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EDITORIAL

The society needs continuous transformation of its social order which can be attained by making adjustments and variations to social institutions, behavior and interpersonal relations. This process involves social evolution, where the society makes conscientious amendments to traditional socially acceptable norms leading to social change. In order to ensure that the necessary change is successful, there is a need for modification of the psychology behind the idea of development. With Social Change there is heightened awareness and more understanding due to the presence of more information in the community. This in turn enables people to make informed decisions based on the scenario at hand. Greater participation, from the academia motivates the public to correct the instances of injustice and therefore they need to be committed in creating a sustainable future. Ultimately inspiring all to think keenly, of the desired transposition.

It is fervently hoped that the *RGNUL Law Review* offers a platform for the much needed social change.

Dr. Kamaljit Kaur

RGNUL Law Review (RLR)

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THE STUDY AND INTERPRETATION OF CONSTITUTION: A JUDICIAL FUNCTION

Justice Raghuram Goda (Retd.)*

A Constitution defines the social architecture of a society - a Nation. It does more than define the reality of its domain and habitat. A constitutional democracy is not mere textual cartography; it is text practiced in its true spirit; a spirit that delineates a universe of consensually adopted and articulated values of the society, which has given it form and utterance.

If we need to appreciate, sustain and expect continuity of the quality of life, liberty and happiness that our Constitution, our laws, our government and other public institutions were designed to ensure, we need to study and understand our Constitution.

In a democracy that is fragile, incompetent, unresponsive, irresponsible, or venal; the operative pathology of its formal and informal institutions and its public servants is illustrative of an ignorant, apathetic and careless citizenry. Tyranny and despotism do not spring forth on their own. They are too often invited by a fragile, uninformed, unconcerned and fractured social order. Therefore, should we study our Constitution.

How should we study the Constitution? In the context of the Constitution, one is principally concerned with how courts develop and interpret the Constitution. Today, world over there is a steady shift towards constitutionalization of democratic politics. This shift invites the interpretation of the Constitution and the principal institutions that perform this function with a substantive measure of finality – the superior courts, as a topic of centrality in discourses of democratic society. Courts however are not and ought not to be the final or immutable arbiters of constitutional meaning and of its values, on a sociological scale of time. Constitutional values must be illustrated, evolved, nuanced and defined by the interactive practices of civil society and the institutions we establish, nurture

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This paper is reproduction of a Special Lecture delivered at Faculty Development Programme at Rajiv Gandhi National University of Law, Punjab, Patiala on 07 March 2017.

and permit to flourish. In this sense **We the People** are the final interpreters of the Constitution. We must therefore study the Constitution at this level of abstraction as well.

The Study Must be Generic: Constitutional theory and its underlying values and themes substrate in a deep and substantive measure, the production, regulation and distribution of the material resources; the evolution and governance of societal, moral and civilization values of the entire civil society over which a given Constitution has domain and operation. How does one read and understand such an organic document?

A Constitution is more that a series of house keeping rules for a society. It does more than enumerate a raft of regulations without an underlying and related philosophy. We must understand the connectivities between the several value pregnant provisions, how they influence each other and how they operate in harmony and synergy, like several discrete notes in a symphony produce the melody. We must comprehend the simultaneity, of the elegance and complexity, of the dynamics of constitutional space captured in its compass.

We must study the historical processes that helped evolve the principles that have found acceptance into our constitutional structure and recorded as the Constitution's text; the concerns of the founders and the problems they set about to address; the compromises that the Document verifies in its architecture, the overarching structural arrangements it mandates and its details. Alongside must we study the particular pathologies of the post-independent Indian democratic practices, the reasons for the several pathologies and how they interact to produce endemic irritants to constitutional governance?

Since we live in an ever shrinking world where small ripples in far off lands produce tidal waves across continents; a world that is more closely bound together than since the dawn of history: bound by social, economic, cultural, climatic and several other phenomena, we must study developments and evolutions of constitutional cultures in the several legal jurisdictions and in the several parts of the world; the dominant governmental processes, the social tensions, the economic and cultural trends, the vitalities and pathologies of the component units of this coalescing world order.

Without a comprehensive understanding of the evolutionary history, the conflicts and compromises in the enacting of the organic document and the interplay of the several seemingly incoherent and inconsistent values that underscore this

fundamental instrument that overarches the nation's *modus vivendi*, we would mistake the sterility of the trees for the rich verdure of a forest.

scrutiny and policing of governmental action in all its facets, including the Executive and Legislative, and the capacity of individuals in the civil society to challenge abuses of executive power; of transgressions of legislative authority; or of gross usurpations and aggrandizement of power by any one branch to the detriment of separation of powers values, are non-negotiable pre-requisites of a civilized democratic society. The study of the Constitution involves the study of these tensions and the techniques, both prophylactic and curative; for avoidance, resolution or the maintenance of equilibrium of the conflicts.

Much of constitutional jurisprudence is a reflection of constitutional conventions and practices. These normally fertilize ambiguous or plurisignative areas of text and flesh out values from sterile language. Our study must thus include constitutional practices and conventions and how these have evolved over time. What practices and conventions have survived and which have perished are important areas of study, to assess the vitality of the social order and the strength of a constitutional democracy.

The Mechanism of Judicial Review: Judicial review is an inalienable adjunct of any society governed by rule of law values. India is such a society. Judicial review is the medium and the forum for explication of constitutional values and principles by the judicial branch; for defining the power arrangements of governing institutions; for regulating public authority within limits enjoined by the organic instrument; and for maintaining the delicate and sensitive balance between individual liberties and competing demands of government and public instrumentalities, often seeking insatiable regulatory or controlling power.

Our Constitution consecrates the power of judicial review in the judicial branch, one of the three great departments of the State. Judicial review is the medium through which disputes between the citizen and the State and amongst the several branches of Government are presented and resolved. The Constitutional and normative justification for judicial review of administrative action, of legislative action, and in the Indian context and post-Kesavananda[1], of constituent exercises too, is an intensely fascinating and keenly debated issue. Identifying the *loci* and boundaries of judicial review, of Parliamentary and

[1] *Kesavananda Bharati* v. *State of Kerala* – (1973) 1 S.C.C 225.

Legislative spaces and of the spectrum of executive discretion, are intensely problematic areas. Constitutional space is dynamic, inflationary and evolving. We must study this dynamic process.

Superior courts are thus political institutions which wield enormous power. When judges develop the law they exercise political power and when the law in issue is the Constitution, the judicial power exercised is of the highest order and has deep and awesome impact on the civil society.

The development and evolution of judicial review, both conceptually and functionally has not necessarily and always proceeded coherently or with neatly definable regularity.

Even in the area of judicial review of administrative action, the growth has been from the narrow *ultra-vires* phase, extending to substantive review of policy, despite frequent and regular disclaimers that review of policy is out of bounds for judicial scrutiny. Whether, Courts have managed and coherently the distinction between policy review and explicit policy-making deserves serious study as well.

Modern society has itself evolved from periods of minimalist governmental presence of the 18^{th} & 19^{th} centuries, to the contemporaneous proactive and affirmative model of governance, clearly visible since the mid 20^{th} century. This has brought in its wake ever accelerating levels of governmental activity, intruding into and influencing ever increasing facets of the lives of citizens.

Government today exercises wide-ranging, ever expanding; and an awesome measure of regulatory power. Legislations are increasingly skeletal in nature. Substantive policy and regulatory power is too disturbingly often delegated, or abdicated if you will, in favor of the Executive branch. The task of identifying deviant conduct and of supervising and ensuring the accountability of the Executive to Constitutional and Legislative limits is proportionately rendered exponentially complex.

While individuals in the civil society are increasingly exposed to growing levels of governmental regulation, legislatures dominated by organized political parties with transient self perpetuating concerns, prioritized by and preoccupied with partisan political discourse, are unable to ensure accountability of the awesome powers, authority and the facially uncanalized discretion that the executive branch is conceded or has usurped. This has led to the near obsolescence of

effective and adequate legislative control of executive power. This phenomenon equally deserves focus and study.

