control.[54]

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[50] *Supra* note 4 at 8
[51] *Supra* note 4 at 7
[52] Crl. Misc. No. M- 26374 of 2008 in the Punjab and Haryana High Court
[53] Neha Singhal, Sakshi, "India's anti-narcotics law is in urgent need of rehab" *The Wire*, Jan. 26, 2016
[54] *Supra* note 51

By concentrating predominantly on the punitive aspects of UN legislation, the Indian authorities are currently failing to address adequately the issue of drug use within their own borders. Without an urgent change in approach, involving not only the refocusing of resources but also the recognition of traditional attitudes to the use and management of mind-altering substances, the nation may in the future face similar drug-related problems to those recently experienced in other countries in the region.

In such a context, it is imperative for policymakers and enforcement authorities in India to better understand trends and patterns of drug use within the country. The only survey mapping the extent of drug use in India was carried out in 2001-2002[55]. This has led to a glaring lacuna in policymaking, rendering it out of touch with the situation on the ground. Up-to-date surveys evaluating drug-use patterns, geographical incidence and user demographic need to be carried out on a priority basis.

In areas known to have traditional and customary sanctions for drug use, local methods that control drug-use can be mapped and developed by training people from rural areas. This would ensure community participation in tackling the incidence of drug-dependency in remote areas – outside the purview of information dissemination.

Harm reduction services in India continue to operate in a restrictive legal environment with program staff facing the risk of prosecution for 'aiding and abetting' drug use.[56] For people who inject drugs, the fear of being identified and harassed by the police constitutes a significant barrier to accessing prevention and treatment facilities.[57] A greater institutional commitment to the principle of harm reduction will ensure a constructive change in drug policy. The necessary differentiation between drug-use, dependency and addiction should be recognized within the letter of the Act as well as in institutional efforts to minimize harm.

The disproportionate and harsh sentencing under the NDPS Act must be reviewed, and the death penalty for drug offences must be abolished to make way for a more humane, public-health oriented approach to drug control. Mandatory licensing for de-addiction centres and strict punishment for non-compliant institutions will ensure a human rights-based approach to de-addiction and rehabilitation.

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[55] *Supra* note 4 at 10

[56] Lawyers Collective, Legal and policy concerns related to IDU harm reduction in SAARC countries (UNODC, 2007))

[57] V. Chakrapani, "Access to comprehensive package of services for injecting drug users and their female sex partners: Identification and ranking of barriers in North-East India*" UNODC, ROSA* 36 (2012)e:

Importantly, civil society groups – medical professionals, patient groups, academics and drug users must be consulted in drug policy formation. Keeping in mind the cultural sanctity accorded to certain forms of cannabis and opium use in India, the government can consider differentiated legalisation for soft drugs, with a clear distinction from harder substances classified in the Act. An identification of cultivation areas such in Himachal Pradesh and Kerala, among others, will present a unique opportunity to convert large swathes of money circulated through illicit trafficking into legal trade, thus improving livelihoods, patterns of recreational use and ultimately improving the GDP of the country.

VICTIM COMPENSATION: AN INDIAN PERSPECTIVE

Abhishek Kumar[*] *and Himanshu Pabreja*[**]

'Life and Personal Liberty'- to secure these rights governments are instituted among men but every day people get injured or killed due to crime. In the aftermath of a crime, victims and their families face psychological and physical trauma, incur unanticipated medical expenses, loss of income and other hardships including emotional grievance and funeral costs on the account of state's failure to fulfil its Social Contract.

In recent years, the Supreme Court has emerged as the savior of human rights of convicts of severe offences, especially death row convicts. But while commuting their sentences, it fails to take into account the plight of victims affected by those crimes. Indian criminal jurisdiction, being plagued by undue delays, often ignores the social, economic, and psychological hardships faced by victims. When crimes are committed, victims lose their right to livelihood or even their lives but the legal system focuses on rights, rehabilitation, and probation of only the accused, not victims. Being expected to cooperate with the legal system and wait for the award of punishment to the wrongdoer, they are reduced to mere spectators of prosecution. How can tears of victims be wiped off if the system is itself helpless to punish the guilty?

In this context, this paper will analyse the right of victims to receive compensation from the wrongdoer (who violated their right to life or livelihood) or from the state (which failed to protect his/her such right), and the extent to which these rights can be exercised, by analysing India's legal framework for the same. Further, the authors will provide a legal and economic analysis to justify the rationale behind victim compensation. Lastly, in light of recommendations made by various commissions and committees, and a comparative study of similar laws in other jurisdictions, authors will provide certain recommendations for dealing with this issue.

Keywords: Life, Crime, Victim, Compensation, Criminal Justice System.

I. INTRODUCTION

"It is a weakness of our criminal jurisprudence that victims of crime and distress of their dependents do not attract the attention of the law."[1]

~ J. Krishna Iyer

[*] III year student at the National Law University, Delhi.
[**] IV year student at the Gujarat national law University.
[1] Rattan Singh v. State of Punjab, AIR 1980 SC 84.

The purpose for which governments are instituted is to secure the right to life, personal liberty to every citizen.[2] Accordingly, a well advanced Criminal Justice System is a prerequisite for securing these rights to its citizens through a mechanism that ensures security and impart a sense of safety to all. The Criminal Justice System must operate to ensure a balance between compelling interests of the victim, offender, and public at large. While it cannot be denied that it is plagued by various predicaments which have prevented it from achieving its ends (delay in prosecution, low rate of conviction, etc.) and left victims with no hopes of justice, but it should be underwritten that its purpose is to protect collective interests and prevent every individual that forms constituent of collective from unwarranted hazards.[3]

Where Constitution provides safeguards for both victims[4] and accused, the State in its quest to protect accused's rights - viz. right against self- incrimination, to legal aid, fair trial, bail, etc. - fails to consider the plight of victims who ends up being treated as an inconsequential person of our criminal justice system, thus denying them the justice they deserve.[5] Once the case is taken up by the State, the victim is pushed to the backseat and merely reduced to being a spectator to the prosecution of accused. They are just seen as recipients of criminal's greed, anger or frustration, and falling 'in the wrong place at the wrong time'. After being subjected to the accused's wrongful acts, they become a victim of our criminal justice system, leading to *secondary victimization* because of ignorant behaviour meted out by the justice system. Besides, the victim is not even a necessary party to revisions, appeals or writs filed by the accused, barring few exceptions.

While sentencing the accused may serve the purpose of criminal jurisprudence, it would not help victims to revert to a position as if no crime was committed. Recognizing the fact that statutory provisions allow discretion to courts to ensure adequate compensation, the harsh reality remains that these are seldom invoked by lawyers and courts resulting in a gross miscarriage of justice for victims.[6]

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[2] The Declaration of Independence: A Transcription, In Congress, July 4, 1776, available at http://www.archives.gov/exhibits/charters/declaration_transcript.html , (last accessed- February 12, 2016).
[3] Justice Dipak Mishra in State of Punjab v. Saurabh Bakshi, (2015) 5 SCC 182.
[4] UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, (29 November 1985), victims: "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.", Available at http://www.un.org/documents/ga/res/40/a40r034.htm , (last accessed- February 13, 2016).
[5] Justice Benjamin N. Cardizo in Snyder v. Massachusetts, 291 US 97 (1934).
[6] 42nd report of Law Commission of India on Code of Criminal Procedure, 1898, para 3.17 (1971).

In light of these issues, this paper would discuss and analyse India's legislative framework and judicial dicta securing victim's right to seek claim compensation for wrongs done to them. Besides, it would also justify the rationale for state's obligations to ensure compensation for victims and how giving victim his due share may make the system work 'efficiently and effectively'. Then, it would enlist some suggestions for improvements in this system with help of study of similar laws in other jurisdictions and case study of such law in Delhi. The limitation of this paper is that it does not specifically address the position of vulnerable victims (such as children and victims of sexual crimes).

II. JUSTIFICATION FOR COMPENSATION TO VICTIMS

It might be questioned that why should State be placed under an obligation to pay for offences inflicted by one individual against other? Can victims or dependents rehabilitate themselves merely on the satisfaction of sentence awarded to the offender? Does the State's duty towards victims restrict itself to the filing of criminal cases, initiation of prosecution or does it extend further?[7]

I. Victim-oriented Approach

The Indian polity is styled as a welfare society by the Indian Constitution.[8] Its Preamble expressly envisages 'social justice to all' as its bog-standard goal. The government sponsors a range of central and state welfare and support schemes - including disability pension[9], MGNREGA[10], Right to Food Act[11] - to provide substantial support to those who are in need. With respect to the criminal justice system in India, the State is taking great pains to seek reformation and rehabilitation of offenders and is facilitating their re-establishment in society but its efforts are almost negligible for victims who have same and as equal fundamental rights as offenders.

Every victim or dependent has a legitimate expectation to seek compensation from State as means of their rehabilitation irrespective of conviction or acquittal as punishment is not the only step towards justice. This shall be directed to be paid as a public law remedy on account of the failure of authorities to safeguard their rights under Article 21 due to their loss or injury to a bread-earning member of the family. Since crime is not a private wrong but a public wrong or wrong against society, State should be held liable to compensate victims.

[7] Abdul Rashid v. State of Odisha, O.J.C. No. 13765 of 1996.
[8] Article 38, Constitution of India, 1950.
[9] National Social Assistance Programme, 1995.
[10] Mahatma Gandhi National Rural Employment Guarantee Act, 2005.
[11] National Food Security Act, 2013.

The focus of criminal justice system has shifted from retributive to the reformative concept for reformation and reintegration of offenders into society. Their reformation and rehabilitation should give way to restorative justice i.e. restoring the victim to a position as if no crime has been committed. The criminal system would be able to achieve its ends only when people being affected by such crimes or victims have trust in the system and come to law enforcing authorities with their complaints, otherwise, they may resort to 'public justice' rather than 'court justice'[12] which will undermine the very objective of criminal justice system.

During prosecution, victims have a minimal role that there is no place provided in the courtroom for victims to observe the trial. In addition to this, the embarrassing questions asked by defence counsel, witnesses turning hostile, etc. prevents them from approaching judicial system. This results in high acquittal or low conviction rates, thus subduing justice process.

The importance of compensation for victims can always be understood from these reasons that compensation would ensure at least some *incentive* for victims to approach judicial system. This should be provided to them even where prosecution results in acquittal.

II. Economic Analysis of Crime Victim Compensation

Every crime imposes costs on society in physical, psychological, social, and financial form in terms of enforcement costs, loss of income or livelihood, medical expenses, lost wages for work rate and many other economic and non-economic expenses.[13] Economic analysis would mean the application of economic principles for an effective remedy to such crimes.

A criminal is presumed to be a rational person who would commit a crime only when return from crime (including money or satisfaction received) is greater than costs to commit it (including term and probability of sentence)[14]. Economic analysis would help the State to determine the effective punishment to deter such crimes. Its objective would be to ascertain damages with the sentence as an efficient punishment for criminal cases.

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[12] 'Public Justice': system where citizens themselves try to carry out justice instead of going to courts; 'Court Justice': system where justice is delivered by courts through formal judicial system.

[13] Gary Becker, Crime and Punishment: An Economic Approach, p. 2-5, in Gary S. Becker and William M. Landes, Essays in the Economics of Crime and Punishment, available at http://www.nber.org/chapters/c3625.pdf, (last accessed February 22, 2016).

[14] Gary Becker, Crime and Punishment: An Economic Approach, Journal of Political Economy, 169- 170 (Vol. 76, 1968); Erling Eide, Economics of Criminal Behaviour, p. 352- 355, available at http://www.mtk.ut.ee/sites/default/files/mtk/dokumendid/07cb6b07fa2225bb3cd54242e6f2dc5a.pdf, (last accessed February 22, 2016).

In victim compensation, we propose that victims be made eligible for fines and compensation from accused if they are unable to pay, the state should provide compensation, recoverable from offender during his sentence (giving rigorous imprisonment and using amount earned for rehabilitation of victims). This system provides for sentence and fines or compensation (used very rarely by courts) for the offender. With dismal conviction rate and slow judicial process in criminal cases, it takes the whole lifetime of a victim to see the accused behind bars for offences committed meanwhile they have already lost their income, livelihood, mental peace, etc. to such offence.

Leaving a wide gap between costs of the sentence and return from it, this increases *punishment Costs.*[15] Justice system should aim at making this cost zero, meaning that, mere punishment is not enough but quick punishment along with compensation and return or satisfaction to convict from the offence are at least equal which would help the criminal administration to achieve its basic objective of deterrence. There can be no 'perfect compensation' for most of the crimes[16] but at least some assistance may provide some hope to already distressed victims.

Using Kaldor- Hicks compensation criterion, criminal gains something from committing a crime whereas victim loses something. It envisages making the position of gainer negative to deter them from further committing crimes (by redistribution or transfer of such gain to victim or State) and this can be best done through payment of compensation[17] by a criminal to the victim along with his sentence.[18]

Applying Normative Hobbes Theorem, costs of operation and maintenance of police, law and order, the justice system can be considered as 'transaction costs'. After a crime is committed (with high transaction cost), the State needs to identify the highest value owner in such transaction (criminal act) i.e. person who suffered greater loss or damage from such transaction (here, victim). In high transaction costs environment, damages are the best remedy to highest value owner and law here would identify both highest value owner and offender in the transaction and ensure victim's benefits.

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[15] Joanna Shepherd & Paul H. Rubin, The Economic Analysis of Criminal Law, International Encyclopaedia of the Social and Behavioural Sciences, 2nd ed., available at http://economics.emory.edu/home/documents/workingpapers/rubin_13_04_paper.pdf, (last accessed February 22, 2016).

[16] Robert Cooter & Thomas Ulen, Law and Economics, p.432, (Addison-Wesley Longman, Inc., 1999).

[17] John Chipman, Compensation Principle, The New Palgrave Dictionary of Economics, (2nd ed., 2008).

[18] *See,* Peter Newman, The New Palgrave Dictionary of Law & Economics, p. 417, available at http://www.brown.edu/Departments/Economics/Faculty/Allan_Feldman/AMF%20Significant%20Published%20Papers/Kaldor-Hicks%20Compensation.pdf, (last accessed February 22, 2016); T. Scitovszky, A Note on Welfare Propositions in Economics. The Review of Economic Studies, p. 77-88, (Vol. 9(1), 1941).

Applying Multiplier Theorem, people commit fewer crimes when expected punishment, which depends on amount and probability of punishment, increases.[19] According to Professor Gary Becker, increasing probability of crimes means more enforcement costs in the form of funding more jails, courts, police personnel, strengthening security of jails, etc. whereas inflicting more fines and damages on criminals (keeping probability and amount of sentence constant) would be relatively cheaper and more efficient deterrence which would help to compensate victims also. Imposing sufficient amount of punishment with compensation (with constant probability) would make punishment costs negative and decrease in enforcement costs. This is an efficient sentence. While increasing probability of punishment with low punishment without compensation would increase enforcement costs and vitiate the whole effect of deterrence, the constant probability with high punishment and compensation is the more efficient remedy.

Polluter pays Principle says that in a non-cooperative environment (like criminal dispute), compensatory damages are the best remedy with both parties. While determining these damages, costs of such crimes to victims, viz., social, psychological, economic costs, etc. needs to be taken into consideration for adequate punishment. As recognized in International Environmental Law,[20] it states those who contribute to causing of pollution shall pay from benefits reaped from causing pollution for its revival. It just creates liability on manufacturers and traders for polluting the environment.[21]

These law and economics principles provide a holistic view of how criminal courts ought to take into account the costs of crimes committed on victims and society and thereby decide an efficient punishment for criminals.[22] This analysis provides that confluence of these principles with criminal justice system would ensure that no criminal is punished with an inadequate punishment or that no victim is left without receiving adequate damages from the offender. Now, to prevent other costs on society and State, the offender should be ordered to pay compensation to victims for

[19] Erling, *supra* note 32, at 347.
[20] Principle 16, Rio Declaration on Environment and Development- National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment, Available at- http://www.jus.uio.no/lm/environmental.development.rio.declaration.1992/portrait.a4.pdf, (last accessed February 22, 2016).
[21] Vito Lucia, Polluter Pays Principle, available at http://www.eoearth.org/view/article/155292, (last accessed- February 12, 2016).
[22] Robert, *supra* note 34, at 475.

damages inflicted upon them which would be a disincentive to offenders for the commission of crimes.

III. State's Responsibility

Also, according to 'Social Contract Theory,'[23] social scientists believe that citizens and State have a virtual contract by which they share rights and duties towards each other, meaning, hereby, that if an individual has a duty to pay taxes to State, he has right to seek protection from the State or if State has right to restrict liberty of individuals, it has a duty to protect them from any harm.[24] They surrender some of their rights to the State in return for which the State shall ensure their security. When a crime is committed by any individual, he/she breaks such contract with the State (by excessively exercising liberties granted to them) and by that same reason, State also failed to fulfil its obligations of safety towards the affected individual. On account of its failure to obligate its responsibilities, State has to compensate victims of crime.

Also, according to *No-fault liability principle* or Strict Liability Principle[25] person whose vehicle causes the death of or permanent disability to any person shall be held liable to pay compensation and there shall be no need to prove negligence, fault or mala fide intention on part of owner (State).[26]

In the criminal justice system, the offender shall be held liable to pay as the one who violated the victim's rights, but even where the State is not directly involved in offence it shall pay to victims of serious offences due to its failure in protecting them.

III. LEGISLATIVE FRAMEWORK

Different Indian statutes provide for compensation to victims. The Code of Criminal Procedure (CrPC)[27] provides for compensation to victims in different ways: the accused may be ordered to pay fine as compensation to victim for costs incurred in prosecution;[28] for any loss suffered by victims due to any loss caused by offence committed by accused and it must be recoverable in a

[23] John Locke, TWO TREATISES OF GOVERNMENT, Chapter 2 (1st ed. 1690).
[24] Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913), reprinted in Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*, 23 at 63-64 (Cook ed. 1923).
[25] Section 140, Motor Vehicles Act, 1988
[26] A S Bhatnagar, Motor Accident Compensation, Orient Law House, New Delhi (2004).
[27] Code of Criminal Procedure, 1973.
[28] *Id.*, Section 357(1) (a).

civil court;[29] where convict caused death or abetted commission of such offence;[30] for compensating *bona fide* purchaser of any property for its loss by wrongful act committed by accused.[31] Further, it empowers court (even an Appellate or Revision Court)[32] to award compensation to victim from convict even for these offences where fines do not form part of the sentence for any loss or injury suffered by them.[33]

This section was added pursuant to 42nd Law Commission Report.[34] It provides a limited scope for providing compensation to the victim. Compensation or fine has to be provided ancillary to sentence for the offence, which depends on factors, viz. facts of the case, the ability of accused to pay, the contribution of the victim to the offence, the manner of offence.[35] Court considers the financial and economic condition of the convict as a factor for compensation which would be too low if he has meagre financial resources.[36]

However, being limited in scope, it fails to take into account certain situations. Where accused has been convicted, courts can provide compensation but not where apprehension or conviction does not happen or where convict fails to provide the said amount. One of many reasons for its scarce use is that it is a discretionary power of courts and not mandatory on courts to award compensation to victims. Since its commencement in 1898, a number of cases where courts have used this provision are like salt in flour.[37]

Subsequently, the legislature added 'Victim Compensation Scheme'[38] in CrPC[39], along the lines of Law Commission recommendation[40], to be operated by State Governments in coordination with

[29] *Id.,* Section 357(1) (b).
[30] *Id.,* Section 357(1) (c).
[31] *Id.,* Section 357(1) (d).
[32] *Id.,* Section 357(4).
[33] *Id.,* Section 357(3).
[34] Law, *supra* note 10.
[35] K.D. Gaur, CRIMINAL LAW AND CRIMINOLOGY, Deep & Deep Publications Pvt. Ltd. (1st ed. 2002); Balraj v. State of UP, AIR 1995 SC 1935; Sarwan Singh and others v. State of Punjab (1978) 4 SCC 111, Baldev Singh and Anr v. State of Punjab (1995) 6 SCC 593, Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd. and Anr. (2007) 6 SCC 528.
[36] V.S.R. Avadhani & Soubhagya Valli, SENTENCING & VICTIM COMPENSATION: PRINCIPLES AND PRACTICES, Asia Law House, Hyderabad, p. 688 (1st Edition, 2014); *See*, Hari Kishan & State of Haryana v Sukhbir Singh, (1988) 4 SCC 551.
[37] Swaran Singh v. State of Punjab, AIR 1978 SC 1525; Palaniappa Gounder v. State of Tamil Nadu, AIR 1977 SC 1323; Guruswamy v. State of Tamil Nadu, 1979 (3) SCC 797.
[38] Code, *supra* note 45, Section 357A
[39] Code of Criminal Procedure (Amendment) Act, 2008.
[40] 154th Report of Law Commission of India, Criminal Procedure Code, 1973, Vol I (1996), available at http://lawcommissionofindia.nic.in/101-169/Report154Vol1.pdf, (last accessed on February 22, 2016)

the Central Government. Herein, the Court may recommend,[41] being satisfied that fines or compensation under Sec. 357 is inadequate for rehabilitation of victim or where accused was never arrested or tried or prosecution ends up in acquittal or discharge of accused and the victim needs support for rehabilitation,[42] to District/State Legal Services Authority to ascertain an appropriate amount of compensation. Further, it also allows victims to directly apply to State District Legal Services Authority for compensation where accused could not be traced or identified and thus, the trial could not start.[43]

While states have fixed maximum limits for compensation under different offences, District/State Legal Services Authority shall decide the final amount after due inquiry into the case.[44] It cannot be denied that the amount specified for different offences under this scheme is not sufficient for rehabilitation of victims but there is a need for balance for it is not possible for a country like India to provide compensation to every victim of crime.

Moreover, CrPC[45] also provides that that compensation to a victim under Sec. 357A would be in addition to a fine payable to a victim under Sec. 326A or 376D of IPC.[46] The Courts have also been empowered to pass order, ordering convict to pay to victims the costs incurred by him during prosecution process.[47] In order to ensure that compensation is provided to victim, courts have been empowered to issue warrants against accused in effect to attach and sell his movable or immovable property[48], or even to order to collect any money (other than fine) on account of any order made under CrPC whose method of recovery has not been provided as fine. [49]

Apart from CrPC, other specific legislations also provide for compensation to victims. [50] Courts have been empowered to direct offenders released on probation to pay compensation as it thinks

[41] Code, *supra* note 45, Section 357A (2).
[42] *Id.,* Section 357A (3).
[43] *Id.,* Section 357A (4).
[44] *Id.,* Section 357A (5).
[45] Criminal Law (Amendment) Act, 2013.
[46] *Id.,* Section 357B.
[47] *Id.,* Section 359.
[48] *Id.,* Section 421.
[49] *Id.,* Section 431.
[50] Prevention of Caste-Based Victimization and Protection for Victims: The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989; Protection of Women from Domestic Violence Act of 2005.

reasonable for loss or injury caused to victims.[51] Besides, they can also allow parents, child, wife, and husband of the deceased victim to seek compensation from a convict.[52]

Even High Courts[53] and the Supreme Court[54] have interpreted Constitutional provisions to award compensation to victims for recovery of any loss or injury suffered by them on account of offence by the wrongdoer. Despite these, the role of courts also needs to be seen for the implementation of these provisions rests at their discretion.

Iv. Judicial Response

At this juncture, it would be more than appropriate to quote Justice Chipman Gray that *"Courts put life into the dead words of the statute."*[55] The mere existence of laws does not mean their proper utilization, due to which courts have to come forward and ensure their proper application. While these provisions have been a part of Indian statute books for a significant period of time, it seems that courts have not taken a significant note of these powers and thus, instances where courts have used their discretionary powers to award such amount to victims are inadequate.[56]

Indian courts have used abovementioned provisions to award compensation but not as much as they were expected to, as similar concern has been expressed by the Supreme Court: "*Objects and reasons of the Code of Criminal Procedure state that section 357 was intended to provide relief to victims whose rights have been violated by offences of the offender. It is a regret to note that courts are still oblivious of this provision. This section casts a duty upon the court to give due regard to these provisions and be careful in future with respect to its use.*" [57]

Justice Krishna Iyer, while recognizing ordeal of victims of crime, noted: "*The criminal law in India is not victim oriented and the suffering of the victim, often immeasurable are often overlooked in misplaced sympathy for the criminal. Though our modern criminal law is designed to punish as well as reform the criminals, yet it overlooks the by- products of crime i.e. the victim*"[58]

[51] Section 5, Probation of Offenders Act, 1958.
[52] Section 1-A, Fatal Accidents Act, 1855.
[53] Constitution, *supra* note 20, Article 226.
[54] *Id.,* Article 32 & 142.
[55] John Chipman Gray, The Nature and Sources of Law, 124-125, (2nd Edn. 1921).
[56] *See,* Roy Fernandes v. State of Goa, AIR 2012 SC 1030; Manish Jalan v. State of Karnataka, AIR 2008 SC 3074.
[57] Ankush Vhivaji Gaikwad v. State of Maharashtra, (2013) 6 SCC 770, para 45; Sukhbir, *Supra,* n.6 at 1.
[58] V.R. Krishna Iyer, Access to Justice- A Case Of Basic Change (1991) p. 14.

Supreme Court, through a series of judgments, has expanded the scope of this section. They have awarded compensation on the basis of paying capacity of accused, nature of the offence, the severity of injury inflicted and suffered, and justness of claim of the victim.[59]

In *Bodhisattva Gautam* v. *Subhra Chakraborty,* SC ordered a rape convict to pay an interim compensation of Rs. 1000 per month to the victim of rape throughout the period of trial proceedings. It further observed that compensation, in this case, would be appropriate even if accused is not convicted.[60]

In *The Chairman, Railway Board & Ors* v *Mrs. Chandrima Das & Ors,* SC ordered Railways to pay compensation of Rs. 10 lakhs to dependents of the victim, a Bangladeshi citizen who was gang raped by 4 railway employees in a railway accommodation.[61]

In *S. Anand* v *State of Tamil Nadu*, Madras High Court ordered compensation of Rs. 1,00,000 to victims and their dependents who were illegally detained and tortured by Human Rights and Social Justice C.I.D.[62] In the case of *SAHELI* v. *Commissioner of Police, Delhi*, SC ordered state government to pay Rs. 75,000 as compensation to the mother of a nine-year-old boy who died after being beaten by police officers while extracting information.[63]

Recently, in *Suresh* v. *State of Haryana*, SC ordered Haryana State Legal Services Authority under Sec. 357A to pay an interim compensation of Rs. 10 Lakh to dependents of the deceased, failing which the state government shall be liable to pay the amount. While recognizing the onus on the court to determine whether victim needs financial relief depending on the gravity of crime or condition of victims or not either by its own motion or on the application, it reiterated the hapless use of these provisions by courts. Even after becoming statute, interim compensation or award of compensation has not become a rule.[64]

In *Palaniappa Gounder* v. *State of Tamil Nadu*, SC reduced the amount of compensation awarded by HC at Rs. 20,000 to Rs. 3,000 citing poor financial conditions of the convict. Here, courts while considering the inability of accused to pay completely ignored the ordeal endured by victims during and after the offence. If accused is unable to pay, State should come into the picture and pay

[59] *See,* Rachhpal Singh v. State of Punjab, AIR 2002 SC 2710.
[60] Bodhisatva Gautam v. Subhra Chakraborty, AIR 1996 SC 922.
[61] The Chairman, Railway Board & ors v. Mrs. Chandrima Das & ors AIR (2000) SC 988; Nilabati Behera v. State of Orissa, (1993) SCC 746.
[62] S. Anand v. State of Tamil Nadu, (1983) IILLJ 277 Mad.
[63] SAHELI v. Commissioner of Police, Delhi, (1990) AIR 513.
[64] Suresh & Ors. v. State of Haryana, Criminal Appeal No. 420 of 2012.

compensation for rehabilitation considering the nature of the offence, the impact of the offence on victim or dependents.[65]

Since it can't be denied that courts have seldom exercised these powers, their role can't be ignored in widening their scope by compensating victims inflicted with murder, rape, grievous offences, accidents, custodial deaths to more severe offences like the mass destruction of public property, riots, etc. They have realized that justice would be meted out to them only when adequate compensation is paid to victims. However, Courts may need to reduce the amount of compensation for victims on account of different reasons, but should the victim be allowed to suffer because of the inability of accused to pay is a much bigger doubt that needs to be clarified.[66] But unless such provisions are made mandatory, their enforcement in India seems improbable. It is high time an exhaustive legislation is passed by the legislature for strong steps towards protecting victims from being subjected to secondary victimization.

V. Commissions & Committees

Various commissions and committees have deliberated on the issue of compensation to victims of crime. Law Commission of India had recommended for statutory amendments which were instrumental in the introduction of section 357(3) in the Cr. P.C. of 1973.[67] It also recommended for the empowerment of courts to order payment of compensation by the Government. But, this has not yet translated into action.[68] Further, it recommended amendments to introduce schemes related to Victim Compensation Fund by the Central and State Governments and recommended State to provide assistance to victims out of its own funds: (i) in cases of acquittals; or (ii) where the offender is not traceable, but the offence has been proved and victim has been identified.[69]

Moreover, Malimath Committee also recommended a separate legislation by Parliament for the creation of a 'Victim Compensation Fund' to be administered by the Legal Services Authorities for payment irrespective of apprehension, conviction or acquittal of the offender.[70] Additionally,

[65] Palaniappa, *Supra,* note 56.
[66] Madhukar v. State of Maharastra, A.I.R. 1978 S.C. 1525; Venkatesh v. State of T.N., A.I.R. 1993 S.C. 1230.
[67] Law, *Supra* note 10 at para 3.19.
[68] M/s J.K. International v. State, (2001) 3 S.C.C. 462.
[69]Law, *Supra*, note 59 at 8, para 15.17.
[70] V.S. Malimath., Report of Committee on Reforms of Criminal Justice 76 (2003), p. 279.

The Commission to Review the Working of the Constitution also discussed a scheme of reparation/compensation particularly for victims of violent crimes like murder, rape, etc.[71]

On the directions of the Supreme Court, National Commission for Women prepared a draft legislation for the constitution of National Crime Relief and Rehabilitation Board and Crime Injuries Compensation Board (under State Govt) at district- level to provide interim relief to rape victims, irrespective of conviction or acquittal of the accused.[72]

VI. Victim Rights: Other Jurisdictions

The international community has also taken note of the issues related to victim's compensation. United Nations General Assembly came up with "Declaration of Basic Principles of Justice for victims of crime and abuse of power"[73] to secure justice and assistance to victims and their families. It recognized their rights as victim's human rights[74] and endeavoured for States to provide financial compensation when an offender or other sources are insufficient for victim's rehabilitation.[75] It also advocated for establishment and maintenance of national funds for compensation to victims by states. The Council of Europe also came up with "Convention of Compensation of Victims of Violent Crimes, 1983"[76] that obligates member states to compensate victims of violent crimes.

Many countries have passed specialized legislations in this regard. New Zealand was the first among them to legislate[77] by providing social security benefits through civil actions.[78] The United Kingdom enables the courts to order compensation to victims under its laws.[79] It provides for state-funded "Criminal Injuries Compensation Scheme"[80], established by the "Criminal Injuries Compensation Act, 1995."[81] It also follows a non-statutory scheme of *ex gratia* payments.

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[71] Report of the National Commission to Review the Working of the Constitution, Vol.1, Chapter 7.15. p. 143-144, Government of India, (2002).
[72] National Commission for Women, Revised Scheme for Relief and Rehabilitation of Victims of Rape, 15th April 2010.
[73] U.N. Assembly Resolution No. 40/34, November 29, 1985, available at http://www.un.org/documents/ga/res/40/a40r034.htm, (last accessed February 22, 2016).
[74] The First International Symposium on victims, Jerusalem, 1973.
[75] UN, *Supra* note 86, para 12.
[76] European Convention on the Compensation of Victims of Violent Crimes, (E.T.S. No. 116), available at http://www.conventions.coe.int/Treaty/EN/Treaties/Html/116, (last accessed February 22, 2016).
[77] The Criminal Injuries Compensation Act, 1963 (New Zealand).
[78] Nancy Swarbrick, *Victims of crime - The victim's experience*, Te Ara - the Encyclopaedia of New Zealand, updated 13-Jul-12, URL: http://www.TeAra.govt.nz/en/victims-of-crime/page-1, (last accessed February 22, 2016)
[79] Powers of the Criminal Court (Sentencing) Act, 2000.
[80] Criminal Injuries Compensation Scheme, 2008.
[81] Criminal Injuries Compensation Act, 1995.

The USA introduced the first federal crime victims' rights law in 1982 as "Victim and Witness Protection Act" followed by "Victims of Crime Act, 1984"[82] which created a Crime Victim Fund, funded by revenues from federal offenders based on fines, forfeited appearance bonds, and penalty assessments. The landmark Crime Victims' Rights Act, 2004,[83] guarantees eight specific rights to the victims of crime and provides standing to individual victims to assert those rights in a court of law.[84]

VII. Victim Compensation Schemes in India: A Study

Various states have drafted their legislations under Section 357, 357A of the Cr.PC. Herein, this paper would analyse provisions and schemes adopted by the Delhi government.

NCT of Delhi passed Victim Compensation Scheme in line with Sec. 357A of CrPC in 2011.[85] It recognizes right of victims or their dependents to receive compensation from State for any harm inflicted upon them by the perpetrator.

Clause 2 defines 'victims' (as defined in Sec. 2 (wa) of CrPC[86]) and 'dependents' of victims[87]. Clause 3 provides for constitution of a Victims Compensation Fund out of which amount of compensation would be provided to victims or dependents.[88] Clause 5 provides a procedure to be followed by Delhi State Legal Services Authority (DSLSA) for verification of case received within 60 days. Such complaint needs to be filed within 3 years.

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[82] Victims of Crime Act, 1984.
[83] Crime Victims' Rights Act, 2004.
[84] *See* Statement of Sen. Feinstein re. CVRA (150 Cong. Rec s2329, April 22, 2004; and Jon Kyl, Stepven J. Twist, Stephen Higgins, On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Lourna Gillis, and Nila Lynn Crime Victims' Rights Act, Lewis and Clark Law Review, 581, (2005).
[85] Home (Police II) Department Notification, Government of National Capital Territory of Delhi, F.No.11/35/2010/HP II, (February 2, 2012), Available at http://delhi.gov.in/wps/wcm/connect/3ba2ab004a168918a0c4b7054aa9b1b1/New+Microsoft+Office+Word+Document+%284%29.pdf?MOD=AJPERES&lmod=-287399459, (last accessed February 22, 2016).
[86] *Id.,* Sec. 2 (wa)- "victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir.
[87] *Id.,* Clause 2(c) - "Dependent" includes wife, husband, father, mother, unmarried daughter and minor children of the victim as determined by the authority empowered to issue dependency certificate that is to say the Collector, or any other authority authorized by the Government in this regard.
[88] *Id.,* Clause 3- The 'Victim Compensation Fund' shall comprise the following: - (a) budgetary allocation for which necessary provision shall be made in the Annual Budget by the Government; (b) Receipt of amount of fines imposed under section 357 of the Code of Criminal Procedure, 1973 (2 of 1974) and ordered to be deposited by the courts in the Victim Compensation Fund; (c) Amount of compensation recovered from the wrongdoer/accused under clause 9 of the Scheme; (d) Donations/contributions from International/National/Philanthropist /Charitable Institutions/Organizations and individuals.

Clause 7 provides that after DSLSA determines the amount to be awarded as compensation, it shall be deposited in a nationalised bank, out of which 75% should be in form of Term Deposit (minimum 3 years) and rest 25% for basic expenses by victims or dependents.

Clause 9 empowers DSLSA to initiate criminal suits against perpetrators to retrieve the amount paid to victims or dependents in the form of compensation for injury caused to them due to their criminal act.

Schedule to Notification provides for minimum and maximum compensation for certain categories of offences[89]:

Loss or Injury	**Minimum Amount**	**Maximum Amount**
Loss of Life	3 Lakhs	5 lakhs
Rape	2 Lakhs	3 lakhs
Acid Attack survivor	2 Lakhs	3 Lakhs
Loss of any part of body 80% disability 40-80% disability	 2 Lakhs 0.60 Lakhs	 3 Lakhs 1 Lakh
Simple Loss or Injury	0.10 lakhs	0.10 Lakhs

In light of this scheme, Delhi High Court in a recent judgment[90] ordered DSLSA to pay adequate compensation to a petitioner who lost her husband to an injury in a road accident, irrespective of fact that petitioner had already received Rs. 25,000 as compensation under Motor Vehicles Act, while accepting petitioner's argument that such compensation can't suffice for her rehabilitation.

Taking cognizance of implementation of the scheme, Delhi HC lambasted delay in allocation and disbursal of funds as 'unacceptable'. It pulled up both DSLSA and the state government in showing laggardness in distribution of funds even after 2 years of enactment, thus, directing, both to devise a comprehensive plan to set up a fund within 3 months[91]; to clear backlog within a week and

[89] *Id.,* the Schedule.
[90] Mohini v. State (Govt of NCT of Delhi) & Ors., W.P. (C) 3754/2015.
[91] *Delhi: High Court Orders Compensation to Crime Victims Within a Day,* NDTV, August 14, 2014, Available at http://www.ndtv.com/delhi-news/delhi-high-court-orders-compensation-to-crime-victims-within-a-day-648838, (last accessed- February 12, 2016).

matters henceforth within 24 hours[92] and to give wide publicity and spread awareness among victims, lawyers, judges about this scheme.[93]

In 2014, Delhi Govt has proposed to amend this scheme so as to increase compensation and to include some new categories of offences like burns, gang rape, unnatural sexual offences but is still awaiting approval of Union Home Ministry.[94]

Till 2015, 25 out of 29 states have made state level provisions under Sec. 357A to provide compensation to victims (very similar to the Delhi scheme).[95]

In 2015, the Central Government also introduced Central Victim Compensation Fund scheme with 200 crore capital to supplement financial support to state schemes notified by states/UTs for heinous offences like human trafficking, acid attacks, rape, etc. and some new categories of offences as people killed or injured in cross- border firing.[96]

VIII. Conclusion

"Law should not sit limply, while those who defy it go free and those who seek its protection lose hope".[97]

India being a welfare State is committed to the welfare of crime victims. The state shall implement the scheme laid down in Sec. 357A of the Cr.PC and other provisions of different statutes in word and spirit to make a victim-friendly system. Moreover, the state has a duty under the constitution to guarantee the right to a dignified life to all its citizens. The state shall endeavour for creation of a robust mechanism. Similar laws in different jurisdictions and proposed draft bill shall find a room for due consideration.

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[92] *Compensate rape victims in 24 hours, expedite induction of more cops: Delhi High Court,* DNA, 6 Aug 2014, available at http://www.dnaindia.com/delhi/report-compensate-rape-victims-in-24-hours-expedite-induction-of-more-cops-delhi-high-court-2008618 , (last accessed- February 12, 2016).
[93] Court on its own Motion v. Union of India through Secretary, Ministry of Home Affairs and Anr. , W.P. (C) No. 7927/2012.
[94] *Delhi Govt approves 'Victim Compensation Scheme,* The Hindu, (September 16, 2015), available at http://www.thehindu.com/news/cities/Delhi/delhi-govt-approves-victim-compensation-scheme/article7657297.ece, (last accessed- February 12, 2016).
[95] Ministry of Home Affairs, *Index of Notification of Victim Compensation Scheme*, available at http://mha1.nic.in/par2013/AnnexLSQNo203For220714.PDF, (last visited February 7, 2016).
[96] Neeraj Chauhan, *Central victim compensation fund set up with Rs 200 crore,* Times of India, (October 14, 2015), available at http://timesofindia.indiatimes.com/india/Central-victim-compensation-fund-set-up-with-Rs-200-crore/articleshow/49359189.cms , (last accessed- February 12, 2016).
[97] Jennison v Baker (1972) 1 All ER 997.

Considering Indian economic condition, it is not feasible to provide compensation to victim of every crime, the State and Central government should conjoin for a National Victim Compensation Fund for the victims of grievous injuries, death, rape, *et al* offences with punishment of 7 or more years, considering financial stability and dignity of victims, ergo, helping in their recovery. For victims Below Poverty Line, compensation for all criminal offence shall be provided.