The volume of modern-day legislative business; the disproportionate engagement of legislative time in partisan political discourse; the growing practice of delegating essentially legislative functions, in areas of policy including macro policy formulation to the executive; the near obsolescence of coherence and normative values in executive action; the sub-optimal administration even of legislated policy, all lead to an accountability deficit in the legislative branch.

These factors have led to, invited, and to an extent legitimized the expansion of judicial review. The increment in the scope and operative reach of judicial review is proportionate to the diminution of effective legislative monitor and control of executive power and of proscribed legislative exertions; both too frequently transgressing constitutional values.

Why Must We Study the Conceptual Reality of Judicial Review? The power of judicial review is a great and potent power. As we have seen, it is also a species of political power. Judicial Review substantively impacts critical areas of the society - culture, economics, liberty, democracy, and several equally fundamental aspects of the life of individuals and groups. Like all great power it must be cabined by checks and balances to ensure that it does not run amok or corrupt and subvert even ancient, venerable and essential democratic institutions. Unchecked judicial power is not only counter-majoritarian but tends to destroy the vibrancy of co-ordinate branches of government and eventually self-destructs the very institutions that appropriate and entrench uncanalized power.

Unbounded judicial review upsets the delicately conceived and crafted constitutional balance, undermines and enfeebles democracy and popular will, even in its application to review administrative action. Judicial review of legislative action is a problematic of higher criticality. How judges interpret the laws can be controversial. The issues are much too fundamental when it comes to the interpretation of the Constitution.

The Constitution as the fundamental law allocates and regulates governmental power. The Constitution also articulates the fundamental and transcendent values of the society, while allocating to the legislative and executive branches the task of evolving policy and of executing it, in harmony with transcendent values. Its interpretation can therefore have profound effect on the institutional structure;

control the culture of civil society; the exercise of political power and individual liberties within it. Constitutional interpretation impacts the distribution of powers between organs of government, levels of government, and government and the citizen.

The greater difficulty of amending a constitution than of amending ordinary laws is sometimes offered as the justification for judicial creativity in the interpretation process. If on account of Founders' oversight, failure to expressly provide for an exigency or to anticipate wisely the unfolding complexities of society, a Constitution fails to achieve one or more of its main purposes. The potential consequences could then be ominous and grave. Governmental powers could then be abused, democratic processes or the federal system subverted or human rights violated. Where the needed constitutional amendment requires corrective action by the very political process that poses the threat that needs to be checked, the necessary amendment fails to emerge from the crucible of legislative discourse and the civil society is again in peril. Then too judicial review is either invited or invites itself, and often to popular acclaim.

Substantive constitutional provisions are usually couched in ambiguous, abstract or open-textured language. Equality, equal protection, religious freedom, secularism, freedom of expression, fairness, democracy, enumeration and distribution of legislative powers, inter-play between the several constitutional values and similar seminal norms are not and cannot be unambiguously or inflexibly captured in the Constitution's text. These apparently non-specific and inchoate areas of the Constitution provide fertile ground for evolution of constitutional meaning, content and dynamic processing. This is the process of mapping the penumbra from the core, the dynamic interpretation process.

Is such ambiguity an invitation exclusively to the judicial branch, for fleshing out the gaps and articulating the sounds of constitutional silence or is constitutional evolution legitimate by the participatory practices and processes of the other organs as well, is a matter essentially of constitutional and political philosophy.

The civil society must evolve principles in this regard, instead of leaving this area for combative posturing amongst the three organs, each of which may have a ubiquitous interest in maximizing their powers. Informed and robust deliberation and debate among citizens is thus critical to maintenance of a vibrant democratic process. Robust and incessant though informed discourse, ensures due accountability of the institutions of governance, to the people. An

uninformed or an ill informed citizenry is the antithesis of and the greatest peril to, democracy.

Competing Theories of Judicial Review: In any study of the evolution of constitutionalism through the judicial process, comparatively across jurisdictions or even federal jurisdictions, it is imperative to understand the normative principles underlining the exercise of power and jurisdiction. Without a deep-field knowledge of defining principles, we cannot chart the course of constitutional developments; hiccups in the identification and evolution of certain societal values through judicial opinions; the pervading incoherence in adherence to one or the other interpretive school during a given period and sometimes by the same judicial personality; resistance by co-equal branches - the legislative and the executive, to particular judicial opinions, while passively accepting other decisions adopting substantively similar interpretive doctrines; and a host of other such seemingly incongruent behavior of the political institutions of the civil society. These behavioral incongruities cannot be comprehended in any meaningful way, without normative analyses of the process of judicial review and without political and administrative behavioral analyses. Mere precedent analyses would result in a catalogue; not in a holistic commentary; and would contribute to confusion, not comprehension.

Competing Theories of Constitutional Interpretation: The controversy enveloping constitutional interpretation centers round two dominant theories: should the interpretation of a law be governed mainly by its letter or by its spirit, if the spirit, how should it be identified? Should the Constitution be regarded as a set of discrete written provisions, governing and authoritative since they were formally adopted or enacted, or as a normative and amorphous structure whose provisions are founded upon and derive authority from abstract principles and values that may not have been expressly textualized?

Also fertilizing the debate and the controversy is the issue as to the extent to which the meaning of a constitutional prescription may or ought to be determined by the original intention, purpose or understanding of its founders, including when applied to evolving issues, whether or not a specie of the generic concerns addressed in the text. This is the originalist versus the non-originalist conflict; the distinction between legal positivism and structuralism or constructivism, as it is also labeled.

Legal positivism holds that the truth of legal propositions consists in facts about the rules that have been adopted by specific social institutions, and in nothing else. Ronald Dworkin - **Taking Rights Seriously**, defines this school of interpretive discipline. The other, the structuralism or the organic model, justifies a liberal interpretation of the Constitution - as a totality, in the light of its pervading spirit and underlying philosophy. According to this school it is legitimate to articulate the inherent and implicit nuances of the organic instrument. This school accords to the judiciary a wider and pervasive role, that requires it to be creative, though not always with fidelity to the Text. Benjamin Cardozo that great American jurist and Judge was an eminent advocate of the structuralism school. His **Nature of the Judicial Process**, defining the appellate judicial process, is a magisterial study. I commend law students to study this magnificent work. It will enrich your perceptions and provide the necessary depth and focus to better understand the judicial role and the craft of judicial policymaking.

The study of Constitutions involves analyses of how courts have dealt with federal distribution of powers; resolved conflicts between overlapping and competing constitutional values; of individual liberties and regulatory power; powers and privileges of legislatures *vis-à-vis* fundamental rights; how the transition from a controlled to a liberalized economic model was managed in legal doctrine; how the interrelationship between fundamental rights and directive principles and the relative scope of these constitutional values was perceived and has evolved over time; how the rule of law and democratic values were and are nurtured through tumultuous periods of our history; how access to justice and empowerment of the less advantaged sections of society was perceived and administered; how often, pervasive, and persistent is judicial trenching into clearly legislative and executive domains and in which areas; how neutral and coherent has been the explication of norms about the independence of the judiciary *vis-à-vis* claims for structural and operational independence of the other State instruments - the legislature and the executive; does the history of judicial review enable identification of the socio-cultural personality of the judicial branch; and like aspects. These are among issues that are central to any discourse about the development of Constitutionalism.

In adjudication, various groups interpret the Constitution in accordance with the conflicting interests and understanding of their membership. Constitutional interpretation and legal principles and sanctions emerge from this dynamic, combative and adversarial process. In this perspective, the process of

adjudication is itself a source of constitutional law. We must understand this reality as well. The constitutional framework must temper active judicial participation in the public sphere. According to this model, judiciary has three distinct functions: (a) courts are limited to settlement of specific disputes by applying the positive law; (b) courts operate as independent though not omnipotent actors in a continuous multi-participant process or network of decision making, contributing towards social change, operating within a social consensus, measured by the social and political background of particular decisions; and (c) perform a central role of protecting and promoting core societal values. The third role presents an empirical problematic, complex to define and difficult to practice.

Separation of Powers: Currently, there is a robust and on occasion strident discourse regarding the normative role of judicial review within our constitutional schemata; of the jurisdictional limits of legitimate curial concerns *vis-à-vis* the other institutions of governance; and a measure of critical appraisal and comment that the judicial branch oversteps the limits and trenches into fields and contexts exclusively chartered to co-ordinate branches under our constitutional scheme.

This is a serious debate and on a fundamental issue, too critical to be exclusively left for discourse among the community of judges, legislators and the professional bureaucracy. Distressingly the debate is too often uninformed, lacks coherence, never defines the terms activist or restraintivist and too often is generated by partisan and subjective rhetoric.

Citizens are the foundation of our representative democracy, its sentinels; and in a very substantive measure the preservation and nurture of our Constitutional democracy is ultimately their care and concern.

All institutional arrangements for governance, including the Constitution itself, draw legitimacy and sustenance from citizens' abiding faith and in a Constitutional way of life. All governance arrangements and the complementary instrumentalities, it must be clearly perceived, are artificial constructs by citizens and their longevity and vitality is proportional to the shared faith of society in their efficacy, symbiotic integrity and harmony.

In a representative democracy, unlike in a regime of absolute power, the vitality and nurture of the Republic is the care of every citizen. That is why we have fundamental duties enjoined on citizens by the Constitution.

Under a regime of absolute power, all authority goes unchallenged. The will of the despot is the supreme law, arbitrarily executed by inferiors who participate in organized repression as a consequence of the authority they wield. This is not the case of democratic regimes.

On that glorious midnight hour, we shook free the yoke of imperial rule and became a free people as a nation, now of a billion-plus people. The triple yoke of ignorance, tyranny and corruption yet haunts and blinds us. Multitudes of our people are unable to acquire learning, power or virtue. We continue to be schooled by evil tutors – alas now they are our own and poach and habitat our public offices too. The examples we receive and the lessons we learn from such are of a most ruinous nature.

We are given to be enthralled by deception even more than by force; corruption degrades our body politic more than superstition. *Slavery is the daughter of darkness; an ignorant people are the blind instrument of its own destruction,* observes Will Durant[2]. As Simon Bolivar perceptively observed (18th February 1819): ***Ambition and intrigue take advantage of the credulity and inexperience of men who have no political, economic or civil understanding: they take to be realities what are in fact only illusions; they confuse license with liberty, treason with patriotism, vengeance with justice. Such a people resemble an able bodied blind-man, who encouraged by his feeling of strength, strides forward with the assurance of the most clear-sighted and stumbling into every pitfall, is no longer able to find his way.***

The Constitution is more than a mere tool. It is the founding faith of our Republic and has several, interrelated and complex dimensions. We ought to be well informed about it, be concerned with and must participate in the discourse about our organic and constitutive Charter. The participation must be informed, mature, sober and continuous.

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2 The Story of Civilization.

SURVEILLANCE, TECHNOLOGY AND PRIVACY

Prof. Nishtha Jaswal *
Dr. Lakhwinder Singh **

1. Introduction

An individual's body, person and place have been made subject to rulers' power of search and arrest since ancient times. Past histories have shown us many incidences where authoritarian regimes were in the habit of using such surveillance powers to protect their own thrones and political will, and to settle their personal revenges. For satisfying their personal enmities, the authoritarians used to persecute and punish political opponents, political dissidents, or many other innocent individuals by naming them as enemies of the nation. In response, people have also fought and protested against these surveillors over the period of time, for the purpose of protecting their freedoms including the right to privacy. This struggle still continues in the contemporary technological world when the government using modern surveillance technologies, is doing the same kind of surveillance for the same purpose. However, the present struggle is more challenging than earlier since the capabilities of the surveillance technologies are extreme.

It is very important that there should be a balance between surveillance and privacy. Right to privacy is an indispensable part of every individual. It also protects fundamental institutions of the society. According to Alan F. Westin, the functions of privacy in democratic societies can be grouped under the following headings: (a) personal autonomy (b) Emotional release (c) Self-evaluation and (d) Limited and Protected communication.[1] Alan F. Westin defines Privacy as the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.[2] Priscilla Regan says, "I argue that privacy is not only of value to the individual, but also to society in general."[3] Philosopher John Dewey said that individual rights also contribute "to the

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1 Alan Westin, *Privacy and Freedom*, 32 (1967). Ig Publishing New York.

2 *Id.*, at 7.

3 Priscilla M. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy*, 213 (1995). University of North Carolina Press.

welfare of the community".[4] Similarly, Daniel J. Solove says, "privacy harms affect the nature of society and impede individual activities that contribute to the greater social good.[5] Furthermore, he says, "privacy enhances social interaction on a variety of levels." A society without privacy, according to Solove, is a 'suffocating society.'[6]

Furthermore, the expansion of the surveillance has also psychological implications. Alan Westin says, "if surveillance does not provide necessary space to a person for his actions and thoughts, he would face certain schizophrenic implications".[7] It does not stop here. Unreasonable surveillance violates individual's freedom of speech and expression, freedom of association, freedom to exercise his or her own personal autonomy, freedom of religion, freedom to marry, etc.

Increasingly, all these modern surveillance technologies are being used more by the private agencies or individuals than the government. People interact more with the private entities than the public entities. They provide personal information to private entities more than the government agencies. Thus, the private agencies exploit the information more than the government. But the government has easy access to their (private entities) databases. In that sense, private entities, storing individuals' personal information, are new spies of the government.

Following are some modes of surveillance, which are being shared by both public and private agencies:

2. Frisking

'Frisking' or pat down search is a common mode of search, surveillance, and seizure at shopping malls, cinemas, multiplexes, streets, Airports, etc. It has

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4 John Dewey, Liberalism and Civil Liberties, in 11 Later Works 372, 373 (Jo Ann Boydston ed., S. Ill. Univ. Press 1987) (1936). Cited in Daniel J. Solove, "A Taxonomy of Privacy," University of Pennsylvania Law Review, Vol. 154, No. 3 (Jan., 2006), pp. 477-564 at 488. Available at *http://www.jstor.org/stable/40041279* accessed on 28 August, 2012, at 7:16 p.m. IST.

5 Daniel J. Solove, "A Taxonomy of Privacy," University of Pennsylvania Law Review, Vol. 154, No. 3 (Jan., 2006), pp. 477-564 at 488. Available at *http://www.jstor.org/stable/40041279* accessed on August 28, 2012, at 7:16 p.m. IST.

6 Daniel J. Solove, Understanding Privacy, (2008). Quoted in DeCew, Judith, "Privacy", The Stanford Encyclopedia of Philosophy (Fall 2013 Edition), Edward N. Zalta (ed.), available at *http://plato.stanford.edu/archives/fall2013/entries/privacy/* accessed on 24 August, 2013, at 8:48 p.m. IST.

7 Alan Westin, *Privacy and Freedom*, 58 (1967). Ig Publishing New York.

been observed that frisking at private places is being done by the hired security persons who are not sensitized towards an individuals' privacy. The security agencies to which they belong do not fulfill the legal requirements of imparting orientation and educating them culturally, morally, legally and technically.

Frisking or pat down search by the law enforcement agencies has also got the court's approval in the name of national security and public law and order. On April 2, 2012, the U.S. Supreme Court decided *Florence v. Board of Chosen Freeholders of County of Burlington*, No. 10-945, holding that persons arrested and detained in a detention facility even for minor offenses may be subjected to invasive searches for weapons, drugs, and other contraband without violating the Fourth and Fourteenth Amendments. In this case, the person was arrested for some minor traffic violation. Before sending him into a prison, he was treated like a serious crime offender, and subjected to body cavity search.