Victim compensation schemes in every state provide for minimum 2 lakhs in compensation to rape victims. A total 36,735 rape cases were reported in India in 2014, accordingly government would need at least ₹720 crores just for this purpose. If we look at Union Budget contribution in these components, it is almost nil. State and Union Government. shall contribute some budget for this purpose. Receipts from court fees, bail bonds, bail forfeitures, government contributions, the income of convicts in jails, (may be promoted to work as a business venture as in Tihar Jail), insurance premiums, *et al* can be used as revenue sources for Victim Compensation Fund.

A Crime Safety Insurance Policy may be introduced against any criminal harm for which a nominal monthly or annual premium needs to be paid. The government may contribute from income out of such premiums for victim compensation fund. The possibility of a Social Security Scheme (as in other nations) can also be looked at. The compensation under criminal suit must run separately from that in a civil matter but the courts shall consider and determine the compensation taking into account the compensation through civil matter.

A Crime Victims' Compensation Tribunal shall come into effect which would provide a mechanism for dealing with the issues of compensation to the victim of death and rape cases. Victim Compensation boards shall be established for the effective mechanism. Self-Help Groups of victims of crime and for their dependents should be formed for the welfare of the victims and their dependents.

The right to Free Health facilities shall be granted to victims of rape and sexual offences, death, and other grievous injuries under Sec. 320, IPC or any other injuries that the court may deem fit, with free counselling and other mental, physiological or psychological services at minimal or no charges. The court shall also seek convicts to compensate victims and their dependents pro rata and shall endeavour to strike a balance between the criminal and victim on account of legal principles, justice, equity, and good conscience. The wrongdoer shall be made to work in a jail and compensate the victims or their dependents from their earning.

Compensation to victims of crime should not become the ground for reducing or cancelling the punishment of the criminal as the rich may walk free after paying a fine for killing or injuring people. The amount of compensation must be determined by the court and not left over to the parties to claim as it could lead to parties asking unjust (low or high) compensation.

The victim of crime shall be reasonably compensated by the state in the case where the state fails to find the criminal or to prosecute the accused. An interim fund to the victims and their dependents shall be awarded, at the very instance of the crime which is grievous in nature like rape, murder, *et al.*

Let us accept that historically neglected victims of a crime feel "that the rights of those accused of a crime take precedence over theirs"[98] and the system has continuously failed in changing this hard reality. Today, victims of crime are the victims of the system as victim justice has become a causality in criminal justice discourse. The principle of compensating victims of crime is recognized more as a token relief than the very part of a punishment or substantial remedy to the victims.

But it's never too late for justice. Taking note of this, Indian Courts while empathizing with the plight of victims under criminal justice system have shown commitment to do complete justice under the Indian Constitution in defence of human rights and evolved the trend of awarding compensatory remedies to the victims.

Professor Bard put some light on the crisis through which the criminal justice system is going when he said: "the violation…can hardly be called a positive experience, but it does represent an opportunity for change. One of two things will happen, either victim will become recorded or their experience will promote further disorder with long-term consequences."[99]

In order to prevent the breakdown of the system, for it is non-friendly to the victim, the collective cry for justice shall be given due consideration to avoid secondary victimization of victims at the hand of the insensitive and callous system. Restoring rights of the victim of crime in the judicial process are the obligation of the State. Coming with an effective mechanism to deal with the plight of the victims is the need of the day which can brook no delay. Let's not ignore the collective cry for justice.

[98] Guidelines for the treatment of victims of crime: best practice, Commonwealth Secretariat, London, (2003).
[99] M. Bard & D. Sangrey, The Crime Victims Book, 47-48, (1979).

THE INTERNET NEVER FORGETS?
LOCATING THE 'RIGHT TO BE FORGOTTEN' WITHIN THE INDIAN CONSTITUTIONAL AND LEGAL FRAMEWORK

Shreeyash Uday Lalit and Shaurya Upadhyay[*]

The right to be forgotten has been a hotly debated topic across the world, with emerging jurisprudence being highly polarised as either vehemently supporting or objectively denying the existence of such a right. The authors through this article attempt to trace the origins of the right as observed today [i], explore the impact of the Google Spain SL case [ii], attribute to it a definitional paradigm [iii], locate the right within the Indian constitutional framework [iv], suggest a legislative solution in the event that judicial recognition is difficult [v], test the vires of such a 'proposed law' as against the Indian Constitution [vi], and finally provide the conclusion on the location of this right within India's constitutional and legal framework [vi].

1. ORIGINS OF THE RIGHT TO BE FORGOTTEN

Since the beginning of time, forgetting has been the norm, and remembering the exception.[1] Today however, we see a vast shift from this bygone norm, due to advent of the easily accessible, inexpensive digital memory that defies this natural decay of memory and can be everlasting.[2] The recognition of the need for protection of privacy and public reputation has been seen in legal discourse in the past, however one must note the contextual underpinnings that had persuaded the academic and legal exercise. The [then] recent inventions and business methods brought forward the requirement of securing for the individual, what Judge Cooley calls, the right "to be let alone".[3]

We see ourselves at a similar crossroads, where the developments in technology have resulted in lacunae within existing protective legislations. With the advent of newer technology in the last few decades, we see a rise in invention and distribution of mass-consumption devices and other changes in the material environment, which have dramatically altered the contemporary social

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[1] Viktor Mayer-Schonberger, *Delete: The Virtue of Forgetting in the Digital Age*, Ch. I (2011 ed.).
[2] Peter Gryffroy, *Delisting as a part of the Decay of Information in the Digital Age,* CLTR 2016.
[3] Warren and Brandeis, *The Right to Privacy*, Harvard Law Review IV, 15 December, 1890, No. 5.

fabric.[4] As a consequence, we have seen the emergence and permeation of concepts like virtual personalities, social networking, electronic surveillance[5] and virtual tradeable assets[6]. Due to the permanent nature of their archival capabilities, one can even say that remembering has become the norm, and forgetting the exception.[7]

It is in this developing context that the debate on the 'Right to be Forgotten', an oft loosely used phrase, becomes imperative. The authors shall attempt to define the term later in this article, however to understand the true meaning of the phrase, we must first locate it within its historical and sociological context.

In the international domain, if one is to attempt to locate the intellectual roots of the right to be forgotten, one can turn to the French Law which recognizes *le droit à l'oubli* or the 'right of oblivion'. This particular right was used specifically for the erasure or objection to publication of a convicted criminal's history of conviction and incarceration.[8] A similar protection is afforded within German Privacy Laws as upheld by its court of appeals from the year 2006 onwards[9]. Some scholars are of the opinion that the underlying principle can be found in the concept of 'honour-based duelling', permitted by 19th century French and German laws, which first crystallized a law dealing with honour, dignity, and the right to private life.[10]

1.1 Evolution of the 'Right to be Forgotten'

Although there was a general discourse on the right to removal of certain sensitive data, and the protection of privacy, dignity and honour in the past, the 'right to be forgotten' debate, as we know it in the present scenario, rose to prominence in Europe with the CJEU deliberating on the same. These discussions were initiated when the Spanish High Court referred the matter to them in the case of *Google Spain SL v. Agencia Espanola de Proteccion de Datos (AEPD).* A similar debate sprung up in Argentina, in 2009, with the with the *Virginia da Cunha* case, wherein the Argentinian Lower

[4] William Fielding Ogburn, *How Technology Changes Society,* The Annals of the American Academy of Political and Social Science, Vol. 249, Social Implications of Modern Science (Jan, 1947), pp. 81-88.
[5] David Lyon, *The Electronic Eye, The Rise of Surveillance Society – Computers and Social Control in Context* (1st Polity Press, 1994).
[6] Joshua Fairfield, *Virtual Property,* Boston University Law Review 1047, 2005.
[7] *Ibid*.
[8] Jeff Rosen, *The Right to be Forgotten*, 64 Stan. L. Rev. Online 88, Feb 13, 2012.
[9] Nuremburg Court of Appeals Judgment dated December 12, 2006, File No. 3 U 2023/06, published in Magazindienst 2007, 313-31,OLGR Nuremberg 2007, 227,ZUM-RD 2007, 133-134 and Court of Appeals Frankfurt, Judgment dated February 6, 2007, File. No. 11 U 51/06.
[10] Tom Gara, *The Origins of the 'Right to be Forgotten': Sir I Demand a Duel,* Wall Street Journal, 14 May, 2014; See also Rolf H. Weber, *The Right to Be Forgotten: More than a Pandora's Box"*, 2011 JIPITEC 120.

courts upheld the claimant's request to order the respondent search engines to remove certain content from their search engines.[11] The authors shall attempt to highlight the evolution of this right in those countries and regions where this right has been recognized or implemented in some form, and extract the principles relevant to the Indian context, in order to provide the reader with a comprehensive definition and understanding of the right.

1.2 Two Competing Rights

Under the Universal Declaration of Human Rights (UDHR), there is a clear right of freedom of opinion and expression[12]. The law was intended to cater to the technological development that may create new and innovative forms of expression[13], with the internet being one such example[14]. The internet allows the organisation and permanence of information, and therefore its scope and effect is far more threatening in comparison to other forms of print media[15]. In the cases of Stacy Snyder and Andrew Feldmar, this proved ominous. Stacy Snyder, being a 25 year old single mother, wished to be a teacher but was denied her certificate due to an online picture of her donning a pirate hat with the caption 'drunken pirate'[16]. The same fate was in store for Andrew Feldmar, who attempted to cross the Canada/U.S. border which he had crossed several times before. Yet, he was unable to since a news article dating back to the 1960s surfaced on the internet, which showed Feldmar possessing LSD[17].

On the other hand, the right to privacy by default extends to the restriction of activity trails that may be viewed by third persons[18]. The conception of this right was made in 1890, with future SC

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[11] Da Cunha v. Yahoo and Google (Argentinian Lower Courts, 2009; Appeals Court 2014); See also Edward L. Carter, *Argentina's Right to be Forgotten*, Emory International Law Review, Vol. 27, Issue I.
[12] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at http://www.ohchr.org/EN/UDHR/Documents /UDHR_Translations/eng.pdf
[13] Article 19, UDHR: "Everyone has the right to freedom of opinion and expression; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance"
[14] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 16 May 2011, A/HRC/17/27. Available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf
[15] Cláudio de Oliveira Santos Colnago, The Right To Be Forgotten And The Duty To Implement Oblivion: A Challenge To Both "Old" And "New" Media, available at: http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws14/w14-colnago.pdf (hereinafter referred to as "Colmago"), ¶ 4
[16] *Snyder v. Millersville University et al*, 2008 WL 5093140 (E.D. Pa., 2008) (2007, U.S. District Court of Eastern
Pennsylvaniya)
[17] Viktor Mayer-Schonberger, *Delete, Virtue of Forgetting in The Digital Age, Princeton University Press*, 2009
[18] Rolf H. Weber, '*The Right to be Forgotten: More than a Pandora's Box?*', Journal of Intellectual Property, Information Technology and Electronic Commerce Law (2011). Available at https://www.jipitec.eu/issues/jipitec-2-2-2011/3084/jipitec%202%20-%20a%20-%20weber.pdf

Justice Louis Brandeis and Boston lawyer Samuel Warren publishing in the Harvard Law Review[19]. They argued for a common law right which is extant in the system, since it "*secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others*"[20]. Their article was in response to various technological developments in those days, especially of Kodak Brownie Camera and mass-circulation newspapers, which they felt would stifle "*the obvious bounds of propriety and decency*"[21]. According to them, "*what is whispered in the closet shall be screamed from the house-tops*"[22]. Their words could not have been more prophetic. Justice Brandeis was able to foresee a social issue that would continue to plague scholars and jurists alike, even 100 years before its real and potent manifestations could arise.

1.3 Europe

We have seen that in Europe, several nations have always had some form of the right existing in their Right to Privacy and Individual Rights Jurisprudence. However different countries have seen the evolution of this right in slightly different contexts.

In ***France***, the right to oblivion has been an intrinsic part of their legal framework from the late 1970s, as one can see in Article 40 of Law 78-17/1978 which provided for the erasure of irrelevant personal data[23] (also included in the Criminal Code in order to provide for effective enforcement). While till date no express provision states the 'right to be forgotten' as a right in itself, the implicit acknowledgement of this right within the domain of privacy laws, and the French Courts imposition of the law, as laid down in the *Google Spain SL* case, through their decisions[24], shows a strong inclination of the French legal framework towards adopting the principle *ex integro*.

In ***Italy***, the Supreme Court (hereinafter referred to as "SC") has also upheld in a 1998 Judgment, the concept of '*diritto all'oblio'*, a concept further used by the *Garante per la Protezione dei Dati Personali* (The Italian Data Protection Agency) in arguing for the right to be forgotten. Italian scholars and legal commentators have argued that the right to be left alone includes the right to control information about oneself[25], and in line with this, "Italian law prohibits the continued publication of news or information about those crimes unless new events lead to legitimate and current public

[19] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harvard Law Review 193 (1890)
[20] *Ibid*, p. 198
[21] *Ibid*, p. 196
[22] *Ibid*, p. 195
[23] https://www.loc.gov/law/help/online-privacy-law/france.php.
[24] https://www.theguardian.com/media/2014/nov/13/google-french-arm-fines-right-to-be-forgotten.
[25] Virginia Da Cunha Appellate Court Judgment

interest in publication".[26] In practice however the Italian court of Cassation has observed otherwise, stating that search engines must be seen as mere intermediaries, and has ruled against any obligation on their part to remove links to contested web pages.[27]

Spain, the country where the Google Spain SL case originated, has had the concept of '*el derecho al olvido'* in its socio-legal discourse,[28] and the same has been implemented by the Spanish Data Protection Agency, AEPD, on multiple occasions. Mario Costeja Gonzalez, a Spanish citizen, had lodged a complaint with the AEPD, on March 5, 2010, which eventually led to the reference requested by the Supreme Spanish Court from the CJEU, giving official recognition within Europe to the 'right to be forgotten'. While we shall deal with the case in detail at a later point, it is important to note that the initial decision of the AEPD was one in favour of Mr. Gonzalez, substantiating the point that an individual's right to control his image and date on the internet, has been recognized within Spain even before the crystallization of this right by the CJEU decision.

As discussed earlier, a version of the right to be forgotten, has existed in ***Germany*** as an extensive interpretation of the 'right to personality', wherein, in matters of criminal history of convicted criminals, for the cause of their reintegration into society, the publication of their criminal history unless required for immediate public interest can be barred. This highlights the balance struck between the rights of the individual and those of society, as this provision does not deal with information already in the public domain which remains available and can be found in the list of results on search engines.[29] The German Basic Law (GG) of 1949 in Art. 2(1) guarantees to everyone a "right to free development of his personality", a provision crucial for the inclusion of personality protection.[30] The existence of this general personality right was contested for a very long time. It was claimed that only certain aspects of the right to personality such as the right to one's name or image could enjoy legal protection.[31] Two German Constitutional court judgments delivered in Germany that very clearly demarcate the realm of protection afforded by the right to personality and what is excluded from it are the *Lebach* I (1973) and *Lebach* II (1999) decisions.

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[26] Edward L. Carter, *Argentina's Right to be Forgotten*, Emory International Law Review.
[27] Aurelia Tamo, Damian George, *Oblivion, Erasure and Forgetting in the Digital Age,* 2014 (n 30) 81.
[28] Rallo Lombarte, Artemi Telos, *El Derecho al Olvido u su Proteccion: a Partir de la Proteccion de Datos,* 2010.
[29] Joris van Hoboken, *The Proposed Right to be Forgotten Seen from the Perspective of our Right to Remember: Freedom of Expression Safeguards in a Converging Information Environment,* Amsterdam, May 2013, (n 44) 3.
[30] Huw Beverley-Smith/AnsgarOhly/Agnes Lucas-Schloetter, *Privacy, Property and Personality: Civil Law Perspectives on Commercial Appropriation*, Cambridge 2005, p. 100.
[31] *Ibid.*

In *Lebach* I, the docu-drama produced by the Zweites Deutsches Fernsehen (ZDF), a public-service television broadcaster, on a criminal gang who had killed five soldiers in 1969 was prohibited from being aired. The ratio of this case was based on the fact that it showed an individual's name and picture (He had been an actual member of the gang and at the time was still in prison). The court had observed that airing such a presentation would have a negative effect on his privacy as well as on public interest, and would compromise any attempts at rehabilitation.[32] *Lebach* II however, on similar facts involving another TV station airing another documentary, this time without naming or showing pictures of the gang, wished to air the same. The court held that the right to personality did not entitle criminals with a claim to never be confronted with their deeds in public again, and that such an interpretation of Lebach I was misleading.[33] These judgments have formed the basis of personality protection litigation in Germany[34], however the German courts have in toto been reluctant in granting the right to oblivion on grounds of the individual's right to personality.[35] The authors shall attempt to locate this distinction within the Indian context later in this article.

In ***Switzerland*** one can locate the right to be forgotten specifically with respect to criminal history of convicted criminals, with the aim of this right being that of rehabilitation of the criminal into civic society. Publishing the name of someone with a criminal record may be allowed after time has elapsed since conviction only if the information remains newsworthy.[36] This is not true when the former criminal has radically changed his life. However this right to be forgotten is subject to the protection of the public, and in cases of public interest and welfare, the right to be forgotten will not exist.[37]

One of the first instances of legal recognition being given to the 'right to be forgotten' in Switzerland is the *Sociètè Suisse* case, wherein the Swiss Federal Tribunal ruled in favour of an individual asking the court to restrain the Swiss TV from broadcasting a documentary on his

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[32] Bundesverfassungsgericht, 35, 202, 5.6.1973, *Lebach* I, decision available in German at: http://www.servat.unibe.ch/dfr/bv035202.html.
[33] Bundesverfassungsgericht, 1 BvR 348/98, 25.11.1999, *Lebach* II, decision in German available at: https://openjur.de/u/182101.html.
[34] Bundesgerichtshof, VI ZR 227/08, 15.12.2009, Sedlmayr, (www.dradio.de), decision in German available at: https://openjur.de/u/70781.html, Bundesgerichtshof, VI ZR 245/08, 20.4.2010 (www.morgenweb.de); Bundesgerichtshof, VI ZR 346/09, 22.2.2011 (www.faz.net); Bundesgerichtshof, VI ZR 243/08, 9.2.2010 (www.spiegel.de); Bundesgerichtshof, VI 217/08, 8.5.2012 (www.rainbow.at).
[35] Tamo (C. III).
[36] F Werro, *The Right to Inform v. the Right to be Forgotten: A Transatlantic Clash,* in Liability in the Third Millennium, pp. 285-300, May 2009 available at http://ssrn.com/abstract=1401357.
[37] F. Werro/E.M.Belser, *Le droit a l'oubli et ses limites,* Medialex 1997, 99 ff.; F. Werro, *Chronique de la jurisprudence* 1997: *Le droit de la personalitie,* Medialex 1998, 175 ff.

father's life, time spent as a death row convict and his execution. The primary line of reasoning provided by the court was that of the right of the criminal to be forgotten, the plaintiff's right to privacy and his interest in keeping his feelings as a son from being trampled.[38] This case formed the backdrop for cases like *R. AG* where the court held that making the plaintiff's past criminal records public constituted an unjustified violation of his right to be forgotten, and works against the goal of rehabilitation.[39]

1.4 Non EU Nations

While the European courts have *prima facie* balanced the competing constitutional rights against one another, the work done by courts in certain countries like the United States paints a very different picture. On the other hand, countries like Argentina have contributed significantly to the discourse on the right to be forgotten, not just in the context of criminal records, but in a much broader interpretation of the right.

As discussed before, ***Argentina*** with the *Virginia Da Cunha v. Yahoo and Google* case contributed to the International discourse on the right to be forgotten. While the Lower Courts in Argentina upheld her right against Yahoo and Google, with Justice Simari stating that Da Cunha's photographs on the search engines linked with pornography, sex trafficking and prostitution, constituted a violation of her right to control her own image in the present time, The Court of Appeals partially reversed this decision, and held in favour of the Search engines. However one must note that while the search engines were not made responsible, two of the three judges explicitly defended the individual's right to be forgotten, with one of them affirming the lower court's opinion, on the count that search engines were active participants in bringing to the consumer's attention certain pieces of data while disregarding others.[40]

Out of all these countries, perusing the law of ***USA*** is the most pertinent in terms of jurisprudential similarity as well as for comparing the constitutional protection. The US First Amendment till date remains one of the most fiercely defended rights within the country, with the freedom of speech or the press[41] remaining unabrogated. The Right to Privacy however does not find an explicit mention in any of the first 17 Amendments to the Constitution, although some judgments have

[38] *X. v. Societe' Suisse de Radio et de Television.* BGE 109 11 353 (1983).
[39] *R. AG v. W*, BGE 122 111 449 (1996).
[40] *Supra* 14.
[41] US Constitution, First Amendment

held it to be implied within the "penumbras of the First, Third, Fourth, Fifth and Ninths Amendments as a necessary condition"[42].

1.4.1 Persuasive value of First Amendment

While there are various points of departure[43] between Article 19(1)(a) and the First Amendment, the same have eroded over the years due to various decisions. The SC in the celebrated *Shreya Singhal case*[44] makes several points of equivalence to import the American judgments and apply them persuasively. The US SC has, in *Cantwell v. Connecticut*[45], followed by *Chaplinsky v. New Hampshire*[46], noted that there are certain limited classes of speech, the prevention of which has never been thought to raise any Constitutional issue, similar to Article 19(1)(a). This is also why the SC in *Kameshwari Prasad*[47] noted that the First Amendment has always been understood to be subject to the police power. Thus, it is imperative to consider the privacy cases in US to assess the challenge posed by freedom of speech and expression.

1.4.2 US Law on Search Engine Discretion

With specific focus on search engine discretion, there are three famous trial court cases in US which have adjudicated specifically upon search engine discretion: *SearchKing*[48], *Kinderstart*[49] and *Langdon*[50]. The first was in 2003, which involved a company called Search King which sued Google for "maliciously" devaluing certain websites where Search King would place advertisements, thereby affecting its business[51]. The Court agreed with Google's argument that although the algorithm was subjective, the rankings were themselves gravely subjective, involving an element of "public concern" which could not be interfered with through tort law[52].

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[42] *Griswold v. Connecticut*, 381 U.S. 479, 482-486 (1965)
[43] Firstly, the First Amendment is much more absolute and peremptory in its language. Secondly, Article 19(1)(a) only adverts to freedom of speech and expression, without any reference to the "press" while the First Amendment refers only to speech and press. Thirdly, while speech in US may be abridged in pursuance of governmental regulation, in India, such speech can be curtailed only through eight designated subject matters as found in Article 19(2).
However, these points of variance
[44] 2015 5 SCC 1
[45] *Cantwell v. Connecticut*, 310 U.S. 296
[46] 86 L. Ed. 1031
[47] 1962 Supp. (3) SCR 369
[48] *Search King, Inc. v. Google Tech., Inc.*, No. 5:02-CV-01457, 2003 WL 21464568, (W.D. Okla. May 27, 2003)
[49] *Kinderstart.com, LLC v. Google, Inc.*, No. 5:06-CV-02507, 2007 WL 831806, (N.D. Cal. Mar. 16, 2007)
[50] *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 630 (D. Del. 2007);
[51] SearchKing, ¶ 10
[52] Ibid., ¶ 11

This position was reiterated in *Kinderstart* and *Langdon* where search engine discretion of Google was upheld. Their right to reject ads was held as protected under the First Amendment and the Page Ranking algorithm escaped criticism. This excessive insistence on upholding the First Amendment renders a balance of the two rights almost impossible.

1.4.3 Public Disclosure Tort under US Law and conflict with the First Amendment

The tort of public disclosure is extremely relevant to this debate to understand the true extent of the constitutional conflict presented by the 'Right to be Forgotten'. In American courts, the public disclosure tort has been applied more often than not, to supersede privacy rights[53], since "*in public debate we must tolerate insulting speech in order to provide 'breathing space' to the First Amendment*"[54]. This tort was developed through three landmark US SC cases: *Cox Broadcasting v. Cohn*[55], *Smith v. Daily Mail Publishing*[56] and *Florida Star v. B.J.F*[57].

In *Cox*, the Court was concerned with the liability of a media outlet broadcasting the name of the deceased rape victim. The Court held that liability cannot be imposed for publishing information that can be found in public records. In *Daily Mail*, the Court said that any truthful publication regarding public records can be made by the Press provided that it has been obtained through a lawful source. This went up further in *Florida Star* where the Court stated that truthful publication can only be injuncted when it is contrary to a "*state interest of the highest order*"[58]. This case also revolved around the publication of the name of a sexual assault victim where the assailant was still at large and the police investigation ongoing. Therefore, the *Florida Star* test leads to an extremely narrow scope within which the right to privacy can operate – a state interest of the highest order – whereas the *Daily Mail* test permits a truthful publication provided that it is obtained through a lawful source.

However, it needs to be noted that while the public disclosure tort proscribes the publication of truthful facts that are not of 'public concern', the law as established in the wake of *Florida Star* makes it impossible for any real implementation of the Right to be Forgotten in the US. The

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[53] Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?, Law & Contemporary Problems*, Winter 1966, at 326, 335–38; Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 George Washington Law Review 1097, 1101 (1999); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 Cornell Law Review 291, 293 (1983)
[54] Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)
[55] 420 U.S. 469, 493–96 (1975)
[56] 443 U.S. 97, 105–06 (1979)
[57] 491 U.S. 524, 541 (1989)
[58] *Ibid*.

'newsworthiness' test or the *Daily Mail* test engulfs the Public Disclosure tort since the media themselves determine what is newsworthy and therefore of 'public concern'. The law protects the expectations of the media to uncover truth and report the same, and "*when they collide with expectations of privacy, privacy almost always loses*"[59].

Notwithstanding the federal judgments, the judgment of California High Court in *Briscoe v. Reader's Digest Association Inc.*[60] was a saving grace in so far as it held a variety magazine liable for the publication of a man's criminal antecedents. The court drew a distinction between items of immediate public concern, and those that add little in the way of public value.[61] However in *Gates v. Discovery Communications, Inc.*[62] the California SC overturned its judgment in *Briscoe* finding it incompatible with certain U.S. SC judgments. The effect of the latter judgment rendered the states unable to restrain the media from disseminating sensitive information as long as it is legally obtained.

Thus, under the current legal precedence set by these judgments in US, it becomes nearly impossible for any further developments in recognising a 'Right to be Forgotten'[63]. However, it may be noted, that since India does not share the same insistence on free speech protection as the US, the vires of a 'proposed law' in India would not find the same constitutional hurdles.

By perusing the debates in various countries, one can observe that the right to be forgotten is not something set out only within the context of the CJEU Judgment of 2014, but has existed or if not, then adjudicated upon by several countries on the basis of differing priorities between the freedom of press and the right to privacy. However, one must explore the definitional and legal shaping of the concept within the CJEU Google Spain Judgment, before one endeavours to consolidate a definitional understanding of the 'Right to be forgotten' as we know it now.

2. GOOGLE SPAIN SL V. AEPD

On 13 May 2014, the Court of Justice of the European Union (CJEU) delivered a landmark judgment in the field of privacy rights and more specifically 'the right to be forgotten'. In *Google Spain SL v. Agencia Espanola de Proteccion de Datos*,[64] the Court aimed to interpret Article 2(b) and

[59] *Florida Star v. B.J.F.*, 491 U.S. 524, 540–41 (1989)
[60] 4 Cal. 3d 529.
[61] 483 P. 2d 34 (Cal. 1971).
[62] 101 P.3d 552.559 (Cal. 2004).
[63] *Supra* 25.
[64] Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos* (May 13, 2014).

(d), Article 4(1)(a) and (c), Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ('the Directive'),[65] and of Article 8 of the Charter of Fundamental Rights of the European Union ('the Charter'). [66]

The Court held that the work done by search engines i.e. the finding, indexing, storing and making available on the internet, information published by third parties must be classified as 'processing of personal data' within the meaning of Article 2(b)[67] when that information contains personal data. The operator of the search engine was also brought within the definition of 'controller' as given under Article 2(d)[68] of the Directive. The operations were held to be conducted on 'Member State territory' if the operator promoted and sold advertising space to the inhabitants of the Member State. Thereby these two interpretative actions, brought Google Spain SL and Google Inc. under the jurisdiction of the Directive.

The crux of the judgment however lay in the interpretation of Articles 12 (b)[69] and the subparagraph (a) of the first Paragraph of Article 14 of the Directive[70]. The court held that when appraising the conditions for the application of those provisions, examination must be made as to whether the data subject has a right that the personal information in question no longer be displayed in the list of results provided upon a search made on the basis of his name. This personal information need not necessarily be prejudicial to him in order for the exercise of his right. The data subjects fundamental rights under Article 7 and 8 of the Charter[71], were held to override the

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[65] Council Directive 95/46, 1995 O.J. (L 281) 31 (EC).
[66] Charter Of Fundamental Rights Of The European Union (2000/C 364/01).
[67] Article 2(b) of Directive 95/46 defines 'processing of personal data' as 'any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction'.
[68] Article 2(d) of Directive 95/46 defines 'controller' as 'the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data'.
[69] Article 12(b) of Directive 95/46 provides that Member States are to guarantee every data subject the right to obtain from the controller, as appropriate, the rectification, erasure or blocking of data the processing of which does not comply with the provisions of Directive 95/46, in particular because of the incomplete or inaccurate nature of the data.
[70] Article 14 of Directive 95/46, entitled 'The data subject's right to object', provides:
'Member States shall grant the data subject the right:(a) at least in the cases referred to in Article 7(e) and (f), to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data.
[71] Article 7 of the Charter guarantees the right to respect for private life, whilst Article 8 of the Charter expressly proclaims the right to the protection of personal data. Article 8(2) and (3) specify that such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other

economic interest of the operator of the search engine, as well as the interest of the general public in having access to that information. The only exception to this right was held to be the 'preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question'.[72]

It is interesting to note the undercurrents within the judgment, wherein the rights of the data subject are held in such high regard, that protection is not only given to information sensitive, or prejudicial to oneself, but to all information in general, even if it is just 'inadequate, irrelevant or no longer relevant, or excessive in relation to the purpose and time elapsed,[73] thus truly putting forth the right to be forgotten, inasmuch as giving near complete control to an individual to protect and determine his own personality.

The ruling must not be seen in isolation, as the move towards data protection, and the Google Spain SL case take place in the context of the deliberations and enactment of the various European Union Data Protection Regulations. In January 2012, the official draft of the new General Data Protection Regulation was published by the European Commission, marking the beginning of the long-standing legislative tussle on data protection legislation, crucial "at a time when information systems and digital business underpin human life"[74]. This regulation was aimed at resolving and harmonizing the conflict of laws within the various European countries,[75] and at the same time reforming significantly the data protection rules of the country.[76] On 12 March 2014, the European Parliament voted overwhelmingly in favour of the new data protection laws, and after months of negotiations, on 15 December 2015 the EU Commission, Parliament and Council of Ministers reached agreement on the General Data Protection Regulation, after months of 'trilogue' negotiations.[77] Finally, this year, on 4 May 2016, the GDPR was published on the Official Journal of the European Union, and it comes into effect on 25 May 2018.[78] The final GDPR spells out a

legitimate basis laid down by law, that everyone has the right of access to data which have been collected concerning him or her and the right to have the data rectified, and that compliance with these rules is to be subject to control by an independent authority.

[72] *Supra* 38.

[73] *Google Spain SL v. Agencia Española de Protección de Datos,* 128 Harv. L. Rev. 735, 10 Dec 2014, available at http://harvardlawreview.org/2014/12/google-spain-sl-v-agencia-espanola-de-proteccion-de-datos/.

[74] Bird and Bird, *Guide to the General Data Protection Regulation,*

[75] Simon Castellano, *El derecho al olvido en el universe 2.0,* 2012, Textos Universitaris de Biblioteconomia i Documentacio.

[76] European Commission, *Press Release,* (ec.europa.eu 2012) available at http://europa.eu/rapid/press-release_SPEECH-12-26_en.htm.

[77] *Supra* 48.

[78] Regulation (EU) 2016/679 Of The European Parliament And Of The Council, of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

clear 'right to be forgotten'[79], specifically providing for erasure of data in cases of withdrawal of consent, objections raised, or when the data otherwise does not comply with the regulation. The Regulation also highlights cases where consent is taken when data subject is a child, or is not fully aware of the risks involved and later wants to remove the data. The right to erasure has also been extended to the responsibility of the controller to ensure that he informs other controllers processing such data to erase any links, copies or replications of the personal data. These aims of the Regulation are achieve by Article 17[80] which specifically deals with the 'Right to erasure' or the 'right to be forgotten'. This perhaps marks the first instance where the 'right to be forgotten' will be enforced by a specific legislative tool.

2.1 Criticism of the CJEU Decision

In the wake of the ruling handed down by CJEU, there are various points of inquiry which need further analysis. Many commentators have openly criticised the ruling in view of the skewed consideration of the two rights of privacy and freedom of information and communication that the Court has considered.

A criticism emerges, which attempts to highlight the inadvertent undervaluing of the freedom to inform through this judgment[81]. The ruling notes the following: "*Whilst it is true that the data subject's*

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[79] *Ibid.* Introduction pt. 65, 66.

[80] Article 17: Right to erasure ('right to be forgotten') **1.** The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:
(a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed; (b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing; (c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2); (d) the personal data have been unlawfully processed; (e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject; (f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1). **2.** Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data. **3.** Paragraphs 1 and 2 shall not apply to the extent that processing is necessary: (a) for exercising the right of freedom of expression and information; (b) for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; (c) for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3); (d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or (e) for the establishment, exercise or defence of legal claims.

[81] Niko Härting, *"Can a Search Engine be "Private by Default"?"*, Cronline (May 14, 2014). Available at: http://www.cr-online.de/blog/2014/05/14/can-a-search-engine-be-private-by-default/.

rights protected by those articles also override, as a general rule, that interest of internet users, that balance may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information". As evidenced by the aforementioned quote, the balancing test, also brings forth another principle – 'privacy, by default'. In effect, this enables privacy to be elevated over every other right; an anomaly, which is not supported by a perusal of the human rights framework[82]. It has been urged that this presumption towards data erasure, is highly lop-sided and tends to create a "super-human right"[83] in the absence of any such hierarchical structure. The critics thus argue that the Court precluded the equal importance, if not significance, of the freedom to disseminate[84].

The argument naturally flows that this rationale of 'privacy by default' will encourage powerful entities and natural persons to employ their lawyers to ensure the removal of any and every information that they find inconvenient. The consequent elimination of search results will only be exploited as a convenient tool to suppress information. This could be profoundly harmful to the Internet, especially coming from the EU which has an established legacy of being the champion of disseminating information[85]. The Court necessitates a public interest justification, for every piece of published information, which some critics describe as an unwarranted reductionist approach[86].

There are other criticisms as well, which find that the Court incorrectly identified Google as a "data controller" and not a search engine operator. Recognising it as a "data controller" makes Google subject to the Directive, thereby ensuring that it is answerable to the mandate therein[87]. The criticism pertaining to the broad interpretation of "data controllers" adverts to the British

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[82] *Google Spain SL v. Agencia Española de Protección de Datos,* 128 Harv. L. Rev. 735, 10 Dec 2014, available at http://harvardlawreview.org/2014/12/google-spain-sl-v-agencia-espanola-de-proteccion-de-datos/.
[83] Martin Husovec, *Should We Centralize the Right to Be Forgotten Clearing House?,* Center For Internet & Society (May 30, 2014) available at: http://cyberlaw.stanford.edu/blog/2014/05/should-we-centralize-right-be-forgotten-clearing-house (quoting Hans Peter Lehofer, EuGH: *Google muss doch vergessen - das Supergrundrecht auf Datenschutz und die Bowdlerisierung des Internets,* E-COMM (May 13, 2014). Available at: http://blog.lehofer.at/2014/05/eugh-google-muss-doch-vergessen-das.html)
[84] Steve Peers, *The CJEU's Google Spain Judgment: Failing to Balance Privacy and Freedom of Expression*, EU Law Analysis (May 13, 2014). Available at: http://eulawanalysis.blogspot.co.uk/2014/05/the-cjeus-google-spain-judgment-failing.html; cf. Caro Rolando, *How "The Right to Be Forgotten" Affects Privacy and Free Expression,* IFEX (July 21, 2014), https://www.ifex.org/europe_central_asia/2014/07/21/right_forgotten
[85] Guy Vassall-Adams, *"Case comment: Google Spain SL, Google Inc v Agencia Espanola de Proteccion de Datos, Mario Costeja González"*, Eutopialaw (May 16, 2014). Available at: https://eutopialaw.com/2014/05/16/case-comment-google-spain-sl-google-inc-v-agencia-espanola-de-proteccion-de-datos-mario-costeja-gonzalez/.
[86] Ibid.
[87] Shane McNamee, *Europe and The Right to Be Forgotten: A Memorable Victory for Privacy or Defeat for Free Speech?,* Undisciplined.com (May 17, 2014). Available at: https://theundisciplined.com/2014/05/17/europe-and-the-right-to-be-forgotten-a-memorable-victory-for-privacy-or-defeat-for-free-speech/.

House of Lords report (hereinafter referred to as "Committee Report")[88]. The Committee Report while perusing the ruling and its consequences bemoaned the extensive definition of a data controller which could potentially bring within its ambit "any company that aggregates publicly available data"[89]. Thus, in its conclusion, it notes that the Court "*could and should have interpreted the Directive much more stringently*"[90].

However, these criticisms fail to consider that the Court only inferred from the provisions under the Directive within the bounds available to it. A preview of Google's functioning reveals the extent of its functions[91]. The criticisms neglect the interpretation that the Court drew from the strength of the Directive itself[92]. Furthermore, this argument on the lop-sided balancing of privacy vis-à-vis other rights forgets that this preference arises from the principles enumerated in the Directive. The object of the Directive is defined as: "*protect[ing] the fundamental rights and freedoms of natural persons, and in particular their right to privacy*"[93]. Thus, the Court considers its limits and imbibes the object while reflecting its underlying values.

There are also critics who attempt at highlighting the practical ramifications of the judgment. *Firstly*, they argue that the ruling grants unbridled power to individuals sitting in high positions at Google to censor public information without any accountability or oversight[94]. A simple task of completing a form can render this information inaccessible to the world. *Secondly*, they argue that private corporations should not be permitted to consider these requests without any accountability mechanism or additional scrutiny[95].

While these criticisms reflect a legitimate concern, they too misconstrue the confines within which the Court has operated. There is a direct relation between the Directive text and the Court's judgment on the same. The Directive provides that: "*it shall be for the controller to ensure that the principles relating to data quality are complied with*"[96]. It would be a thorough mischaracterization of the debate to put these two rights at complete loggerheads with each other sans the context in which they are

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[88] European Union Committee, EU Data Protection Law: A 'Right To Be Forgotten'?, 2014-15, H.L. 40 (U.K.)
[89] *Ibid*.
[90] *Ibid*., ¶ 55
[91] *See How Search Works*, Google, http://www.google.com/insidesearch/howsearchworks
[92] HLR Criticism, p. 741.
[93] Council Directive 95/46, Preamble ¶ 2, p. 31
[94] Jonathan Zittrain, *Don't Force Google to 'Forget*', New York Times, (May 14, 2014). Available at: http://www.nytimes.com/2014/05/15/opinion/dont-force-google-to-forget.html
[95] Danny O'Brien & Jillian York, *Rights that Are Being Forgotten: Google, the ECJ, and Free Expression,* Electronic Frontier Found (July 8, 2014). Available at: https://www.eff.org/deeplinks/2014/07/rights-are-being-forgotten-google-ecj-and-free-expression
[96] Council Directive 95/46, Article 6, p. 40

to be reconciled. The Directive under Articles 14(a) and 12(b) posits that a data subject may object if the information is "*inadequate, irrelevant or no longer relevant, or excessive in relation to [the] purposes [of the processing] and in the light of the time that has elapsed.*"[97] Therefore, the CJEU Ruling does not extend to individuals strong-arming data controllers in removing 'inconvenient' information, or entitle a data subject to restrict or terminate information that he considers to be contrary to his self-interest.

3. DEFINITIONAL PARADIGM

The 'right to be forgotten' is a complex and intriguing juridical instrument. Defined as 'the right to silence on past events in life that are no longer occurring' by certain scholars,[98] it has imbibed various meanings in the sociological context within which it has evolved. This article does not deal in detail with the historical conception of the right to be forgotten, or the right to oblivion as has existed in the 20th century legal framework of certain European Countries. It focuses, however, on the right to be forgotten as revolving around the question of granting (or not) individuals the ability to delete personal data (such as images, texts, opinions, official documents, certificates, and any other type of personal data describing past behaviour and actions) from the public domain, including from lists of results promoted by search engines, or posted on the internet.[99] The idea in this context is not to allow someone to re-write or build from scratch an entirely new history, or erase unpleasant traces of one's time on earth[100], but to see that one's present is not "cluttered up by his/her past". It aims to undo the sense of eternal existence[101] present day technology gives to one's virtual identity and existence.