However, such arbitrary body cavity searches are unconstitutional as violation of an individual's right to privacy. It also violates the basic principles of penology and reformative justice.

In 2012, two Texas women were stopped by police for speeding. The police officials suspected marijuana inside car. The women were subject to body-cavity search on the side of the road. The way the female police officer conducted the body cavity search was extremely humiliating. The female police officer got convicted for the alleged offences, and was fired thereafter.[8] Similarly, an Indian diplomat in the United States was strip-searched forcibly.

3. Deoxyribonucleic Acid (DNA) Surveillance

Familial Deoxyribonucleic Acid (DNA) testing is a new criminal investigative technique, in which police watch for a close but imperfect match between the Deoxyribonucleic Acid (DNA) left at a crime scene by an unknown offender, and the Deoxyribonucleic Acid (DNA) of a known convicted person in a forensic Deoxyribonucleic Acid (DNA) database. If police find such a match,

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[8] Snejana Farberov, "Female Texas trooper fired for illegal cavity search on shocking dashcam video pleads guilty to criminal charges - but DENIES touching anyone's privates," Mail Online 24 May, 2014, available at *http://www.dailymail.co.uk/news/article-2637974/Female-Texas-trooper-fired-illegal-cavity-search-shocking-dashcam-video-pleads-guilty-criminal-charges-DENIES-touching-anyones-privates.html* accessed on 15 June, 2015.

they may investigate the relatives of the convicted person.[9]

It has been observed that the law enforcement agencies retain such Deoxyribonucleic Acid (DNA) profiles for an infinite period of time. They carry this information even after the acquittals of the suspects and convicts. While considering this aspect, the European Court of Human Rights in *S. and Marper* v. *United Kingdom*[10], rejected the practice of retention of Deoxyribonucleic Acid (DNA) profiles, Deoxyribonucleic Acid (DNA) samples, and fingerprints of suspects for infinite time period in the United Kingdom.

Jeffrey Rosen said that familial searches are racially discriminatory. African-Americans represent about 13 percent of the United States population but 40 percent of the people convicted of felonies every year. But, Jeffrey Rosen pointed out, "Is it fair to subject African-American families to disproportionate genetic surveillance simply because one member of the family committed a crime in the past?"[11]

Despite the above said facts, the courts are in favour of legitimizing the warrantless DNA testing. In *Maryland* v. *King*,[12] the United States Supreme Court held that when officers make an arrest supported by probable cause to hold for a serious offence and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's Deoxyribonucleic acid (DNA) is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.[13]

David H. Kaye argued that the Supreme Court narrowly upheld the constitutionality of routine collection and storage of DNA samples and profiles from arrestees. He viewed that the court avoided the usual framework that treats warrantless searches as per se unconstitutional unless they fall

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9 Ofelia Casillas, "Familial DNA Testing Raises Privacy and Civil Rights Concerns", available at *http://www.aclu-il.org/familial-dna-testing-raises-serious-privacy-and-civil-rights-concerns/* accessed on 6 June, 2012.

10 (2009) 48 EHRR 50.

11 Jeffrey Rosen, "Privacy Risks and Racial Bias", available at *http://www.nytimes.com/roomfordebate/2010/7/14/how-far-should-the-dna-dragnet-go/discrimination-and-privacy-concerns-with-familial-dna-searches* accessed on 6 June, 2012.

12 Decided On June 3, 2013, 12-207 (2013). Available at *http://supreme.justia.com/cases/federal/us/569/12-207/opinion3.html* accessed on 12 July, 2013.

13 *Id.*, at 28.

within specified exceptions to the warrant and probable cause requirements.[14]

4. Closed Circuit Television (CCTV) Cameras

The advanced characteristics of Closed Circuit Television ("CCTV") cameras, i.e. recording or storing the images and videos, etc., have the ability to affect the individuals' privacy rights. Among numerous rights, the right to be different, the right to hope for tolerant forgiveness or overlooking of past foolishness, errors, humiliations, or minor sins (notion of the possibility of redemption), and right to make a fresh start will also be jeopardized.[15]

Beatrice von Silva-Tarouca Larsen argued that the CCTV surveillance is permissible only when there is a 'comprehensively documented and significant criminal threat' at a specific location. She said, "To protect anonymity against unwarranted intrusions, it is imperative to assess the risks. The mere possibility of crime occurring cannot provide sufficient grounds for public CCTV, or there would hardly ever not be a reason to install it."[16]

5. Mobile Phones' Surveillance

The modern mobile phone is a personal document of the user. He or she usually shares, receives and stores each and every personal detail with the mobile phone. The users do install various apps on their phones without even reading its terms and conditions. On their uninformed acceptance, the Application (apps) developers and their advertisers get the full access to the users' mobile phone. It has been reported recently that the apps of Facebook, twitter, or others are being downloaded to Google Android phones, Apple's iPhone, etc. and hence, accessing the private information of their users.[17] For mobile apps, the Wall Street Journal reported on a study of 100 apps for the iPhone and Android, finding that more than half of them sent phone identification (IMEI) without users' awareness or consent, while others sent age, gender and more.[18] In the global market, every personal detail of an individual has commercial value. The

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14 David H. Kaye, Why So Contrived? Fourth Amendment Balancing, Per Se Rules, and DNA Databases After Maryland v. King, 104 J. Crim. L. & Criminology 535 (), available at *http://scholarlycommons.law.northwestern.edu/jclc/vol104/iss3/2*.

15 Vance Packard, *The Naked Society*, 12 (1964). New York: David McKay Co.

16 Beatrice von Silva-Tarouca Larsen, *Setting the Watch: Privacy and the Ethics of CCTV Surveillance*, 122 (2011). Bloomsbury Publishing.

17 Robin Henry and Cal Flyn, "Tap, Tap, Tapping Us All Up- Mobile Apps Invade Privacy", *The Sunday Times*, 26 February, 2012.

18 D. Wetherall et. al., Privacy Revelations for Web and Mobile Apps, *In Proc. of Hot Topics in Operating Systems (HotOS)*, May 2011.

more intimate the information, the more valuable it is.[19] The developers of apps share the users' information with others including the government.

However, in 2014, the United States Supreme Court in *Riley v California*[20] ruled that a warrantless search of a cell phone violates the Fourth Amendment, even when it occurs during a lawful arrest. The court said that the mobile phone is a private document which possesses an individual's sensitive personal information.

It is apt to mention here about US District Judge's opinion on the process of meta-collection of individuals' personal data. Responding to the bulk collection of individuals' telephony records by National Security Agency (NSA), the U.S. District Judge Richard Leon on December 16, 2013, said:[21]

> The government does not cite a single case in which analysis of the NSA's bulk metadata collection actually stopped an imminent terrorist attack.

Judge Leon further expressed his views which are as follows:

> Given the limited record before me at this point in the litigation – most notably, the utter lack of evidence that a terrorist attack has ever been prevented because searching the NSA database was faster than other investigative tactics – I have serious doubts about the efficacy of the metadata collection program as a means of conducting time-sensitive investigations in cases involving imminent threats of terrorism.

On 7th May 2015, the United States court of appeals has ruled that the bulk collection of telephone metadata is unlawful. A panel of three federal judges for the second circuit acknowledged that the controversial surveillance practice revealed by NSA whistleblower Edward Snowden in 2013 is subject to judicial review.[22]

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19 Emily Steel, "Financial worth of data comes in at under a penny a piece," Financial Times 12 June, 2013 8:11 pm, available at *http://www.ft.com/intl/cms/s/0/3cb056c6-d343-11e2-b3ff-00144feab7de.html#axzz39EC8sAFb* accessed on 24 June, 2013.

20 573 U.S. 1 (2014).