The new General Data Protection Regulation defines the 'right to be forgotten' as "the right [of a data subject] to have his or her personal data erased and no longer processed where the personal data are no longer necessary in relation to the purposes for which they are collected or otherwise processed, where a data subject has withdrawn his or her consent or objects to the processing of

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[97] Google Spain case, ¶ 93.
[98] Pino, G. (2000). *The Right to Personal Identity in Italian Private Law: Constitutional Interpretation and Judge-Made Rights*. In M. Van Hoecke & F. Ost (eds), The Harmonization of Private Law in Europe. Oxford: Hart Publishing, pp. 237.
[99] Norberto Nuno Gomes de Andrade, *Oblivion: The Right to be Different ... from Oneself: Re-Proposing the Right to be Forgotten* in Alessia Ghezzi, Ângela Guimãraes Pereira and Lucia Vesnić-Alujević, The Palgrave Macmillan Ethics of Memory in a Digital Age: Interrogating the Right to be Forgotten, European Commission, Joint Research Centre, 2014
[100] Viviane Reading, *The EU Data Protection Reform 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age*, Speech delivered in Munich, 22 January 2012
[101] Walz, S. (1997). *Relationship between the Freedom of the Press and the Right to Informational Privacy in the Emerging Information Society*. 19th International Data Protection Commissars Conference, Brussels, 17–19 September 1997.

personal data concerning him or her."[102] The right to be forgotten in this context can be broken down into three variants, each with an increasing degree of interaction and conflict with the right to freedom of speech and expression. The first variant deals with the right to self-deletion of data in cases where the individual exercises the option of taking down information from their own domain. A legal right to this end would be of no practical significance, as this option is exercisable in most cases, however a corollary to this would be the confirmation of deletion from the archives issued by the operators after deletion initiated by the data subject.[103]

The next two variants are either the right to delete information copied from the original and reposted on a third party domain, or deleting information about oneself from a third party domain. The General Data Protection Regulation in its approach protects both these rights, as it deals with "personal data concerning him or her".[104] This definitional width has garnered a lot of negative criticism from free speech advocates, and one must peruse the same before conclusively accepting any one definition of the same. [105]

In a system independent of the legislative mandate as provided through the European Council Directive, an ideal implementation of the 'right to be forgotten' could be through a proper institutional framework that adverts to the takedown requests, and allows an appeal to a higher authority in the event that the request may not be accepted. If the matter concerns a right as precious as privacy, it cannot be the prerogative of private companies to accept or reject requests without having an appropriate channel for ensuring accountability.

This also presents the constitutional argument that a data controller exercising such powers would necessarily be performing a public function, thus inviting its applicability under Article 226 through which the Higher Courts would be able to control the misuse of this enormous power. In the event that such a public function cannot be traced by the judiciary, appropriate limits could be created through a legislative mandate that prescribes and proscribes as may be appropriate. Both these outcomes shall be discussed in detail in the following sections.

[102] *Supra* 52.
[103] *Supra* 9, p. 90.
[104] *Supra* 54.
[105] *Supra* 9

4. INDIA'S RIGHT TO PRIVACY AND PRIVACY TORT

In the Second Restatement of Torts, the four actions available under the common-law are the following: *firstly*, intrusion on seclusion; *secondly*, misappropriation of name or likeness; *thirdly*, publicity placing a person in a false light; *fourthly*, publicity given to private life.

These four torts cover separate and exclusive subject matters. The first pertains to information collection of a person, thereby entailing disturbance of mental peace or actual physical intrusion by the tortfeasor[106]. The second pertains to matters where the identity of an individual is breached[107]. This does not necessarily concern itself with physical intrusion of space, but covers instances where the "property" is exploited, where the exploitation includes but is not limited to commercial exploitation[108]. The third covers disclosure of facts which are highly offensive for reasonable men, coupled with malice as the motivation for such disclosure[109]. However, the fourth encapsulates situations which impose liability on the tortfeasor even for disclosing true facts to the public which may not necessarily be of public concern[110]. To understand what is of legitimate concern to the public is highly subjective[111]. It is this last tort which is the most contentious among all these, since it prima facie infringes the freedom of the speech or the press when it attempts to injunct material which is true, but does not concern the public.

4.1 India's Constitutional Right to Privacy

In India, whether the privacy was sought to be protected under tort law or under constitutional protections, any discussion on the same naturally involved a mention of *Kharak Singh*[112] and *Gobind v. State of M.P.*[113]. In an order passed on August 11, 2015, the Bench headed by Justice Chelameswar referred the matter of *Justice K.S. Puttaswamy v. Union of India* to a larger Bench, to consider whether the judgments of *Gobind*, *Rajagopal* [114]and *PUCL*[115] (smaller benches of two or three judges) hold

[106] *Pearson v. Dodd*, 410 F.2d 701, 704 (D.C. Circuit 1969); *Restatement (Second) of Torts* § 652B, Comment B
[107] Ibid., Comment A
[108] *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 311 (Cal. Ct. App. 2001); *Ainsworth v. Century Supply Co.*, 693 N.E.2d 510, 512 (Ill. App. Ct. 1998)
[109] Restatement (Second) of Torts § 652E
[110] *Wagner v. City of Holyoke*, 404 F.3d 504, 508 (1st Cir. 2005); Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 Columbia Law Review 1205, 1258–62 (1976)
[111] Jeffrey Rosen, *Free Speech, Privacy, and the Web That Never Forgets*, 9 Journal on Telecommunication & High Technology Law 345, 349 (2011)
[112] *Kharak Singh v. State of U.P.*, 1964 1 SCR 332
[113] 1975 2 SCC 148
[114] 1994 6 SCC 632
[115] *PUCL v. Union of India*, 1997 1 SCC 301

the fort or whether *M.P. Sharma*[116] and *Kharak Singh* (6 and 8 judge benches respectively) which have denied the existence of privacy, cover the field.

In *M.P. Sharma*, which was a case on self-incrimination, the SC categorically held that that the Indian Constitution had no contemporaneous provision to the Fourth Amendment that prohibited unreasonable searches or seizures. *Kharak Singh* reiterated this, by holding that since there was no right to privacy, surveillance of a person's movements could not amount to an infringement of Article 19(1)(d).

However, with great deference to these two judgments, it must be noted that both *M.P. Sharma* and *Kharak Singh* were adjudicated in a time when every fundamental right was assessed in isolation (pre-*R.C. Cooper*[117] era). Post the *Bank Nationalisation case*, there was a definite structural framework in which the fundamental rights came to be seen - to assess a violation of Article 21, it also became pertinent to determine if Articles 14 and 19 were not breached. Every country following Anglo-saxon jurisprudence, has imbibed privacy as a fundamental component of 'liberty'.

4.2 Right to Privacy (*Puttaswamy*) judgment

This surely came to be contested and was finally put to rest through the landmark 9 Judges Bench decision of the Supreme Court in *Justice K S Puttaswamy v. Union of India*[118] where the Court unanimously concluded that Right to Privacy is embedded within Article 21. Further, the Court overruled the 6 and 8-bench decisions in *M.P. Sharma* and *Kharak Singh* respectively. There were 6 separate judgments written by Chelameswar, Bobde, Nariman, Sapre, Chandrachud and Kaul JJ. This article would not attempt to unearth this ratio for a variety of reasons. *Firstly*, this article was written when the 9 bench decision was not yet pronounced. *Secondly*, extracting the *ratio* out of this 547 page is an onerous task – one which requires detailed analysis. Thus, this article will only focus on the judgments of Chandrachud, Nariman and Kaul JJ, for these are the judgments which make a specific mention of the right to information, doctrine of waiver and the right to be forgotten within the Indian landscape.

It may be said that a majority *ratio* may be culled out with regard to right to information since Chandrachud and Nariman JJ refer to the Right to Information Act, 2005 and specifically, Section 8(1)(j) which refers to disclosure of personal information by the Public Information Officer.

[116] *M.P. Sharma v. Satish Chandra,* AIR 1954 SC 300
[117] *R.C. Cooper v. Union of India,* 1970 SCR (3) 530
[118] Writ Petition (Civil) No 494 Of 2012

Similarly, a majority *ratio* is visible in so far as the doctrine of waiver of fundamental rights is concerned. Both Justices Chandrachud and Nariman have expressly stated in as many words that the fundamental right to privacy cannot be waived. The reason this argument is important is since the Right to be Forgotten is mostly based on a contractual agreement whereby the end user waives his claim to have ownership of the information, or waives his right to effect deletion of the information because he signs a contractual agreement forbidding him from making those claims.

Advocate Gopal Sankarnarayan argued that if privacy were to be held as a fundamental right, then the doctrine of waiver would not apply on the same and the following ramifications would ensue, namely, *first*, that all the statutory provisions that deal with aspects of privacy would be vulnerable; *second*, the State would be barred from contractually obtaining virtually any information about a person, including identification, fingerprints, etc.; *third*, the judiciary would be testing what aspects of privacy could be excluded from Article 21 rather than what can be included in Article 21.

Rejecting this argument, Justice Nariman prophetically states the following in paragraph 60 of his separate judgment: "*This argument again need not detain us. Statutory provisions that deal with aspects of privacy would continue to be tested on the ground that they would violate the fundamental right to privacy, and would not be struck down, if it is found on a balancing test that the social or public interest and the reasonableness of the restrictions would outweigh the particular aspect of privacy claimed. If this is so, then statutes which would enable the State to contractually obtain information about persons would pass muster in given circumstances, provided they safeguard the individual right to privacy as well.*"

Similarly, Justice Chandrachud has reaffirmed the inapplicability of the doctrine of waiver in paragraph 112 of his separate judgment, thereby confirming this as a majority *ratio*. Thus, it appears that the *Puttaswamy* lays a strong foundation for enforcement of privacy qua the State. However, enforcement of privacy with respect to a private individual is the cause of concern here, and it would be wise in our discussion to separate the two as being two distinct values.

4.3 Privacy Tort in India

When we discuss privacy torts, the first decision to admit privacy as a tort was *R. Rajagopal v. State of Tamil Nadu*[119], which distinguished between the tort action and the action available under the constitutional protection of Article 21. It upheld the right to privacy as the 'right to be let alone' and stated the following: "*A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning*

[119] 1994 6 SCC 632

the above matters without his consent whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. The position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy".

Therefore, *Rajagopal* clearly holds the fort with regard to the tort action of privacy. Writing for the Bench, Justice Jeevan Reddy carved out a few exceptions as well:

a) Public records including court records are precluded from being objectionable.
b) Public officials are also excluded from raising a tort action for privacy violation for the sheer public nature of their official duties.

The principles laid down in *Rajagopal* were further streamlined in the Delhi High Court case of *Indu Jain v. Forbes Incorporated*[120]. The plaintiff wished to injunct Forbes from publishing her family's name in the Forbes list of Indian billionaires. After a careful perusal of the authorities involved, Justice Gita Mittal of the Delhi High Court rendered the following *ratio*:

a) Right to privacy can be waived by a person through express or implied consent.
b) A public person enjoying standing, accomplishment, fame or by adopting a profession which gives the public a legitimate reason in his doings, becomes a public figure and thereby relinquishes a *part* of his privacy.
c) The standard for evaluating privacy infraction is that of an ordinary man of common sense.
d) Although there is no presumptive priority of the freedom of press as in the US, that does not take away from the significance of the freedom of the press.
e) In assessing the grant of a relief, the privacy infringement must pass muster through a *balancing test* comparing the privacy of an individual against the right of the public to disclose newsworthy information.
f) The disclosure includes such matter that cannot be read without the accompanying message intended to be conveyed to the public.

Thus, as we can see, *Rajagopal* hits significant roadblocks in its assessment and expansion of the right to privacy. While *Rajagopal* considers only public records and public officials, *Indu Jain* expands this to incorporate various facets, which are not covered by the *Rajagopal* at all. It would be proper to say that the *ratio* of *Rajagopal* has been expanded since *Indu Jain* attempts to insert

[120] (2007) ILR 8 Delhi 9

various new dimensions to the right, which were never anticipated or foreseen by the SC in *Rajagopal.*

There are several objections to *Indu Jain* as well. It stipulates that right to privacy can be waived by consent. This observation has met criticism, especially once it agrees that right to privacy is implicit in Article 21. Going by *Basheshr Nath*[121]*, Olga Tellis*[122] and *Puttaswamy*[123]*,* fundamental rights cannot be waived. Therefore, this observation would imply that claims to privacy tort (against private individuals) can be waived, however, in light of the recent *Puttaswamy* decision, the right to privacy against the State (under Article 12) cannot be waived.

Thus, it would appear that depending on who the right to privacy is being claimed against, the same would be capable of being waived or not. *Firstly*, this creates an unnatural distinction between the two kinds of rights – constitutional privacy right and privacy tort. *Secondly*, an end user wishing to erase information from the data controller, would necessarily have to pitch the data controller as occupying a public function under Article 12, and thereby becoming a State; otherwise, his/her right to claim privacy qua private bodies will stand to naught.

On other grounds also, *Indu Jain* appears to be riddled with controversy. In light of the test mandated by the judgment, it would appear that the privacy right and freedom of press stand on an equal footing, thereby necessitating a balance of the two. However, when the judgment makes the privacy right non-absolute, while freedom of press enjoys its near-absolute status, it renders the balancing test of these two rights skewed and improbable.

4.4 Can Right to Be Forgotten be found within *Rajagopal* or *Indu Jain*?

Rajagopal in its application to privacy tort covers the area in isolation, without any help from foreign precedents. Furthermore, *Rajagopal* barely scratches the surface since there is no SC precedent adverting to a balancing test for comparing the privacy rights of individuals in terms of deletion of content vis-à-vis the rights of the press to disseminate.

Secondly, *Rajagopal* refers to subjects falling under a few categories such as the subject's family, marriage, procreation, motherhood, child-bearing and education among other matters, on which nobody has a right to infringe privacy. However, in as vague and broad these categories have been

[121] *Basheshr Nath v. Income Tax commissioner,* 1959 SCR Suppl. (1) 528
[122] *Olga Tellis v Bombay Municipal Corporation*, 1985 SCR Suppl. (2) 51
[123] Writ Petition (Civil) No 494 Of 2012

left, it seems unlikely that the Right to be Forgotten may be implicitly found within the *ratio* of Rajagopal. The Right to be Forgotten involves permanently removing the public from accessing information that may be 'inadequate, irrelevant or excessive', thereby being a barrier to free speech and offending Article 19[124]. This element may have arisen in cases where Courts have granted relief on a fact-specific basis, but to grant this relief as a matter of right requires an in-depth analysis of the ramifications that may follow.

The only specific instance where such principles have been culled out is *Indu Jain*, which has infirmities as discussed previously. It cannot be gainsaid that such a right is *necessary* in a society such as India, however this 'Unwritten Constitution'[125] of India needs further probing by the SC which allows it to develop the *ratio* as propounded in *Rajagopal.*

One can attempt to locate the right within the Constitution, as can also be seen through the previous precedents establishing privacy as inherent in Article 21. However, there is a dire need for a SC precedent which adjudicates on these principles while incorporating the 'right to be forgotten'. Judicial action has already begun with the Delhi High Court[126] having taken cognizance of this issue. However, while further developments on the case are not known, it is a long time before a significant judgment is developed by the courts. Thus, in the absence of such a precedent, a legislative mandate is necessary for implementing this right.

5. LEGISLATIVE SOLUTION

The Parliament can pass an amendment to the already existing IT Act so that it may mould it to suit the privacy requirements of the Indian populace. Under the 2008 Amendments, Section 43A[127] covers the compensational aspect when a body corporate fails to secure 'sensitive personal data' through 'reasonable security practices'. Both sensitive personal data and reasonable security practices have been defined under Section 43A. However, their scope and extent is significantly

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[124] Google Spain case, ¶ 93.
[125] Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles we live by,* New York: Basic Books, 2012.
[126] Abhinav Garg, *Delhi banker seeks `right to be forgotten' online,* Times of India, (May 1, 2016). Available at: http://timesofindia.indiatimes.com/india/Delhi-banker-seeks-right-to-be-forgotten-online/articleshow/52060003.cms
[127] Information Technology (Amendment) Act, 2008, Section 43A: "Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation, not exceeding five crore rupees, to the person so affected."

limited. Even under the IT Rules 2011[128], 'sensitive personal data' has only been defined to cover passwords, financial information, physical and mental health condition, sexual orientation, medical records and biometric information[129]. Even Rule 4 of IT Rules, 2011 mandates a body corporate to provide a privacy policy only with regard to such 'sensitive personal data' but does not extend beyond the same. An ideal solution would be to amend the IT Act that caters to all the facets discussed previously. A carefully drafted statutory right would satiate a data subject's expectations of privacy and would also not run afoul of Article 19(1)(a)[130]. Thus, the following elements are proposed with regard to this legislative model (hereinafter also referred to as the "proposed law").

5.1 Pros and Cons of a Contract Model

A mandate could be introduced by the Parliament whereby data controllers or 'body corporates' as defined under Section 43A IT Act, would be obliged to uphold this right through their privacy policies and terms of use. The main advantage of a contract model is that estops people from breaking their promises[131]. Even in situations where persons have an expectation that their data shall be kept private, courts do infer an implied contract to compel the observation of confidentiality[132]. The US SC considered this aspect in *Cohen v. Cowles Media*[133], and held that promises that compel a party to maintain confidentiality do not violate the First Amendment. Similarly, the Indian SC in *Niranjan Shankar*[134] analysed Section 27 of the Contract Act, 1872 by holding that negative covenants under a contract may be valid if they are reasonable. Thus, the promise of confidentiality or privacy does not run contra to Article 19(1)(a). It also has the advantage of standardizing website terms of service and privacy policies. Privacy policies are usually at the sole discretion of the website operator and can be changed at will[135]. This position

[128] Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011
[129] IT Rules, 2011, Rule 3
[130] Robert Kirk Walker, *Note: Right to be Forgotten,* 64:101 Hastings Law Journal 257;
[131] Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 Stanford Law Review 1049, 1063 (2000)
[132] Restatement (Second) of Contracts § 4 Comment A (1979); Volokh, p. 1058-1059; Pamela Samuelson, *A New Kind of Privacy? Regulating Uses of Personal Data in the Global Information Economy*, 87 California Law Review 751, 768 (1999)
[133] 501 U.S. at 670–72
[134] *Niranjan Shankar Golikari v. Century Spinning and Manufacturing Company Ltd*, 1967 SCR (2) 378
[135] Caroline McCarthy, *'Do Facebook's New Privacy Settings Let It off the Hook?'*, CNET News (May 26, 2010). Available at: http://news.cnet.com/8301-13577_3-20006054-36.htm

should be modified for the benefit of users. Additionally, data collection is disproportionate to what people perceive that policies should be[136], which is why this approach is meritorious.

This approach also has various drawbacks. *Firstly*, the requirement of privity of contract between parties is a huge negative. It prohibits third party beneficiaries from enforcing against the promisor the promise that the latter had made to the promisee. The principle that arose through *Tweedle v. Atkinson*[137] was applied in India through *M.C. Chacko*[138]. In a hypothetical situation, a person who suffers through a disclosure of personal information, would have no *locus standi* if he himself has not disclosed that information. *Secondly*, these standard contracts are usually non-negotiable – data subjects have no bargaining power[139]. More often than not, users tend to accept whatever is pasted upon the website terms of use without sifting through its contents. However, while these drawbacks exist, the overall experience can be elevated by providing various other benefits.

5.2 Balancing Test or Presumptive Priority?

The CJEU Ruling prescribes a balancing test with a presumptive priority through its 'privacy by default; principle. This latter does not bode well for a model that attempts to reach an equilibrium between the two rights. Any such interim measure would only result in lop-sided results where it would be abused on one spectrum or the other. There are various suggestions that have been provided[140]. However, these tests posit that such information should be automatically removable at the instance of the subject, which offends the balancing test and also runs contra to freedom of the press. Thus, this test must be tailored according to the framework of the Indian Constitution. Furthermore, there should be no *prima facie* 'default' prioritization to evaluate these requests.

This article proposes that the Parliament should enact legislation which formulates a balancing test barring any 'privacy by default' principle as the CJEU Ruling[141]. The factors should be:

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[136] Lothar Determann, *Data Privacy in the Cloud: A Dozen Myths and Facts, Computer & Internet Lawyer*, Nov. 2011, at 1, 2–3

[137] [1861] EWHC QB J57

[138] *M.C. Chacko v. State of Travancore*, AIR 1970 SC 504

[139] Black's Law Dictionary 366 (9th ed. 2009). A "click-wrap" or "point and click" agreement is a form of adhesion contract where a computer user assents to the terms of the agreement by clicking a button or ticking a box on a website or other electronic interface.

[140] Lisa Owings, *The Right to be Forgotten*, 9 Akron Intellectual Property Journal 45, 47, 67–80 (2015). The 3 tests being: : (1) a private fact which is offensive and not newsworthy should be removable at the instance of the person; (2) non-offensive private information or an expression of opinion should be removable; (3) information that is not relevant or is outdated or if there is no compelling reason for it to remain public should be removable.

[141] Google Spain case, ¶ 97

a) Whether the data subject is an individual or entity. This is adopted from the defamation framework existing under 19(2)[142] and the principles enunciated under *Indu Jain*[143].
b) Whether the data subject was the creator/original source of the data or whether it is a third party source. The creator of the information has a property right over the information which he/she can also takedown using the copyright laws available[144].
c) Whether there is any possibility of illegality of the data[145].
d) Whether the data subject will be unfairly injured or prejudiced through a sustained presence of this information on the internet[146]. While this may appear to be a subjective determination, however it aims to ensure that the information which does not prejudice any person should not be compelled to be deleted and therefore infringe free speech. For example, a person who was arrested for sexual harassment but never charged for the same would have his life in a turmoil due to search results cropping up everywhere.
e) Whether the data has any literary, artistic, political or scientific value[147].

Depending on these elements, the data controller would then decide upon these requests and consider which interest outweighs the other and thereby balance the same. On a determination of this balance, the controller would then decide upon such an acceptance or rejection of the request. Thus, this model acts is an advanced version of the one given in the CJEU Ruling. However, it also needs to be protected from the unbridled discretion of the data controller.

5.3 Appeals Process

In addition to the model prescribed, it is important to ensure that this function of determining the requests is exercised with great caution and accountability. If wantonly exercised, it would lead either to an infringement of privacy or choke freedom of the press. Thus, for the purpose of greater accountability in the decision-making process, we propose that the hierarchy of the appeals be set in the following manner. *Firstly*, data subjects should be allowed to avail an internal process of appeal within the data controller's authority structure. This internal appeal would also require to provide a reasonable opportunity of being heard[148]. This appeal would be subject to a further judicial review in case the matter is going in appeal on certain specified grounds. *Secondly*, a quasi-

[142] L. Rustad & Sanna Kulevska, *Reconceptualizing the Right to be Forgotten to Enable Transatlantic Data Flow*, 28 Harvard Journal of Law & Technology 349, 416–17 (2015)
[143] Indu Jain case
[144] Owings, p. 73-76
[145] Rustad & Kulevska
[146] Google Spain case, ¶ 93
[147] Joseph Blocher, Institutions in the Marketplace of Ideas, 57 Duke Law Journal 821, 824 n.3 (2008)
[148] *Delhi Transport Corporation v. DTC Mazdoor Union*, 1990 SCR Supl. (1) 142

judicial appeal should be permitted to ensure expedited and quality adjudication. This quasi-judicial authority could be established under the IT Act, by amending Section 43 accordingly. The appeal could result in two ways: (1) if the internal appeal structure defaulted on natural justice; (2) if the internal appeal did not consider a question of law.

5.4 Statutory Remedies in the form of Damages

It is important to introduce statutory damages as a relief against data controllers who refuse to entertain requests[149]. There exists a dilemma in this regard. Under common law, providing remedies in the form of specific performance is troublesome, whereas in contract law the same can be enforced since Courts compel specific performance when damages are not an adequate reparation for the injured party[150]. On the other hand, contract laws do not provide monetary damages extending to punitive damages as under tort. Therefore, a mix of both would be the ideal situation where both these remedies are provided through the statute: *firstly*, specific performance of data deletion obligations when it satisfies the criteria; *secondly*, damages extending to punitive damages when the neglect from the data company is opprobrious.

However, such a legislative model presents various problems in itself, with regard to the vires of the 'proposed law' because of its conflict with Article 19, and it becomes pertinent to check this 'proposed law' against the various tests propounded under this article.

6. VIRES OF THIS LAW WITH REGARD TO FREEDOM TO INFORM

6.1 Marketplace of ideas v. Public interest

Over the years, the internet has emerged as a potent yet beneficial instrument of dissemination of information[151]. The theories providing normative justifications are aplenty: instrumental theories include the 'marketplace of ideas'[152], 'speech promoting democracy', etc.[153]; whereas non-instrumental theories delineate that speech is essential to the development of individual autonomy. The 'marketplace of ideas' theory was propounded by Justice Oliver Holmes Jr. in *Abrams v. United States*[154], which was later cemented in US through *Brandenburg v. Ohio*[155].

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[149] Robert Kirk Walker, p. 284
[150] *Restatement (Second) of Contracts* § 359(1)
[151] Colmago, ¶ 4
[152] *S. v. Mamabolo*, 2001 (5) BCLR 449 (CC) (South African Constitutional Court); R. v. Keegstra [1990] 3 SCR 697 (SC of Canada); *Raghunath Pandey v. Bobby Bedi*, (2006) ILR 1 Delhi 927.
[153] Eric Barendt, *Freedom of Speech,* 2nd Edition, Oxford University Press 2007
[154] 250 US 616 (1919) 630
[155] 395 U.S. 444

The 'marketplace of ideas' theory is in direct conflict with the Right to be Forgotten, since the former proclaims that truth prevails in an open marketplace, whereas the latter relies on the injury capable of being caused by a skewed free-market. This theory comes into conflict on two grounds: *first*, access to the marketplace may depend on one's private resources, thereby negating the ability of the marketplace to truly reflect the public acceptability of a speech or expression; *second,* regulation of markets is usually in the interest of public welfare, which is necessary in light of any abuse happening on the basis of access. This theory was implicitly rejected by the SC in the case of *Ministry of I&B v. Cricket Association of Bengal*[156], where the Court preferred to opt for the public interest approach in assessing the capacity of the State to have a monopoly over airwaves.

Thus, the non-existence of the marketplace theory and an insistence on public justification theory in India, provides an impetus in terms of jurisprudential approach to locate the Right to be Forgotten within the Constitution. As mentioned in Justice Brandeis's dissent in *Olmstead v. United States*, "*the right to be let alone is the right most valued by civilized men*"[157]. Thus, the 'proposed law' finds sufficient support from the Indian jurisprudential approach.

6.2 Protection given to Speech and Press under Article 19(1)(a)

A perspective on the constitutional protection can be gathered from the following precedents. The emphasis on 'expression' came through the celebrated case of *Bijoe Emmanuel*[158], where the SC included the 'right to remain silent' within Article 19. In *Bennett Coleman*[159]*,* the SC tried to determine the 'effects' and not the object of the law. This 'effect test' along with the the *ratio* in *Sakal Papers*[160] and *Express Newspapers*[161] provided the framework for testing Article 19(1)(a) violations. In *Romesh Thapar*[162]*,* the Court specifically held that any democratic society sans the freedom of the press, would never be able to function and flourish. The position in relation to commercial speech was a little dubious due to the decision in *Hamdard*[163]. However, it was ultimately clarified in *Tata Press*[164] where the SC stated that commercial speech was guaranteed by Article 19(1)(a).

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156 (1995) 2 SCC 161
157 277 U.S. 438, 478 (1928)
158 *Bijoe Emmanuel v. State of Kerala,* (1986) 3 SCC 615
159 *Bennett Coleman v. Union of India,* AIR 1973 SC 106
160 AIR 1962 SC 305
161 AIR 1958 SC 578
162 *Romesh Thapar v. State of Madras,* AIR 1950 SC 124
163 *Hamdard Dawakhana v. Union of India,* AIR 1960 SC 554
164 *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.,* 1995 5 SCC 139

Various decisions such as *Raj Narain*[165] and *PUCL*[166] culled out a right to know for the voter. In *PUCL*[167], the SC upheld the ratio in *Association for Democratic Reforms*[168] and ruled that the right of a voter to know the bio-data and antecedents of a candidate is the foundation of democracy which is also guaranteed under Article 19(1)(a) and struck down Section 33B of the Representation of People Act, 2002, which legislated to the contrary.

In *Rajendra J. Gandhi*[169], the SC considered the aspect of 'trial by media' which resulted in unnecessary publicity that jeopardized the trial, leading to a case transfer. While not denying the freedom under Article 19(1)(a), the SC came down heavily on the media and observed that a trial by media is the very antithesis of the rule of law.

By perusing these precedents, it appears that the 'proposed law' on Right to be Forgotten would be compelled to preclude criminal or other antecedents of elected representatives for the mere reason that they are a matter of 'public concern' and would be hit by the ratio of *Raj Narain*, *PUCL* and *Association for Democratic Reforms*. This 'proposed law' could also potentially cover situations of media trials which cause grave injury to an accused person who even after being acquitted continues to be prejudiced by the online presence of articles. However, since criminal actions cause insecurity to the public and therefore gain public significance, it would be extremely hard to balance the two. Thus, the 'proposed law' would do well to avoid delving into this analysis and only consider matters which are offensive, inadequate, irrelevant, and excessive in relation to its purpose or time elapsed, and which are not of 'public concern'.

6.3 Protection under Article 19(2)

Article 19(2) introduces reasonable restrictions on the speech guaranteed by Article 19(1)(a). Any law, and in our case, the 'proposed law', on the 'right to be forgotten' would be required to find itself within the 8 subject matters as given under Article 19(2). The subject matters which would be of assistance to determine if the law is protected by Article 19(2), would be decency, morality and defamation.

[165] *State of Uttar Pradesh v. Raj Narain,* (1975) 4 SCC 428
[166] *PUCL v. Union of India,* AIR 2003 SC 2363
[167] *Ibid.*
[168] *Union of India v. Association for Democratic Reforms,* AIR 2002 SC 2112
[169] *State of Maharashtra v. Rajendra J. Gandhi,* (1997) 8 SCC 386

6.3.1 Whether the object is proximate to the subjects within Article 19(2)

This basically states that there must a proximate nexus between the object sought to be achieved by the legislation and the subject matter in Article 19(2). This was first propounded in *Ram Lohia*[170], which while closely following the criteria set by *VG Row*[171], remarked that it is difficult to establish an abstract test of reasonableness; what is required is to analyse the underlying object of the restriction and the extent and urgency of the evil sought to be remedied.

Public Order cannot be applied as the object, since as under *Romesh Thapar*[172], it refers to a state of tranquillity which prevails once the regulations are established. Going by *Ram Lohia*, public order is synonymous with public safety, which is not the concern of this law.

Decency or morality have widely subjective connotations. Under English law, the *Hicklin test*[173] became the paramount test for covering 'obscenity'. In US, this test was overthrown with the *Roth test*[174], which defined it more strictly. In India, although obscenity does not find mention in Article 19(2)[175], *Ranjit Udeshi*[176] identified 'obscenity' as being covered under decency or morality and used the *Hicklin test* to determine whether a person found in possession of an obscene book (Lady Chatterley's Lover) could be prosecuted. *Aveek Sarkar*[177] overturned this by using the *Roth test* for a 1993 nude photograph of Boris Becker, which the SC proclaimed was not obscene. Thus, the law could use this restriction to injunct publication that may be obscene, indecent or immoral even if the person concerned does not object to it.

However, among all these pertinent subject matters, 'defamation' is the most relevant since it validates any law that reasonably aims to protect an individual's reputation[178], even if the said law scuttles speech under Article 19(1)(a). The operative word here would be 'reasonable' which would be taken care of by the proportionality test discussed ahead. In US, *NY Times v. Sullivan*[179] expresses the view that in absence of 'actual malice', free speech will remain unhindered since public interest is served in acquiring information about public officials.

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[170] *Superintendent, Central Prison v. Dr. Ram Manohar Lohia,* AIR 1960 SC 633
[171] *State of Madras v. VG Row,* AIR 1952 SC 196
[172] *Romesh Thapar v. State of Madras,* AIR 1950 SC 124
[173] As propounded in *R. v. Hicklin,* (1868) 3 QB 360
[174] *Samuel Roth v. United States,* 354 U.S. 476
[175] *Dr. Ramesh Prabhoo v. Prabhakar Kunte,* (1996) 1 SCC 130
[176] *Ranjit D. Udeshi v. State of Maharashtra,* AIR 1965 SC 881
[177] *Aveek Sarkar v. State of West Bengal,* (2014) 4 SCC 257
[178] *Horrocks v. Lowe, (1974) 1 All ER 662; Beauharnis v. Illinois,* (1952) 343 US 250
[179] 376 US 254

In India, although the position with regard to public officials is the same (*Raj Narain, PUCL*), however in view of *Rajagopal* and *Gobind*, reputation clearly has been accepted as a ground to restrict speech under 19(2). India's position is not as dubious as the one under the First Amendment, where only privacy intrusion done with 'knowing and reckless falsehoods'[180] can be curtailed[181]. India's stance with regard to protection for defamatory speech is clear. Thus, the law clearly falls within the overaching restriction of 'defamation' under Article 19(2).

6.3.2 Whether the restriction is reasonable and satisfies the test of proportionality

In deciding the reasonableness of a restriction, the most important test is the test of proportionality. This test focuses not only on proximity of the object with the law, but also whether a law is excessive in ambit. In *Virendra Ojha*[182], the High Court observed that the test of proportionality has always been used to check the reasonableness of the restriction, although no judgment has ascribed to explicitly using it. The standard of 'reasonableness' was also noted in *Chintaman Rao*[183], which stated it as "*intelligent care and deliberation where the restriction is not arbitrary or excessive*". In *Motion Pictures Association*[184] as well as *K.A. Abbas*[185], the test of the reasonableness of the law was evaluated to determine if it was hit by 19(1)(a). In *Motion Pictures Association*, the SC ruled that 'compelled speech' infringes 19(1)(a), but if such compulsion leads to better decision making, then it will not infringe and such a regulation would be protected by Article 19(2). In *K.A. Abbas*, the Court considered whether 19(2) permitted a regulation to classify films into 'A' and 'U' categories and it answered affirmatively, thereby affirming it as a reasonable restriction.

The law is reasonable in so far as it imposes only a balancing test and does not scuttle speech in favour of privacy. Any determination of a takedown request would necessarily have to consider the private or public nature of the subject, illegality of the data, whether the subject is the creator or the information is sourced through a third-party, whether the subject would be unfairly prejudiced or not, coupled with the significance of the information in terms of artistic and literary values. This is in furtherance of the appeals process which also involves a quasi-judicial authority. All these considerations ensure that flimsy or frivolous requests aimed at removing information that might be relevant in today's times or connected to public concern, would not be stifled through this law, thereby removing arbitrariness from the equation.

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[180] *Times Inc. v. Hill,* (1967) 385 US 374
[181] Ibid.
[182] *Virendra Ojha v. State of Uttar Pradesh*, AIR 2003 All 102
[183] Chintaman Rao v. State of Madhya Pradesh, AIR 1951 SC 118
[184] Union of India v. Motion Pictures Association, AIR 1999 SC 2334
[185] K.A. Abbas v. Union of India, AIR 1971 SC 481

7. CONCLUSION

In the light of the discussion above, it is clear that one can attempt to locate the 'Right to be Forgotten' within the Indian legal framework. Whether the same happens through a constitutional law, a tort law or a contract law path, or whether a legislative mandate is given to the same, remains to be seen as of now. However, with the Delhi High Court having recently admitted a very direct plea to recognize rule on an individual's right to be forgotten[186], the time is not far when the Indian judiciary finally delves deeper into questions of constitutional validity of the same.

The authors through this article, aim to shed light on this very investigation, and are of the opinion that going by the trajectory taken within the international context, and by the interpretative precedent set by the Indian higher judiciary, it is not difficult to locate a similar protective right within the Indian legal framework. However, we must also observe precaution while dealing with a right with such myriad repercussions, as it not only affects directly our individual interests, but significantly alters our social fabric. The stakeholders involved are not only the individuals affected by information in the public domain, and data controllers who could be subject to undue burdens and statutory duties, but society as a whole. One must attempt to balance and reconcile societal interest in having complete information about an individual's past, vis-à-vis the individual's interest in erasing the past.

[186] Abhinav Garg, *Delhi banker seeks `right to be forgotten' online,* Times of India, (May 1, 2016). Available at: http://timesofindia.indiatimes.com/india/Delhi-banker-seeks-right-to-be-forgotten-online/articleshow/52060003.cms

RIGHTS IN CAPTIVITY: ISSUES IN IMPLEMENTATION OF THE MODEL JAIL MANUAL AND KEY POLICY RECOMMENDATIONS FOR DELHI JAILS

Abhinav Verma[*]

This paper uses a legal and policy perspective to explore the issues in realising the constitutional and fundamental right to live with dignity that prisoners inherently possess. It undertakes an analysis of the Model Prison Manual and recommendations made by the Mulla Committee as Union guidelines, contrasted with the Delhi Jail Manual and other guidelines laid down by the Delhi Government, to comprehensively determine how far the Delhi Government follows the philosophy of the Union. Moreover, through comprehensive secondary research including judicial decisions and perspectives of the civil society, supplemented by primary surveying in Tihar, the paper exhaustively lays down the key dimensions of the issues in implementation of the Union and State guidelines in Delhi Prisons. The study also presents key recommendations from a public policy perspective.

I. INTRODUCTION

It is well accepted that imprisonment doesn't spell farewell to fundamental rights under Part III of the Constitution, and hence prisoners retain all rights enjoyed by free citizens except those necessarily lost as an incident of confinement.[1] Prisons are meant to serve both retributive and reformative purposes, and the responsibility of prison administration falls upon respective state governments as per List-II of the Seventh Schedule of the Indian Constitution.

Dr. W.C. Reckless' Report[2] started the movement towards prison reform in India. This was followed by constituting a number of Committees to suggest reforms including the All India Jail Manual Committee (1957), All India Committee on Jail Reforms - or popularly the 'Mulla Committee' (1980) - and the Krishna Iyer Committee (1987) to study the situation of women prisoners. Recently, the Model Prison Manual, 2003 and Draft National Policy on Prison Reforms, 2007, prepared by the Bureau of Police Research and Development (BPRD), have provided benchmarks for prison reforms and protection of rights of the prisoners. All state governments

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[1] *Charles Sobraj* v. *Superintendent Central Jail, Tihar, New Delhi,* AIR 1978 SC 1514

[2] Dr. Walter C. Reckless Commission Report, Jail Administration in India (1952)

are required to draft their own Prison Manuals for management of correctional facilities within their respective territory.

Delhi has two prison complexes; one at Tihar, being one of the largest in the world comprising of nine Central prisons, and the other a District Prison at Rohini Prison Complex. The combined total population in these ten prisons is around 14,000.[3] In order to decongest the existing prisons, Govt. of NCT of Delhi plans to construct new jails at Mandoli, Narela and Baprola.[4] The Mandoli Jail became operational in October 2016, almost 35 years after its construction was first proposed.[5]

II. ISSUES

Four dimensions on the basis of which the implementation and discrepancies can be analysed are:

1. Living space
2. Basic needs
3. Disciplinary policies and accountability
4. Restrictions on freedoms

Living Space

Accommodation Facilities

The Model Prison Manual provides for three types of living accommodations - barracks, single rooms, and cells for segregation. The prescribed minimum capacity per prisoner is 3.71 sq. meter of ground area and 15.83 cubic meter of air space for a barrack and 8.92 sq. meter of ground area and 33.98 cubic meter of air space for a cell.[6]

In comparison, the Delhi Jail Manual states that the accommodation capacity of wards, cells and other compartments shall ordinarily be regulated by the scale of superficial cubical space and lateral ventilation prescribed for each prisoner as prescribed by the Inspector General with the sanction of the administration.[7] However, it provides that each berth in every ward or any compartment

[3] Prisoner Profile, Central Jail, *available at*: http://www.delhi.gov.in/wps/wcm/connect/lib_centraljail/Central+Jail/Home/Prisoner+Profile (Last Modified March 2, 2017).
[4] About Us, Tihar Prisons, *available at:* http://tiharprisons.nic.in/html/about.htm (Last Visited May 2, 2017)
[5] Staff Reporter, "Mandoli Jail opens its gates to first batch of prisoners", *The Hindu,* Oct. 9, 2016
[6] Government of India, Model Prison Manual For The Superintendence And Management Of Prisons In India (Ministry of Home Affairs, 2003).
[7] Delhi Prisons (Transfer Of Prisoner, Labour And Jail Industry, Food, Clothings And Sanitation) Rules, 1988, s. 124

intended for night accommodation, shall be at least 2 metres long, 0.69 metres broad, and 46 cm. high.[8] This means that the area per prisoner is 1.38 sq. meter and air space is 0.6348 cubic meters only - approximately 4 percent of the 15.83 cubic meters air space prescribed by the Model Manual. This stark disparity can lead to severely adverse physical and mental repercussions for the inmates and may prove detrimental to rehabilitation.