21 Cited in "NSA phone surveillance program likely unconstitutional, federal judge rules," The Guardian Monday 16 December 2013 20.38 GMT, available at *http://www.theguardian.com/world/2013/dec/16/nsa-phone-surveillance-likely-unconstitutional-judge* accessed on January 19, 2014.

22 Dan Roberts and Spencer Ackerman, "NSA mass phone surveillance revealed by Edward Snowden ruled illegal," The Guardian, 7 May, 2015, available at *http://www.theguardian.com/us-news/2015/may/07/nsa-phone-records-program-illegal-court* accessed on 25 June, 2015.

6. Social Networking Sites

Anupam Chander draws out two competing versions of the Internet's role in authoritarian States. First view is optimistic, in which he considered Habermas's vision of people's participation in public discourse. It emphasizes on the fact that people's participation, in the making of public policies, is the basic edifice for every democratic set up. And because of the social networking sites, such public participation has been increased. Social networking sites enable individuals to speak directly to their compatriots and to the world.[23] It has been seen that the internet helped dissidents to circulate information in unfree societies. The tragic video of Neda Agha-Solten, who was murdered as she protested against Iranian repercussion, was smuggled out of the country and finally, uploaded at social networking sites like Facebook, YouTube, etc. The video really shocked the conscience of the world. Similarly, Burmese citizens used Google's Blogger and YouTube to reveal government's suppression in the year of 2007.[24]

However, repressive states are shutting down the internet and social networking sites to stop people's protest. Alternatively, the repressive states can make the social networking sites as their auxiliaries, and in return, the social networking sites may get the free access to the local market. To explain the situation, Anupam Chander applies Foucault theory, and sees internet as a facilitator of the surveillance state. In such scenario, the digital network itself could make political dissidents vulnerable, providing a veritable black book of names and addresses for the secret police to round up.[25]

In the latest Google Transparency Report of 2012, it was admitted that Google regularly receives requests from government agencies and courts around the world to remove content from its services. Governments ask companies including Google and other technology and communication companies, to remove content for different reasons like, allegations of defamation, the content violates local laws prohibiting hate speech or adult content, etc.[26]

The indicting statistics show the Indian government ranks third in requesting users' data since July 2009, when Google started indexing the requests. It

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23 Anupam Chander, "Googling Freedom," *California Law Review*, Vol. 99, No. 1: 1-46 at 11 February, 2011.

24 *Id.*, at 2.

25 *Id.*, at 5.

26 "Google Transparency Report," 2012, available at *http://www.google.com/transparencyreport/removals/government/* accessed on 9 April, 2013.

was also the second snoopiest government in the world in the first half of previous year i.e. in 2012. The report revealed that Google also received requests from unauthorized agencies for the removal of content. Such disclosure reflects surreptitious censorship on the part of executive authorities.[27]

Google does retain the users' personal and private information like location data, IP addresses, emails and contacts. From July 2009 to June 2012, Google received 10,455 requests to hand over data from 9,333 user accounts from various government agencies in India. Only the United States and Brazil made more requests in the same duration. The Indian government sent 2,319 applications to Google for obtaining information from 3,467 accounts for the latest reporting period (January to June 2012), making it second only to the United States in prying on user data. Considering that governments around the world run their own machinery to mine data transferred over the Internet, these statistics, however hazy, bespeak an Orwellian story.[28]

However, Google claims that it provides the users' personal information to the governments in very rare cases. Despite this fact, Google complied with enough surveillance requests from January to June 2012 to rank India tenth in terms of the percentage of compliance.[29]

In the recent past, everybody witnessed the conflict between BlackBerry and the Indian government. For some time, the government wanted the access to encrypted messages between BlackBerry devices. However, according to the Wall Street Journal, BlackBerry and the government have settled the dispute on some mutual benefits. Eventually, BlackBerry smartphone maker, research in motion (RIM) and the Indian government, have set up a facility in Mumbai to assist with the legal surveillance of encrypted BlackBerry communication.[30]

In order to get the access, Indian government threatened to cut off BlackBerry services in the country. Finally, research in motion (RIM)

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27 Rohini Lakshane, "A Google Transparency Report in India," *Intelligent Computing Chip*, Volume 10, Issue 2: 28-29 at 28, (January 2013).

28 *Ibid.*

29 *Ibid.*

30 Shayne Rana and Padmini Harchandrai, "RIM sets up surveillance facility in Mumbai," available at *http://tech2.in.com/news/smartphones/rim-sets-up-surveillance-facility-in-mumbai/252652* accessed on 10 April, 2013.

granted the government some access to their services where the government needs to send the name of the suspect they are investigating to research in motion (RIM) (through legal procedures of course) and research in motion (RIM) will provide them the un-encrypted communication for that specific suspect. Similarly, Indian government is also planning to tap communications on Skype, Facebook and Twitter.[31]

Increasingly, in 2013, an internal note of Telecom Ministry has recommended to take over the possession of BlackBerry infrastructure created at Mumbai. Obviously, it will require the mutual agreement between Department of Telecommunication and Canada-based BlackBerry, manufacturer of the smart phone. At present, BlackBerry has been complying the requirements of the government, and helping the security agencies to intercept its services. At the same time, the government is also trying to negotiate on the access to Personal Identification Number (PIN) and International Mobile Equipment Identification (IMEI) list of all the BlackBerry handsets.[32]

Another problem is of extra legal censorship on the part of the authorities. Google received requests for removal of 1,618 items from the Indian government from July 2009 to June 2012. Among these items, only few were ordered by the court. And most requests were made by unauthorized executive agencies and the police. From July 2010 to July 2012, out of 344 requests only 34 (10 percent) were ordered by the court. Requests citing impersonation (11 percent), national security (1 percent), and copyright violation (1 percent) were made solely by the executive or law enforcement agencies during this period. These requests together identified 1,493 items for removal, of which only 518 (34.7 percent) were ordered to be removed by the court. Of these, the court identified 24 percent for removal citing privacy and security, 5 percent for defamation, and 5 percent for religious offence.[33] Interestingly, the items categorized under 'privacy and security' translate to 360 search results that were removed between January and June 2012 in

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31 *Ibid.*

32 PTI, "Government plans to take over possession of BlackBerry infrastructure," available at *http://ibnlive.in.com/news/government-plans-to-take-over-possession-of-blackberry-infrastructure/376434-11.html* accessed on 10 April, 2013.

33 Rohini Lakshane, "A Google Transparency Report in India," *Intelligent Computing Chip*, Volume 10, Issue 2: 28-29 at 28, (January 2013).

response to a single court order. It was said that Google rely on courts to determine whether the statement is defamatory under local law or not.[34]

All requests from July 2010 to July 2012 to remove content criticizing the Indian government was made by the executive agencies. 18 percent of the 1,493 items were requested to be removed for 'criticism of the government'. However, Google said that it refused to remove the blog and You Tube videos which were critical of ministers and officials of different states. Undoubtedly, the government is authorized under section 69A of Information Technology Act to block the content online under certain conditions. But above mentioned requests for removal of contents are ambiguous in nature.[35] In the whole Google transparency report, the government's action is doubtful because it is using the communication companies as medium of surveillance and censorship.

Recently, the Hon'ble Supreme Court of India declared section 66A of the Information Technology Act, relating to the online offensive speech, unconstitutional since it gives unguided and uncontrolled powers to the law enforcement agencies in tackling offensive speeches online.[36]

7. Radio Frequency Identification Chips or VeriChip

The VeriChip is a miniaturized radio frequency identification device (RFID)-the size of a grain of rice-which stores a person's unique verification number, from which one can access his personal information, including medical information. VeriChip can be injected into a person's body. A special scanner, when passed over the VeriChip, can read the chip's information. Thus, a hospital equipped with a special scanner could obtain a patient's medical history by reading his VeriChip.[37] However, it has not remained confined to medical purposes.