In order to improve accommodation facilities, it is suggested that the new jail complexes become operational soon and decongestion measures be taken – especially for under-trials. The jail administration should prescribe a scientifically-derived minimum capacity per inmate in terms of the ground area, air volume, and lateral ventilation, in line with the Model Manual and publicly disseminate it on their website or through a public notification.

Overcrowding

At the end of 2015, the total population of all the prisons in Delhi stood at 14,183 as compared to the capacity of 6250,[9] making it 2.27 times overcrowded. The prison population in 2015 has increased 2.4 percent since 2014, primarily due to a substantial 6.96 percent increase in under-trial population.[10] Even though Delhi prisons are below the average rate of overcrowding in other states, overcrowding leads to adverse inmate to official ratios, ineffective supervision, and spikes in indiscipline. Prison offences and fights are also partially motivated by increased competition for existing resources, including sleeping space, washing facilities, and recreational and reformative machinery.

The primary causes for this spiralling overcrowding are increasing number of under-trial prisoners and absence of a uniform policy on and implementation of probation, parole, remission and commutation of sentence. As per the National Crime Records Bureau, under-trials made up 67.6 percent of the total inmate population in 2014 nationally, while in Delhi prisons, this rate was as high as 76.7 percent at the end of 2015.[11] On the other hand, the conviction rate hovers around 46 percent,[12] which means that a large chunk of prisoners are languishing in jails only to be ultimately acquitted. Another reason for overcrowding, as observed by the National Human Rights

[8] Delhi Prisons (Transfer of Prisoner, Labour And Jail Industry, Food, Clothings And Sanitation) Rules, 1988, s. 128
[9] Supra note 3.
[10] Ibid.
[11] Prison Statistics India, 2015, *available at* http://ncrb.nic.in/StatPublications/PSI/Prison2015/Full/PSI-2015-%2018-11-2016.pdf
[12] Crime in India, 2015, *available at* http://ncrb.nic.in/StatPublications/CII/CII2015/FILES/Compendium-15.11.16.pdf

Commission, is the lack of uniformity and impartiality in the state machinery for pre-mature release.[13]

To control the menace of overcrowding, a multi-pronged approach is needed to tackle each of the causes. Following are some steps that can be taken:

- The proposed prison complexes in Narela and Baprola be finalized at the earliest and methodically constructed for optimum accommodation with respect to prescribed minimum standards. The Delhi Government can take aid from the Ministry of Home Affairs (MHA) under the 'Modernization of Prison Scheme' that provides for construction of new prisons, repair and upkeep of existing ones, and improvement in overall prison services.
- The under-trial population can be effectively reduced by these measures:
    - Providing effective legal aid to under-trials by setting up legal aid cells or clinics within large prison complexes.
    - Provision for periodic Prison Courts or Jail Adalats for effective disposal of pending cases. The task of preparing a proforma for all under-trials convicted for petty or simple offences that are eligible for summary disposal by Prison Courts should be assigned to the Jail Superintendent.
    - Exploring the possibility of conducting summary trials of petty offences through video conferencing to avoid unnecessary delays.
    - Extending the functions of the Undertrial Review Committees, to be set up by the order of the Social Justice Bench in 2015, to also review cases of first-time offenders with respect to the Probation of Offenders Act, 1958 and to encourage compounding of offences under Sec. 320 of the CrPC.
    - The Chief Justice of the High Court shall also set up a committee to review the implementation of the provisions of plea bargaining under Sec. 265A to 265L of the CrPC, and its impact on the population of under-trials in prisons.
    - Prioritizing and expeditious disposal of cases of persons on remand over those who have been already released on bail.

[13] Procedure/Guidelines on Premature Release Of Prisoners, *available at*: http://nhrc.nic.in/Documents/prematurerelease.pdf (last visited on March 4, 2017).

- Liberalizing bail provisions by exploring possibilities of release on personal bond, without money and by expanding the list of bailable offences under the First Schedule of the CrPC.

- In order to decongest prisons, it is essential that even after conviction, there are alternatives to imprisonment. Parole and probation should be liberally used. A community service system for punishment of less serious crimes can better meet the ends of justice as also suggested by the Draft National Policy[14]. In line with some sentences for community service given by the SC and the Delhi High Court, a state-level legislation like the Andhra Pradesh Community Service of Offenders Act 2010, is strongly suggested.

The Comptroller and Auditor General (CAG) Performance Audit Report for Delhi (2014) explicitly mentions non-compliance with Sec. 436A of the CrPC[15] and the advisory notes from the MHA (in 2011).[16] It states that on 31 August 2014, 51 under-trials were detained for periods exceeding half of the maximum punishment and that it was caused by a delay in providing the Courts with the list of under-trials. It is suggested that working mechanisms and information flows should be set up for periodic reporting about under-trials, to be sent to the Courts by jail authorities, every 3 months.

Basic Needs

Sanitation and Hygiene

The Model Prison Manual and the Draft National Policy on Prison Reforms and Correctional Administration (2007), both suggest that each barrack used for sleeping shall have sufficient number of attached Water Closets (WCs), urinals and wash places. The ratio of such WCs shall be 1:10 prisoners. The ratio of the WCs used during the daytime, will be 1:6 prisoners. Also, every prison should provide covered cubicles for bathing with the ratio of 1:10 prisoners, as well as ensuring the daily requirement of water per individual to 135 litres.[17]

[14] Government of India, Report of the Committee on Draft National Policy on Criminal Justice (Ministry of Home Affairs, 2007).
[15] Section 436A CrPC provides that if a person has undergone detention for one-half of the maximum punishment specified for that offence under law, then the Court shall release him on his personal bond with or without sureties.
[16] Report of the Comptroller and Auditor General of India on Social, General and Economic Sectors for the year ended 31 March 2014 (Report No. 2 for the year 2015), Ch. 2.2.3.1 *available at* http://www.cag.gov.in/sites/default/files/audit_report_files/Delhi_Report_2_2015.pdf
[17] *Supra* note 6, Ch. 2.13.1, Ch. 2.14.1, and Ch. 2.14.2

Chapter 12 of the Delhi Jail Manual only makes general provisions that sufficient supply of drinking water shall be ensured, and that vessels for holding and conveying drinking water shall be covered and cleaned out daily and a suitable supply of water for other purposes shall also be made, including for bathing. This lack of specific directions makes it difficult to set standards, and hence guidelines specifying proper quantities of water and facilities like WCs to be provided to each prisoner shall be drawn up and circulated. Jails should be provided with mechanical cleaning, treatment and maintenance of sewage plants so that the septic tanks do not have to be manually cleaned by the prisoners. Water supply should be maintained round the clock.

Food and Nutrition

As per recommendations 53 and 60 of the Mulla Committee,[18] norms for prison diet should be laid down in terms of calorific and nutritious value, quality and quantity. In order to break the monotony of the diet, menus should be prepared in advance, under the guidance of nutrition experts. As per the Model Prison Manual, the minimum space requirement in the kitchen will be 150 sq. metres per 100 prisoners. Subject to certain conditions, under-trial prisoners may be allowed food from outside on a day-to-day basis.[19]

The Delhi Manual states that some civil or un-convicted criminal prisoners may be allowed to maintain themselves. Those not maintaining themselves, shall, daily receive the scale of the prison diet provided in Section 73, except those on special diet in the hospital, which is as follows:

- Early Morning Meal – half the cereals, half the oil, half the dal, half the vegetable and tea
- Mid-Day meal – the parched or boiled gram and tea
- Evening Meal – the remainder of the cereals *dal*, oil and vegetables.[20]

Section 75 calls for prescribing dietary scales for different classes. Males and females are both classified into those subjected to labour and those who are not, with an additional class of female prisoners who are nursing infants. However, the major problem with nutrition is the dichotomy between specific calorific details prescribed by the Model Manual, and the lack of clear specifications by the Delhi Government to meet those requirements. The Model Manual specifies that the daily calorie requirement for an average man is between 2,000 and 2,400, and for one who

[18] Government of India, Report of the All India Committee on Jail Reforms (Ministry of Home Affairs, 1983)
[19] Supra note 6, Ch. 2.15.4, Ch. 22.12
[20] Delhi Prisons (Transfer of Prisoner, Labour And Jail Industry, Food, Clothings And Sanitation) Rules, 1988, ss. 72,73.

does heavy work, it is 2,800. An average woman would require 2,400 calories per day, while pregnant or nursing women need 3,100 calories per day.[21] Since the Delhi Jail Manual does not give a detailed description as to what kind of work falls under which category of labour, the Jail Authorities rely upon the Punjab Jail Manual for determining the same.

The Model Manual specifies the nutrients required in a person's daily diet, their quantities and common sources, including calcium, iron, carbohydrates, Vitamins A, C, and D etc.[22] On the other hand, neither does the Delhi Manual specify quantities of these nutrients, nor do any Delhi Government notifications specify the prisoner's diet exhaustively. Only Standing Order-38 (2009) by the Director General[23] makes an oversimplified attempt, not taking into account the prescribed nutrients, as follows:

- Atta/Rice – 500 gms for labouring prisoners (400 gms for non-labouring)
- Dal – 90 gms
- Vegetables – 250 gms

A 2011 Report by the People's Union for Democratic Rights, Delhi, states the Delhi Prison Act and Rules are silent on the sort of vegetables and fruits to be provided to prisoners. There is no list provided of the vegetables that visitors may carry, and as a result much depends on the whims and fancies of the officers deputed at the checking counters of what may eventually be allowed. The prices of commodities are hiked up and very often the fruits on offer are not of very good quality.[24]

It is strongly suggested that a new notification or circular be released by the Delhi Government specifying the quantities of different nutrients that shall be provided on a daily basis, along with the intended sources and alternatives. It is essential that these notifications be made publicly available. The government should add milk, milk products, fruits, green vegetables, oils and butter etc. to the diet in scientific quantities.

Medical Care

[21] *Supra* note 6, Ch. 6.01, 6.02, 6.03
[22] Id., Ch. 6.04
[23] Standing Order – 38 (F.N. 10(261/11/A)/CJ/Legal/2009/837-838 dt. Mar. 19, 2009), *available at* http://it.delhigovt.nic.in/writereaddata/Odr20131838.pdf
[24] Peoples Union for Democratic Rights Delhi, "Beyond the Prison Gates: A Report On Living Conditions In Tihar Jail"

For maintaining prisoners' health, the Model Prison Manual calls for the appointment of institutional staff and medical personnel including medical officers (Chief Medical Officer or Medical Officer in charge of every prison, appointed by the government), psychiatrist, nursing staff, and pharmacist. Hospital accommodation should be provided on the scale of 5% of the daily average of the inmate population in all Central and District Prisons. Prison hospitals are divided into two types - Type 'A' with 50 beds or more and Type B hospitals having less than 50 beds - each having different prescribed staff requirements.[25] Each hospital shall have assistant civil surgeons with different specialties and at least one ambulance. The medical officer will carefully examine the prisoner as per the proforma for health screening on admission and thereafter visit the jail daily to see sick prisoners.[26]

The Delhi Jail Manual, more or less, works on a similar pattern of responsibilities, but fails to mention anything about the prison hospital and the staff to be appointed therein. The Delhi Government website boasts of 78 Doctors and 127 para-medical staff deputed round the clock, along with a 150-bedded hospital with Medical, Surgical, Tuberculosis, and Psychiatric Wards. It also has a minor operation theatre, behaviour therapy ward, a physiotherapy unit, and even a new 80-bedded integrated Drug De-Addiction Centre.[27]

To begin with, even though the hospital facility is diversified, it still operates under the suggested capacity of 5% of the average inmate population, resulting in poor healthcare. In 2015, out of the 45 custodial deaths, 30 were due to natural causes or sickness.[28] The internal medical systems and channels have proved to be ineffective. Insiders say that despite implementing all the required systems, it still takes 45 minutes to an hour to provide care to patients in case of an emergency, especially during night hours.[29] In 2012, the High Court sought response from jail authorities on its facilities for treating patients with chronic diseases like cancer or AIDS prompted by the death of a prisoner by cancer.[30] The jail authorities ignored the prisoner's complaints of pain, and further refused his request for medical examination, even though he had lost a substantial amount of

[25] *Supra* note 6, Ch. 7.02
[26] Id., Ch. 5.66, 4.07.4
[27] Medical Care and Hospital Administration, Central Jail, *available at*: http://www.delhi.gov.in/wps/wcm/connect/lib_centraljail/Central+Jail/Home/Medical+Care+and+Hospital+Administration (Last Modified March 23, 2014)
[28] *Supra* note 11
[29] Kritika Sharma, "Deaths double inside Tihar, poor healthcare to blame?", *The Hindu,* Feb. 21, 2014.
[30] Ayesha Arvind, "Tihar jail in spotlight for poor medical facilities with Delhi High Court asking stern questions", *Mail Online India,* Feb. 23, 2014

weight. Proper medical facilities were made available after a considerable delay caused due to rigid protocols and apathetic attitude of the medical team.[31]

The CAG's Report (2014) observed that the Hospital was not equipped to face any emergency situation, as there was a shortage of doctors and other medical staff ranging from 18 to 62 per cent. The hospital was lacking in facilities such as ultrasound, endoscopy, echocardiograph, 24-hour pathology laboratory and a well-equipped operation theatre, forcing inmates to be referred to outside hospitals even for Out Patient Department (OPD). During 2009-14, prisoners were referred to outside hospitals on 93,224 occasions, out of which 77,232 cases were for OPD treatment, constituting over 82 per cent of total cases referred.[32] Such references necessitated the use of ambulances as well as armed escorts, entailing both additional cost as well as security risks. Further, there was no proper system of keeping medical records or reports of the patients, which were packed in bags making it impossible to retrieve records swiftly.[33]

Based on these observations, the following steps are suggested:

- Increasing the bedding capacity and staff in hospitals to meet the 5% standard of the Model Manual, with expansion in facilities, such as more operation theatres, appropriate diagnostic machines and special provisions for prisoners with chronic and mental illnesses.
- Reports show that both, prisoners and authorities, harass female doctors and nurses while on duty. This calls for strict action, including formal declaration of such harassment as a major prison offence and greater vigilance for female staff working in prisons for male inmates.
- Electronic medical records be implemented and facilitated at the earliest.
- Given the high occupancy rate, overcrowding, lack of ventilation and humidity, fever and tuberculosis are common problems. Thus, the prisoners' access to fresh air - allowing them to remain unlocked for the maximum period possible, the provision of primary health care on a 24-hour basis - supplemented by visiting specialists for all emergency consultations, are some measures that may be adopted by the prison authorities.

Disciplinary Policies and Accountability

Prison Offences and Discipline

[31] Staff Reporter, "Court Issues Notices to Centre and Delhi Government on Plea by Widow", *The Hindu,* Aug. 14, 2012.
[32] *Supra* note 18, Para. 2.2.4.4
[33] Supra note 16

The Model Manual enlists 45 acts as prison offences, which are the same as those recommended by the Mulla Committee. It states that the Superintendent may award punishments provided that no solitary confinement, hard labour, dietary change as a painful additive, denial of privileges and amenities, or transfer to other prisons with penal consequences shall be imposed on a prisoner without the judicial appraisal of the Sessions Judge. Where such intimation is difficult, such information shall be given within two days of taking such action. While minor punishments range from formal warnings to fatigue drills and additional work for a period not exceeding an hour each day for up to seven days, the major punishments include loss of privileges for one to three months, forfeiture of wages or earned remission, and even solitary confinement to a maximum of 30 days.[34] Basically the system calls for judicial review of most major punishments, and also provides for calling upon the prisoner for showing adequate cause.

However, the problem with the Model Manual is that it doesn't follow all of the Mulla Committee's recommendations. The Committee suggested that some of the existing prison punishments (imposing fetters and handcuffs, cellular confinement, separate confinement beyond 30 days, penal diet and whipping) should be abolished, and that no complaint shall be dealt with in a summary manner, and right to appeal to the Inspector General against major punishments.[35] These recommendations are important for maintaining an impartial, fair and reformative approach to punishment, but are not included in the Model Manual.

The Delhi Jail Manual is even further removed from the recommendations than the Model Manual. Even minor punishments here include temporary reduction from a higher to a lower class/grade, imposition of handcuffs, and imposition of link fetters for up to 30 days. Even though the rules provide for prior approval of the District/Sessions Judge for imposition of handcuffs or fetters; and for other punishments, an appraisal from these judges within 2 days, it is derogatory and against personal liberty and bodily freedom to prescribe these punishments, that too for minor offences. Major punishments include: hard labour in case a prisoner is sentenced to rigorous imprisonment, forfeiture of remission earned not exceeding 12 days, forfeiture of class or grade for periods exceeding 3 months, permanent reduction from a higher to lower class, handcuffs behind or staples, link fetters for more than 30 days, bar-fetters etc.[36] The following suggestions are made in this regard:

[34] *Supra* note 6, Ch. 19.10, 19.11
[35] *Supra* note 19, Rec. 162, 165 and 166
[36] Delhi Prisons (Discipline, Daily Routine, Offences and Punishments) Rules, 1988

- Bringing the prescribed punishments under the Model Manual in line with the Mulla Committee recommendations, and aligning the Delhi Manual with the Model Manual.
- Specifically, imposition of link-fetters and handcuffs should be only used as exceptional punishments, falling under a separate class of most extreme offences only, and shall be imposed for a period that the judicial officers deem fit after consulting with the medical officer.
- Imposition of bar-fetters and solitary confinement should be completely outlawed. The Convention Against Torture[37] and the Mandela Rules[38] also outlaw solitary confinement as violating of the right to life, at the international level. In view of the decision in the *Sunil Batra Case,*[39] it is urged that solitary confinement should only be by the order of the Court and shall not be used as punishment for prison offences, and bar-fetters shall only be imposed when escape becomes a 'clear and present danger' and only for the briefest periods with daily scrutiny and review. Thus, fetters should not be used as punishment but only as a means of securing custody.
- An appeals procedure should be established, where any prisoner can appeal against the imposition of a major punishment to the Inspector General, and should alternatively be allowed to put forth their grievances with regard to punishments to the Board of Visitors (as explained in the next section). The prisoners shall also have the right to receive information about disciplinary proceedings and have the right to be heard in defence.

Board of Visitors

The Model Prison Manual orders state governments to constitute a 'Board of Visitors' at the district and sub-divisional levels tasked with monitoring correctional work of the prison, including quality of training, facilities and infrastructure, and investigating and redressing individual or collective grievances.[40] The Board of Visitors shall comprise of official members including District Magistrate, District Judge, Chief Medical Officer, Executive Engineer, District Inspector of Schools, District Social Welfare Officer, and District Agricultural Officer and non-official members including MLAs, a nominee of the State Commission for Women, and social workers.[41]

[37] 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85
[38] 2015 United Nations Stan0]1dard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) A/C.3/70/L.3, available at: http://www.refworld.org/docid/56209cd14.html [accessed 2 May 2017]
[39] (1978) 4 SSC 494
[40] *Supra* note 6, Ch. 26.02
[41] *Supra* note 6, Ch. 26.03

The Delhi Prisons (Visitors of Prisons) Rules, 1988 state that once in every three months, not less than two ex-officio and one non-official visitor, of which one, unless prevented by unavoidable cause, shall be the District Magistrate, shall constitute a Board and visit the jail.[42] For effective functioning, the rules also make it clear that no prisoner shall be punished for any statement made to a visitor,[43] and give them power to examine jail records, interview prisoners, and inspect barracks, food etc.[44]

By a notification in March 2014, the Delhi Government constituted a Board of Visitors for the first time, 25 years after the rules were framed, that too only when the High Court ordered for its constitution.[45] A few days after the order, the Delhi State Legal Services Authority filed an objection to the establishment of a single board for all prisons in the NCT, stating that each of the 10 jails should have its own Board. A petition filed by the NGO Multiple Action Research Group (MARG) also requested the High Court to quash the notification on grounds that the visitors are not independent, and that it is arbitrary and *ultra vires* Rules 2 and 3 of the Delhi Prisons (Visitors of Prisons) Rules, 1988.[46] The Board is required to be ex-officio (outsiders and independent), and the inclusion of the Superintendents of the 10 jails sabotages the sanctity of the Board. [47]

It is urged that the Delhi Government should issue a fresh notification appointing visitors in accordance with the prescribed rules of the Model Manual with special emphasis on the following:

- Appointing official visitors in ex-officio capacity from outside the jail administration.
- Making separate and smaller Boards for each of the 10 jails currently operating, and adding more when new complexes become operational.
- Making public disclosures of the competence of the non-official visitors appointed in areas such as prison reforms, legal rights, counselling, social work, criminology, adult education, training, nutrition, healthcare etc.
- Mandatory appointment of at least one woman, non-official visitor to look into the issues faced by women prisoners.

[42] The Delhi Prisons (Visitors of Prisons) Rules, 1988, Rule 12
[43] Id., Rule 15
[44] Id., Rule 13
[45] Delhi Governement notification dated March 18, 2014, (F.9/83/2012-Home(G)), *available at:* http://it.delhigovt.nic.in/writereaddata/egaz2015183.pdf
[46] Rule 2 states that the Visitors should be either ex-officio or officials and non-officials (appointed by name by the administrator), and Rule 3 states that the commissioner of Police and Session Judges are required to visit the jails once in three months and once a month, respectively. Additionally, District Magistrates are required to visit the jails once fortnight.
[47] PTI, "HC seeks response from Delhi govt. on jail visitors' boards", *Business Standard,* July 23, 2014.

As for the rules of operation and mandates of these boards, the State Government needs to make special provisions to allow for longer interviews with prisoners and to ensure confidentiality and impartiality so that the prisoners can place their grievances forward without fear. The state government should also provide draft memos or checklists to the visitors that contain parameters on all relevant aspects of prison inspection and reforms.

Young Offenders

The Model Prison Manual describes that 'young offenders' as those between ages 18 to 21 years, and prescribes that they should be confined separate from the hardened criminals, to be rehabilitated according to their special needs. The Juvenile Justice Act, 2015 reiterates that minors found to be in conflict with the law shall not be treated as adults and imprisoned, rather they shall only be, if required, be sent to a special home, with certain exceptions whereby this child can be tried as an adult.[48] In contrast, as per the Delhi Prisons Act, 'young offender' means a person who has attained the age of sixteen years in case of a boy and eighteen years in case of a girl, but has not attained the age of twenty-one years.[49] They are further classified into adolescent prisoners (between 16-18 years) and youth prisoners (between 18-21 years), and the Delhi Manual prescribes separate treatment and rules for the two.[50]

In a writ proceeding before the Delhi High Court on its own motion, it was stated that during the period between October 2010 to August 2011, 114 persons were shifted from Tihar Jail to observation homes after they were found to be juveniles. The Court was informed that members of the National Commission for Protection of Child Rights and Delhi Legal Services Authority had visited Jail Nos. 6 and 7 in Tihar Jail complex and found that various irregularities and illegalities were being committed in treating adolescent under-trials and prisoners, namely, (a) adolescent under-trials and prisoners are kept mostly in Jail No.7 though some are housed in Jail No.6 as well where woman prisoners are also lodged; (b) more than 100 under-trials and prisoners appeared to be juveniles, i.e., less than 18 years at the time of commission, with some even being 15-16 years. The Court ordered that if the jail authorities suspect that a person is a juvenile, he/she shall be immediately segregated and a letter shall be addressed to the Court concerned within 24

[48] Juvenile Justice (Care and Protection of Children) Act, 2015, ss. 18(3), 19.
[49] Delhi Prisons Act, 2000, s. 2 (aa)
[50] Delhi Prisons (Treatment Of Convicts Sentenced To Simple Imprisonment, Death, Female Prisoners, Youthful Prisoners, Leper Prisoners And Lunatic Prisoner) Rule, 1988, s.33.

working hours for an age inquiry, following which the Juvenile Justice Board can make an order as it deems fit.[51]

It is imperative that the Delhi Prisons Act, 2000 and Chapter 11 of the Delhi Jail Manual be amended to bring the Model Manual and Delhi Rules in line with the Juvenile Justice Act, 2015. 'Youthful offenders' shall be confined to those above the age of 18 years, regardless of sex, except in cases where a juvenile is adjudged to be treated as an adult under Section 19 of the 2015 Act.

Unnecessary Restrictions on Freedoms

Parole and Furlough

The Delhi Rules state that for humanizing the penal provisions and helping prisoners maintain harmonious relationships with their families, the provisions of grant of leave should be liberalized, but still shall extend to selected prisoners on well-defined norms of eligibility.[52] Parole means releasing prisoners by suspension of their sentence, not as a matter of right, but only to be granted if a competent authority has made out sufficient cause, such as the. Head of the Prison Department or the Inspector General of Prisons. Furlough, on the other hand, is granted as a matter of right, periodically to enable maintenance of familial ties. The following system has been prescribed: [53]

Sentence (Years)	**Due for First Release**	**Due for Second Release (as counted from date of last return)**	**Due for Third Release (as counted from date of last return)**	**Duration (Per Year)**
Less than 5	After 1 year of imprisonment	After 6 months of imprisonment	After 6 months of imprisonment	21 days
Between 5-14	After 2 years of imprisonment	After 1 year of imprisonment	After 6 months of imprisonment	21 days during first 5 years, and 28 days for remaining term

[51] WP(C) No. 8889 OF 2011*available at* http://www.hrln.org/hrln/images/stories/pdf/Delhi-High-Court-Judgment-dated-110512.pdf
[52] *Supra* note 6, Ch. 17.01
[53] Id, Ch. 17.05

More than 14 or Life Imprisonment	After 3 years of imprisonment	After 1 year of imprisonment	After 6 months of imprisonment	21 days during first 5 years, and 28 days for remaining term

The Delhi Manual does not address this issue at all, but the Parole/Furlough Guidelines published by a 2010 notification enshrine the rules to be observed.[54] The Guidelines envision two types of paroles, viz. custody parole and regular parole. The former is to be granted in emergent circumstances such as death, marriage, illness, etc. of a family member by an order issued by the Superintendent, for a period not more than six hours. The latter can be granted to a prisoner who has served at least one year of the sentence, with at least 6 months having elapsed since the last parole, having uniform good behaviour, under special circumstances. The order has to be made by the Home Department and shall not exceed one month, except in special circumstances. On the other hand, a prisoner who is sentenced to 5 years or more of rigorous imprisonment but has undergone 3 years of imprisonment, excluding remission, can be released on furlough. Such prisoner would be entitled to 7 weeks of furlough in a year. The first spell could consist of 3 weeks, while the subsequent spells would consist of 2 weeks each.

Partial application of these provisions is witnessed in favour of socio-economically richer prisoners and there are recurrent delays due to government departments not being able to adhere to the three-week time limit for disposing of the application. Moreover, there seems to be a logical discrepancy between the furlough provisions in the Model Manual and the Delhi Guidelines. The Guidelines do not allow for any grant of leave before 5 years or to those who have been sentenced to imprisonment for less than 5 years.

The following steps are suggested:

- The system for the grant of leave should be harmonised, with the first leave being given before the third year of imprisonment, periodically thereafter and for not more than 2-3 weeks at a time. The frequency of leave, and not the length, should be the cornerstone of the system.

[54] Parole/Furlough: Guidelines 2010 (Order No. F. 18/91-2009/HG, dt. Feb. 17, 2010), *available at:* http://delhi.gov.in/wps/wcm/connect/b9eff18047292516981d9d741ca07a0f/GUIDELINE.pdf?MOD=AJPERES&lmod=1922745342&CACHEID=b9eff18047292516981d9d741ca07a0f

- Provisions for incremental parole for good behaviour and permanent release on parole should be drafted. The Rajasthan Prisoners Release on Parole Rules (1958) are a pioneer in this regard.[55]
- For regular parole, the decision should be taken by the Home Department only in specified cases. In other cases, the competent authority should be the Commissioner or Additional Commissioner of the division, and each decision should be taken within 7 days of submission of report by the police department.

Unequal status of prisoners

The Model Prison Manual calls for no classification on grounds of socio-economic status, caste or class, besides those made on scientific basis, for proper reformation, education, segregation of high-security prisoners etc. The Mulla Committee strictly prohibited classification of under-trials on these grounds as well.[56] However, legally, the Delhi Prisons Act and Rules follows a system of classification of inmates that provides for differential treatment of separate groups of prisoners. Inmates who, by 'social status, education or habits of life are accustomed to a superior mode of living', are accorded the status of Class B prisoners, while those not meeting the above criteria are given Class C status. Further, the Delhi Manual also codifies rules for the treatment of 'Better Class' Under-Trial Prisoners.[57]

Thus, two classes are created for both convicts and under-trials. The 'better-class' convicts are given the following privileges as per Chapter 6 of the Manual:

- Accommodation in cells or barracks specially set aside for them (Para 39(1)). 'Better-class' under-trials are to be given accommodation better than Class-C convicts.
- Cells are to be supplied with better furniture including *takht posh* or bedstead, wooden stool, wooden teapoy, shelf or cupboard, necessary washing appliances. (Para 39(2))
- Supply of mosquito nets, if requested.
- Provision of toothbrushes and other sanitary material, and they shall be allowed to retain their hair and beards, and get shaved by the prison barbers.
- Provision of utensils including *thali*, two metal cups, spoon etc. (Para 40)

[55] Rajasthan Prisoners Release on Parole Rules (1958), Rule 9
[56] *Supra* note 19, Rec. 347
[57] Delhi Prisons (Admission, Classification, Separation, Remission, Reward and Release of Prisoners) Rules, 1988, Rule 52

- In addition to diet scale of Class-C prisoners, they shall get 400 ml milk every day. (Para 41) The same diet is provided to 'better-class' under-trials.
- Special clothing, including provision of winter clothing like woollen jackets and sweaters, and bed sheets, pillow covers etc. (Para 42)
- In addition to books from the Jail Library, provision of up to 3 books or magazines from private sources, and provision for newspapers. (Para 44)
- Provision of jail servants for menial duties. (Para 47)

In an unequal society such as ours, the justification of special facilities based on class considerations is questionable simply because it goes against the basic tenets of equality enshrined in the Constitution. It is urged that the Delhi Manual be amended to remove this classification that gives an unfair advantage to the more privileged. Safeguards should be put in place to check the use of discretionary power of prison authorities to provide for discriminatory advantages to high-profile criminals.

Restrictions on access to prisoners

As per the Model Manual, no prisoner shall be allowed to have an interview without the permission of the Superintendent, on days/hours fixed by him, within which all interviews shall take place. The Delhi Manual, however, additionally allows every convicted prisoner to have two interviews with his relatives or friends and to write two letters a week during the terms of his imprisonment.[58]

However, the rules are substantially different for under-trials. The Mulla Committee states that there should be no restriction on the number of interviews sought by the under-trial prisoners for the sake of legal assistance. Interviews with family members and friends should still be restricted to two per week.[59] The Model Manual prescribes that every interview between an under-trial and legal adviser shall take place within sight, but out of hearing, of a prison official. Any *bona-fide* written communication by an under-trial prisoner to his legal adviser may be personally communicated by the Superintendent, with regard to confidentiality. The Delhi Manual specifically prescribes that every newly convicted prisoner shall be allowed reasonable facilities for communicating with his relatives or friends with a view of procuring bail or filing appeals, and shall be allowed to have interviews or write letters to his friends once or twice, or often if the

[58] *Supra* note 3, Ch. 8.11, 8.12, 10.22
[59] *Supra* note 19, Rec. 354

Superintendent considers it necessary, to enable him to arrange for the management of his property or other family affairs.

In February 2013, a standing order was issued by the Director General (Prisons) that restricted the number of interviews by an advocate to one per week, and two in exceptional circumstances with prior approval of the Law Officer of the Prison Headquarters.[60] A Public Interest Litigation seeking quashing of this order was filed and the petition also sought directions to the jail authorities for providing better facilities for advocates visiting the jail to conduct legal interviews.[61]

On 24 July, 2015, the MHA also issued guidelines for allowing visitors inside the jails, in response to the uproar caused by a British filmmaker's documentary, 'India's Daughter'. These require the media to give undertakings that they would obtain a 'no objection certificate' from jail authorities to publish, broadcast or telecast any article or programme on jails and inmates, including a mandatory security deposit. As per the new guidelines, no private individuals, media, non-government organisations or company should ordinarily be allowed entry into jail for the purpose of doing research, making documentaries, writing articles or conducting interviews. However, permission may be granted to individuals, media and non-government organisations – whether Indian or foreign – for research, making documentaries or writing articles if the state government or Union Territory Administration feels it would have a positive social impact or would help in jail reforms.[62]

The reactions to this advisory have been astounding. The Press Association has called it an attempt to control the media and nothing short of censorship, while the Commonwealth Human Rights Initiative (CHRI) has called it unreasonable and out of line with prison law, and if implemented, would result in an overreach of powers on part of the prison authorities. The Supreme Court in its decisions in *Sunil Batra v Delhi Administration*[63] and *Francis Coralie Mullin v. Administrator, Union Territory for Delhi*[64] have unambiguously declared that the right to be visited should be liberal and unrestrained, and any regulation is not constitutionally valid under Articles 14 and 21 unless it is reasonable, just and fair. Further, in *Sheela Barse v. State of Maharashtra*[65] the SC said that it considers the members of the press as friends of the society and public-spirited citizens, working to further

[60] Office of the Director General (Prisons), Standing Order No. 53 *available at*: http://it.delhigovt.nic.in/writereaddata/Odr20131841.pdf.
[61] Akanksha Jain, "Prisoners' right to meet lawyers not violated, Tihar Jail authorities inform High Court", *The Hindu,* Mar. 13, 2014.
[62] Press Information Bureau, "MHA finalises Guidelines for allowing visitors inside jails", *PIB,* July 24, 2015.
[63] 1980 AIR 1579
[64] 1981 AIR 746
[65] JT 1988 (3) 15

the fundamental rights of the under-trials and convicts, and permits access to information and prisoners for interviews. The Court held that it is necessary to have the public gaze to be directed to matters of prison conditions and public access for this shall be permitted.

It is strongly urged that any restriction that impedes the legal rights and agency of any citizen be revoked immediately. More interview rooms and longer designated interview timings can effectively be employed to solve any issue of accommodating rapidly increasing requests for interviews. Moreover, freedom of the press should be respected even in the prisons, and access should be granted to all individuals, media, or non-governmental bodies, with only certain prescribed exceptions, the list for which should be publicly notified.

In a nutshell, harmonization between the Union guidelines and the State Manuals is the need of the hour, along with scientifically derived standards both at the Union and the State level. Engaging with social action groups and think tanks that have considerable expertise in reviewing these prisons on various rights-based benchmarks can facilitate this, besides setting up further commissions and studies on specific issues in prisons as elaborated above.

THE IN AND OUT OF ENTRY TAX

Yash Varmani[*]

There has always been a tax on entry of goods in a State from outside areas since time immemorial by the name of either Chungi, Octroi or Entry Tax. This paper will be dealing with two such aspects in an Entry Tax legislation that has been a subject matter of controversy since 1960 on which different High Courts have held different views and which are still not settled by the Hon'ble Supreme Court of India.

First, this paper will deal with whether an Entry Tax can be levied by a State on goods coming in from outside the boundaries of India. Even the historical case involving 9 Judges of Hon'ble Supreme Court left this question open. The author will give his opinion as to why Entry Tax should not be levied on such goods in first part of the paper.

Second, how and when can an Entry Tax legislation be termed as discriminatory i.e. discriminating between locally manufactured goods vis-à-vis imported goods and thus violating Article 14 of the Constitution of India. This aspect is shown with the help of cogent and comparable financial figures showing effects of the levy in the second part of the paper.

India is a welfare state, however not a tax- friendly state. In the words of Sh. Arvind P. Datar[1], India is a tax hell because of the complexities of its tax structure and the burdensome compliances that a businessman (trader/ manufacturer/ importer) has to undergo in order to operate in India. Entry tax is one such levy which has been levied on the entry of goods into a local area in a state either for the purpose of sale, consumption or use by the state governments under the garb of maintaining their tax base which was introduced in India on September 1, 2000[2].

The questions of law in entry tax matters have mostly been decided by the constitutional benches of the Hon'ble Apex Court of India (and most of the matters being decided by majority) for the reason that these questions have considerable public importance because they deal with two things, first the powers to levy tax of state legislatures and second, the decisions given by Apex Court is bound to have an impact on the federal character of polity and the centre-state relationship in our country which deals in legislative and fiscal matters.

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[2] Earlier, a tax by the term of "Octroi" was levied on entry of goods into a local area.

States levy tax by the virtue of the Entries present in List II of VII Schedule of the Indian Constitution and the power to levy tax on entry of goods into local areas is envisaged on states by the virtue of Entry 52 in the said List.

This paper is aimed at giving the reader an understanding on the overall aspects which are still open for the courts to examine and on which various courts have given dissecting views and the Hon'ble Apex Court hasn't laid down the law yet. It will cover the incidence of entry tax, the disputes involved in entry tax, the constitutional aspects of entry tax, recent amendments relating to the Constitution w.r.t. entry tax and the road ahead.

Incidence of Entry Tax:

In any tax statute, the point when the said tax is levied is known as the incidence of tax. For example under the Income Tax Act, 1961 the tax is levied as soon as an income has been earned by the assessee irrespective of when he/she/it receives it or even whether or not he/she/it receives it at all. Under the Sales Tax regime, the incidence of tax is when a sale is completed i.e. when a sale is made. As far as the entry tax is concerned, the incidence of tax is when the goods enter the boundaries of the local area (which is defined as the area within the geographical boundaries of a municipal office).

The question that comes to the mind is that why is the incidence of entry tax an important aspect? The reason for that is simple i.e. it has to be checked at what time entry tax should be levied on goods moving within the State so that it would be clear and unambiguous as to whether entry tax should be levied on such movement or not. For example, should the entry tax be levied on goods which are imported into the local area of the state from outside India i.e. in the course of imports into the territory of India.

Incidence of Entry Tax- Will there be an entry tax on import of goods from outside the country?

This has been a major issue for litigation in various High Courts across the country as well as in the Hon'ble Supreme Court of India. At one hand, various decisions of different High Courts have held that entry tax is not levied on goods which enter the local area in the course of import into the territory of India from a foreign jurisdiction. In the reported cases of *Tata Iron & Steel Co. Ltd.*

v. State of Jharkhand & Others[3], *F.R. William Fernandez v. State of Kerala*[4], *Thressiamma L. Chirayil v. State of Kerala*[5] the Hon'ble High Courts of Jharkhand, Kerala and Kerala respectively have held that entry tax would not be levied on goods imported into India. Another important decision is that rendered by the Orissa Sales Tax Tribunal in the case of *Hindustan Aeronautics Ltd., Koraput v. State of Orrissa*[6] wherein the full bench of the Tribunal sat over the matter and concluded that entry tax cannot be levied upon imports made from outside the country. Please refer to comments on JV Gokal case in the page infra.