The United States Supreme Court dealt with the matter of installation of Global Positioning System (GPS) devices by law enforcement agencies. In *United*

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34 *Id.*, at 29.

35 *Ibid.*

36 *Shreya Singhal* v. *Union of India*, Writ Petition (Criminal) No. 167 of 2012, decided on 24 March, 2015.

37 Waseem Karim, "The Privacy Implications of Personal Locators: Why You Should Think Twice before Voluntarily Availing Yourself to GPS Monitoring", 14 Wash. U.J.L. & Pol'y 485, 485-515 at 490, (2004). Available at *http://www.law.wustl.edu/Journal/14/p485 Karimbookpages.pdf* accessed on 18 June, 2012.

States v. *Jones*,[38] the United States Supreme Court held that the government's installation of a Global Positioning System (GPS) device on a vehicle, and its use of that device to monitor the vehicle's movements, constitutes a "search" within the meaning of Fourth Amendment of the United States Constitution.[39]

8. Biometric System

A Biometric system essentially is a pattern recognition system that makes a personal identification by determining the authenticity of a specific physiological or behavioral characteristic possessed by the user.[40] In actual, it is a kind of physical measurement. Biometric Technologies include facial recognition techniques, fingerprints, hand geometry, voice, iris, retina, vein patterns, palm print, Deoxyribonucleic Acid (DNA) samples, etc. However, there are many privacy issues which are inherently attached with the biometric technology. Since biometric data can never be revoked, there are concerns about the protection of biometric data in many areas. If biometric data gets compromised, an individual could face significant problems. If an individual's biometric data gets substituted by malicious data, then the innocent individual could be treated with suspicious eyes.[41] Biometric information is part of an individual's identity, and a loss of control over that information can threaten autonomy and liberty.[42] Human recognition systems are inherently probabilistic, and hence inherently fallible. The chance of error can be made small but not eliminated. System designers and operators should anticipate and plan for the occurrence of errors, even if errors are expected to be infrequent.[43] Biometric cryptography is a privacy enhancing technical solution that integrates an individual's biometric characteristics in a revocable or non-revocable cryptographic key.[44]

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38 565 US (2012), available at *http://www.supremecourt.gov/opinions/11pdf/10-1259.pdf* accessed on 15 April, 2013.

39 *Id.*, at 3.

40 Mayank Vatsa et. al., "Biometric Technologies," in Margherita Pagani (ed.), *Encyclopedia of Multimedia Technology and Networking*, 56-62 at 56, (2005).

41 Stewart T. Fleming, "Biometrics Security," in Margherita Pagani (ed.), *Encyclopedia of Multimedia Technology and Networking*, 63-68 at 68, (2005).

42 Joseph N. Pato and Lynette I. Millett (Eds.), *Biometric Recognition: Challenges and Opportunities*, 100 (2010).

43 *Id.*, at 1.

44 Paul de Hert, "The Use of Privacy Enhancing Aspects of Biometrics," TILT – Tilburg Institute for Law, Technology, and Society, 1-50 at 21 January, 2009, available at *http://arno.uvt.nl/show.cgi?fid=93109* accessed on 12 March, 2012.

places for security reasons, it does not mean the same technology should be made common among private individuals or private agencies. State should always keeps this thing into their mind that people still have trust in the public agencies than the private agencies.

EFFECTS OF VEHICULAR POLLUTION: A CASE STUDY OF LUDHIANA CITY

Dr. Shamsher Singh *

1. Introduction

Our nation is passing through an unsympathetic stage of severe environmental decline. With the rapid industrialization, the quality of air is being compromised in various cities. Numerous reasons are responsible for the depletion of environment particularly water pollution, air pollution, noise pollution, radio-active pollution, vehicular pollution, unplanned agricultural activities, bio-medical wastes, household activities and industrial pollution etc. In the present research, vehicular pollution in Ludhiana City- an industrial hub[1] of Northern India is a matter of concern. An important industrial city may be described as service centre of India. Ludhiana is well known for the production and exportation of the woolen garments, machine tools, cycle parts, mopeds, sewing machines, dyes and motor parts, all over the globe.

Undoubtedly, an effective transport system is a necessary part of modern life. Industry and commerce depend on it, and increasing use of the vehicles shaped today's lifestyle. But if we see the other side of the coin then picture is totally different. The rapid growth in motor vehicles has made human life more complicated. Transportation[2] system has become an important environmental issue, which has a strong impact on environment, health and welfare. At the present time, countries around the world are continuing to struggle with this motor vehicle pollution problems[3]. Motor vehicles are a major source of low level emissions. Emissions mainly consist of carbonaceous particles, lead compounds and odours. Apart from the effects of vehicles exhausts on health, it is responsible for photochemical smogs[4], a phenomenon which considerably

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1 Popularly known as Small Scale Industrial Capital of India.

2 Transportation, which includes road vehicles, railways, aircrafts, ships and other combustion engines, is the single largest contributor in the air pollution problem especially in the urban areas and accounts for 45% of world's air pollution load. (*See;* Kailash Thakur, *Environmental Protection Law and Policy in India,* Deep and Deep Publications, New Delhi, p. 47).

3 T. Pardeep, "Killer auto Pollution", *at Killer in the Air,* September, 2008, Puran Printing Press, Amritsar, p. 13.

4 Photochemical smog is the chemical reaction of sunlight, nitrogen oxides and volatile organic compounds in the atmosphere, which leaves airborne particles and ground level ozone. *See*; *en.m.wikipedia.org/wiki/Smog#Photchemical_smog*, accessed on 16 September, 2014.

reduces visibility. The pollution from exhausts comes from both petrol and diesel-driven vehicles and dust made airborne by the passage of vehicles[5].

2. Legislative Measures

2.1 Air (Prevention and Control of Pollution) Act, 1981

To maintain standards for emission of air pollutants from automobiles Section 20 of Air (Prevention and Control of Pollution) Act, 1981 confers powers to State Board[6]. State Government in consultation with State Board, give such instructions as may be deemed necessary to the concerned authority in charge of registration of motor vehicles under the Motor Vehicles Act, 1939 and such authority shall, notwithstanding anything contained in that Act or the rules made there under be bound to comply with the standards fixed by the State Pollution Control Board.

2.2 Environment (Protection) Act, 1986

For the preservation of society from environmental pollution, Central Government has been given powers to take all necessary such measures as its deem necessary for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution[7]. In particular, Central Government has been given powers to take various measures under Section 3 of the Environment (Protection) Act, 1986[8].

2.3 Motor Vehicle Act, 1988

Section 110 of the Act contains provisions for controlling pollution regarding the control of air pollution, arising from the vehicles, emission of the smoke, visible vapours, spark, ashes, grit or oil[9]. These provisions have direct link with environment preservation. This Act states that all hazardous waste is to be properly packed, labeled and transported. In the year of 2002[10], Apex Court discussed the status of the autos and taxis. The court decided that the taxis and autos were to convert to CNG or other cleaner fuels and this order could not be modified. However, the taxis and autos had an option to convert into CNG or

5 Sukumar Sah, "Growing Menance of Automotive Pollution i.e. Pollution caused by Automobiles", *Puran Printing Press, Amritsar,* p. 4.

6 Section 17 (1) (g) *Air (Prevention and Control of Pollution) Act*, 1981.

7 Section 3 (1) of *the Environment (Protection) Act*, 1986.

8 Section 3 (2) (i to xiv) of *the Environment (Protection) Act,* 1986.

9 *http://www.ecifm.rdg.ac.uk/inofsd.htm.* accessed on 29-01-2010.

10 *M. C. Mehta* v. *Union of India,* (2002) 10 SCC 191.

Euro II norms with clean fuel usage. Moreover, there was no compulsion to use a single mode system alone.

2.3.1 Drawbacks of Motor Vehicle Act, 1988

It appears to be that the provisions of the Motor Vehicles Act are concerned more with the issuing of permits, rather than with controlling of emissions. There are various drawbacks in the Act which are responsible for the non-implementation of the Act to control the vehicular pollution. Some of the weaknesses are as follows:

- The emission standards are only for carbon monoxide and hydrocarbons; the Act does not mention the oxides of nitrogen, which have been regulated in the US for instance since 1973.
- Petrol pumps are also a big source of pollution. But these are not covered under the Motor Vehicles Act. The process of unloading of tankers, the layout of petrol pumps and improper filling practices cause increased hydrocarbon emission.
- The penalty for violation of emission standards affects only the owner of vehicle, what of the manufacturers the law is silent.

2.4 Motor Vehicles Rules 1989 (Central Rules 1989)

For the preservation of environment from vehicular pollution, Motor Vehicles Rules 1989 has been framed by the Parliament of India. Rule 115[11] and 116[12] deals with the conformity of set regulations of air pollution from vehicles and to determine contaminants released by automobiles.

2.5 The Road Transport and Safety Bill, 2014

The proposed Bill is for scientifically planned and evolving framework for the safety of all road users in India, including vulnerable road users, and for enabling the seamless development of a secure, efficient, sustainable and inclusive transport system for the movement of passenger and freight in the country as well as matters connected therewith. The objective of the Bill is to orchestrate the integration of various components that must collaborate to deliver a sustainable self-generating socio-economic ecosystem, which facilitates innovation in mechanically propelled vehicles, infrastructure that enables and

[11] Emission of smoke, vapour, etc. from motor vehicles.
[12] Test for smoke emission level and carbon monoxide level for motor vehicles.

connects, information technology platforms that analyze and help in better planning and trained human capital that delivers, is the objective with which the Ministry of Road Transport and Highways formulated this Bill[13].

3. Judicial Approach

With the initiation of the human race, the problem of vehicular pollution steps together. For curbing the grave problem of vehicular pollution, Indian judiciary has playing a very important role.

In *Murali Purushotam v. Union of India*[14], keeping in view the problem of vehicular pollution, Court directed that the State Government of Kerala shall provide, at least, one smoke meter and gas analyzer (or any other approved instrument to measure carbon monoxide and other pollutants emitted by automobiles) each at all the major centres (Kozihikode, Palakkad, Thrissu, Ernakulam, Kottayam, Alapuzha, Kollam and Thiruvananthapuram) within three months. Court further directed that[15] the State Government shall issue such instrument as are necessary to all authorities in charge of registration of motor vehicles within three months in order to comply with the legislative mandate contained in Section 20 of the Air (Prevention and Control of Pollution) Act, 1981.

Further in *Ajay Singh Rawat v. Union of India*[16], Supreme Court of India held that increase of traffic and vacationers adversely effecting the environment of the city, particularly Nanital lake. Keeping in view this fact, Court directed that vehicular traffic on the Mall has to be condensed. Heavy vehicles may not be allowed to carry out on Mall.

In Suo Moto proceedings, *In Re Delhi Transport Department*[17] while dealing with serious problem of air pollution in Delhi the Supreme Court categorically stated that the 'Precautionary Principle' which is a part of concept of sustainable development has to be followed by State Government in controlling pollution. The State Government is under a constitutional obligation to control pollution and if necessary by anticipating the causes of pollution and curbing the same. The court held that in process of considering various measures to control the

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13 Draft of Road Transport and Safety Bill, 2014 (*for detail see; morth.nic.in/index2.asp?slid=1479&sublinkid=932&lang=1*, accessed on 14 December, 2014.

14 AIR 1993 Ker 297 para 11 (1).

15 AIR 1993 Ker 297 para 11 (3).

16 1995 SCC (3) 266.

17 (1998) 9 SCC 250.

pollution in the city of Delhi, there is likelihood of some restrictions being imposed on the plying on taxis, three-wheelers and other vehicles in the city of Delhi. The court, therefore direct the Commissioner-cum-Secretary (Transport) NCT, Delhi to issue notices to the various operators through their respective unions to be present in this Court, if they so wish to assist this court in the process of controlling the pollution in the city of Delhi.

Taking note of the adverse effect upon the environment and ecology of the State, the Supreme Court of India in *M.C. Mehta v. Union of India and Others*[18], Court fixed a deadline for city of Delhi regarding switching over of diesel vehicles to CNG vehicles within specified time limit. Court held that vehicular pollution creates smoke, noise etc. Court further observed that Articles 39(e), 47 and 48-A by themselves and collectively cast a duty on the State to secure the health of the people, improve public health and protect and improve the environment. It was by reason of the efforts on the part of the enforcement agencies, notwithstanding adequate laws being in place, that this court has been concerned with the state of air pollution in the capital of the country. Lack of concern or effort on the part of various governmental agencies had resulted in spiraling pollution levels. The quality of air was steadily decreasing and no effective steps were being taken by the administration in this behalf.

It was by reason of failure to discharge its constitutional obligations, and with a view to protect the health of the present and future generations, that this court, for the first time, on 23rd September, 1986, directed to the Delhi Administration to file an affidavit specifying steps taken by it for controlling pollution emission of smoke, noise, etc. from vehicles plying in Delhi[19]. For reducing the consumption of petrol and diesel in the city, court directed to owners of diesel buses which continuous to ply diesel buses beyond 31st January, 2002; otherwise they have to pay the fine of Rs. 500/- per bus per day increasing to Rs. 1,000/- per day after 30 days of the operations of the diesel buses. Same shall be deposited in court by the Director of Transport by the 10th day of every month. Court held that Union and all governmental authorities directed to prepare scheme containing time schedule for supply of CNG to other polluted cities and furnish same to court by 9-5-2002 for its consideration.

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18 AIR 2002 SC 1696.
19 AIR 2002 SC Para 2.

Vardhman Kaushik v. Union of India[20], Keeping in view the bitter reality of ambient air quality of Delhi NCR, National Green Tribunal ordered to prohibit the carrying out of diesel vehicles older than 10 years and petrol vehicles older than 15 years.

In 2010, Maharashtra Government also sanctioned that green taxes to be included in the Mumbai Motor Vehicle Tax Act, 1958. The Act is penalizing commercial vehicles over eight years old and private vehicles over 15 years old. Further, the Maharashtra Coastal Zone Management Authority (MCZMA) declared that industries that set up projects on the coast to subsidize to the 'Coast Conservation Fund. Recently, Uttar Pradesh government has initiated the process and imposed Green-taxes on 15 years old vehicles. In a cabinet meeting held on May 20, 2014, the Uttar Pradesh cabinet gave a go ahead to the amendment in the UP Motor Vehicle Act and decided that all the vehicles that have completed 15 years from the manufacturing date will be registered again and 'green tax' would be levied on them at that time[21].

4. Vehicular Pollution: A Case Study of Ludhiana City

Transportation is a key element for the overall growth of society, but if we see the other side of the coin, it is a major source of air and noise pollution. No doubt, various studies have been done on the vehicular pollution. The objective behind the present research is to understand and to highlight the present position of Ludhiana City regarding vehicular pollution.

4.1 Overview of Ludhiana

Ludhiana, popularly known as Manchester of India, is a famous city in Punjab, both in terms of region and population. The city is expensed over an area of 159.37 sq.km and accommodates approximately 34, 87,882 population (Census 2011). The city is placed in the district of Ludhiana, which is the most centrally located amongst the 19 districts of Punjab State. It falls within the Malwa region of the State of Punjab. Now, in Northern India, Ludhiana has emerged as one of the best industrial and academic destination for the whole of India. Moreover, the city is ordinarily known as

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20 National Green Tribunal Principal Bench, New Delhi- Original Application No. 21 of 2014 and 95 of 2014.