One of the contentions, inter alia, in the above cases was that entry tax cannot be levied on goods imported into India for the reason that it is hit by the impediments levied on the power of the states by Article 286 of the Constitution of India which reads as follows:

> *"Article 286: Restrictions as to imposition of tax on the sale of purchase of goods*
>
> *(1) No law of a State shall impose, or authorise the imposition of, a tax on the same or purchase of goods where such sale or purchase takes place*
>
> *(a) ….*
>
> *(b) in the course of the import of the goods into, or export out of, the territory of India."*

In the *Tata Steel case* (supra), this aspect was delved deep into by the Hon'ble High Court. While holding that Entry Tax is levied on the goods imported into India, the Hon'ble High Court observed two decisions, one was that in the *F.R. William case* (supra), the Kerala High Court held that entry tax is not levied on the entry of goods in the course of imports for the reason that Article 286 imposes a restriction on such a levy and another one was by the Hon'ble Gauhati High Court in the case of *Primus Imaging Private Limited v. State of Assam*[7], wherein the Hon'ble Court held as follows on the aspect of fetters on the power of the States by virtue of Article 286:

> *"from a reading of Article 286 of the Constitution, it becomes clear that this Article does not permit States to levy tax on the sale or purchase of goods which takes place in the course of import into, or export out of the territory of India. The restriction is, thus, in respect of levy of tax on the sale or purchase of goods which takes place in the course of import into, or export out of, the territory of India. The power to levy Sales*

[3] (2007) 6 VST 587 (Jharkhand)
[4] (1999) 115 STC 591 (Ker)
[5] (2007) 7 VST 293 (Ker)
[6] Unreported case, however the case was discussed in the Orissa High Court Judgment of *Tata Steel Ltd. v. State of Odisha and Others* reported in 2012 Indlaw ORI 123; AIR 2013 ORI 54; 2013 (1) ILR(Cut) 256
[7] (2007) 9 VST 528 (Gau)

Tax is derived from Entry 54 of List II of the VII Schedule of the Constitution. Under the said Entry, the point of levy is purchase or sale, but under Entry 52, the point of levy is the point of entry into a local area."

The Hon'ble Court further distinguished between the incidence of tax under both the tax regimes and went onto hold that: *"The restriction imposed by Article 286 (1) (b) of is in respect of the levy of tax on sale or purchase of goods and not as regards entry of the goods into a local area and hence, the contention that levy of entry tax on goods imported from outside the State is hit by Article 286 (1) (b) of the Constitution of India has no force and is misconceived".*

In an old yet important judgment of the Hon'ble Apex Court in the case of *J.V. Gokal & Co. Private Ltd. v. Assistant Collector of Sales Tax (Inspection)*[8], the Apex Court categorically discussed about the meaning of the phrase "in the course of import of goods into the territory of India" and concluded that the incident of import ends on the goods crossing the custom barriers. While taking note of this decision, the Hon'ble Rajasthan High Court in the case of *Gulabdas Jagannath v. The State of Rajasthan*[9] that Octroi duty (which was replaced by entry tax, and was levied under Entry 52 of List II too) can be levied on goods imported from outside the country. While discussing the above two views taken by different High Courts and the Supreme Court, the court in Tata Steel Ltd. case (supra) agreed with the view expressed in the latter cases that entry tax can be levied on good imported from outside the country.

However, this issue is still open because there has been no concrete law which is laid down by the Supreme Court. Even in the Jindal (2016) case (infra), the Apex Court (in the majority judgment of Hon'ble Chief Justice T.S. Thakur) left this issue open to be determined by the respective division benches of the court in which entry tax matters has been pending.

However, in a concurring, but separate judgment, Hon'ble Ms. Justice Banumathi held that entry tax can be levied on goods imported from outside the country. Her Ladyship observed at Para 474 of the judgment as follows:

"The moment imported goods are cleared for home consumption either under Section 47 of the Act or under Section 68 of the Customs Act, the imported goods mix up with the mass of goods in the country and enter into the local area. Import of goods into the territory of India and transit of goods within the country are not integral. Import of goods and customs clearance and the entry of goods into the local areas are two

[8] (1960) 11 STC 186 (SC)
[9] AIR 1995 Rajasthan 225

distinct events. In the case of customs duty, the taxable event is entry of goods into the territory of India. The taxable event under entry 52, List II is the entry of goods into local area for consumption, use or sale therein. Two taxable events are distinct in law and there is no overlap."

However, one small, but important aspect which has been overlooked by Her Ladyship is that if one closely reads the language of Article 304 (a) of the Constitution which uses the expression *"goods imported from other States or Union Territories"* clearly states that the Constitution makers intended to give powers to the state legislatures to levy tax on entry of goods from other states and Union Territories of India i.e. goods which are coming into a local area from within the boundaries of India.

Also, a tax on the movement of goods (just like entry tax is on movement of goods) is already being collected on goods imported from outside the country by the name of "Special Additional Duty" u/s 3 (5) of the Customs Tariff Act, 1975 which is a tax levied to offset the local sales tax, central sales tax or "tax on transport of goods" paid by domestic traders. Thus, there will be no discrimination between goods imported from outside the country and locally manufactured goods if the former are completely exempt from payment of entry tax.

Constitutional Aspects relating to Entry Tax- the most disputed ones:

As mentioned in the introduction of this paper, Entry 52 of List II gives power to the states to levy entry tax. However, almost all the legislations enacted by different states relating to entry tax have been challenged as in violation of Article 301 and 304 (a) of Part XIII of the Constitution. Part XIII titled as "Trade, Commerce and Intercourse Within the Territory of India" has Article 301 which guarantees that the flow of trade, commerce and intercourse within the territories of India shall be free i.e. in other words, movement of goods from one place to another within India would be free from encumbrances which, however, would be subject to certain exceptions as laid down in Part XIII itself.

For the restrictions put up by Article 301, the majority of all the contentions were that entry tax creates an impediment on the free flow of trade, commerce and intercourse by making fiscal barriers for goods entering local areas of a state. However, in the recent and famous judgment of a 9- judge bench of the Hon'ble Apex Court in the case of *Jindal Stainless Limited v. State of Haryana*[10],

[10] 2016 SCC OnLine SC 1260

the Apex Court by a 7:2 majority held that taxes simpliciter are not hit by Part XIII and the word 'free' used in Article 301 does not mean 'free from taxation'.

That being said, the main test that an entry tax legislation is subjected to in order to be intra vires the Constitution is the test of Article 304 (a) which states that state may enact a law for imposition of tax on goods imported from other states, however, such tax must not be discriminatory as regards to the goods so imported and similar goods manufactured or produced within the state. The question of whether the impugned levy is discriminatory or not has been an issue for enormous amount of litigation in both High Courts and the Supreme Court as was predicted by Prof. P.S. Deshmukh in Constituent Assembly Debates[11] wherein he criticized the structure of Part XIII. Prof Deshmukh called it a lawyers' constitution and in his words which could not be more true for the simple reason that in the Jindal case (supra) itself, the Apex Court dealt with a mammoth batch of special leave petitions and civil appeals in which as many as 14 States took part. His words were:

> *"there will be so many innumerable loopholes that we will be wasting years and years before we could come to the final and correct interpretation of many clauses."*

'Discriminatory' taxes- major cause of litigation:

The suggestion given by the *Sub- Committee on fundamental rights*[12] which comprised of Mr. K.M. Munshi, Sir Alladi Krishnaswami Ayyar and Sir B.N. Rao amongst others. This committee gave language to the present Article 301 and 304 (a) after taking considerable assistance from Section 92 of the Australian Constitution and recommended thus:

> *"Subject to regulation by the Law of the Union trade, commerce and intercourse among the units (States) by and between the citizens shall be free:*
>
> *Provided that….*
>
> *Provided that nothing in this section shall prevent any unit from imposing on goods imported from other units the same duties and taxes to which the goods produced in the unit are subject"*
>
> *"Provided that no preference shall be given to one unit over another"*

[11] CAD, VOL IX, September 8, 1949

[12] Draft Report by the Committee contained suggestions on provisions of the present Article 304 (a) which were given on 10th, 14th and 15th April, 1947 [Jindal 2016 case para 46 p. 73]

These suggestions were accepted and by the virtue of Article 244 of the Draft Constitution [which is now Article 304 (a) of the Constitution], the power to levy tax on entry of goods was given to the states subject to the condition that such tax must not discriminate between locally manufactured and imported goods.

The previous view was that if the taxes were compensatory in nature, they would be outside the purview of Part XIII and consequently, Article 301 of the Constitution. This concept of 'Compensatory Taxes' was evolved in the famous *Atiabari Tea Company v. State of Assam*[13] case after relying on the sanctity of test of "direct and immediate effect" laid down in Australian cases *James v. Commonwealth of Australia*[14] and *Commonwealth of Australia and others v. Bank of New South Wales and others*[15] which was modified by the *Automobile (Transport) Limited v. State of Rajasthan*[16] case wherein Das J. followed the direct and immediate effect test that Article 301 is invoked only if a legislation operates to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or inconsequential impediment which may fairly be regarded as remote. These tests were confirmed in the *Jindal Stainless Limited (2) and Another v. State of Haryana and Others*[17] case wherein it was held that if the impugned levy is compensatory in nature, it would be intra vires the Constitution even if it is discriminatory. However, Apex Court in the *Jindal (2016)* case has done away with the concept of Compensatory Taxes holding that it has no juristic basis and observed that the theory of 'Direct and Immediate Effect' has lost its importance with the passage of time. The Australian High Court in the case of *Cole v. Whitfield*[18] held that only discriminatory burdens which have a protectionist character violate Section 92 of their Constitution

A tax which discriminates between the imported and locally manufactured goods is hit by Article 304 (a) and will be declared as unconstitutional, it is a settled proposition of law as was discussed in the case of *G.K. Krishnan v. State of Tamil Nadu*[19] by Mathew J. The above broad position of law is settled and there is no dispute regarding this. Now, the question that arises is what constitutes a discriminatory tax? It may be a high rate of entry tax as compared to the local sales tax which may create fiscal barriers and thus be termed as discriminatory or certain exemptions which may result in discrimination between local goods and imported goods.

[13] AIR 1961 SC 232
[14] (1936) A.C. 578
[15] (195) A.C. 235
[16] 1962 AIR 1406, 1963 SCR (1) 491
[17] (2006) 7 SCC 241
[18] (1988) 165 CLR 360
[19] 1974 Indlaw SC 239

The discrimination must be hostile in nature and not merely distinguishing and it will be judged on the touchstone of Article 14 of the Constitution. The word 'discrimination' is not used in this article, but in different articles of the Constitution[20] which involves an element of "intentional and unfavourable bias". One decision of the Apex Court that dealt with the interpretation of the word "Discrimination" was the 7 Judge Bench decision in the case of *Kathi Raning Rawat v. The State of Saurashtra*[21]. There the Court relied upon the dictionary meaning[22], the Court observed that *"the expression means 'to make an adverse distinction with regard to; to distinguish unfavourably from others".*

In the concurring judgment[23], His Lordship observed that a distinction should be drawn between "discrimination without reason or rational basis" and "discrimination with reason" and it would indeed be discrimination if an impugned legislation falls under the former expression.

One important point to be noted in this regard is that whether or not similar goods are manufactured in the State is immaterial because the essence of the guarantee in Article 304 (a) is that same or similar goods should be treated similarly in the matter of taxation.

(a) High rate of tax:

In a catena of judgments of the Hon'ble Apex Court, it has been held that if the levy seems to be unduly heavy, it would be no reason for it to be held as contrary to Part XIII. Some of the decisions being *Raja Jagannath Baksh Singh v. State of U.P.*[24], *Y V Srinivasamurhty and Ors. v. State of Mysore and Anr.*[25]**,** *D G Gose & Co. (P) Ltd. v. State of Kerala and Anr.*[26], *Hotel & Restaurant Association of India etc. v. Union of India & Ors.*[27] and *A Suresh and Others v. State of Tamil Nadu and Another*[28]

However, one factual situation may be imagined wherein the rate of entry tax is more than the rate of local sales tax or rate of entry tax is more on imported goods as compared to goods manufactured or produced in the same state. Although, such a situation is highly implausible as the state legislation would also be aware of the fact that such a law would be ultra vires the Constitution on the face of it and would not survive in the court for even

[20] Article 16, 301 and 304 of Indian Constitution
[21] AIR 1952 SC 123
[22] Oxford Dictionary was quoted by Chief Justice Sastri (as he then was)
[23] Written by Fazl Ali, J.
[24] AIR 1962 SC 1563
[25] AIR 1959 SC 894
[26] (1980) 2 SCC 410
[27] (1989) 3 SCC 634
[28] (1997) 1 SCC 319

a single hearing. Interestingly, such a legislation was actually enacted and later struck down by the court in the case of *Anivyl Polymers Private Limited v. State of Karnataka and Others*[29] wherein rate of entry tax was more on imported goods vis-à-vis local goods. The court followed the judgment of the Apex Court in the case of *Rattan Lal & Co. and Another v. The Assessing Authority and Another*[30] wherein the court held that to check discrimination, only the rates of tax has to be compared.

(b) Exemptions granted by the state to certain industries for promoting economic development:

The famous case is that of *Shree Mahavir Oil Mills and Another v. State of Jammu and Kashmir and Others*[31] wherein there was a total exemption from payment of sales tax on goods manufactured by small scale industries within the state even when the impugned levy was payable by other industries which included manufacturers of goods in other states and the rate of tax being to the tune of 8%. The Apex Court struck down the exemption as being one of the nature that puts manufacturers and traders in other states at a clear disadvantage.

In the 1990 case of *Video Electronics v. State of Punjab*[32] wherein the court upheld the constitutional validity of certain notifications issued by the states of U.P. and Punjab which provided for exemptions to new units established in particular areas for a limited and prescribed period of 3 to 7 years. The reason that the court gave was that the notifications related to a specific class of industrial units and their benefit was available only for a limited time period whereas an 'overwhelmingly' large number of local manufacturers were paying sales tax.

(c) Exemption of entry tax liability as per the payment of local sales tax/VAT:

This is a scenario wherein an impugned levy of entry tax may be challenged as discriminatory for the reason that the Act contains a clause which gives exemption of entry tax on the goods on which local sales sax/VAT has been paid i.e. set off of entry Tax liability with VAT liability.

In the case of *Syndicate Bank v. State of Karnataka*[33], although Karnataka High Court struck down the impugned entry tax legislation, but in the last paragraph of its judgment, the

[29] 1997 (43) Kar. L.J. 88 (HC) (DB) : (1998) 109 STC 26 (Kar.)(DB)
[30] 1970 AIR 1742; 1969 SCR (2) 544
[31] (1996) 2 SCC 39
[32] (1990) 3 SCC 87
[33] 119 STC 155

court observed that there may be a plausible situation wherein the entry tax liability is given adjustment from the total liability of sales tax or the sales tax liability already paid may be adjusted from the entry tax liability and there would be no discrimination because of this clause.

Hon'ble Patna High Court in the case of *Indian Oil Corporation Limited v. State of Bihar and Others*[34] held that there was a discrimination when goods brought from outside the state are for the purpose of either consumption or use as raw material, and sales tax would not be levied (as there would be no sale) and resultantly, set off provisions would not be applicable on such goods. Similar decision was given by *Bharat Earth Movers Limited v. State of Karnataka*[35].

One latest and beautiful judgment is that of the Patna High Court in the case of *Instakart Services Private Limited v. The State of Bihar*[36] which was argued by Dr. Ashok Saraf[37] on behalf of the assessee where the impugned levy was challenged as being discriminatory on the same grounds of setting off entry tax amount from the local VAT amount which was done via a Proviso to Sub- section 2 of the Charging Section (3) of the Bihar Tax on Entry of Goods Into Local Area for Consumption, Use or Sale Therein Act, 1993. Dr. Saraf gave certain brilliant examples enumerating certain situations which will show the discrimination by the use of simple mathematics which are reproduced hereinbelow:

Scenario 1: Dealer registered under the state VAT Act:

Situation 1: Dealer bringing goods from outside the state for the purpose of resale in the state: (CST: Central Sales Tax; ET: Entry Tax.)

Price of Good	**CST [2%]** (assuming availability of 'C' Form)	**ET [5% on A+B]**	**State VAT [5% on A+B+C]**	**State VAT after reduction of ET as per proviso to Section 3(2)**	**Cost to the Customer**
(A)	(B)	(C)	(D)	(E=D-C)	(A+B+C)
10000	200	510	535.50	25.50	10225.50

[34] (2007) 10 VST 140 (Patna)
[35] 2007 3 MPHT 69
[36] Civil Writ Jurisdiction. Case no. 6155 of 2016 decided on September 27, 2016.
[37] Senior Advocate, Gauhati High Court

Situation 2: Dealer doing resale of good to end consumer by bringing goods in state via stock transfer:

Price of Good	CST [2%]	ET [5% on A+B]	State VAT [5% on A+B+C]	State VAT after reduction of ET as per proviso to Section 3(2)	Cost to the Customer
(A)	(B)	(C)	(D)	(E=D-C)	(A+B+C)
10000	NIL	500	525	25	10025

Scenario 2: Dealer registered under the state VAT Act:

Situation 1: Raw materials brought in from outside the state for the purpose of manufacturing finished goods:

Total Cost of material	CST [2%] (assuming availability of 'C' Form)	ET [5% on A+B]	Price of goods manufactured in State	State VAT [5% on D]	State VAT after reduction of ET as per proviso to Section 3(2)	Cost to the Customer
	(B)	(C)		(E)	(F = E-C)	(A+B+C)
8000	160	408	10000	500	92	10092

Situation 2: Raw materials brought in the state via stock transfer for manufacturing goods within the state:

Total Cost of raw material	CST	ET [5% on A+B]	Price of goods manufactured in State	State VAT [5% on D]	State VAT after reduction of ET as per proviso to Section 3(2)	Cost to the Customer
(A)	(B)	(C)		(E)	(F = E-C)	(A+B+C)
8000	NIL	400	10000	500	100	10100

Scenario 3: Dealer not registered under the state VAT Act:

Situation 1: Goods brought in from outside the state for the purpose of personal use or consumption:

Price of Mobile	CST [5.5%] (2% rate can't be claimed because 'C' Forms are not	ET [5% on A+B]	State VAT	State VAT after reduction of ET as per	Cost to the Customer

	issued to non-registered dealers.			**proviso to Section 3(2)**	
(A)	(B)	(C)	(D)	(E=D-C)	(A+B+C)
10000	550	527.50	525	527.50	10527.50

In the light of the above analysis, it can be said that the final price paid by the consumer in each of the case supra would be as follows:

Scenario	**Price (Rs.)**
Scenario 1, situation 1: State dealer reselling goods to end customers within the state	10,225.50
Scenario 1, situation 2: State dealer reselling goods to end customers after bringing such goods via stock transfer	10,025
Scenario 2, situation 1: State dealer producing goods from raw material brought in from outside the state	10,092
Scenario 2, situation 2: State dealer producing goods from raw materials brought in via stock transfer	10,100
Scenario 3: Goods brought in by non- registered dealer (State VAT) for the purpose of personal use or consumption of individual customers	10, 527.50

As there is visible difference in the prices of goods sold which are locally manufactured and good brought in from outside the state for personal use or consumption, the Hon'ble Court held that the Entry Tax Act was discriminatory because of the clause providing for setting off entry tax and VAT liability.

Different High Courts have held different viewpoints on this aspect of the state Entry Tax Acts, but there is no Supreme Court decision clarifying this aspect for the reason that if a tax is discriminatory or not is an essential question of fact and which will have to be judged on a case to case basis as was concluded by Hon'ble Chief Justice T.S. Thakur in his majority judgment.

Again, however, in her separate Judgment, Justice Banumathi observed at Para 430 that setting off entry tax from the VAT liability of a trader cannot amount to discrimination per se. At Para 431, she observed that ultimate tax burden has to be seen and compared to make out a case of discrimination. Thus, the basic principle underlying the test for discrimination is to calculate the ultimate tax burden on the locally manufactured and imported goods and compare them.

Entry Tax- The road ahead:

With the historic advent of 101st Constitutional Amendment Act, 2016[38] of the Indian Constitution, a new Article[39] shall be inserted which shall give power to the Parliament as well as state legislatures to make laws in relation to goods and services. Important point to be noted here is that humongous updating of indirect tax system in India is taking place and the country is dreaming about 'One Nation- One Tax' concept wherein there will be only one Goods and Services Tax (GST) on both goods and services and taxes like VAT, CST shall be subsumed in GST.

Entry tax is no exception and by the virtue of the Amendment Act[40], Entry 52 has been omitted from the State List of VII Schedule. Thus, it implies that no entry tax shall be levied by any state in the future and the entry tax shall be subsumed in the highly ambitious GST sought to be rolled out by the Ministry of Finance from July 1, 2017 onwards. Hopefully, this subsuming of various taxes into one GST would become successful in reducing litigation at least with respect to entry tax matters in a country like ours where the judiciary is over- burdened with millions of pending cases. A step in the right direction. Kudos, Government of India!

[38] Amendment brought on 8th September, 2016. Amendment Act available at: http://lawmin.nic.in/ld/The%20Constitution%20(One%20Hundred%20and%20First%20Amendment)%20Act,%202016.pdf (Last visited March 4, 2017)
[39] Article 246A.
[40] Section 17 clause (b)

CONTEMPT OF COURT: A CHALLENGE TO THE RULE OF LAW?

Tanmay Yadav[*]

The concept of contempt is a necessary aspect to assert impartial and uninterrupted administration of justice. The article discusses the need of laws relating to contempt with respect to the rights enshrined in the Constitution of India. The judiciary of our country is an independent, elegant and the majestic source which interprets law and delivers justice. The paper deals with the importance of the ammunition of the judge and the courts, which includes integrity, virtue and learning. The following paper also deals with the aspect of balancing interest of an individual against the interest of entire society. The need for the society to believe in the courts versus the need to protect the freedom of speech and expression brings in the concept of rule of law. This is because the Indian Judiciary has not only evolved in terms of its interpretation but has also evolved through its various criticisms and the reluctant sensitivities that it faced during the early periods. The Contempt of Courts Act, 1971 which has replaced the earlier Act also sets forth the objective of punishing those who cause hindrance in the path of the judiciary to deliver justice and in consequence of the same. The Act also aims to protect the right of an individual by giving a free and fair trial without any discrimination whatsoever. My paper would extend to substantiate each of the issues above-mentioned with case laws and the interpretations of the courts to restrict and expand the scope of the rights guaranteed in the Constitution.

CHAPTER I: INTRODUCTION

Contempt of court is defined under Section 2 (a) of The Contempt of Courts Act, 1971 and falls under civil contempt and criminal contempt. However, the rule of contempt of court has been under the scanner for a very long period of time as it encroaches upon two of the most important fundamental rights guaranteed by the Constitution of India to the citizens of this country. These rights are enshrined in Part-III of the Indian constitution. The first, under Article 19,[1] provides citizens of this country with various freedoms but is subjected to certain restrictions. The second, yet one of the most important rights, is given under Article 21[2] of the Indian Constitution, which provides the right to life and personal liberty. The scope of right to life and personal liberty includes the right to live a dignified life. Since the inception, it has been observed that there is a constant hustle to balance the power to punish under the contempt of court and to protect the rights enshrined in the Indian Constitution which has been mentioned above. It is at

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[1]The Constitution of India, art. 19: Protection of certain rights regarding freedom of speech, etc.

[2]The Constitution of India, art. 21: No person shall be deprived of his life or personal liberty except according to procedure established by law.

this juncture that the tussle between contempt of court and the rule of law begins and it is a challenge for the judiciary to resolve this issue. Therefore, it is very important to look out for potential solutions to this issue.

HISTORY

The first legislation which dealt with the contempt of courts emanated in the year 1926. It was initially enacted with an objective to define and limit the power of certain courts to punish for contempt. The Act of 1926 was replaced by the Contempt of Courts Act, 1952 (32 of 1952). However, these two Acts proved to be uncertain and unsatisfactory, due to which on 1st April, 1960 a bill was introduced in the Lok Sabha to consolidate and amend the laws relating to contempt of courts.

The Bill was examined by the Government and further assessed that the existing law concerning contempt was ambiguous and certain amendments were required. The government was of the view that since independence there had been critical constitutional changes due to which it was necessary to have the relevant law scrutinized by a special committee. The Ministry of Law on 29th July 1961 set up a committee under the chairmanship of Shri S.N. Sanyal, the then Additional Solicitor General of India. The committee later on came to be known as the ***"SANYAL COMMITTEE"***. the main task of the committee was to examine the law relating to contempt of courts and the law establishing procedure for the punishment thereof.

The committee was supposed to perform the following tasks:

(a) To suggest any amendment(s) with a view to clarifying and reforming the law wherever necessary,
(b) To make recommendations for codification of the law in the light of the examination made.

After a detailed scrutiny and examination of the above-mentioned issues, the Committee was of the opinion that the Parliament or the Legislature procured the power to make laws relating to the contempt of both the Supreme Court and the High Courts. It was also observed that the said legislative power could neither abrogate the powers vested with the Supreme Court or the High Courts, as Courts ***of Record*** to punish nor could it vest such power to some other court.

After considering various recommendations of the Sanyal Committee, the Contempt of Courts Act, 1952 was replaced by the Contempt of Courts Act, 1971. This Act came into existence

"to define and limit the powers of different courts in punishing contempt of courts and to regulate their procedure in relation thereto". The essential ingredients to establish contempt are defined under The Contempt of Court Act, 1971 which require: i) a valid court order, ii) knowledge of the respondent regarding the contempt, iii) the ability to render compliance and iv) wilful disobedience of the order. The Act also describes the two types of Contempt which are classified as i) Civil Contempt and ii) Criminal Contempt. Civil Contempt includes any disobedience or breach of an order passed by the court[3] whereas Criminal Contempt constitutes any kind of publication which would scandalize the authority of the court.[4] Thus, after discussing the scope of the Contempt of Courts Act, 1971, this paper discusses the conflict between the rule of law and contempt of court in the subsequent chapters.

CHAPTER II: CONTEMPT OF COURT AND RULE OF LAW

The power to punish for contempt of court is considered to be a special jurisdiction and it should be used with great caution. It may be used when anyone tries to undermine the value of judicial institutions in the eyes of general public. Any act which negatively affects the administration of justice is punishable. The power to punish for contempt is not intended to protect the image of any judge individually, but it is to protect the image of judicial institutions in the eyes of general public. It is necessary that the authority of courts is not maligned and the confidence of general public in the judicial system of the country is kept intact. The following acts have been held to constitute contempt of court:[5]

(i) Insinuations derogatory to the dignity of the Court which are calculated to undermine the confidence of the people in the integrity of the judges;
(ii) An attempt by one party to prejudice the Court against the other party to the action;
(iii) To stir up public feelings on the question pending for decision before the Court and attempting to influence the judge in one's own favour;

[3]The Contempt of Court Act, 1971, s. 2(b),– The Civil contempt is defined as wilful disobedience to any judgement, decree, direction, order, writ, or other process of a court or wilful breach of an undertaking given to a court

[4]The Contempt of Court Act, 1971, s. 2(c),– Criminal contempt is defined as the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which:
i) Scandalizes or tends to scandalize, or lowers or tends to lower the authority of, any court, or
ii) Prejudices, or interferes or tends to interfere with the due course of any judicial proceeding, or
iii) Interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner

[5]*Hira Lal Dixit* v *State of Uttar Pradesh*, AIR 1954 SC 743: (1955) 1 SCR 677

(iv) An attempt to affect the minds of the judges and to deflect them from performing their duty by flattery or veiled threat;

(v) An act or publication which scandalizes the Court, attributing dishonesty to a judge in the discharge of his function;

(vi) Wilful disobedience or non-compliance of the Court's Order.[6]

It is clear from the above-mentioned instances that the main purpose of granting the Court power to punish for its contempt is to protect the image of the judicial system in the eyes of the general public. The question that has been left unanswered, at this juncture, is how the contempt of court is related to the rule of law.

NEED AND SCOPE OF SUCH A RULE

This chapter shall deal with different aspects of the Supreme Court and various High Courts' power to punish for contempt of court. It revolves around the need of such rule and its scope which has further been discussed in detail.

Basically, contempt of court is committed when a court is "scandalized by casting unwarranted, uncalled for and unjustified aspersions on the integrity, ability, impartiality or fairness of a judge in the discharge of his judicial function as it amounts to an interference with the due course of administration of justice."[7] It is clear that anybody who tries to interfere with the administration of justice is liable to be punished for contempt of court. The Constitution of India has given certain rights to the citizens but the freedoms entailed therein are not absolute. Every right that has been enshrined in the Constitution is coupled with some reasonable restriction. For instance, Article 19(2)[8] of Part III of the Indian Constitution provides for the freedom of speech of the citizens but it constitutes of certain reasonable restrictions as well. These restrictions aim to protect the judicial process against any interference of the freedom of speech and the court has the power to punish in case of any contrary situations. But the real question is whether courts while punishing for contempt can overlook the fundamental rights of the citizens. Article 19(2) clearly states that restrictions upon these rights should be reasonable.

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[6]*Rajiv Choudhary* v *Jagdish Narain Khanna*, (1996) 1 SCC 508

[7]*Jaswant Singh* v *Virender Singh*, (1995) Supp (1) SCC 384

[8]The Constitution of India, art. 19(2): Nothing in sub-clause (a) of clause 1 shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interest of [the sovereignty and integrity of India] the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

The Supreme Court derives its power to punish from Article 129[9] of the Constitution and the High Courts are vested this power under Article 215.[10] It is clear from a bare reading of these two Articles that a court of record has the power to punish for its contempt and in India, the Supreme Court and High Courts are courts of records.

The Apex Court in many of its judgments has reiterated the need and scope of such a power. In a landmark judgment delivered in the case *In Re: Vinay Chandra Mishra,*[11] the Court held the following:

"The judiciary is not only the guardian of the rule of law and third pillar but in fact the central pillar of a democratic State. If the judiciary is to perform its duties and functions effectively and true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the courts have to be respected and protected at all costs. Otherwise the very corner-stone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. It is for this purpose that the courts are entrusted with extraordinary powers of punishing those who indulge in acts, whether inside or outside the courts, which tend to undermine the authority of law and bring it in disrepute and disrespect by scandalizing it."

The reason why it is necessary to have such a rule to punish for contempt is to keep intact the image of judiciary in the eyes of the general public and *"when the courts use this power, it does not do so to vindicate the dignity and honour of any individual judge, but to uphold the majesty of the law and of the administration of justice. The foundation of the judiciary is the trust and the confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by the acts which tend to create disrespect for the authority of the court by creating distrust in its working, the edifice of judicial system gets eroded."*[12]

NEED OF RULE OF LAW

The essence of the rule of law is covered within the following essentials, namely: i) the supremacy of law, ii) equality before law and iii) predominance of legal spirit.

The above prerequisites could be satisfied if arbitrary power is defeated. In the case of *Somraj* v. *State of Haryana*[13]*,* it was held by Justice Ramaswamy that:

[9]The Constitution of India, art.. 129: Supreme Court to be a court of record- The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for its contempt.
[10]The Constitution of India, art. 215: High Courts to be court of record- Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt for itself.
[11]*In re: Vinay Chandra Mishra*, AIR 1995 SC 2348,2358 : (1995) 1 KLJ 504
[12]*In re: Arundhati Roy*, Suo Moto Contempt petition (CRL) No. 10 of 2001
[13]*Som raj v. State of Haryana*, 1990 AIR 1176, 1990 SCR (1) 535

"…. The absence of arbitrary power is the first postulate of rule of law upon which our whole constitutional edifice is based on. In a system governed by the Rule of Law, discretion when conferred upon an executive authority must be confined within clearly defined limits and was said to be arbitrary since it violated Article 14 and 16 of the Indian Constitution…"

As stated in the above judgment, the following sub-section of the chapter deals with the conflict between rule of law and contempt of court. This aspect has been discussed in relation to the independence of judiciary and separation of powers which is considered to be an essential element of the Indian Constitution. The basic feature of rule of law lies within the right to obtain judicial redress through the courts established in India.[14] Thus, for the administration of fair trial and dispensation of justice in our courts, it is very important to follow the rule of contempt. The protection given to court proceedings plays an important role in securing the confidence of the people in the society in the judicial system of the country[15]. The judicial structure of this country has been evolving ever since 1947 and the country has witnessed many changes due to the changes in the country. The Privy Council was the predecessor to the Supreme Court of India and was not conferred with as many powers as that of the Supreme Court of India. Post-independence, it was first observed in *A.K.Gopalan* v. *State of Madras*[16] that the Supreme Court restricted the scope of Article 21 and failed to make an effective check on the Government. The Constitution gained full momentum in the case of *Kesavananda Bharti*[17] and it was after this that the Supreme Court became active and the rigid principle of *"locus standi"*[18] was instilled[19]. It was in this case, that the Apex Court observed that in a democracy where the judiciary plays an important role, the concept of judicial review has to be emphasised upon since the Constitution is the Grundnorm of all the laws in the country. The judiciary is the central pillar of the Constitution because it keeps checks on the performance of the executory, legislature and the fundamental law of the land. It was observed in *Kesavananda Bharti* v *State of Kerala,* that it is important to maintain the dignity of the court and since it is the cardinal principle of rule of law, it ought to uphold the pride and honour of the court not scandalize the honour of a judge. Thus, in my opinion, after briefly scrutinizing the various judgements laid down by the Supreme Court of India, it is a well acknowledged fact that both rule of law and law of contempt are proportionally working together so as to safeguard the image of the judiciary in the society., The law of contempt cannot be read separately from the rule of law

[14] *Union of India,* v *Raghubir,* 1989 AIR 1933, 1989 SCR (3) 316
[15] *In re. Vinay Chandra Mishra,* AIR 1995 SC 2348, 1995 (1) ALT Cri 674, 1995 CriLJ 3994, (1995) 2 GLR 992, JT 1995 (2) SC 587, 1995 (2) SCALE 200, (1995) 2 SCC 584, 1995 2 SCR 638, 1995 (2) UJ 93 SC
[16] *A.K. Gopalan* v *State of Madras,* 1950 AIR 27, 1950 SCR 88
[17] *Kesavananda Bharti* v *State of Kerala,* (1973) 4 SCC 225
[18] Locus Standi – the right or capacity to bring an action or to appear in a court.
[19] https://www.quora.com/How-did-Judiciary-as-an-institution-evolve-in-independent-India-after-1950

since the objective of the court is defined in the scope of rule of law. In the various writings of Dicey, he asserted the various objectives of the Rule of Law which were existent in the British Constitution as well. It is important to note in this regard that the British Constitution is judge-made and the rights of the individual form part of, and pervade the Constitution. Further, the objectives as stated by Dicey were:

1. *Absence of Arbitrary Power:* No man is above law. No man is punishable except for a distinct breach of law established in an ordinary legal manner before ordinary courts. The government cannot punish any one merely by its own fiat.
2. *Equality before law:* Every man, whatever his rank or condition, is subject to the ordinary law and jurisdiction of the ordinary courts. No man is above the law.
3. *Individual liberties:* The general principles and the various liberties of an individual are judge-made, i.e., these are the result of judicial decisions determining the rights of private persons.

Therefore, emphasising upon the values of J. Khanna as observed in *A.D.M. Jabalpur* v *S. Shukla*[20] stated that –

> *"Rule of law is the antithesis of arbitrariness… Rule of law is now the accepted norm of all civilised societies… everywhere it is identified with the liberty of the individual. It seeks to maintain a balance between the opposing notions of individual liberty and public order. In every state, the problem arises of reconciling human rights with the requirements of public interest. Such harmonising can only be attained by the existence of independent courts which can hold the balance between citizen and the state and compel governments to conform the law."*

CHAPTER III: CONTEMPT OF COURT AND RIGHT OF SPEECH

The citizens of India have certain freedoms guaranteed by the Constitution, under Chapter III providing fundamental rights, but these freedoms are not absolute. Article 19(1) (a) of the Constitution ensures freedom of speech and expression to the citizens of this country. This means that citizens have the right to express their views and express their feelings in any way. But this right comes with certain restrictions and Article 19(2)[21] provides for these restrictions.

The right to freedom of speech and expression is hit by the rule of contempt of court, if any citizen of the country in anyway interferes with the administration of justice. India is a country

[20] *A.D.M. Jabalpur* v *S. Shukla,* AIR 1976 SC 1207 : (1976) 2 SCC 521
[21] *Supra* note 8 at (page no.)

with diversity of views and it accommodates various ideologies and provides an equal platform to all the communities to express their views. But with this right comes certain responsibilities and it is expected from the citizens that they will not do anything which is against the law. Yet, the question still remains as to what is extent of such limitation.

The Constitution of India is the 'Grundnorm'[22] of the Indian legal system and was adopted to depict the contemporary Republic of India by replacing the Government of India Act, 1935. So as to ensure the constitutional autochthony, the framers of the Indian Constitution repealed the prior Acts of the British Parliament via Article 395[23] of the Indian Constitution. Its fundamental principles establish the basic structure of the constitution. The concept of freedom of speech is completely attained when the citizens of this nation manage to exchange their thoughts freely. The independence of thought and freedom of speech also cover the criticism of judiciary in its scope.

It is commonly known that freedom is inconceivable without free speech. The basic concept of freedom of speech is indispensable in the modern democratic system. It is the right of every citizen to criticize the Judiciary as an institution and its functioning.

It is very important to understand that both freedom of speech and expression and the power to punish contempt of court are vital for a democratic system. On one hand, the freedom of speech ensures judicial accountability and on the other hand, law of contempt ensures proper administration of justice. So, these two are an important part of any democratic set up.

At this juncture, it becomes relevant to talk about freedom of speech and the law of contempt in different countries. For the purpose of this paper, I am going to discuss the position in the United Kingdom and the United States of America.

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[22] 'Grundnorm' is a German word meaning *"fundamental norm"*. The jurist and legal philosopher Hans Kelsen coined the term to refer to the fundamental norm, order, or rule that forms an underlying basis for a legal system. http://pgil.pk/wp-content/uploads/2014/12/Kelsen-Theory-of-Grund-Norm.pdf (Mridushi Swaroop, Manupatra) – Kelsen's theory of Grundnorm.

[23] Article 395, Indian Constitution – Repeals the Indian Independence Act, 1947, and the Government of India Act, 1935, together with all enactment as amending or supplementing the latter act, but not including the Abolition of Privy Council Jurisdiction Act, 1949, are hereby repealed FIRST SCHEDULE Article 1 and 4 I THE STATES Name Territories.

POSITION IN THE UNITED KINGDOM

Article 19(1) of the Constitution of India guarantees freedom of speech to all citizens in India, and as stated earlier this comes with reasonable restrictions. Similar is the position of freedom of speech in England in relation to the contempt of court.

The evolution of the status of freedom of speech was referred in the famous *case of Bahamas Island*[24] in which the Board reported that the note published in the newspaper did not amount to libel since the said letter did not obstruct court proceedings and thus did not constitute contempt of court. It was in this case that the integral personality of the judge was not considered. In another important case, Lord Denning pressurized the every man, in Parliament or in the Press, to make a fair comment on matters of public interest.[25] Further, Salmond supported the view of Denning by stating that the right to comment fairly upon any matter of public importance is an inalienable right and constitutes one of the basic pillars of personal liberty. It was further stated by Salmond that the expression, whether in good or bad taste, ought to be within the limits of reasonable courtesy and must constitute good faith. Thus, the judgments given above led to many changes in the law and, by extension, court proceedings in England. This was also emphasized in another case, in which Owen J. stated that any discussion in relation to public affairs need not be suspended merely on the grounds that there is a likelihood of prejudice being created towards a person who is the litigant at the time of the proceedings.[26] Further, there were many discussions pertaining to the conflict between freedom of speech and contempt of court. It was explained by *Walker* that administration of justice which finally found its passage in another case, in which they stated that, undoubtedly the administration of justice is important, but a person cannot be prohibited to discuss publicly a matter merely on the grounds of contempt of court, or that such person was criticized publicly regarding his conduct[27]. However, in this case the Law Lords granted limited injunction restraining the respondents from publishing or causing or authorizing any article because it amounted to contempt of court (in accordance with the brief facts of the case). Besides the Law Lords, the author would like to draw reference to Article 10[28] of the European

[24] Caribban and North Atlantic Territories, The Bahamas Independence Order, 1973, 20th June 1973.
[25] *R* v *Commissioner of Police, Blackburn,* (1968) 2 Q.B. 150.
[26] *Ex Parte Dawson's case,* (1961) S.R. (N.S.W.) 573.
[27] *Ex Parte Bread Manufacturers Ltd Case*; *Re: Truth and Sportsman Ltd,* (1937) 37 S.R. (N.S.W.) 242.
[28] Article 10 of the European Convention – Freedom of expression:
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and receive and impart information and ideas without interference by public authority and regardless of frontiers. The article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

Convention which states that everyone has the freedom of expression but in the interest of national security, protection of health or morals and to maintain impartiality in judiciary.[29] Thus, with reference to the cases stated above, maintaining a balance between *free press and fair trial* is very important so as to protect the legal rights of individuals in the interest of justice and morality.

POSITION IN THE UNITED STATES

The position of freedom of speech in America was explained clearly by Scott J., who stated that "inherent tendency" and "reasonable tendency" are not sufficient grounds to oppress the freedom of expression; the test of "clear and present danger" are the basic necessities to be satisfied so as to restrict the freedom of speech.[30] Subsequently, it was held that free discussion of the problems of the society is one of the essential principles of American Law which ought to be preserved.[31]

This Doctrine of Clear and Present Danger[32] states that there must be a reasonable threat to administration of justice to suppress the freedom of expression. The development of this doctrine observed that any publication made out of court were to be governed by this doctrine which would standardize the gravity of the situation[33].

POSITION IN INDIA

As opposed to the U.S Constitution, in India, the right to freedom of speech and expression is not an absolute right. It is subject to certain restrictions under Article 19(2) which may be imposed in the interest of maintaining *state sovereignty and integrity of India.* The Apex Court was confronted with the conflict between freedom of speech and contempt of court in a landmark case of *Bathina Ramakrishna Reddy* v *State of Madras,* wherein the Apex Court held the appellant guilty because the appellant was not able to substantiate the allegations made by him and also because he refused to offer an apology.[34]

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2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territory integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

[29]*Attorney General* v *Times Newspaper Ltd*., (1974) A.C. 273

[30]*Times Mirror Company* v *Superior Court of State of California*, 314 U.S. 252 (1941)

[31]*Pennekamp* v *Florida*, 328 U.S. 331 (1946)

[32]*Craig* v *Harney*, 331 U.S. 367 (1947).

[33]*James Wood* v *Georgia*, 370 U.S. 375 (1962)

[34]*Bathina Ramakrishna Reddy* v *The State of Madras*, 1952 SCR 425

The current position of freedom of speech in relation to contempt of court was defined by Justice Sanghvi, in *Indirect Tax Practitioners Association* v *R.K. Jain,* who stated that, *the freedom of speech is the right of an individual which ought to be cherished*[35]. India is the land in which Gautam Buddha, Mahavir and Mahatma Gandhi had stated that freedom of speech and expression has to be respected. The Courts have guarded this policy by fairly dividing the nature of criticisms, which includes the exclusion of *malafide* intentions. This is essential because all the institutions would get corrupted by the weapons of propaganda; it is at this juncture that the freedom of expression plays an important role (which is also limited in scope). Though the freedom of speech and expression has a wide scope while interpreting, this right is not absolute in nature and certain restrictions are imposed. For example, under the Indian Law, any threat to the security of the state or to maintain public order, or if there is any act which causes contempt of court or defames the paucity of the nation or if it affects the sovereignty and integrity of the country, reasonable restrictions can be imposed only by a duly enacted law and not by any executive action. Thus, the evolution of this theory restricts any threat to judicial proceedings or any expression which destructs the basic structure or purpose of law. In the case of *Gitlow* v. *New York,* which is considered to be a famous decision given by the Supreme Court of the U.S. was cited by the drafters of our Constitution, establishing a clear distinction between freedom of speech and contempt: *"The Freedom of Speech and Press which is secured by the Constitution, does not confer an absolute right to speak or publish without responsibility".*[36] The evolution of this principle was given a clear view after the Constitution came into effect and after the passing of the Contempt of Courts Act, 1952. The Supreme Court reversed the decision given in the *Bathina Ramakrishna case* stating that any person who is incompetent in law and does not state thorough facts was considered discourteous.[37]

In the case of *Baradakanta Mishra* v *Registrar of Orissa High Court*[38], J. P.N. Bhagawati observed that a major emphasis was laid on maintaining a balance between the freedom of expression and fair and fearless justice. The authority of the Court is given by the people of the democracy. The Constitution of India is *"for the people, by the people and of the people",* thus, as given in the American system, the importance of public security and benefit are given complete importance since the courts and judge exercise their power in order to deliver rightful justice.

[35]*Indirect Tax Practitioners Association* v *R.K. Jain,* Contempt Petition (CRL.) No. 9 of 2009
[36]*Gitlow* v *New York,* 268 U.S. 652 (1925).
[37]*Brahma Prakash Sharma* v *UP,* 1954 AIR 10, 1954 SCR 1169
[38]*Baradakanta Mishra* v *Registrar of Orissa High Court* (1974) 1 SCC 374

Finally, the thorough guidelines given to expressly distinguish between two of the most debated concepts were given by U.K. Krishna Menon whose contentions were that:

1. The law of contempt must be read separately from the freedom of speech guaranteed under Art 19(1) (a) of the Constitution of India.
2. The contemnor ought to be free from any kind of malafide intention and his statement made must be made for the public good.[39]

   In Re S. Mulgaokar, Justice Krishna Iyer and Justice Kailasam delivered a concurring order stating, *"The judiciary cannot be immune to any kind of criticism. But such criticism must not be based on distortions or any gross misstatement which might lower the respect of the judiciary or destroy public confidence in it[40]."* This was the judgement which was made after referring to many of the English cases.

Justice S.P. Barucha also shows his due concern to the freedom of expression and stated that the court has shoulders, broad enough to overlook the comments made by the appellants and that an action of contempt would be taken into consideration when there would be gross miscarriage in the delivery of justice.[41]

Therefore after a brief analysis of the above stated case laws and the various interpretations of the courts it can be observed briefly that, the conflict of freedom of speech and contempt of court in India is not similar to that of the position recognised in United Kingdom and United Stated of America. It is also observed that it is the primary duty of all the civilised states to ensure that the fundamental rights guaranteed to its citizens should be protected without disregarding and neglecting the administration of justice by the courts. The utmost importance given to the discretion of the judge is an essential characteristic since the judgment should be free of bias, prejudice and unfairness. One objective which remains common in all the countries discussed is that they are trying to create harmony between these two concepts, and the right of a person to freely speak his mind without any pressure is sought to be secured. Thus the best possible way of stopping any sort of conflict between these two concepts, both of which are vital for the smooth functioning of any democracy, is to create an environment in which citizens are free to speak their mind and the judiciary is able to perform its task of administering justice without any prejudice.

CHAPTER IV: CONCLUSION

[39] *M.S. Namboodripad* v *T. Narayanan Nambiar,* (1970) 2 SCC 325
[40] *re S. Mulgaokar,* (1978) 3 SCC 43
[41] *re Arundhati Roy,* (2002) 2 SC 508

The freedom of speech granted by the Indian Constitution ought to be utilized in a very religious and responsible manner, especially, by the influential and the educated segment of the society.

It is the duty of every citizen of the country to use his right in a responsible manner and not to hinder or hamper the duty of the judiciary or the proceedings of a trial. The effect of opinions raised by a non-influential person is different from that of an influential one and therefore it is important for the individuals to respect the judiciary since propagation of one's thought in the public domain and promulgation of false opinions and thought only causes disregard to the judiciary.

Thus, when we discuss about influential persons, it is very important to know and understand that their followers would affect the societal trust. Freedom of speech used by the influential persons who have a major social stature in the society affects the public opinion at large. For instance, in the case of Arundhati Roy, the influence of her opinion and her followers caused a major distrust in the public.

Thus, it is the duty of the Court to clearly measure the degree of influence of the said opinions and predict the repercussions which may be incurred. This includes the concept of Beneficial Construction in which the courts ought to predict whether such opinion would affect the respect and trust of the judiciary in the eyes of the public and make such judgment. Similarly, as discussed in the above segment, similar conflict of opinion and transmission of information is applicable to the information presented by the Media. Media plays a major role in collecting, editing and broadcasting information and facts to the public which, in turn, defines their opinion and also affects societal interpretation of an issue. Often, the facts presented by the media are exaggerated and destroy the basic process of administration of justice and thus it is necessary to restrict the scope of such an adverse display of the judiciary which negatively impacts the minds of the citizens.

With this discussion, we clearly understand that there is a major difference in the levels of interpretation, both by the citizens and the courts. Thus when there is a conflict between the two concepts which are equally important as far as the smooth functioning of democracy is concerned, we try to create harmony between the two. Here, harmony is taken to mean that the right of freedom of speech of the citizen does not interfere with the administration of justice. Meaning thereby, the citizen of the country can speak whatever without any pressure and the judiciary or the judicial system or the courts could affectively exercise their objective towards administering justice.

377: USE, MISUSE, AND ABUSE

Tanushree Bhalla[*]

This article, has been authored with reference to the controversial section 377 of the Indian Penal Code, 1860. As is self-explanatory from the title, the objective of this article is to examine the said law and its various aspects in order to enable the reader to form their own well-informed opinion about the issue. This may in turn enable them to take their own well-informed stand regarding the morality and constitutionality of the said provision based strictly on logic and legal/jurisprudential merit.

As is well known, the impugned provision is not only draconian and archaic, it is also currently one of the most controversial laws in the country at the time. At present, it has not only come under ire internally, but also pits India against the modern progressive world view, including that of the United Nations. To add to the problem, there exists the fact of massive lack of awareness at all social levels regarding the issue which in turn leads people to harbour misinformed opinions thereby adding to the chaos. These may range from con-men duping people in the name of curing "the ailment" to cases of extortion, abuse, and false prosecution of the marginalised community.

A lot of care has especially been taken to ensure that all citations from ancient Hindu texts are taken in view of the actual language, context and transliteration of the original texts as far as possible, instead of using the British born English translations. This is especially crucial, since these translations have at times been found to suffer from several intentional/unintentional omissions and insertions (such as those in Naradiya Dharmsastra and Manusmirti in English) with due apparent regard and bias towards the colonial point of view in their execution and translation.

In order to address the above stated issues, in addition to the existing arguments regarding the section, this article has been carefully drafted to guide any lay reader to understand the topic and its various dimensions.

> *"3.7 Severability: we have seen that where two interpretations are possible, a Court will accept that interpretation which will uphold the validity of law. If, however, this is not possible, it becomes necessary to decide whether the law is bad as a whole, or whether the bad part can be severed from the good part. The question of construction, and the question of severability are thus two distinct questions"*[1]

Introduction

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[1] H.M. Seervai, Constitutional Law of India (2006)

The Hon'ble Supreme Court of the United States of America, in a landmark judgement, ***Obergefell v. Hodges***,[2] legalised gay marriages in the country. Following this, the prestigious Stanford University became the first university in the world to start a flagship 'Executive Leadership Programme' with focus on the LGBT community and allies.

Subsequently, the United Nations, spearheaded by Secretary General Ban Ki-Moon, that had started pushing for equal rights for the LGBT community openly from 2013[3] went further in its pro-active approach by passing a UNHRC resolution that declared open expression of gay rights as a human right while maintaining its stand in favour of pro-active efforts towards legalization of gay marriages across the world. During the voting on this resolution, India, while abstaining to vote on 11 out of 17 issues, voted with hostile nations, including Pakistan who represented the Organization of Islamic cooperation, to introduce six amendments with the sole intent of subverting the purpose of the resolution. India's abstention on most issues while voting for the hostile amendments was seen as a tactical measure to avoid a homophobic and regressive public perception of itself without actually taking any progressive step towards the implementation of equal rights under Sexual Orientation and Gender Identity (SOGI) resolution[4] which aimed to build upon two previous resolutions, adopted by the Council in 2011[5] and 2014[6] by mandating the appointment of its first independent expert.

In light of the above, it is imperative for us to examine a Section in the Indian Penal Code (hereafter, IPC) that, despite its archaism and dormancy, continues to exclude and marginalise a major part of our population from the national machinery.

Objective

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[2] James Obergefell, et al., Petitioners v. Richard Hodges, Director, Ohio Department of Health, et al. 576 U.S. ___ (2015) 135 S. Ct. 2584; 192 L. Ed. 2d 609; 83 U.S.L.W. 4592; 25 Fla. L. Weekly Fed. S 472; 2015 WL 2473451; 2015 U.S. LEXIS 4250; 2015 BL 204553

[3] UN General Assembly, HRC document A/HRC/RES/27/32, Human rights, sexual orientation and gender identity, 27th session, 02/10/2014 *available at:* https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/177/32/PDF/G1417732.pdf?OpenElement *(Last visited on Jun 19th 2017)*

[4] Human Rights Council Resolution 32/2, Protection against violence and discrimination based on sexual orientation and gender identity (adopted 30 June 2016) - **A/HRC/RES/32/2**, *available* at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/RES/32/2 *(Last visited on Jun 19th 2017)*

[5] Human Rights Council resolution 17/19 – Human rights, sexual orientation and gender identity (adopted 17 June 2011) **– A/HRC/RES/17/19**, *available at*: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/148/76/PDF/G1114876.pdf?OpenElement *(Last visited on Jun 19th 2017)*

[6] ***Supra 2***

The objective of this article is to examine the said law, its pros & cons; arguments in favour of and against it, among other aspects; and to allow the reader to then decide their own stand regarding its constitutionality based strictly on logic and legal merit.

What the Section Reads:

> ***"S. 377 Unnatural Offences -*** *Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*
>
> *Explanation — Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."*[7]

The definition of "penetration" as mentioned in this section can be found in Section 375, sub cl. (a) of the IPC as that of a man's *"penis, to any extent, into the vagina, mouth urethra or anus of a woman"* This is of utmost importance as the above mentioned Explanation to section 377 and the respective definition of "penetration" which is applicable to this section as given in S.375(a) as a test of carnal intercourse play a major role in pitting this section in violation of Article 14 of the Indian Constitution, even in accordance with the section's own objective. This aspect is discussed later in this article.

How Can "The Section" (377 of IPC) Be Interpreted

At the risk of sounding redundant, it may be apt to recall here that the correct interpretation of any statute is that which is the most logical and socially accommodating and gives the benefit of presumption to the accused till proven guilty (unless there are statutory exceptions); rendering justice in strict accordance as per the exact terms, phraseology and language used within the statute while practicing judicial restraint with due respect to the legislative intent and progression of law with changing times. With respect to the above, in case of ambiguity, it is then left to the mind of the learned bench to clarify the same and render justice, keeping in mind, the future of the accused as well as the welfare of the society.

This factor holds more importance in the case of section 377 than any of its contemporaries due to the reasons stated below. In literal terms, Section 377 can be interpreted as follows:

"Whoever" that is Any person – man or woman – *"Voluntarily"* that is including consensual acts –

[7] Indian Penal Code (Act 45 of 1860), s. 377

"has carnal intercourse" – which must include penetration as per the explanation – *"against the order of nature with any man, woman or animal"* that is including sodomy, peno-oral sex, bestiality etc.) – *"shall be punished'…*[8]

Now, among the multiple interpretations of this section, the two that stand out in particular are:

The one focussing on the word **"**whoever**";**

The other focussing on the "necessity of penetration"

It may be noted here that Section 377 also suffers from the inherent fallacy that affected the erstwhile versions of Sections 375[9] and 376, wherein it was necessary to prove penile penetration in order to prove carnal intercourse, and therefore the offence, the lack of which led to an acquittal in most cases. While this "fallacy of penetration" in rape laws was resolved by an amendment brought to Section 375, thereby including "insertion", "manipulation" and "application of mouth" that is oral as forms of rape, the same is not true for Section 377. Especially so, since the abovementioned additions in sub clauses (b), (c) and (d) of Section 375 IPC are only applicable when the act is inflicted by a man on a woman without her consent.

This inherent fallacy is of prime importance to the applicability of S. 377, since, once taken into account, it limits the section's applicability to both, homosexual men, alternate sexual conduct between a heterosexual couple or of course people who commit bestiality, while completely excluding any such relations between two women from under its purview. In simpler words, while men who have sex with men (MSM) and alternative sexual practices

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[8] *Supra 6*.

[9] *(Old Version)* The Indian Penal Code, 1860 (Act 45 of 1860), Pre-2013 Amendment, s 375. Rape.-- A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-
Firstly.- Against her will.
Secondly.-Without her consent.
Thirdly.-With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
Fourthly.-With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
Fifthly.-With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
Sixthly.-With or without her consent, when she is under sixteen years of age.
Explanation.-Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.
Exception.-Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

between a man and a woman are termed criminal, lesbian women are not even considered to exist as per this law. This major loophole pits the section in direct violation of Article 14 of the Indian Constitution as it criminalises a consensual practice for one section of the society while completely overlooking the other.

Some people may argue that as per the amendment[10] to Section 375, especially with respect to the *Sakshi Vs. UOI & Ors*[11] case, penetration would also apply to that by finger or another object, or to any other form of manipulation of a woman's body parts, thereby resolving the **"**fallacy of penetration**"** and making this section applicable to women who have sex with women (WSW) as much as any other person. It would then be important for us to highlight the fact that as per the amendment to Section 375, the aforementioned acts with respect to fingering, oral sex, and manipulation of genitalia, were specifically added to the section under separate sub clauses (b), (c) and (d), namely: "insertion", "manipulation" and "application of mouth", and *not* to sub cl. (a), that is, the part defining "penetration" that specifically limits the definition of penetration to be initiated through a penis.

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[10] Substituted by the Criminal Law (Amendment) Act, 2013 (13 of 2013), S. 9, for Ss. 375,376-A, 376-B, 376-C, 376-D (w.r.e.f. 03-02-2013), after the amendment the act read: -- '375. *Rape* --A man is said to commit "rape" if he-—
penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any ~ of body of such woman or makes her to do so with him or any other person; or
applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:—
First.—Against her will. Secondly.—Without her consent.
Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.
Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.
Sixthly.—With or without her consent, when she is under eighteen years of age.
Seventhly.—When she is unable to communicate consent.
Explanation I.—For the purposes of this section, "vagina" shall also include labia majora.
Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:
Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.
Exception I.—A medical procedure or intervention shall not constitute rape.
Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.'

[11] AIR 2004 SC 3566

Further, since the explanation to S. 377 limits it to the word "penetration" only while excluding any references to the legal terms of "insertion", "manipulation" and "application of mouth", as defined in law with respect to (hereinafter, 'w.r.t.') sexual offences, it is sufficient to conclude that the section, despite its use of the term *"whoever",* fails to include WSW in its ambit.

A third interpretation, although purely technical and overruled by the judiciary, is that, contrary to the claims that this section was made to protect children, it cannot actually be applied to protect a child. This is because even though it covers all persons who initiate the intercourse under the term *"whoever",* it fails to protect children as it only mentions "man, woman or animal" as receivers and not 'child' or 'minor' unlike other laws meant for the protection of children.

To this effect (though not purely in this context), the Hon'ble High Court of Delhi in para 92 of its 2009 judgement in the Naz Foundation Case[12] stated: *"92. According to Union of India, the stated object of Section 377 IPC is to protect women and children, prevent the spread of HIV/AIDS and enforce societal morality against homosexuality. It is clear that Section 377 IPC, whatever its [WP(C)7455/2001] Page 75 of 105 present pragmatic application, was not enacted keeping in mind instances of child sexual abuse or to fill the lacuna in a rape law. It was based on a conception of sexual morality specific to Victorian era drawing on notions of carnality and sinfulness. In any way, the legislative object of protecting women and children has no bearing in regard to consensual sexual acts between adults in private."*

This interpretation, though technically correct, has mostly been ignored by the judiciary keeping in mind social welfare and pragmatic implementation, if and whenever this section was applied to such cases on rare occasions, especially until the legislation of alternate laws for the protection of children and minors recently.

History and Objective

Section 377 of the Indian Penal Code was legislated as a part of the original Penal Code brought into effect on 1 May,1861 by the British Parliament after it was drafted by a committee headed by Lord Thomas Macaulay in 1860. It derives its origin from analogous provisions in the British Common Law based on orthodox Christian belief.

As is self-explanatory, it was legislated as a punishment for carnal acts considered unnatural by the society at the time based on their faith in the Biblical verses as well as other texts, especially those finding their roots in Judaism. One for example such as,

[12] Naz Foundation Vs. Govt. of NCTD (WP(C) No.7455/2001)

"IB: 21:8 Lesbian relations are forbidden. This is "the conduct of Egypt" which we were warned against, as [Leviticus 18:3] states: "Do not follow the conduct of Egypt." Our Sages said: What would they do? A man would marry a man, a woman would marry a woman, and a woman would marry two men.

Although this conduct is forbidden, lashes are not given for it, for it is not a specific prohibition… such women are not forbidden to marry into the priesthood as *zonot*, … this is not considered harlotry. … A man should take precautions with his wife with regard to this matter and should prevent women who are known to engage in such practices from visiting her and her from visiting them." – Mishneh Torah

377 and Religion

Since religious belief is the most vociferous argument presented against the reading down of this section, it is necessary for us to examine where the origins of this law lie in religious faith. Since a detailed examination into religious views on homosexuality is beyond the scope of this article, we shall only examine briefly, what can be said to be the tip of an iceberg vast enough to have fueled a worldwide debate for centuries.

To be precise, homosexuality in India first began to see some conservative reactions in society with the arrival of Islamic rulers, for whom, it was taboo as per the homophobic verses of the Quran, and in cases of strict implementation of Sharia.[13]. The verses of the Quran indicating the same are reproduced below.

Lot said to his people, "You commit such an abomination; no one in the world has done it before!
"You practice sex with the men, instead of the women. Indeed, you are a transgressing people."
His people responded by saying, "Evict them from your town. They are people who wish to be pure."
Consequently, we saved him and his family, but not his wife; she was with the doomed.
We showered them with a certain shower; note the consequences for the guilty.;[14]

AND;

The people of Lot disbelieved the messengers.
Their brother Lot said to them, "Would you not be righteous?

[13] Sunan Abu Dawood, Jami` at-Tirmidhi 1456 to 1457;
Note: The above reference is inexhaustive as there is some contention regarding the presence of four schools of Islamic law when it comes to punishment for homosexuality as per medieval jurists. These range from acceptance of repentance up to death penalty. The detailed discussion and citation of the same being beyond the scope of this article.
[14] Quran **[7:80] to [7:84]**

"I am an honest messenger to you.

"You shall reverence God, and obey me.

"I do not ask you for any wage; my wage comes only from the Lord of the universe.

"Do you have sex with the males, of all the people?

"You forsake the wives that your Lord has created for you! Indeed, you are transgressing people."

They said, "Unless you refrain, O Lot, you will be banished."

He said, "I deplore your actions."

"My Lord, save me and my family from their works."

We saved him and all his family.

But not the old woman; she was doomed.

We then destroyed the others.

We showered them with a miserable shower; what a terrible shower for those who had been warned!

This should be a lesson, but most people are not believers.

Most assuredly, your Lord is the Almighty, Most Merciful.[15]

While this was in theory, in practice no such anti-gay laws were ever codified by any of the Indian Muslim rulers; least so at the peak of the great Mughal Empire when Emperor Jahangir himself was said to be bisexual[16]. It may also be interesting to note that apparently at base of empire's inception itself, the Baburnama (memoirs of Babur) indicated towards homosexual inclinations of the founder, Emperor Babur[17]. Hence, any person who did not fall under the rule of Sharia (such as Hindus and others) were not technically subjected to these restrictions at all.

Some may contend here that 'Manusmriti[18]' the Hindu text stated homophobic verses or even anti-gay laws prior to the coming of the Islamic rulers. However, upon closer inspection, this belief may be found to be somewhat misplaced. Especially, in view of the evolution and corruption of the Manusmriti into the form as we know it today. Prior to the British colonial rule, Muslim law was codified as *Fatawa-i Alamgiri*[19], but laws for non-Muslims – such as Hindus, Buddhists, Sikhs,

[15] Quran [26:160] to [26:175]
[16] Ellison Banks Findly, Nur Jahan : Empress of Mughal India 102-103 (Oxford University Press, United Kingdom, 1993); Edward Terry, A Voyage to East India 383 (Printed for J, Wilkie, W. Carter, & S. Hayes, United Kingdom, 1st Edn., 1655)
[17] Annette Susannah Beveridge - Babur-Nama (Memoirs of Babur) – Translated from Tuzk-i-Babri (Oriental Books Reprint Corporation, Reprint 1979, 1st Edn., 1922)
[18] Manusmriti (India, 2nd Cent. BCE to 3rd Cent. CE)
[19] Alamgiri Mohd. Mohiuddin Aaurangzeb, Fatawa-i-Alamgiri (India, 18th Century)

Jains, Parsis – were not codified during the 600 years of Islamic rule[20]. In fact, the Manusmriti itself was only referred for codification of the Hindu Law by the British (who to some extent, are said to have referred more to the traditionally less important Manusmriti instead of the Vedas in their bid to codify the "British born" Hindu Law with least differences as against the Christian Law), after its translation to English in 1794. Prior to that, even with respect to Hindu social codes, Manusmriti, i.e. the 'Law of Manu' had mostly been seen as a commentary on jurisprudence i.e. a self-proclaimed 'Dharmshastra', contrary to 'Dharma' i.e. the actual social codes that were essentially derived from the Vedas. Further, it is to be noted that there are over fifty discovered manuscripts of the Manusmriti and gross inconsistencies across these manuscripts are found, which ultimately gave rise to a doubt upon their authenticity[21]. However, despite all the inconsistencies, none of the original Sanskrit manuscripts of the different versions of Manusmriti ever mention the phrase "unnatural offences".[22] This phrase was only inserted in the text of the same after its English translation. At the risk of digression, it may be pertinent to note at this stage that upon closer inspection the specific verses of the Manusmriti, which may initially come across as homophobic in isolation from the text[23], were not actually homophobic when read with reference to their context. Instead they were directed at overall socially maleficent behaviour that may lead to ceremonial impurities - such as pollution of a damsel – in which case, heterosexual maleficence was actually more heavily punished than same sex maleficence.[24] However, to avoid digression from the topic we shall limit this discussion at this stage.

From the above, it can be clearly derived that specific anti-gay law was codified in India for the first time only in 1860 as Section 377 by the British. Here, it is found to have its analogy in

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[20] Richard W. Lariviere, "Justices and Paṇḍitas: Some Ironies in Contemporary Readings of the Hindu Legal Past" 757–769. *Journal of Asian Studies*. Association for Asian Studies. **48** (4) (November 1989)

[21] Thomas Duve (ed.), Entanglements in Legal History: Conceptual Approaches, Global Perspectives on Legal History, (Max Planck Institute for European Legal History Open Access Publication, Frankfurt am Main,2014), *available at:* http://dx.doi.org/10.12946/gplh1 *(Last visited on Jun 19th 2017)*

[22] Manusmriti [11.174] – "Maithunam tu samaasevya punsi yoshitiva dvija.." – The literal meaning of the original Sanskrit word "Maithuna" means 'Sexual Union' and **not** unnatural offences. The punishment for consummating the same with either a man, or with a woman in water, or in the day, or in an ox-drawn cart is the same i.e. taking a bath with one's clothes on. And even this light punishment (if one may call it that) is only applicable to 'Dvija' i.e. twice born men viz the Brahmins, Kshtriyas et al.

[23] Manusmriti **[8.369]** : Kanya evum kanyam yakuryat tasyahdvishto damah | Shulakm cha dvigunam dadhyaat shifash ch'ev apruyad dashah ||;
[8:370] Ya tu kanyam prakuryat stree sa sadhyo maundagnyam arhati | Angulyor ev va chedam kharen udvahanam tatha||;
[11.174] Maithunam tu samaasevya punsi yoshitiva dvija| Gau Yaane apsu diva ch'ev vasah straanam acharet||

[24] Arlene Swidler (ed.), Homosexuality and World Religions 52-53 (Trinity Press International, Pennsylvania, 1993)

Section 61 of the 'Offences Against Person Act' (hereafter OAPA)[25] brought in effect across Britain later the same year on 1st November 1861. The two sections can further be traced up to the 'Buggery Act'[26] implemented by Henry VIII in 1533. This Act that first criminalised the "act of Buggery", that is, sodomy, with the death penalty, drew its origin from the Bible, the language of which in turn, and not surprisingly in a similar fashion to that of the Quran, can be seen to derive analogy from the Old Testament, and the Hebrew Bible and laws of Judaism. This can be seen particularly with respect to the Torah (Leviticus)[27] and the Mishneh Torah (Issurei Bi'ah)[28][29] which mostly denounce homosexual behaviour on the grounds of being the "behaviour of Egypt" [IB 21:8] [30]. While not surprising, it is certainly interesting to note that all these texts starting from the Torah right down to the 'Offences Against Person Act, 1828', while criminalizing MSM with death, completely ignore, and even at certain places, condone the existence of lesbian sex - An attitude that is obviously reflected equally in OAPA, 1861 and Section 377 of IPC, 1860.

On the other hand, Hinduism happens to be the only major religion that, from its inception, not only classifies various aspects of gender and gender identity such as kliba, napunsaka, panda, kinnara, etc. but also, in various depictions, portrays alternate sexual behaviour in otherwise heterosexual beings. The Narada Smriti[31], for example, forbids the marriage of homosexual men to women while listing fourteen different types[32] of *panda* or men who are impotent with women:

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[25] Offences Against Person Act, 1861, s. 61: "Whosoever shall be convicted of the abominable Crime of Buggery, committed either with Mankind or with any Animal, shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Ten Years."
[26] The Buggery Act, 1533
[27] The Book of Leviticus [18:22], available at: http://www.mechon-mamre.org/p/pt/pt0318.htm (Last Visited on June 20, 2017)
[28] Kedushah, Issurei Bi'ah (for Men) [1:14], available at: http://www.chabad.org/library/article_cdo/aid/960647/jewish/Chapter-One.htm (Last Visited on June 20, 2017)
[29] Kedushah, Issurei Bi'ah (for Men) [21:18], available at: http://www.chabad.org/library/article_cdo/aid/960669/jewish/Chapter-Twenty-One.htm (Last Visited on June 20, 2017)
[30] Kedushah, Issurei Bi'ah (for Women) [21:8], available at: http://www.chabad.org/library/article_cdo/aid/960669/jewish/Chapter-Twenty-One.htm (Last Visited on June 20, 2017)
[31] Narada, Naradasmriti (India, 100BCE to 400 BCE)
[32] Dr. Julius Jolly, Naradiya Dharmasastra or The Institutes of Narada [1.12.12] 82 (TRUBNER & Co., Ludgate Hill, London, 1876);
Note: Dr. Jolly's book, which is the first translation of the Sanskrit text to English, breaks at Shloka 12 of the Twelfth Chapter of the Naradsmriti restarting only at Shloka 18 while omitting all the intervening shlokas that speak of different sexualities in the original Sanskrit text. The reason for these shlokas being omitted has been mentioned in the footnotes as the same being "curious, though highly indelicate", as well as the "technical terms being unintelligible" to the author. This may be taken as a clear hint that the same convenience of omission and tactful translation may also have been followed during the translation of other ancient Indian texts such as the Manusmriti etc. into English, in order to avoid unwanted "indelicate" contradictions with the British Law and subsequent consequences.

It states: *"These four [irsyaka, sevyaka, vataretas, and mukhebhaga] are to be completely rejected as unqualified for marriage, even for a woman who has been raped."*[33] *(NS 1.12.15)*

The Kama Sutra[34] further describes the *"Tritya-Prakriti"* for both men and women while further dividing the category of men (even homosexual men) into 'masculine' and 'feminine'. 'Tritiya- Prakriti', while being explained in different ways across ancient Hindu texts, has essentially been noted to describe a situation wherein the male and female seeds combine in such proportions so as to give rise to a 'Third-nature' or 'Third-Gender' that is completely different from the pure male and female forms in its inception and features.

It goes on to state in context of men, "There are also third-sex citizens, sometimes greatly attached to one another and with complete faith in one another, who get married together."[35] (KS 2.9.36)
In the context of women, describing some as '*svairini'*, that is, "independent women who frequent their own kind or others"[36] (2.8.26)
In another passage, it explains, "the liberated woman, or *svairini*, is one who refuses a husband and has relations in her own"[37] (6.6.50).

This nature of Hindu scriptures extends even to the fluid depiction of gods, for example, the Bahuchara Mata who is depicted as the cross-dressing Goddess of the *kinnars* and the *Ardhnareshwar* depiction of Lord Shiva or Lord Aeiyappa, the son born out of the union of Lord Vishnu and Lord Shiva during their union as Rudra-Mohini.

Sikhism, evolving from its Hindu roots, does not mention homosexuality at all. While the religion forbids extramarital/pre-marital lust towards anyone, it promotes 'marriage'- which it defines as "a merger of two souls", mostly with that of the sevak with the Lord.[38] The fact that the scripture, mentions these souls to be "genderless higher entities" and the fact that the *Laavan*, that is, the central aspect of the marriage ritual, consist of gender-neutral hymns,[39] is taken as a strong indicator of marriage neutrality in Sikhism, irrespective of race, caste, creed, gender or orientation. and Judaism[40]. Consequently, while Hinduism and religions derived from it such as Sikhism[41],

[33] Narada, Naradasmriti NS 1.12.15 (India, 400BCE to 100 BCE)
[34] Vatsyayana, Kamasutra (India, 400BCE to 200 BCE)
[35] Supra. 34 (KS 2.9.36)
[36] *Ibid.* (KS 2.8.26)
[37] *Ibid.* (KS 6.6.50)
[38] Sikhism, Sri Guru Granth Sahib Ji, (India, 1563-1606)
[39] Soohee Mehla(4) 773-16 to 773-18, 774-1 to 774-12, *Ibid. Id.*
[40] *Supra. 27,28,29,30.*
[41] *Supra. 38,39.*

Buddhism[42][43][44]etc. remain neutral on the issue and strictly uphold marriage neutrality as per the scriptures. Judaism and religions tracing their origination to it such as Christianity and Islam remain strictly homophobic as per their scriptures.

It is ironic, that out of the countries that have decriminalised gay sex, most of them are predominantly Christian. For example, Britain, through the *'Sexual Offences Act, 1961',* and now even Ireland. This, while India, impeded by certain fundamentalists amusingly seem to unintentionally be following the Old Testament/ Hebrew Bible instead of the Hindu scriptures.[45]

The Argument Regarding Section 377

While none of the petitioners have ever demanded a complete repeal of the section, with due consideration that it does provide remedy in certain cases, even though rare. Liberals, human rights activists and the LGBT community & allies do, however, want the section to either be read-down by the Hon'ble Supreme Court of India or amended by the Parliament in order to exclude the word "voluntarily" as it criminalises consenting adults forming same-sex liaisons. It has been contended that this violates their rights to privacy, dignity and liberty thereby contravening Article 21 of the Indian Constitution. The section seemingly not only violates Article 21 of the Constitution by allowing the state to decide the behaviour of two consenting adults in the privacy of their bedroom, it remains in stark violation of Article 14 as it continues to condone WSW even as it continues to persecute MSM and MSW with alternative sexual conduct.

The fundamentalist factions, however, are against any kind of dilution of the act based on various arguments listed below.

Arguments in Favour of Upholding 377

Add. Soli. Gen. P.P. Malhotra in 2008 *said, "Homosexuality is a social vice and the state has the power to contain it. [Decriminalising homosexuality] may create [a] breach of peace. If it is allowed then [the] evil of AIDS and HIV would further spread and harm the people. It would lead to a big health hazard and degrade moral values of society."*

[42] Ajahn Punnadhammo, Statement of Arrow River Monastery Buddhist Clergy person on same sex marriage, available a: http://www.arrowriver.ca/torStar/samesex.htmlRefer comment 37.
[43]Bhikku Bodhi, Going for Refuge and taking the precepts (The Five Precept of Buddhism available) at : http://bodhimonastery.org/going-for-refuge-taking-the-precepts.htm
[44] Interview with The Dalai Lama, Buddhist Spiritual Leader of Tibet, The Telegraph, March 07, 2014
[45] Anupam Pateria, "*Kamasutra books can't be sold at Khajuraho temple, saffron group seeks ban*", The Hindustan Times Jun 15, 2017

Among social prejudice, the following were the main points stated in favour of upholding Section 377 in its current form and against decriminalization of homosexuality:

1. It is against religion.
2. Homosexual behaviour may lead children to be influenced the same way and follow suit.
3. It is "unnatural", especially with respect to various scriptures as it does not lead to procreation.
4. It is a mental ailment. (Yog Guru Ramdev even went to the extent of claiming he could "treat it through yog")
5. It is anti-social as the society does not accept it.
6. Diluting 377 may lead to further cases of child abuse and promote paedophilia.

Arguments Against 377 and Responses to Contentions Against its Dilution

1. As discussed earlier in this text, the Hindu religion or any of its branches or any other religions originating from it do not hold any views banning homosexuality.[46] They do, on the contrary, aim at mutual benevolence and happiness, terming the soul "genderless" in most cases[47]. Hinduism, in particular, originates from the story of "Rudra-Mohini" wherein the only known progeny of Lord Vishnu is known as *Aeiyappa*, that is, his son born out of his union with Lord Shiva during Lord Vishnu's avatar as Mohini[48]. The Krittivasa Ramayana[49] also mentions the well-known hero-king Bhagiratha who brought the river Ganga to Earth, as being born out of the love lock of two co-widows with "divine blessing", whereas his name, 'Bhagirath' itself originates from the word "Bhaga" or "Vulva"[50]. What remains against the dilution are the Christian, Islamic and Jew faiths [The number of Jewish people are lesser than the number of LGBT people in the country as a minority][51]. But then by those

[46] *Supra 24*
[47] *Supra 42 38 39 45*
[48] Sabarimala, Sree Dharma Sastha Temple, "*Lord Ayyapa", available at:* http://sabarimala.kerala.gov.in/index.php?option=com_content&view=article&id=91&Itemid=93 *(Last visited on June 19th, 2017)*
[49] Krittivas Ojha, Krittibasi Ramayan (India, Early 15th Century to Mid-19th Century)
[50] Ruth Vanita, Kumkum Roy, "Krittivasa Ramyana: The Birth of Bhagiratha (Bengali)" in Ruth Vanita, Saleem Kidwai (eds.), Same-Sex Love in India: Readings from Literature and History (Palgrave, New York, September 2001)
[51] PTI, "Govt. submits data on gay population", The Hindu March 13, 2012 *available at:* http://www.thehindu.com/news/national/govt-submits-data-on-gay-population/article2991667.ece (Last update on July 24, 2016)

standards, the practices of 'Sati', 'Purdah', "slavery', 'crucifixion', child marriage', 'bigamy' etc. should have never been abolished by law.

2. Sexuality, as described in certain scriptures, and researched by bio-medical science, remains fluid in a lot of living beings, if not all.[52] Hence, each offspring (human or not) explores their own sexuality. In short, the way heterosexual couples cannot, and ought not, force homosexual offspring to convert to heterosexuality, the same way it is seemingly impossible for a homosexual couple to turn a heterosexual person 'gay' without the person's own inclination. For example, Aisha and Sonal* who run an LGBT support group in Eastern India have now been married for a few years. The last time when they were interviewed, their son was still in his teens. The boy who is actually Aisha's biological son from her first marriage to her ex-husband is jointly raised by the two women and is an absolutely straight, heterosexual, fine young man.
3. In response to the third argument, about such union being "unnatural", religious scriptures across the board themselves debunk this argument by terming "anything that exists in nature" as being "natural" or with a more theological point of view in case of personal laws, as being "created by God". In addition, scientific research has now established that homosexuality, just like any other form of sterility, is actually nature's way of promoting a natural process of adoption and extending parental protection to orphaned progeny of any species, whether it be humans or animals like penguins, wolves, dogs etc. The logic behind this evolutionary feature is that fertile heterosexual pairs of any species are least likely to adopt (especially in the wild). Even when they do, there is a much higher chance of fertile couples discriminating among their adoptive children and those of their own blood, even if subtly, than parents without any offspring of their own. This is because of the basic evolutionary trait of every being to do it's best to progress its own gene further down the line. In this context, if we then examine heterosexual couples it is established that even though sterile heterosexual couples can adopt, there is a much higher chance that the non-sterile (fertile) partner may abandon the sterile partner or may just take another fertile partner in addition to the 1st sterile partner. As was often seen in cases of polygamy in humans and polyandry in cats. This, is however highly unlikely in a homosexual

[52] Michael Aaron, Ph.D., "Sexuality is more fluid than you think", available at: https://www.psychologytoday.com/blog/standard-deviations/201605/sexuality-is-much-more-fluid-you-think (Last Visited on June 20, 2017)

* Some Names Changed for protection.

relationship; As even though the parental instincts of the individuals remain as strong as any other member of the species, the entry into a sterile relationship and the decision to raise an adoptive progeny to complete a family are all deliberate and not accidental and hence, almost nullify the chances of abandonment. Two examples of the above could be examined in the specific cases of Roy and Silo[53], and more recently, Jumb and Kermit[54]- the exclusive male paired penguins at the Kent zoo that acted as surrogate fathers and helped the egg to hatch when the biological father abandoned the egg and the mother. [Note: Notwithstanding the above, any adoption should only be allowed after due diligence of the background and intentions of the adoptive parent(s) whether M/M, M/F or F/F].

4. Homosexuality was first removed from the list of mental ailments in 1973[55]. The stand was then agreed upon by the Indian Psychiatry Association in 2014[56], rendering the argument of anti-gay factions invalid. It has now been attributed to the mere placement of a certain gene along the DNA helix[57] which is a separate topic of research.
5. The "anti-social" vis-à-vis "socially unacceptable argument" was also settled as explained by the Hon'ble High Court of Delhi, that the concept of something being anti-social is completely different from the concept of social acceptance. For example, honour killings and child marriages have social acceptance and yet remain anti-social; similarly, any person who proves himself to be a law abiding citizen who is benevolent to the society cannot be termed anti-social despite the community's refusal to accept them mere because of their orientation.

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[53] Dinitia Smith, "*Love That Dare Not Squeak Its Name*" The New York Times, Feb. 7, 2004;
Note: Roy and Silo have since broken up after their nest was taken up by another pair of gay penguins after 6 years of partnership. Roy has since taken up a female companion leaving Silo alone and apparently depressed as per zoo authorities. This behaviour also indicates towards sexual fluidity in living beings other than humans.
[54] BBC, "Gay penguins in Kent zoo are 'the best parents'", Kent, 14th May 2014, *available at*: http://www.bbc.com/news/uk-england-kent-27405652 (last visited on June 19, 2017)
[55] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (DSM) (APA, U.S.A., 1973)
[56] T.S. Sathyanarayana Rao, G.Prasad Rao et al, "Gay rights, psychiatric fraternity, and India", Indian Psychiatric Society 2017 *available at:* http://www.indianpsychiatricsociety.org/upload_images/download_folder/imp_po_files/1487396713_1.pdf (Last Visited on June 20, 2017)
[57] Park D., Choi D. et al., "Male-like sexual behavior of female mouse lacking fucose mutarotase", *available at:* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2912782/ (Last Visited on June 20, 2017)

6. The argument regarding paedophilia was once again rendered moot, as reading--down to exclude consensual acts would not decriminalise any kind of non-consensual sexual abuse of children or adults.[58]

7. Section 377 violates Article 14 of the Constitution, that is, Equality before Law, as it criminalises a whole section of the society for the same actions for which it completely condones the other.
8. Section 377 violates Article 21 of the Indian Constitution as it gives the state the right to breach the dignity and liberty of two consenting adults within the privacy of their bedrooms, thereby violating their Rights to Privacy, Dignity and Liberty.
9. It also violates Article 19[59], by taking away the basic human right from someone to express themselves as they were created by nature.
10. The provision is draconian and has become redundant as it is not only out of sync with the progressive world legislation, but in fact the number of convictions for consensual homosexual acts under the section remain rare till date.[60]

While convictions remain next to none, it is rampantly misused to blackmail people of alternate sexualities and third gender.[61]

Present Day Scenario

Following mass protests, the Delhi High Court, through its judgement in 2009 in *Naz Foundation Vs. Govt. of NCTD & Ors.*[62], decriminalised homosexuality by reading down Section 377 to exclude consensual carnal intercourse of any kind between adults by applying the *"Doctrine of severability"*. It justified the judgement on the grounds that S. 377 was in violation of Articles 14, 15 and 21 of the Constitution, while leaving the question of Article 19 unexamined. The court held that:

> *"Section 377 criminalises the acts of sexual minorities, particularly men who have sex with men. It disproportionately affects them solely on the basis of their sexual orientation. The provision runs counter to*

[58] *Supra at 6*, Delhi High Court in *"How Can "The Section" (377 of IPC) Be Interpreted"*
[59] The Constitution of India, art. 19
[60] *Ibid.* Infra. 64.
Note: As a matter of record, the first time NCRB even created a record of cases booked under S. 377, was in 2014. Even there, they did not know how many of them comprised of consensual adult unions and how many were non-consensual.
[61] Poulomi Banerjee, "Section 377 and the biases against sexual minorities in India", The Hindustan Times, Oct. 04, 2015
[62] *Supra. 12*

the constitutional values and the notion of human dignity which is considered to be the cornerstone of our Constitution".

The court further interpreted the word "sex" in Article 15 to include the term sexual orientation, while asserting importance of prevention of discrimination on grounds of the same.

This judgment was set aside by the Hon'ble Supreme Court in 2013 after an appeal from certain religious and fundamentalist groups in the *Suresh Kumar Koushal and Another v NAZ Foundation & Ors. Case*[63]. The court while not dismissing the plight of the same-sex couples, and noting that out of the mere 200 cases under the section in the past 150 years, none of those had been that of consensual acts, set the High Court judgement aside, stating:

"[W]hilst the court found that Section 377 was not unconstitutional, the legislature was still free to consider the desirability and propriety of deleting or amending the provision."

The judgement faced massive ire from world leaders and the United Nations. It faced open criticism from the UNHCHR Chief Navi Pillay and UN Secretary General Ban Ki-Moon, where Ms. Pillay went ahead to term it as "a significant step backwards" for the country.

Review petitions filed in 2014 were also dismissed by the court in all the related matters. However, earlier this year, in February 2016, the Honb'le SC lead by Chief Justice T.S. Thakur heard the curative petition regarding the matter and agreed to refer it to a 5-judge constitutional bench, the proceedings for which are awaited as of June, 2017.

Subsequently, in June 2016, various personalities belonging to the LGBT community, such as journalist Sunil Mehra and others, filed a petition against Section 377. This was a major move against the section as it was the first-time individuals affected by the section had approached the court instead of NGOs thereby providing a strong counter to reasoning given by the SC bench in the 2013 case where it stated that the party had "miserably failed" to provide the particulars of the discriminatory attitude exhibited by state agencies towards sexual minorities and of their consequent denial of basic human rights. This petition is also awaiting hearing along with other curative petitions in the matter.

On the Legislative Front:

[63] (2014) 1 S.C.C. 1

1. The erstwhile regime remained divided on the issue wherein the Union Health Ministry was a party to the petition siding with the Naz Foundation, NACO (expand) and LGBT activists with the pro-dilution stand based on the ground that the freedom to "come out" would lead to better outreach of health measures; especially with respect to prevention and control of HIV in MSM.

On the other hand, the Union Home Ministry was siding with anti-gay rights' activists and fundamentalist groups. The Union Government finally took a one-sided stand in 2012 when party leaders Mrs. Sonia Gandhi and Mr. Rahul Gandhi took a pro-gay rights stand there by confirming the union government's stand on the issue.[64]

2. The current regime at the centre never disclosed its stand on the topic. This may be due to the fact that though the Union Health ministry, even under the changed government, retained its pro-dilution stand[65], contradicting almost all the ancillary groups (like the RSS, Hindu Mahasabha et al.) who supported the current regime to cease power and consequently whose various members form a part of the Parliament as MPs and even certain ministries, and who are among the same anti-LGBT rights groups that defended the Section 377 is full form in the first place.

3. At state levels however, various states have come out in support of the LGBT community, or "sexual minorities", as they may be referred to in official euphemistic parlance.

The current state regime in New Delhi expressed its disappointment with the 2013 SC verdict,[66] open support to gay rights' activists and its stand in support of the Union Health Ministry for the section to be read down.

The state of Kerala has also expressed its pro-rights and anti-377 stand.[67]

4. The Human Rights Commission also stood in favour of the Health Ministry and the pro-gay rights NGOs. It made conducive recommendations on the grounds that the denial of love, and a life of respect solely based on someone's orientation could be placed at the same level of

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[64] *Supra. 66* at 3 *available at:* http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070 *(Last visited on Jun 19th 2017)*

[65] Durgesh Nandan Jha, "Human rights of gays should be protected, health minister Harsh Vardhan says", The Times of India, July 18 2014

[66] Aam Aadmi Party, Current ruling party of the Delhi Govt., "Aam Aadmi Party's Statement on Supreme Court judgement upholding Section 377" *available at:* http://www.aamaadmiparty.org/news/aam-aadmi-partys-statement-on-supreme-court-judgement-upholding-section-377 (Last visited on 20th June 2017)

[67] Associated Press, "Kerala Government Has Unveiled A Policy To Enforce Constitutional Rights Of Transgenders", The Huffington Post, 12th Nove 2015 *available at:* http://www.huffingtonpost.in/2015/11/12/kerala-government-transge_n_8543410.html *(*Last updated on 15th Jul 2016)

discrimination as that in apartheid or as that against gender, and hence, a violation of the basic human right of an individual to live a life of dignity as god made them, and further released an official press release statement affirming it's stand regarding the same. [68]

5. Subsequent to the above, the Union of India has now introduced the recognition of a Third Gender in official parlance for people who do not conform or wish to be identified as is either male or female, thereby giving recognition to transgender and androgynous people for the first time in post-colonial India while being in accordance with the ancient Hindu practice of recognising "the Third Nature" (as mentioned in the Kamasutra and other scriptures.[69])

6. Following the above, Kerala became the first state to formulate transgender policies and laws for conduct and protection, followed by other states. Ironically, Delhi, while being the first state to express support, still remains void of any such specific or conducive legislation.

7. In addition to the above, the 172nd report[70] of the Law Commission also recommends for repealing of Section 377.

8. On an individual level, the former health ministers Dr. Ramadoss and his successor Dr. Harshvardhan, current Delhi Chief Minister Mr. Kejriwal, current Finance Minister Mr. Arun Jaitley, and current Member of Parliament Dr. Shashi Tharoor are among eminent government members who have openly come out in support of the amendment of Section 377.

Mr. Tharoor has earlier presented the bill of amendment in the parliament twice albeit unsuccessfully.[71]

Practical, Statistical and Executive Aspects

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[68] National Human Rights' Commision, Press Release, "NHRC issues a statement appealing to the Government for suitable modification in Section 377 of the IPC to protect the rights of gay" (NHRC, New Delhi, 13th Dec 2013) *available at:* http://nhrc.nic.in/dispArchive.asp?fno=13057 *(Last visited on 20th Jun 2017)*

[69] ***Supra 34***

[70] Law Commission of India, 172nd Report on Review of Rape Laws (March, 2000)

[71] Shashi Tharoor, Member of Parliament, "On 377, I Give Up, Hypocrisy And Bigotry Triumphs", NDTV, March 12th, 2016 *available at:* http://www.ndtv.com/opinion/on-377-i-give-up-hypocrisy-and-bigotry-triumphs-1286373 *(Last visited on June 19, 2017)*

1. The most well-known conviction under Section 377 in recent times was in *State Vs. Ram Singh and Another*[72] (known more commonly as the Nirbhaya Case[737475]), wherein the victim was brutally gang-raped by the six accused, ultimately leading to her death.

The application of the section was however rendered redundant when Section 375 was amended to include non-consensual sodomy of a woman by man under rape[76].

2. The second most propagated use of Section 377 has been that for protection against paedophilic crimes. This too was rendered redundant with the implementation of statutes like the POCSO Act and corresponding sections of the IPC specifically legislated for protection of children and minors.

3. The third implementation of Section 377 is prevention of bestiality, i.e. carnal acts committed with an animal. However, such cases are rare and conviction is even rarer since penetration is to be proven and the victim can neither talk nor give witness. The provision is further rendered redundant by the fact that in such cases, any kind of punishment is mostly handed under the Prevention of Cruelty to Animals Act, 1960.

4. The fourth major implementation is where a man is "raped"[77], that is sodomized without consent. This aspect of the section still holds some relevance as no other law caters to this misconduct. However, it is a point to be noted that the number of such crimes is extremely rare on record through the past century. This is mostly since, even when such crimes happen, they go widely unreported due to the risk of:

(i) perceived loss of masculinity of the victim by the society;

(ii) backfiring of the case and the section in case the victim fails to prove lack of consent, since, unlike other rape laws, the burden of proof under Section 377 remains on the prosecution.

It is also worthy of being noted that the burden of proof in Section 377 will not be affected even if itis read down to exclude consensual carnal intercourse. In fact, as seen in 4. (ii) above, the dilution may actually lead to higher reporting of such crimes inflicted by men upon other men.

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[72] SC No. 114/2013
[73] ***Ibid. Id.***
[74] Ram Singh & Ors. Vs. State of NCTD, Delhi High Court Crl. Rev.P.124/2013
[75] Mukesh Vs. State for NCT of Delhi SLP(Crl.) 3119-3120/2014
[76] ***Supra 10***
[77] Kailash alias Kala vs. State of Haryana, Punjab & Haryana High Court, Criminal Revision No. 1200 of 1988

5. The fifth and the most controversial application of this section, mostly due to its misuse and abuse by certain maleficent entities of the law enforcement bodies is the aspect of the law where it criminalises consensual same-sex intercourse. It is only imperative to note here that the number of case convictions for consensual same-sex acts under this section since its inception have been apparently 'zero'[78], as,

(i) no two consenting adults who are party to carnal activity would usually approach police;

(ii) even if one person reported against the other (as in the case of a jilted lover) the plaintiff would be equally guilty, and;

(iii) in the rare instance of a case registered by third persons, proving penetration is near impossible.

It may be apt to mention here that even the most infamous conviction of Oscar Wilde in Britain for such acts could only be brought under the 'Moral Indecency Law' [Labouchere Amendement][79] and not Section 61 of Offences against Person Act,1861 (analogous to S. 377). This was simply because, as in the case of S. 377 IPC, any conviction under Section 61 of OAPA, 1861 were rare due to lack of provability of penetration[8081]; especially, in the cases where both parties were consenting adults and claimed to love each other.

6. Further, as surprising as it may seem, while the age of consent for male-female relations is 16[82] years for married girls and 18 years in general, India also has an age of consent for female homosexual relationships, that is, 18 years of age. Even in the light of upholding of S. 377, while MSM is termed "illegal", the age of consent of 18 years still holds valid for WSW in India.[83]

S. 377 and Marriage Laws

"No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect

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[78] *Supra 64*
[79] Criminal Law Amendment Act 1885, Britain, s. 11
[80] Caryn E. Neumann, The Labouchere Amendment (1885-1967) *available at:* http://www.glbtqarchive.com/ssh/labouchere_amendment_S.pdf *(Last visited on Jun 19th 2017)*
[81] Regina Vs. Wilde, 1895
[82] *Supra 10, Exception 2*
[83] *Supra 12, para 132 at 105*
List of Ages of consent across the world (Open Source)

it, respect it so deeply that they seek to find its fulfilment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right."

-Justice Kennedy, In Closing of Obergefell v. Hodges, 576 U.S. ___ (2015), United States Supreme Court.

It is a common misconception that section 377 is synonymous with the legality of marriage. Marriage in India is governed by either the respective marriage laws or personal and customary religious laws. To this effect, the codified marriage laws most commonly followed in India are the Special Marriage Act (SMA), 1954 and the Hindu Marriage Act (HMA), 1955 The SMA, 1954 defines the conditions relating to solemnisation of a special marriage in Section 4, which reads:

" 4. Conditions relating to solemnization of special marriage- Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled namely:

(a) Neither party has a spouse living;
(b) neither party-
(i) is incapable of giving a valid consent to it in consequence of unsoundness of mind, or
(ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
(iii) has been subject to recurrent attacks of insanity or epilepsy;
(c) the male has completed the age of twenty-one years and the female the age of eighteen years;
(d) the parties are not within the degrees of prohibited relationship: Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship: and
(e) where the marriage is solemnized in the State of Jammu and Kashmir, both parties are citizens of India domiciled in the territories to which this Act extends…"

As can be observed, The Special Marriage Act, 1954[84] (Hereafter SMA) clearly authorises marriage between "*any two persons*" as long as one of them is a citizen of India. The language of the statute is gender, religion, and caste neutral.

[84] The Special Marriage Act, 1954 (Act 43 of 1954)

This is of extreme importance as the SMA, 1954 forms the basic Uniform Civil Code of marriage law in India, where in any person who does not or cannot get married under personal/religious laws for any reason, may get married under it in accordance with the law.

The mention of the terms male/female only occur with respect to age requirements and nothing else.

The Hindu Marriage Act (HMA), 1955 (which also covers Sikhs, Jains, and Buddhists etc. and any person who is not a Christian, Muslim or Jew)[85], The Indian Christian Marriage Act, 1872[86], and The Parsi Marriage and Divorce Act, 1936[87], all remain similar in the manner that the language of all the statutes with respect to "parties"/"persons" getting married remains gender neutral.

The only cases where prohibition of same-sex unions may be faced would be areas governed by certain personal law boards for example, the Muslim personal law board that defines marriage as a "contract between a man and a woman" or the Jewish personal religious bodies. However, as mentioned above, this can easily be circumvented when parties simply choose to get married under the Uniform Civil Code that is the SMA, 1954.

For example, the first same-sex marriage in India performed in accordance with the Saptapadi was in 1987 between two lady police constables from Bhopal, Leela and Urmilla[88].

Designer Wendell Rodricks - winner of the Padma Shri and a resident of Goa - married his long term partner of about 30 years and French citizen Jerome Marrel in a civil ceremony.

More recently, after the 2009 Delhi HC judgement, the Gurgaon court registered the marriage of Beena and Savita[89], and also provided police protection to the pair against threatening relatives.[*]

USE

[85] The Hindu Marriage Act, 1955 (Act 25 of 1955), s. 2(1)
[86] The Indian Christian Marriage Act, 1872 (Act 15 of 1872), s. 4
[87] The Parsi Marriage and Divorce Act, 1936 (Act 3 of 1936, ss. 2(6),3
[88] Nasargi N. Dave, *Queer Activism in India: A Story in the Anthropology of Ethics, 43* (Duke University Press, London, 2012)

[89] Dipak Kumar Dash, Sanjay Yadav, *"In a first, Gurgaon court recognizes lesbian marriage",* The Times of India, Jul 29, 2011
[*] Names changed for protection.

As explained above, the only use of Section 377 that remain are the prevention of non-consensual sodomy, and provision for a harsher remedy for bestiality. Both of these shall remain unaffected by the reading down and exclusion of carnal intercourse by consenting adults from the provision.

MISUSE

Like any provision, Section 377 is also prone to misuse, as proven in R. vs State of Rajasthan, wherein a young man was prosecuted on grounds of bestiality based on a complaint by the village head.

It was later discovered that the complaint had actually been made as a means for revenge while concealing the fact that the man had relations with the complainant's wife.

In another incident, a boy over 18 years of age, an American citizen of Indian origin, came to India to be with his lover – also an adult male. His family filed a case of kidnapping and unnatural offences against the boy's Indian partner while forcing their son to return to the United States with them while keeping him safe from counter prosecution.

In a third incident, a woman was subject to sexual harassment by her boss, when he came to learn about her sexual orientation. Upon resistance, he threatened to disclose her orientation to her co-workers and subject her to further workplace hostility which could also lead to loss of her job; finally threatening that he would file a complaint under Section 377 if she chose to report to the police and lead to her arrest.

Such threats are misconceived, malicious, and legally unviable. However, due to lack of legal awareness, they allow predators to successfully intimidate genuine victims into silence.

The fourth case is that of the Bangalore techie whose wife discovered his sexual orientation after their arranged marriage failed to consummate. The woman, while justified in seeking justice against cheating, not only filed a case of cheating against the boy's parents but also a case under Section 377 against the boy.[90]

ABUSE

[90] Namita Bhandare, "*The use and misuse of Section 377*", The Mint e-paper, Oct 31, 2014 *available at:* http://www.livemint.com/Opinion/dPPx81iocnHy9hX4MjBAOK/The-use-and-misuse-of-Section-377.html (Last visited on Jun 19th 2017)

Other than misuse by private individuals as described above, Section 377 is often used as a tool of abuse by government personnel and unscrupulous policemen. Incidences are not uncommon where a gay couple may be extorted by random policemen looking to make a quick buck.

In more grievous cases, women (irrespective of whether they were actually partners or not) have allegedly been asked for sexual favours or even molested threatening to be booked under Section 377 if they did not comply.

In June 2009, the Times of India reported[91] the story of a gay couple in Delhi who were called and harassed by a policeman for merely holding hands while walking. The policeman was not even aware of their orientation. He then levied a "hefty fine" on them based on various "reasons".

CONCLUSION

While Section 377 retains its strength through the harsh remedy it provides against non-consensual sodomy or sexual violence of any other kind inflicted against men, women and animals, it cannot be denied or ignored that in its current form it allows the government to breach the privacy of the bedroom of consenting adults whether it be MSM or heterosexual men and women engaging in alternative sexual practices while completely overlooking, and hence excluding, another section of the population viz. WSW from under the purview of the law. This is not only in clear violation of Article 14, 15 and 21 but also Article 19 as it places undue restriction on the Freedom of Expression of a whole class of law abiding citizens. Can such a law then be left without amendment as it continues to violate not only the Fundamental Rights given in the Indian Constitution but also the human rights listed by the United Nations? This question needs to be examined in view of the fact that the country of its origin has amended its analogous provision in the common law and the country of its implementation has no native legislative history of such a law. Any dilution of the section to exclude consensual practices would not only bring it in sync with the Constitution, but also make it more immune to misuse and abuse, thereby strengthening it and making it conducive to social welfare. As an added benefit, health departments and AIDS organisations like NACO etc. will then be able to expand their reach to an earlier undisclosed populace thereby leading to better disease control and social health.

[91] Shonali Ghoshall, "Live-in gay couple: Together and alone" The Times of India, Jun. 26, 2009; available at : http://timesofindia.indiatimes.com/india/Live-in-gay-couple-Together-and-alone/articleshow/4703811.cms (Last visited on Jun 19th 2017)

As far as the question of marriage is concerned, India is a country where, even till date, only 31% of the marriages are love marriages out of which only a minuscule number of about 5%[92] happen to be inter-caste or inter-religion marriages. Given the circumstances surrounding reported cases under S. 377 such as those mentioned above it is important for us as a society to decide whether we give our assent to ruining multiple lives and families in order to keep a group devoid of true love and happiness as well as familial and legal rights it is entitled to by discriminating against them solely on the grounds of sexual orientation despite their individual achievements.

"With the given state of the Indian population growth rate, India could probably do with some gay couples" -Remark at a HR conference.

[92] Rukmini S., "*Just 5% of Indian marriages are inter-caste: survey*", The Hindu, Nov. 13, 2014

MANDATORY WOMAN DIRECTOR: A FULCRUM FOR SUSTENANCE AND HIGHER GROWTH

Saloni Agarwal and Ishika Rout[*]

"Companies are realizing that advancing women to senior leadership roles has many benefits, including increased financial performance and sustainability"

-Anabel Pérez,
Senior Vice President, Development, Catalyst.

1. INTRODUCTION

Women directors are expected and encouraged to contribute as catalysts to the process of enhanced corporate governance, which is the objective of the Companies Act, 2013. The Securities and Exchange Board of India vide its circular dated 17th April, 2014 made it mandatory for all the listed companies to appoint at least one woman director on their Board of Directors by 31st March, 2015 in alignment with the requirement of Section 149 of the Companies Act, 2013, under corporate governance norms. In furtherance of the above, SEBI on 8th April, 2015, issued a Circular[1] to all Managing Directors/Executive Directors and all recognized Stock Exchanges. SEBI's Circular directs that all companies which have not yet complied with the norm but manage to do so by June 2015 would be levied a fine of INR 50,000/-. Further, companies, which comply with this requirement between July and September 2015, would be charged INR 50,000/- and an additional fine of INR 1,000/- per day till the date of compliance. Moreover, companies complying with the norms on or after October 1, 2015 would have to pay INR 1,42,000/- along with an additional charge of INR 5,000/- per day till the date of compliance[2].

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[1]Circular titled: *"Fine structure for non-compliance with the requirement of Clause 49(II)(A)(1) of Listing Agreement" to all Managing Directors/Executive Directors and all recognized Stock Exchanges",* Reference No. CIR/CFD/CMD/1/2015

[2]Mandatory Woman Directors in Listed Companies, *available at:* http://www.mondaq.com/india/x/395340/Corporate+Governance/Mandatory+Women+Directors+In+Listed+Companies (Last modified on 7 May, 2015)

A Board of Directors is a group of individuals that are elected as or elected to act as representatives of the stockholders to establish corporate management related policies and to make decisions on major company issues.[3]

A. Relevant provision to section 149(1) (b) of Companies Act, 2013, CHAPTER XI reads as follows[4]:

(*1*) Every company shall have a Board of Directors consisting of individuals as directors and shall have—

(*a*) a minimum number of three directors in the case of a public company, two directors in the case of a private company, and one director in the case of a One Person Company; and

(*b*) a maximum of fifteen directors:

Provided that a company may appoint more than fifteen directors after passing a special resolution. Provided further that such class or classes of companies as may be prescribed, shall have at least one woman director.

B. Relevant Rule 3 of Companies (Appointment and Qualification of Directors) Rules, 2014 is as follows[5]:

Woman director on the Board.- The following class of companies shall appoint at least one woman director-

(i) Every listed company;

(ii) Every other public company having –

(a) paid–up share capital of one hundred crore rupees or more; or

(b) turnover of three hundred crore rupees or more:

Provided that a company, which has been incorporated under the Act and is covered under provisions of second proviso to sub-section (1) of 4 section 149 shall comply with such provisions within a period of six months from the date of its incorporation.

Provided further that any intermittent vacancy of a woman director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy whichever is later.

[3] http://www.investopedia.com/terms/b/boardofdirectors.asp
[4]The Companies Act, 2013, s. 149(1)(b)
[5]Companies (Appointment and Qualification of Directors) Rules, 2014, Rule 3

Explanation- For the purposes of this rule, it is hereby clarified that the paid-up share capital or turnover, as the case may be, as on the last date of latest audited financial statements shall be taken into account.

2. PENALTY FOR NON-COMPLIANCE

CHAPTER XI, SECTION 172 OF THE COMPANIES ACT, 2013 lays down the fine imposed upon contravention of section 149(1) of Companies Act, 2013[6]:

"If a company contravenes any of the provisions of this Chapter and for which no specific punishment is provided therein, the company and every officer of the company who is in default shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees."

That is, in simple words, the company and every officer of the company who is in default shall be punishable with fine which shall not be less than Rupees 50,000/- but which may extend to Rupees 500,000/-.

3. ANALYSIS OF BENEFITS OF HAVING WOMEN DIRECTORS

Companies with more women leaders are more committed to, and better at developing high-quality Corporate Social Responsibility (CSR) initiatives. Women leaders bring diverse perspectives on fairness, distribution of resources and donation decisions, which in turn broaden a company's commitment to CSR and increase its levels of charitable giving.

It has been seen that between 1997 and 2007, companies with more women board directors donated significantly more funds than did companies with fewer women—with each additional woman board director representing an increase of 2.3 million dollars. For the same period, for each percentage point increase in women corporate officers, yearly donations increased by 5.7 million dollars. In the year 2007, the average donations of companies with three or more women directors was 28 times and companies with 25% or more women corporate officers in 2007 made annual contributions that were 13 times higher than those made by companies with zero women corporate officers.[7]

[6]The Companies Act, 2013, s. 172

[7]http://www.catalyst.org/media/new-catalyst-study-links-more-women-leaders-greater-corporate-social-responsibility

4. NEED OF A WOMAN DIRECTOR ON THE BOARD[8]

While appointing directors, most companies look for candidates of different ages and with different kinds of educational backgrounds and functional expertise. Bringing in a variety of perspectives, backgrounds, and experiences can be the key to an organization's success. Board diversity aims to cultivate a broad spectrum of demographic attributes and characteristics in the boardroom.[9]One way to bring in these diverse perspectives is through gender diversity on a board, and yet women only make up a small percentage of boards of directors[10] as companies are oblivious to the benefits of gender diversity.

The absence of women on corporate boards is a stark and pitiful reality. Only 4% of the directors of publicly listed Indian companies are women. A few reasons for the scant representation of women in the top positions are the non-hiring of women by traditional companies, work interruption due to maternity leave and safety and security issues. The sparse visibility of women at the top is referred to as a "brain drain," and a "crisis of talent retention."

> *"In the area of corporate social responsibility, women directors can contribute significantly to their organizations, right from initiating CSR initiatives, setting priorities and choosing projects to organizing the work plan, deploying management personnel and monitoring progress against targeted achievements. Women are known for their patience and perseverance, which is a prerequisite for these initiatives as they are sometimes challenging and demand long-drawn action to reach the required milestones and make the desired impact.[11]"*

With this important legislative amendment, India has followed suit with Norway, Spain, France, Italy and Belgium who have already implemented legislations or quotas which make it compulsory to appoint women directors in a company's board. The Board of Directors forms the crucial governing body that is primarily responsible for the high stability, efficiency and profitability of the company. It is their fundamental duty to safeguard the interests and the progress of the company and its stakeholders.[12]

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[8]Woman Director: A Necessity, *available at:* http://www.nirc-icai.org/BMaterial/Woman%20Director%20(1).pdf

[9]Diversify the Board, *available at:* http://www.accaglobal.com/in/en/student/exam-support-resources/professional-exams-study-resources/p1/technical-articles/diversifying-the-board--a-step-towards-better-governance.html

[10]Why Diversity Matters, *available at:* https://www.hsph.harvard.edu/ecpe/why-diversity-matters-women-on-boards-of-directors/

[11]Getting Women on Board, *available at:* http://www.thehindubusinessline.com/opinion/getting-women-on-board/article5796826.ece

[12]Appointment of Women Director, *available at:* http://www.legalservicesindia.com/article/article/appointment-of-woman-director-1717-1.html

- Ensures gender diversity
- The System of Corporate Governance should be reconciled with the ground realties in this country.
- A Woman Director is committed to not just good governance but to governance with a global vision.
- A broad set of business benefits is associated with gender diversity on corporate boards. These include improved financial performance and shareholder value, increased customer and employee satisfaction, rising investor confidence, greater market knowledge and superior reputation.[13]
- Experts also believe that companies with women directors deal more effectively with risk.
- More women leaders mean a likelihood of higher quality corporate social responsibility.[14]
- As per Morgan Stanley Capital International, companies that had strong female leadership generated a Return on Equity of 10.1% per year versus 7.4% for those without (on an equal-weighted basis).
- Companies lacking board diversity tend to suffer more governance-related controversies than average.
- Women demonstrate a democratic leadership style which boosts motivation and helps increase cooperation from the management.[15]
- Women also believe in a collaborative approach.[16]
- By being good listeners, they encourage participative decision-making and problem-solving.[17]
- Women are considered to be proactive in anticipating risks and issues that could arise, and thereby, help strengthen risk management practices.[18]
- Women directors are able to effectively oversee implementation of policies and processes, as they tend to closely follow up on deviations, be tough on exceptions, and ensure timely adherence to the right process.[19]

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[13]Corporate Governance: Women on Board, *available at:* https://www.ifc.org/wps/wcm/connect/75610d004f860220bd95ff0098cb14b9/women-on-boards-handout_042013.pdf?MOD=AJPERES

[14]Gender and Corporate Social Responsibility, *available at:* http://www.catalyst.org/system/files/gender_and_corporate_social_responsibility.pdf

[15]*Id. at 10*

[16]*Id. at 10*

[17]*Id. at 10*

[18]*Id. at 10*

[19]*Id. at 10*

- Many studies have shown that having a more diverse board is good for business. For example, of the 842 active companies on the Fortune 1000, women hold 18.8 per cent of board seats – an increase from 17.7 per cent in 2014 and 14.6 per cent in 2011 – and 45 per cent of all companies on the Fortune 1000 have 20 per cent or greater women on their board. In addition, over 55 per cent of the companies that became inactive on the index had one or zero women on their boards.[20]
- A 2008 study by professors Renée Adams of the European Corporate Governance Institute and Daniel Ferreira of the London School of Economics found that women tend to have better attendance records at board meetings than their male counterparts. This has a positive impact on male colleagues as it inspires them to improve their attendance records.[21]
- More women leaders are correlated with higher levels of philanthropy[22]. Results from a sample of 185 companies of the Fortune 500 firms for the 1991-1994 time period showed that companies with a higher proportion of women on their Board engaged in more charity[23].

5. EFFECT OF HAVING A WOMAN DIRECTOR ON THE COMPANY

"Companies with both women and men leaders in the boardroom and at the executive table are poised to achieve sustainable big wins for the company and society."

- It would be the privilege of the company to tap the innate and natural character traits of women like care, kindness, polite attitude, risk management, emotional strength and perseverance which are very much desirable being the harbingers of success. There would be enhanced and effective decision-making owing to a more diverse talent pool.
- It instils a healthy work culture as men and women get to work and interact under the same roof. A greater level of coordination and cooperation due to both sexes being comfortable in working together helps the company achieve laurels.

[20] *Id. at 9*

21 Women in the Boardroom and Their Impact on Governance and Performance, available at: https://corpgov.law.harvard.edu/2008/11/10/women-in-the-boardroom-and-their-impact-on-governance-and-performance/

[22] *Id. at 13*

[23] Williams, R. "Women on Corporate Boards of Directors and Their Influence on Corporate Philanthropy" *JBE* 42(1), 1-10.(2003) Retrieved from http://www.jstor.org/stable/25074940

- Having women on the Board will reduce the risk of 'groupthink'. The term was coined by social psychologist Irving Janis[24]. Groupthink occurs when a group makes faulty decisions because group pressures lead to a deterioration of mental efficiency, reality testing, and moral judgment. A group is especially vulnerable to groupthink when its members are similar in background and/or lack individual creativity, when the group is insulated from outside opinions, when group decisions are unchallenged and when there are no clear rules for decision making.[25]
- Dissimilar leadership, thinking and emotional styles, risk preferences and behaviour may foster creativity in delivering solutions to problems, as the company is more sensitive to a wider range of possible risks.[26]
- Having a heterogeneous board can enhance corporate reputation through positive signals to the internal and external stakeholders that the organisation emphasizes on diverse constituencies and does not discriminate against minorities in climbing the corporate ladder. This may indicate an equal opportunity of employment and the management's eagerness in positioning the organisation as a socially responsible citizen.[27]
- Reduces chances of sexual harassment at workplace as male counterparts learn to have respect and appreciation for the work and abilities of their female colleagues.
- Promotes gender diversity in the company as the board of directors no longer remains the stronghold of men solely. And on a lighter note, no longer would you see a monochrome of power suits in meetings!

6. EFFECT OF HAVING A WOMAN DIRECTOR ON SOCIETY AT LARGE

"The perfect woman you see is a working-woman, not an idler, not a fine lady, but one who uses her hands and her head and her heart for the good of others"

- Thomas Hardy

- As men work and interact with women from close quarters, they learn to appreciate that women are just as efficient, and in many instances score better than them. This attitudinal change at work helps in changing not just the mind set of men as 'colleagues', but also

[24]Janis, Irving L. *Victims of Groupthink* (Houghton Mifflin, New York, 1972)
Janis, Irving L. *Groupthink: Psychological Studies of Policy Decisions and Fiascoes* (Houghton Mifflin, New York, 1982)
[25]Groupthink, *available at:* http://www.psysr.org/about/pubs_resources/groupthink%20overview.htm
[26]*Id. at 8*
[27]*Id. at 8*

makes them better human beings in general. As these men leave the workplace and go home, the ripples of change percolate through the veins of society. They learn to treat their wives, mothers, sisters, daughters and any woman in general with equal respect and dignity.

- 'Women in the company's top brass' no longer is a jargon only to please the ears and something that one can read only in fancy business magazines. It will soon be a positive reality which will help both the company and the society to realize that it is something which is not just a one-off affair, but is a standard, normal and regular feature of a company. Successful women like Indira Nooyi, Chanda Kochhar, Arundhati Bhattacharya, Kiran Mazumdar Shaw, Zarin Daruwala, Chitra Ramakrishna, Rekha Menon, Roshni Nadar, and Schauna Chauhan Saluja to name a few, have not just inspired many girls and women but have proved to be role models in their respective fields.
- Recognition of the knowledge and talent nurtured by women will hopefully bring about much needed revolutionary change of 'equal pay for equal work' which is enshrined in Article 39[28] of the Directive Principles of State Policy and under the Equal Remuneration Act, 1976[29].
- Women on Boards, being working women, raise more independent and balanced children who grow up seeing their parents performing similar roles, be it outside the home, or within. As per a research conducted by Harvard University, these women tend to raise independent daughters and empathetic sons.
- And last but not the least, the most important societal change that will be effected is that it will foster in parents the zeal to educate their daughters and inspire in them the need to be independent and strive for the best jobs, just the way they treat their sons. It will make families sensitive to the fact that their daughters cannot be viewed as a 'responsibility' and a 'liability', first in their parents' house and then in their husband's house.

7. MANDATORY WOMAN DIRECTOR AND CORPORATE SOCIAL RESPONSIBILITY

A core focus of corporate sustainability is stakeholder relations, of which corporate social responsibility (CSR) can be one facet[30]. A company committed to CSR acts as a good corporate

[28]The Constitution of India, 1950, Art. 39
[29]The Equal Remuneration Act, 1976 (Act 25 of1976)
[30]Michael E. Porter and Mark R. Kramer, "Strategy & Society: The Link between Competitive Advantage and Corporate Social Responsibility", Vol. 84 No. 12 *HBR* 78-92 (December 2006)

citizen, expanding the definition of success beyond profit maximization to also consider the organization's impact, both positive and negative, on the world[31].

Going beyond correlation—proving that gender-inclusive leadership actually causes companies to be more socially responsible—can be difficult given all the factors at play. Additional evidence does, however, point to gender inclusive leadership positively impacting CSR[32].

Studies demonstrate that gender-inclusive leadership is linked to increased philanthropy as well as increases in other CSR areas, such as environmental CSR[33]. While it is plausible that companies committed to CSR could attract more diverse leaders, it is likely the connection works in reverse. Research examining the impact of gender-inclusive leadership, when taking time into account, suggests gender-diverse leaders are employed before increases in CSR are observed[34]. Focusing on the roles women play in the marketplace is one-way companies can create success through CSR initiatives. For example, Campbell Soup Company's supplier diversity program aims to develop a supply base that reflects its consumer base, giving companies owned by women an equal opportunity to sell services and products to the company[35]. Hence, the requirement of mandatory woman director on the Board by the amendment of Companies Act, 2013 is essential for meeting the requirement of Corporate Social Responsibility. With an increase in CSR activities of a corporation, there is not only an increase in the goodwill of the company, but society also, in turn reposes its faith in the activities of the corporation, which is an inevitable part of the company's success.

8. CONCLUSION

Gender diversity on the Board of Directors of a Company is the key to better corporate governance. The following extract from academic literature by Conger and Lawler (2001) serves

[31]Ramon Mullerat, International Corporate Social Responsibility: The Role of Corporations in the Economic Order of the 21st Century, (The Netherlands: Kluwer Law International, 2010) and Christopher Marquis, Mary Ann Glynn, and Gerald F. Davis, "Community Isomorphism and Corporate Social Action," Vol. 32 No. 3 *The Academy of Management Review*, 925-945 (July 2007)

[32]*Id. at 13*

[33]Robert J. Williams, "Women on Corporate Boards of Directors and Their Influence on Corporate Philanthropy," Vol. 42 No. 1, *JBE,* 1-10 (January 2003); Jia Wang and Betty S. Coffey, "Board Composition and Corporate Philanthropy," Journal of Business Ethics, Vol. 11 No. 10, *JBE,* 771-778 (October 1992); and Corinne Post, Noushi Rahman, and Emily Rubow, "Green Governance: Boards of Directors' Composition and Environmental Corporate Social Responsibility," Vol. 50 No. 1, Business & Society, 189-223 (March 2011)

[34]Philipp Krüger, "Corporate Social Responsibility and the Board of Directors," (In Press, 2010)

[35]More Women Leaders, means higher levels of Corporate Social Responsibility, *available at:* http://indiacsr.in/more-women-leaders-means-higher-levels-of-corporate-social-responsibility/

as a good summary of board diversity:

'The best boards are composed of individuals with different skills, knowledge, information, power, and time to contribute. Given the diversity of expertise, information, and availability that is needed to understand and govern today's complex businesses, it is unrealistic to expect an individual director to be knowledgeable and informed about all phases of business. It is also unrealistic to expect individual directors to be available at all times and to influence all decisions. Thus, in staffing most boards, it is best to think of individuals contributing different pieces to the total picture that it takes to create an effective board.'[36]

Women have often found new ways to make desirable changes and improve transparency when it comes to corporate governance. Given a greater degree of interconnectivity and interaction between markets across the globe, which deepens every passing moment, good corporate governance is the need of the hour, and the 2013 amendment to the Companies Act, 1956 is an encouraging step in this direction.

Simone de Beauvoir once famously said – *"Man is defined as a human being and a woman as a female- whenever she behaves as a human being she is said to imitate the male"*. The corporate world and especially, the Board of Directors has traditionally been the forte of men. This has been reinforced in many upfront and subtle ways, be it in the way top representatives in companies are chosen or through mass media like films and advertisements. Women, in the 21st century, are making strong and confident strides into this seemingly 'male' arena by carving a unique niche for themselves and must effectively be encouraged through such legislative measures undertaken by the government encompassing positive discrimination aimed at bringing about equity and parity between both the sexes. It is high time that the corporate world, which is one of the torch-bearers of contemporary society, shed its inhibitions, biases and prejudices and gives up discrimination on the basis of gender, which would be a true testament of its modernity. After all, the proof of the pudding is in its eating.

[36] *Id. at 8*

SEARCH AND SEIZURE UNDER THE NDPS ACT

Himaa[*]

The Narcotic Drugs and Psychotropic Substances Act of 1985 (NDPS) was enacted in order to control the rising menace of drug abuse in the Indian society. Narcotics are defined as a class of substances that in sufficient doses can produce profound unconsciousness and tend to develop habit formation in the individuals who use, or rather abuse them.

The Act has been amended three times in the years 1988, 2001 and 2014. The latest amendment introduced some interesting aspects into the Act, and has diluted the extremely rigid and inflexible attitude towards minor quantities of procurement and possession of drugs. Sections 41 to 51 of the Narcotic Drugs and Psychotropic Substances Act of 1985 (excluding sections 46, 47 & 48) are analogous to Sections 91 to 105 of the Code of Criminal Procedure (Cr.PC) which govern the general procedure regarding search and seizure. These sections under the NDPS Act define and regulate the power of the magistrate to sanction, and of the police to conduct searches and seize evidence against those suspected of Drug related crimes. They are extremely crucial as they have various safeguards against possibly exploitative and unjust behaviour of the police, and protect the innocent from being wrongly incriminated for offences under the Act.

This paper will analyse drug related laws only in the Indian context. The paper will compare the procedures revolving around search and seizure in the NDPS Act of 1985 to similar provisions under the CrPC using various judicial decisions and scholarly opinions regarding this issue.

Introduction to the Narcotic Drugs and Psychotropic Substances Act of 1985

The Narcotic Drugs and Psychotropic Substances Act was enacted on November 14th of 1985. Prior to this, there was no criminal liability attached to the possession and use of drugs. Usage of drugs was abhorred only due to the social stigma attached with their effects in the Indian society. Marijuana and its derivatives or variants like hashish, have been sold all over India since time immemorial without very many restrictions. The drug has even been mentioned in mythology as a substance that has been used by the demons and gods as a relaxant[1].

[*] IIIrd year student at The National Law University, Delhi.

[1] The Narcotic Drugs and Psychotropic Substances Act,1985 : Ignoring health; infringing rights *available at:* http://www.lawyerscollective.org/files/Fact%20Sheet%20NDPS%20Act%201985.pdf (Visited on 15th October 2016.)

The Act has been amended thrice in the years 1988, 2001 and 2014. It has been criticized on various grounds for not addressing certain intricacies in the structural framework. For example, the Act did not easily allow for the medicinal usage of the drugs until the 2014 amendment, which created a list of essential narcotic drugs and allowed for doctors to prescribe them as relaxants. There have also been certain problems with the extremely harsh treatment of the drug users in some states. For example, in Uttarakhand the users were treated on par with the suppliers and dealers[2].

The NDPS Act remains one of the harshest laws in our country, with mandatory minimum sentencing for certain crimes and no release on probation for offenders. It also provides for enhanced punishment for repeat offenders and severe restrictions on the provision of bail. The punishment given is based on the quantity of drugs in possession of the offender and does not account for whether the intention is sale, use or distribution[3]. This creates a situation where poor drug abusers are trapped in a vicious cycle of moving between the streets and prison, and are not able to get rehabilitation or any medical or legal assistance, which will adequately address their needs as addicts.

India is one of the few countries, which has the provision of awarding death sentences for drug related crimes. Sentencing someone to death for a crime that does not involve anything that causes the death of another or endanger national security is quite disproportionate and extremely harsh. Even though there is great danger to society, any crime related to drugs is essentially an economic crime and a death sentence for an economic crime is unusual to say the least.

A concerned group of lawyers in the case of *Indian Harm Reduction Network* v *Union of India*[4]approached the court challenging the constitutionality of the death penalty under the NDPS act on the grounds that it violated the fundamental rights given to the convict under Articles 14 and 21 of the Indian Constitution. In this decision, the court found that section 31A of the NDPS Act violated Article 21 as it did not allow the court any form of discretion in the awarding the death penalty. After this judgment, courts have been granted discretionary powers to examine the justifiability of the death penalty on a case-to-case basis[5].

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[2] *Ibid.*
[3] *Ibid.*
[4] Criminal Writ Petition No. 1784 of 2010, High Court of Bombay.
[5] The Narcotic Drugs and Psychotropic Substances Act,1985: Ignoring health; infringing rights http://www.lawyerscollective.org/files/Fact%20Sheet%20NDPS%20Act%201985.pdf (last visited on 15th October 2016)

Even though there are provisions in the Act, which provide for the alternative of rehabilitation to people arrested with small quantities of drugs, the court does not really make extensive use of this provision. The private centres are not very well equipped or regulated and tend to exploit the desperate situation of the addicts and their families just to make a profit without really providing them the required treatment. Most such facilities inflict torture on addicts and do not really help in curing the people of their addiction.

In 2009, an NGO called Sharan filed a case in court asking the State to set regulations for drug dependence treatments, especially in private rehabilitation centres. In the case of *Talwinder Pal Singh* v *State of Punjab*[6] the state made changes in the requirement of providing concrete evidence of addiction to avail treatment and thus, made it more accessible to people. All rehabilitation centres found violating human rights and perpetrating atrocities on patients were also made liable to criminal prosecution.

A lot of countries have now recognized that the usage of drugs is at its core a major health issue like addiction to alcohol and that rehabilitation is the only solution. Portugal has decriminalized the usage of drugs and has seen greater enrolment in rehabs. The number of people using did not drastically go up but this move by the Portuguese government has helped the addicts in getting more access to medical care and social security.

Search and seizure under the Narcotic Drugs and Psychotropic Substances Act, 1985

Chapter V, Sections 41 to 68 of the NDPS Act cover the procedure of search, seizure and arrest as a whole, but the main sections that mention the primary provisions to be followed during search and seizure for cases covered under this act are sections 41, 42 and 50. In *State of Punjab* v *Balbir Singh*[7], the Court said that the provisions for search and seizure under the NDPS Act could be divided into two categories: mandatory provisions and ancillary provisions. Sections 42 and 50 were given the status of mandatory provisions and any non-compliance could be valid grounds for vitiating the trial. Non-compliance with the provisions of those sections, which are categorized as mandatory, could be grounds for vitiation of the trial. In *Dilip* v *State of MP* like the judgment in the *Balbir Singh case*[8], it was held that in all offences committed under this act, the procedures under sections 41, 42 and 50 must be complied with. If not, any evidence so gathered could be questioned

[6] CRL MISC NO. M-26374 OF 2008.
[7] (1994) 3 SCC 299.
[8] *id.*.

in Court for its credibility[9]. Section 41 talks about the power of a magistrate to issue search warrants, Section 42 talks about powers of entry, search and seizure without warrant or authorization and Section 50 talks about rules for conducting the search of a person.

The 155th Law commission report in 1997[10] on the NDPS Act had identified and articulated the lacunae in the law and its application. The report mentions that a great number of cases get vitiated because of non-compliance with the mandatory provisions of 42 and 50.

Who can carry out an arrest or search?

Section 41 says that Metropolitan Magistrates, Magistrates of the First Class or those specially empowered by the State Government can issue warrants for of people who he/she has the reason to believe has committed any offence under this Act or issue a search for any place where such a crime is suspected to have been committed. It also empowers gazetted officers of any department of the Central Government or any specially empowered gazetted officer of the state department, to search a place or a person and seize, freeze or forfeit any suspicious objects or possible evidence, but he/she can do this only after writing down exactly the information leading to suspicion[11].

Section 42 talks about situations when a search can be made without warrant and is the basis for deciding whether the officer who conducted the search, had the authority to do so. In *Roy V.D* v *State of Kerala*[12] the appellant was caught with 'ganja' by an excise inspector who was not empowered to conduct a search and arrest under section 42, at that particular time, the appellant was discharged under section 227 of the CrPc as the complaint was held to not be maintainable. The inspector then later filed another charge sheet against the appellant, who moved to the High Court asking that the entire proceedings be quashed. It was held that an arrest and search by an officer not empowered as given under sections 41 and 42 is illegal per se and section 482 of the CrPc can be invoked to quash the proceeding[13].

In *State of Punjab* v *Balbir Singh*[14], The court said that the lack of authority of the particular magistrate or police officer would vitiate the trial because otherwise innocent people would be harassed under

[9] (2007) 1 SCC 450.
[10] Law commission of India, 144th Report on Narcotic Drugs and Psychotropic Substances Act, 1985 (July, 1997)
[11] *ibid.*
[12] 2001 SCC (CRI) 42.
[13] *ibid.*
[14] *Supra note 7.*

this law because of the harsh investigation processes and punishments. The powers given to officers under section 41 are similar to that of the customs officials[15] .The Court also held that not strictly compiling with the rules laid down under sections 100 and 165 of the CrPc would not immediately vitiate the trial, in such a situation, the Court would look at the particulars of the case and decide whether this non-compliance has been unfair to the accused. The Court would look at the complete effect of such action or non-action and then decide the credibility of the search[16].

Power to Search without a warrant

Section 42 lays down the conditions when a search, entry, seizure and arrest can be conducted without a warrant or authorization. The section says that any officer of any department of the Central Government including Para-military forces and the armed forces who are empowered by the Central Government or any officer of the State Government who are empowered by a similar order by the State Government can, if he has any reason to believe from personal knowledge or information from someone taken down in writing regarding any narcotic drug or substance any act related to which is an offence under the act has been committed or any evidence of commission of such act or any illegally acquired property which is liable to seizure, freezing or forfeiture if concealed in any building, conveyance or closed space can, between sunrise and sunset-

- Enter the building, place or conveyance.
- Can break open any door and remove obstacle to entry.
- Can seize all materials used in the manufacture of the substance or drug.
- Can remove any item, which is an evidence of the offences punishable under this act.
- Can detain and search any person who he has reason to believe to have committed any such act that is punishable under the act[17]

This is provided that the officer cannot afford getting a warrant without giving the suspect an opportunity to escape or to hide the evidence pointing towards the crime. Any officer below the rank of a sub-inspector cannot exercise the powers under this section in case the person who is a

[15] Surendra Malik & Sudeep Malik, *Supreme Court on Narcotics and Drugs*, 296-298(Eastern book company, 2nd ed. 2016)
[16] *State of Punjab* v *Balbir Singh* (1994) 3 SCC 299.
[17] *ibid*

suspect has a license to manufacture the drugs or psychotropic substances as granted under this act.

The officer has to make a record of the reason for his suspicion regarding the commission of crime, and a copy of this record has to be sent to his/her immediate official superior officer within seventy-two hours. According to *Krishna Kanwar* v *State of Rajasthan*[18] unless the information so received from another person or based on personal knowledge, and is reduced to writing, is directly related to the commission of an offence under the act the Section 42 has no application.

In the case of *Ram Kumar* v *Central bureau of Narcotics*[19], it was held that section 42 also has no application in cases of chance recovery of substances from random searches. It was contested in this case that contraband found by the officers during a routine check could not be used as evidence because they had no information in writing and the search was not valid under section 42 of the NDPS Act[20]. The Court held that in case the officer, by chance discovers that the person is in possession of narcotic substances and there was no prior information backing this discovery, the trial cannot be vitiated because of the fact that the provisions of section 41 and 42 were not followed. But once such discovery is made or such suspicion is confirmed, the officer must proceed according to procedure mentioned in the NDPS Act and any further non-compliance will weaken the prosecution case and the accused can be acquitted[21].

The information received must be recorded only by the officer receiving it, and not by anyone else, for fulfilling the requirements under this section. If this information is later conveyed to someone else and they record it in writing, then it is not in the eyes of the court and the accused cannot be convicted on the basis of any action taken on this information[22].

If a gazetted officer conducts the search, then it will come under clause 2 of section 41 and need not comply with the requirements under section 42. The Court also said that it is not right to expect that the minimum requirements as given under Section 165 of the CrPc must be complied with, in situations where the purpose for making the search and seizure would be defeated if such formalities and procedures were emphasized on and complied with[23].

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[18] (2004) 2 SCC 608.
[19] (2008) 5 SCC 385.
[20] (2008) 5 SCC 385.
[21] *Mohinder Kumar* v *State of Goa,* AIR 1995 SC 1157
[22] *Directorate of Revenue* v *Mohd. Nisar Holia* (2008) 2 SCC 370.
[23] *Yashihey Yobin* v. *Deptt. Of Customs* (2014) 13 SCC 344.

In the case of *Ghasita Sahu* v *State of MP*[24], it was held that all the provisions of CrPc 1973 should apply to all actions taken under this act as long as they are not inconsistent with the provisions of this act. In this case, a house was searched without the presence of a gazetted officer or a Magistrate, the defendant said that this was against their right. The court held that the officer followed the requirements under section 42 of the NDPS Act and Section 100 of the CrPc and hence, the allegation is incorrect and does not vitiate the trial.

Search of a Person

Section 50 lays down the conditions under which the officer authorized under section 42 can conduct a search on the body of the person under sections 41,42 and 43, he/she should take the person to the nearest gazetted officer of the departments mentioned under section 42 or a Magistrate. The officer is also authorized to detain the person until he can bring him before the officer or magistrate, who shall then decide whether the grounds for the search are reasonable or not. The Section also provides a clause for the search of a female and says that no female can be searched by anyone other than another female. Clause 5 of this section says that in case the officer authorized under section 42 has reason to believe that it is impossible to take the person to authorities without compromising on the evidence, he may continue to conduct the search according to the provisions of section 100 of CrPc. The reasons for this belief and decision must be recorded and sent to his immediate superior officer within seventy- two hours.

This section is strictly interpreted in order to prevent the misuse of the wide powers conferred to the officers and to protect the innocent from being falsely implicated in crimes they did not commit. Because of the harsh nature of the NDPS Act, the safeguards provided under this Act must be strictly complied with so that the powers are not misused. The option given under clause 5 should only be resorted to in cases of urgency and must be treated as an exception, not as a normal course of action[25].

Definition of the word 'person' as under Section 50

The provisions of this section apply only to personal searches and not to any search of any vehicle or object in possession of the person. In some instances, it is difficult to separate an object from

[24] (2008)3 SCC 52.
[25] *Vijaysinh Chandubha Jadeja* v *State of Gujurat* (2011) 1 SCC 609.

the body of the person, the Court must then look at the inextricable link between the two and decide whether the provisions of section 50 are applicable or not[26].

One of the tests that can be applied is whether the body of the person comes in contact with the object during the search, i.e., the person conducting the search would necessarily come into contact with the object during the process. Hence, the clothes, shoes and accessories of a person can be included within the definition of 'person' under section 50 but bags, luggage, briefcase etc. cannot be considered to be a part of the person of the suspect. Any search of these items will be an independent search and cannot attract the provisions of section 50[27]. In a situation where both the person as well as the bag of such person is searched, the provisions of section 50 must be followed because regardless of what else is searched the body of the person is searched and therefore this attracts section 50[28].

It is sufficient if the right of the person to be searched in presence of a Magistrate or gazetted officer is communicated to him orally and it is not necessary that this right needs to be given to the suspect in writing. The officer conducting the search must inform the person that it is a right and not merely mention that if he wishes to he can have the search conducted in front of the magistrate, the nature of this being an enforceable right must be emphasized for the officer to be deemed to have complied with the provisions of the section[29]. Each accused involved in the crime must be informed individually of this right; joint communication is not sufficient in this any case.

Rights of an arrestee - 'Public vs. Private place'

Section 50 is a mandatory provision and non-compliance can lead to the trial being vitiated. Under this section, if any person is searched, he/she has the right to demand to be taken to a magistrate or gazetted officer and have the search conducted under their supervision, only a female can search any female suspect and if the search is conducted under provision (5) of the section, then the reasons for the search must be written down and a copy of the same must be sent to a superior official within seventy-two hours. There have been many acquittals in cases under the NDPS act, on the basis on non-conformity to the provisions of section 50[30].

[26] *Yashihey Yobin* v. *Deptt. Of Customs* (2014)13 SCC 344.
[27] *Namdi Francis Nwazor* v *Union of India* (1998) 8 SCC 534
[28] *State of Rajasthan* v *Parmanand* (2014) 5 SCC 345.
[29] Surendra Malik & Sudeep Malik, *Supreme Court on Narcotics and Drugs,* 296-298(Eastern book company, 2nd ed. (2016).
[30] *Sayar Puri* v *State of Rajasthan* AIR 1998 SC 3224

The rules that govern search of a person in a private place and a public place are different. Section 43 grants any officer, who is empowered under section 42, the power to seize and arrest in a public place. This section gives the officer the power to detain and search any person who he has reason to believe has committed any offence under the act or is found in possession of narcotic or controlled drugs or of any psychotropic substances which the officer believes amounts to unlawful and illegal possession of the same. The officer then has the right to arrest the person and this power to arrest also extends to any person in the company of the person. There is no requirement for the officers conducting a search of a person in a public place to have to record before conducting the search; the reason why they believe an offence has been committed. There is also no time restriction under section 43, unlike section 42, which explicitly states that no search should be conducted between sunset and sunrise.

An explanation to this section says that the definition of a public place includes any place that is public conveyance, a hotel, any shop or any place accessible to the public or any place that is intended to be used by the public

This means that the rights of a person as under section 42 cannot be enforced in case of any search or arrest in the areas mentioned in section 43, as these would be categorized as public places. The question that then arises is that, what exactly is a private place and how is the line between a public space and private space drawn?

In situations where the contraband is seized from a building or a vehicle, the provisions mentioned under section 42 will apply. Section 43 covers public conveyances but private conveyances and any conveyances that are not public are still covered by the provisions of section 42. In *State of Punjab* v *Kulwant Singh*[31] it was held that section 43 is an enabling provision and not a mandatory provision. But unlike section 42, if an officer is conducting the search under section 43, then he need not write down the reasons behind his belief or suspicion before searching or detaining someone.

The distinguishing factor between a public place and a private place can be the intended use for building. If we apply the ratio derived from the *Man Bahadur* v*State of Goa*[32], which said that by no stretch of imagination could a private building be considered a public place, we can understand the nature of hotels and inns. We can extend the logic to the hotels and say that a hotel is a building

[31] 1995 CRI LJ 744 (P&H)
[32] 1966 CR. LJ 54

that is made with the intention that the public uses it, even though it allows this usage selectively, it still cannot be considered a private building.

A complex question however is whether a hotel room is considered a private place or not. A hotel room is booked by a person to be used in the same manner as he would use his home. For the period that the person rents the room, that room becomes his to use, subject certain restrictions. Therefore, in such a situation the public has no real access to it. The room is not intended for public use but is meant for use only by the person who has paid for it.

However the Supreme Court has held in the case of *Ganga Bahadur Thapa* v *State of Goa*[33], that a room booked in a hotel in the name of a customer is nevertheless a public place and any search conducted will be governed by section 43 and any evidence form a search conducted there after sunset will not vitiate the trial even though the reason for search has not been recorded as the provisions of section 42 do not even come into power.

Hence, it is paramount that one must be able to distinguish between a private place and public place because the rights conferred to a person in under each situation are very different.

Comparison with provisions of search and seizure in the CrPc

Sections 41- 58 of the Narcotic Drugs and Psychotropic Substances Act of 1985 talk about the procedure of search and seizure in some form or the other, and specify the specific conditions to be followed in the cases under this act. The main sections have already been discussed in the first chapter and this chapter will look at whether these sections deviate in any manner from the general procedures of search and seizure as given in the CrPC.

Sections 47, 51, 52, 91 100 and 165 of the CrPC govern the process of search and seizure and are most relevant in order for us to make a comparison with the analogous provisions of the NDPS act. Under both these acts it can be noticed that there are extensive powers given to the police officers empowered to conduct the search of an arrestee.

Section 51 of the NDPS Act explicitly states that the sections of the CrPC shall apply to all warrants issued and arrests, searches and seizures made under this act as far as they are not inconsistent with the provisions of the act. Under the NDPS Act, the normal procedures followed in the CrPC have been slightly modified because of the specialized nature of the crimes that the state is

[33] (2000) 10 SCC 312.

prosecuting the criminal for. For example, it is normal procedure that the investigating officer (IO) and the officer arresting the accused are not one and the same, but under the NDPS Act, the duties of the IO are limited to getting the lab analysis of evidence done and performing other routine work. As most of the evidence collection and investigation is completed by the time of arrest there not a great possibility for any bias on the part of the IO to come in, therefore the officer arresting the accused can continue as the IO[34].

This verdict by the Kerala High Court is not very sound in its argument as even normal routine duties like testing and filing paper work have a great ability to decide the final judgment and even if there isn't any great scope for bias, the IO can still view all results and papers in the light of the initial complaint and as a result, the final results of the investigation placed before the court could have been made through that coloured perception. This might prove detrimental to the case of the accused and therefore for the purpose of greater justice, the IO must be an unbiased officer and not the same as the arresting officer.

But a number of decisions by various courts around the country have said the same thing and it has been held that the officer filing the FIR and making the arrest can be the investigating officer on the case[35]. In cases of chance recovery the provisions of the act like sections 41, 42 and 50, which have procedural safe guards, might not be completely complied with. In such cases, it is for the accused to prove that this non-compliance caused him some disadvantage and was prejudiced. But in situations where the sections 41, 42 and 50 under the NDPS Act have been duly followed there can be no question on the validity of the arrest, search and seizure as even section 102 of the CrPC has been followed[36].

As the NDPS Act is a special law, the provisions of section 100 can apply to it only in the absence of any particular aspect of search not being explicitly mentioned in the act or if the act does not have a section particularly dedicated to the procedure of search[37]. The NDPS Act hence mostly builds on the already existing general provisions of the CrPc. For example, section 103 of the CrPc gives a Magistrate the option of directing the search to be conducted in his presence while under section 50 of the NDPS Act, a suspect or detainee is given the right to demand that he/she be taken before a Magistrate or a gazetted officer and that the search be supervised by them. The

[34] *Kader* v *State of Kerala* 2001 Cri LJ 696.
[35] R.P Kataria, *law relating to Narcotic Drugs and Psychotropic Substances in India,* 422-425 (Orient publishing house 3rd ed. 2010).
[36] *Gulam Nurmamad Theim* v *State of Gujarat,* 2003 Cri LJ 356
[37] R.P Kataria, Commentary on The Code of Criminal Procedure 232 (Orient publishing house, 4th ed. 2014).

focus here on the suspect is probably a safeguard provided because of the possible misuse of this act by the police, as it is easy for the police to plant any evidence on the person.

Section 50(4) of the NDPS act and section 100 (3) of the CrPc govern the search of a female and it has been held that it is mandatory to conform to this provision, non-availability of a female cannot be considered an excuse for the same. This provision is always to be strictly followed[38].

In a situation where the person being searched exercises the right available under section 50 (1), there is no necessity for there to be an independent witness present during the search. The Magistrate can be examined and if there is no discrepancy found, then the person so searched cannot claim to have been disadvantaged[39].

The NDPS Act deals with substances which are in extreme danger of being stolen or substituted because of their high value and huge black market, hence the act under section 55 directs the police officers to take utmost care for the safe keeping of the articles so seized and section 52-A gives them the power to dispose of the seized drugs and substances through a manner approved by the government. The section gives the officer in-charge the option of filing an application and getting the list and description of the evidence signed by the magistrate, but this is not a mandatory step. The list signed is considered as primary evidence in the court. This section suggests steps that are very different from the normal procedure in the CrPC as it allows the destruction of the evidence by the officer and then considers the list and description made by him and then signed by the magistrate as primary evidence. This can be something that is extremely incriminating in nature for the accused and the destruction of the evidence, on which the list is based, does not even give him the opportunity to contest the claim and to request fresh analysis and examination. The word of the police officer is taken at face value and there is nothing that the accused can do about it. Especially in situations where there are appeals made, the accused or convict is put at a great disadvantage.

As held in *the Balbir Singh case*,[40] the NDPS act is not a complete code and sections of the CrPc namely, section 100 and 165 are applicable to any search, seizure or arrest under this act. But non-

[38] *State of Punjab* v *Surinder Rani* (2000) 10 SCC 429 as cited in Surendra Malik & Sudeep Malik, *Supreme Court on Narcotics and Drugs* (Eastern book company, 348, 2nd ed. 2016).
[39] Surendra Malik & Sudeep Malik, *Supreme Court on Narcotics and Drugs* (Eastern book company, 329, 2nd ed. 2016).
[40] *Supra note 7.*

compliance to the provisions of the CrPc will not vitiate the trial proceedings unless the accused proves that decision has caused unfair damage to his/her case.

Conclusion

The NDPS Act of 1985 confers wide-ranging powers on the police officers and is one of the harshest laws in the country when it comes to sentencing of the convicts. The minimum punishment for drug dealing is 10 years while for a case of rape, even after the recent amendments, the punishment is 7 years. This Act, therefore, gives punishments that are disproportionate to the nature and impact of crime.

The provisions relating to search and seizure are very well defined in the NDPS Act. Considering the type of crimes persecuted under the Act, it is necessary to have different and more detailed procedures as compared to the general ones given under the CrPc. The procedures don't really differ from each other but in the NDPS Act, the empowered officers are given more rights. Simultaneously, there are greater safe guards in place to prevent the misuse of this power. Even so, the safeguards have mostly proved inadequate as they can be bypassed in several cases.

There have been concerns about the increasing number of acquittals in cases under this Act due to procedural irregularities, but this should not be seen as a negative thing because the criminal justice system in India aims to protect the innocent from wrongful conviction. Therefore, it becomes necessary to strictly adhere to procedural requirements, especially in the light of the harsh punishments under the NDPS Act.

The Act has recently been amended in 2014 but the amendments do not entirely address the problem area of the Act. Hence, they have not greatly helped in the pursuit of justice. The Act needs to be further refined or it might even be too harsh to actually be effective in curbing the drug menace.

THE CRIME OF DEFAMATION: A STEP BACK IN TIME

Veda Handa[*]

The judgment delivered by the Supreme Court last year in the case of Subramanium Swamy v Union of India upholding the constitutional validity of sections 499 and 500 of the IPC, which criminalize defamation, comes about as a serious blow to free speech in India. This paper argues that criminal defamation amounts to an unreasonable restriction on the right to freedom of speech and expression. Tracing the historical origins of the action for defamation, the first section of the paper argues that criminalizing defamation is unconstitutional, and a violation of the tests laid down in international instruments. The following section argues that the decision is an anachronism in that it fails to take into account the growing positive jurisprudence towards greater protection for free speech and lesser restrictive defamation laws internationally, and disregards domestic precedent as well. The paper thus seeks to establish that the judgment upholding the criminality of defamation is a regressive measure that reeks of colonial absolutism.

Criminal Defamation: An Unreasonable Restriction

While its precise definition varies across jurisdictions, defamation is generally understood as the publication of any such communication or imputation that tends to harm the reputation of another.[1] Most countries today have some or the other form of laws against defamation. In India, however, defamation is both a civil and a criminal wrong. This dichotomy can be explained by looking at the historical origins of the wrong. Tracing its roots to the Roman civil remedy of *action injuriarum,* the medieval English law of *Scandalum Magnatum,* 1275 in providing for the criminal liability for defamation, was aimed at protecting the honour of 'great' and 'noble' men and was more a means of curtailing any political dissent and criticism of the government than a measure for the protection of reputation.[2] Civil remedies were later extended under common law for bringing about defamation suits by private individuals. Lord Macaulay when drafting the Indian Penal Code, incorporated criminal liability for making speech intended to offend the religious sentiments of another.[3] Today, however, while the law criminalizing defamatory libel stands abolished in the land it originated[4], it continues to prevail where the colonial masters carried it forth. Seen in light of its historical origins, criminal defamation as provided for under s. 499 of the

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[1]The Indian Penal Code, Act 45 of 1860, §499 (India); Restatement (Second) Of Torts § 559 cmt. b.(1977) (US).
[2] Van Vechten Veeder, "The History and Theory of the Law Defamation" 3 *Columbia L. Rev*. 553 (1903).
[3]Ireland Law Reform Commission, of Consultation Paper on the Crime of Libel (August 1991).
[4]Coroners and Justice Act, 2009, c. 3, § 73 (b) (Eng).

IPC clearly seems to run contrary to the freedom of speech and expression- a liberty guaranteed in most democratic jurisdictions across the world.[5]

In India, Article 19(1)(a) of the Indian Constitution guarantees the freedom of speech and expression to all citizens. Any restrictions on the same must be such that are 'reasonable' and satisfy any of the aims provided under the article itself.[6] Defamation is included as one of the aims for which speech may be restricted. However, for a restriction on a fundamental right to qualify as being 'reasonable', it must be provided by a valid law in pursuance of the aims recognized as legitimate, and bear a direct and proximate connection with the said objective. Further, it must neither be arbitrary nor excessive, but proportionate to the said aim.[7] These criteria constitute the three-part test that a restriction must satisfy in order to be regarded as constitutionally valid. Taking note of the fact that the protection of the rights and reputation of others has been recognized as one of the legitimate grounds for restricting free expression under the International Covenant on Civil and Political Rights and the European Convention on Human Rights, and that the right to reputation has been interpreted as an integral part of the right to life under Article 21 by the Supreme Court[8], Dipak Mirsa J. in his opinion delivered in last year's landmark *Subramamium Swamy* case held that a 'balancing exercise' needs to be undertaken between the right to reputation and the right to free speech.[9] In pursuance of this exercise, he held that the reputation of one individual could not be compromised at the expense of the freedom of speech of another, and hence the penal provisions are constitutionally valid in that they provide the individual, whose reputation has been harmed, recourse to the state.[10] Furthermore, the Court adds the requirement of a restriction in furtherance of 'public interest'. Public interest, however, is not recognized as an aim in pursuance of which speech may be restricted. As renowned free speech scholar Gautam Bhatia notes that while the Court dismisses this concern by distinguishing the submitted decision in *Harakchand Ratanchand Banthia v Union of India*[11] on facts[12], it fails to take into account the judgments

[5] Universal Declaration of Human Rights, adopted Dec. 10, 1948, art. 19, G.A. Res. 217A, U.N.Doc. A/810 (1948); International Covenant on Civil and Political Rights, opened/or signature December 16, 1966, art. 19, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 51, U.N. Doc. A16316 (1966), 999 U.N.T.S. 171; European Convention on Human Rights, Nov. 4, 1950, art. 10, Europ. T.S.No. 5.
[6]Constitution of India, 1950 Art. 19(2).
[7]*Chintaman Rao v State of M.P,* AIR 1951 SC 118; *State of Madras v V.G Row,* AIR 1952 SC 196; *In Re: Ramlila Maidan Incident,* 2012 5 SCC 1.
[8]*Umesh Kumar v. State of Andhra Pradesh*, (2013) 10 SCC 591.
[9]See *Subramanium Swamy v Union of India* (2016)7 SCC 221 at 140.
[10]*Id.*
[11](1969) 2 SCC 166.
[12]See *Subramanium Swamy supra* 1at 175

in *Sakal Papers*[13] and *Shreya Singhal*[14] where public interest has been held to be a standard that cannot justify the imposition of restrictions on free speech.[15]

Section 499 cannot be regarded as a valid restriction as it is a vague provision. The concept of 'public good' is an imprecise standard, and its requirement for claiming the defence of truth under the First Exception renders section 499 void for vagueness. As noted above, the Court distinguishes on facts the judgment in the case of *Harakchand Ratanchand Banthia*[16] wherein it was held that the requirement of 'public good' is vague as it lays no objective standard submitted by the petitioner, it however fails to counter this attack. After citing innumerable judgments where the standard has been used, the Bench merely holds that what constitutes public good is a matter of fact to be ascertained on an individual case to case basis.[17] This argument in no way establishes how public good is not a vague idea. The Court refers to the landmark judgment in *Shreya Singhal* on several occasions[18] but does not address the ruling given in the said case holding that a law abridging the freedom of expression cannot stand merely if it is in 'public interest'.[19]

For Misra, J., the notion of 'public good' along with that of 'good faith' constitutes the mainstay of the offence of defamation.[20] If that indeed is the case, and if public good is itself a vague idea, then the vires of s. 499 can be argued to be compromised on the whole, and not just that of the First Exception alone. Alternatively, even if the exception were to be considered severable, his ruling that the restriction posed by the provision is in furtherance of 'public interest' which is not a constitutionally recognized ground for restriction, makes the doctrine of severability inapplicable in the instant case. It has been held that even when the void aspects of a provision may be severed, the provision is liable to be struck down entirely if it is applied for purposes beyond those enumerated in Article 19(2) of the Constitution.[21] The excessiveness of the provision is glaring. The Court repeatedly emphasizes the need for balancing freedom of expression with the right to reputation but fails to explain why civil remedy cannot suffice for the protection of reputation, and why must the retention of a criminal provision be the only way to prevent the 'crucifixion' of

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[13][1962] 3 S.C.R. 842.
[14](2013) 12 SCC 73.
[15]Gautam Bhatia, "The Supreme Court's Criminal Defamation Judgment: Glaringly Flawed", *Indian Constitutional Law And Philosophy,* May 13th, 2016 *available at* https://indconlawphil.wordpress.com/2016/05/13/the-supreme-courts-criminal-defamation-judgment-glaringly-flawed/. (Visited on December 30, 3016).
[16] *supra* 12,
[17]See *Subramanium Swamy,* see *supra* 1 at 185.
[18] See *Shreya Singhal supra* 15 at 95, 147, 149.
[19] *Id* at 17.
[20] See *Subramanium Swamy supra* 1at 16.
[21] *Romesh Thapar v State of Madras,* AIR, 1950 SC 124; *Shreya Singhal supra* 15 at 99,100.

reputation. Neither does it explain how defamation constitutes a public wrong as opposed to a private offence. By definition, a crime is an offence that affects the society at large. However, defamation only attacks the reputation of another individual, and therefore can be understood as a personal wrong for which a civil remedy should suffice. The Bench, in regarding defamation as a wrong against the community fails to appreciate that it is only individual reputation that is at stake as opposed to an attack on a person based on his identity as in the case of caste-based crimes, or a threat to public safety as in the case of rape or murder.[22]

In light of the above understanding of defamation as a private wrong, a civil remedy in the form of damages should suffice to address it. It is pertinent to note that in India, there exists no cap on the amount of damages that may be imposed in a defamation suit, and the concerns of the Court for protection of reputation can be adequately served by the grant of compensatory as well as exemplary damages, as is evidenced by recent high-profile defamation suits where damages to the tune of Rs. 100 crores have been awarded.[23] Such exorbitant awards adequately serve both punitive and deterrent purposes. (The chilling effect that such exemplary damages may pose, and the need to for a ceiling on the amount to be awarded is a matter for further discussion that the paper shall not delve into, for the same is beyond its current purpose.) Hence, a criminal liability extending up to two years of imprisonment is an excessive response to attacks on reputation, and fails to satisfy the requirement of proportionality, in the face of lesser restrictive alternatives under civil law.

Thus, criminal defamation is an unconstitutional restriction on the freedom of speech and expression in that it fails to meet the tests of legality, legitimacy and proportionality for a valid restriction recognized not only under Article 19 of the Indian Constitution, but also under the ICCPR and the ECHR that the Court relies on for upholding the right to reputation. Failure to satisfy these requisites is a clear indication of the chilling effect that section 499 would have on speech. A vague provision, it does not define what amounts to public good, thereby inhibiting individuals from making any remarks - even those that may be true, so that they may steer clear of possible liability. Moreover, fear of imprisonment further acts as restraint on speech that is only directed towards an individual, and not harmful for the society per se.

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[22] Indira Jaisingh, "It is Time to Get Rid of the Law of Criminal Defamation", *The Wire* March 16th 2016 *available at* https://thewire.in/36354/it-is-time-to-get-rid-of-the-law-of-criminal-defamation/. (Visited on 9th June 2017).

[23] *Times Global Broadcasting Co. Ltd. v. Parshuram Babaram Sawant,* (2014) 1 SCC. 703.

Criminal Defamation: An Anachronism

There has been a shift across the world towards discouraging criminal liability for defamation[24], and yet the Indian Supreme Court continues to sanctify the colonial relic.

Criminal actions are brought forth by the state, while recent international jurisprudence has denied the government even the right to sue to for damages, in the interests of allowing discussion about and criticism of the state. For instance, in the U.K, the House of Lords held that a civil action initiated by a local authority and that the threat of civil action of defamation would chill any criticism of elected bodies.[25] The Indian Supreme Court in the case of *R. Rajagopal v State of Tamil Nadu*[26] incorporated the same ideology in holding that the government or any other state organ could not initiate a defamation action. It further added that political officials did not enjoy a right to privacy, and thus could not bring a suit for damages. In the said case, the Court modified the traditional defence of truth in light of the decision in *New York Times v Sullivan*[27] to adopt a highly speech-protective standard and held that the defendant in a defamation suit could only be held liable if the statements made by him were made in 'reckless disregard for the truth'. Thus, even if the statements made by the defendant were false, he could be held liable only if he made such statements with actual malice. By placing fetters on the right of governmental bodies and officers from bringing defamation suits in the interest of the freedom of press in a democratic society[28], and by adding the requirement for proving wrongful animus[29], this decision acted as a major step towards greater protection of speech in Indian jurisprudence, besides being a milestone in the history of the right to privacy in India. The *Subramanium Swamy* judgment, however, fails to take the aforesaid decision into consideration while giving its verdict. Although *Rajagopalan* dealt with civil defamation, it is immensely important for understanding the chilling effect that the requirement for establishing the truth of their statements would have on individuals.[30] S. 499 as it stands, not only requires the truth of the allegedly defamatory statements to be proved, but also demands the accused to establish that the same is in furtherance of some vague notion of 'public

[24]Bonnie Docherty, "Defamation Laws: Positive Jurisprudence" 13 *Harv. Hum. Rts. J*. 272(2000).
[25]*Derbyshire City Council v Times Nespapers Ltd.* 1 All E.R. 1011 (H.L. 1993) (U.K.).
[26](1994) 6 S.C.C. 632.
[27]376 US 254 (1964).
[28] See *Rajagopal supra* 27 at 21.
[29] *Id* at 29.
[30]Gautam Bhatia, "Why the Supreme Court's Criminal Defamation Judgment is Per Incuriam", *Indian Constitutional Law and Philosophy*18th May, 2016 *available at*https://indconlawphil.wordpress.com/2016/05/13/the-supreme-courts-criminal-defamation-judgment-glaringly-flawed/. (Visited on December 30, 3016).

good' to avail of the defence of truth. The continuation of such a heavy onus on the defendant is in complete disregard of the growing protection to speech accorded by the SC previously.

Continuing with criminal defamation is also an example of the Indian judiciary turning a blind eye to the immense international jurisprudence pointing towards doing away with such draconian measures. The United Nations Human Rights Committee has explicitly called for the decriminalization of defamation and considered imprisonment as a disproportionate response.[31] Although the European Court of Human Rights has never directly asked for the abolition of criminal penalties for defamation, it has nonetheless held that criminal sanctions for defamation have a chilling effect on expression.[32] The African Court of Human and People's Rights on the other hand, has struck down penal provisions for defamation and held that civil recourse is adequate to address the wrong of defamation, while criminal penalties are disproportionate and violate the freedom of expression.[33] As criminal defamation stands abolished in its birthplace, as well as her former colonies[34], upholding the constitutional validity of the same in India seems to be an anachronism - a refusal to change with the times, and move beyond the totalitarian perceptions of erstwhile colonizers.

[31]UN Human Rights Committee (HRC), *General Comment No. 34, Article 19, Freedoms Of Opinion And Expression*, 12 September 2011, CCPR/C/GC/34 .
[32]*Cumpãnã and Mazãre v. Romania*, App. No. 33348/96, 41 Eur. H. R. Rep. (2005).
[33]*Lohé Issa Konaté v. The Republic of Burkina Faso*, App. No. 004/2013, ACHPR, (2014).
[34]Kenya and Zimbabwe have become the latest states to decriminalize defamation. See *Jacqueline Okuta & Anor vs. AG & Others*, [2017] eKLR; *Madanhire v Attorney General*, [2015] ZWCC 02.