21 *http://www.downtoearth.org.in/content/green-tax-vehicles-made-mandatory*, accessed on 14 - 10-2014.

the Industrial Capital of small scale Industries in the country. The accountability of the general administration of the City is on the shoulders of the Deputy Commissioner. He is the executive head and performs three roles as:

- Deputy Commissioner
- District Collector and
- District Magistrate

The city is heart of Indian hosiery goods, woolen garments and leather items. Machine tools, dyes, cycle parts, mopeds, sewing machines and motor parts are also included in the list of the items exported from Ludhiana. Besides being a commercial hub, Ludhiana is also an important pilgrimage center with a number of Gurudwaras located within and around the place. An important historical monument is the Fort of Lodhi which is about 500 years old and was built by the Muslim ruler Sikander Lodhi along the banks of River Sutlej. On the academic front, Ludhiana has some of the most prestigious institutions. There are two Medical Colleges, an Engineering College and the famous Punjab Agricultural University modeled on the "Land Grant of America". The university has played a key role in ushering the 'Green revolution' in Punjab[22].

4.2 Empirical Data Collection

In the present study, universe of research topic is Ludhiana City. Out of the universe, simple random sampling method was adopted by which Administrative bodies (like Municipal Corporation, Ludhiana, Pollution Control Board, Zonal III Office, Ludhiana, Improvement Trust, Ludhiana, Industrial Department, Focal Point, Ludhiana), Affected Interests, Transporters, Representative Industrialists and Doctors were selected as samples for the collection of empirical data.

For the collection of ***primary data*** schedule technique, Interview technique and field observation have been adopted. Moreover, while dealing with officials, the researcher has adopted the structured and unstructured interview technique. Further, for the collection of empirical data, the researcher has dealt with the respondents from commercial and administrative fields like Railway Station, Dholewal Chowk, Focal Point, Jamalpur, Jodhewal Basti,

[22] Ludhiana City Development Plan- Initiative taken under Jawaharlal Nehru National Urban Renewal Mission. *See; jnnurm.nic.in/wp.../Ludhiama_CEPT.pdf*, accessed on 23-09-2014.

Cheema Chowk, Bharat Nagar Chowk, Surrounding area of Punjab Agricultural University and Samrala Chowk etc.

The residential areas around Vishkarma Chowk, Janta Nagar, Shimlapuri, New Janta Nagar, Shaheed Karnail Singh Nagar, Guru Nanak Colony etc., were covered by the researcher. The control of bureaucracy and politicians is also pointed out in this study.

The researcher has also consulted with Officers of Municipal Corporation, Ludhiana, Pollution Control Board- Zonal III Office Ludhiana, District Transporter Officer, Doctors of the City, Transporters, Architectures and Representative Industrialists etc.

Secondary data has been collected from published literature of Municipal Corporation, Ludhiana, Central Pollution Control Board, Delhi, Ministry of Environment and Forests, Government of India, New Delhi, Punjab Pollution Control Board, Patiala. Moreover, the data was also collected from the Environmental Statistics of Punjab, 2011, Statistical Abstract of Punjab, District Pollution Control Board, Ludhiana, Case Studies etc.

According to records, there is no city in India that does as bad as Ludhiana with 251 micrograms per cubic meter of particulate Matter (PM). Following Ludhiana with 209 micrograms per cubic meter is Kanpur and Lukhnow and Indore with 186 and 174 micrograms per cubic meter[23]. Keeping in view this bitter truth about ambient air quality status of the city, the researcher was anxious to know that even after legislative sanctions and administrative machineries for the protection of environment, why pollution especially air (vehicular) pollution is increasing day by day and India is lagging behind to fulfill the international commitments for achieving the concept of environment protection? Where are the loopholes? What are the deficiencies to achieve pollution free society? *By understanding this, it is expected to gain greater insight into understanding the mobility process of respondents*[24]. *Therefore, the researcher has tried to know from respondents whether mushrooming of vehicles is responsible for air pollution in the city.*

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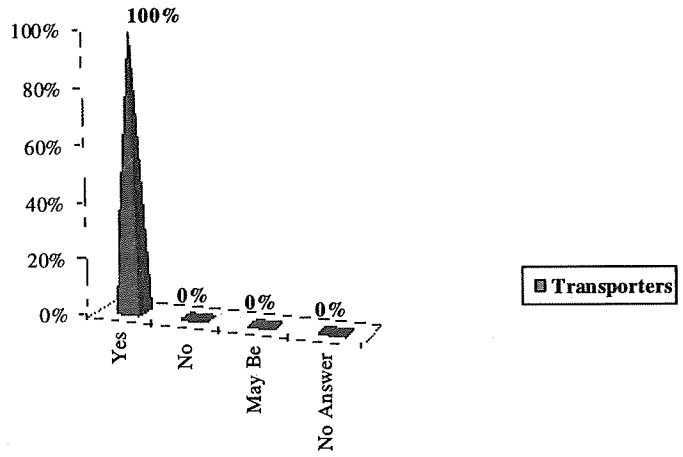
[23] *See;* Ludhiana a most polluted, Amritsar least in India *http://www.expressIndia.com/latest-news/ludhaina-most-polluted-amritsar-least-in-india/852177/*accessed on 23-11-12.

[24] Administrative bodies, Affected Interests, Transporters, Doctors and Representative Industrialists.

Fig. 1
Mushrooming of Vehicles and Air Pollution



	Yes	No	May Be	No Answer
Transporters	100%	0%	0%	0%

Source: ***Data is collected from the responses of Transporters.***

The above figure clearly shows that mushrooming of vehicles in the city is a major cause of air pollution. 100% respondents are aware of this fact. Pollutants released from vehicular pollution have adverse effects on flora, fauna, agricultural yield and human health. Moreover, with the growth of urbanization, industrial and commercial practices in the city, the requirement of transportation has been continuously increasing for the last many years. If one observes the district wise growth of vehicles, then it could be easily said that Ludhiana is fast turning out to be the vehicle capital of Punjab.

Table 1

District–wise number of Motor-Vehicles registered in Punjab

Sr. No.	District	2007-08	2008-09	2009-10	2010-11
1.	Amritsar	625253	658831	706563	755044
2	Barnala	5794	11364	18994	29299
3	Bathinda	206013	216517	229183	243051

4	Faridkot	177579	179545	187805	196516
5	Fatehgarh Sahib	66090	`73308	86918	100503
6	Ferozepur	206235	215640	228779	242829
7	Gurdaspur	220577	227263	249566	269785
8	Hoshiarpur	235009	249815	266069	284363
9	Jalandhar	703866	735352	793400	848273
10	Kapurthala	145202	155547	166081	176723
11	**Ludhiana**	**1006304**	**1055764**	**1137872**	**1222687**
12	Mansa	41718	44843	52935	61079
13	Moga	64405	72558	84348	93723
14	Shri Muktsar Sahib	31852	35516	45299	54577
15	Patiala	404015	425229	445311	470964
16	Roop Nagar	126417	134141	157613	178407
17	Sangrur	207425	217514	238534	255651
18	SAS Nagar	11658	21610	42862	67766
19	SBS Nagar	69987	76988	85838	95220
20	Tarntaran	12520	19253	45001	64255

Source: ***State Transport Commissioner Punjab/Statistical Abstract of Punjab/Environment Statistics of Punjab, 2011, (www.esopb.gov.in).***

The above data shows that undoubtedly, Ludhiana is a vehicular capital of Punjab with 1222687 vehicles running on its roads. *The Environment Statistics of Punjab, the latest version, compiled for the year 2011,* nearly one lakh vehicles has been registered in the district within a year 2011[25]. Apart from that, vehicular emissions create an adverse effect on respiratory and immune system of the human body. It also affects the health of traffic policemen also. The officials who are deputed at Samrala Chowk, Sherpur Chowk, outside area of railway station, Jagroan Bridge, Bharat Nagar Chowk and Jalandhar Bye-pass are inhaling harmful gases released by vehicles. It is learnt that a majority of the officials are suffering from respiratory diseases like bronchitis and asthma. Skin

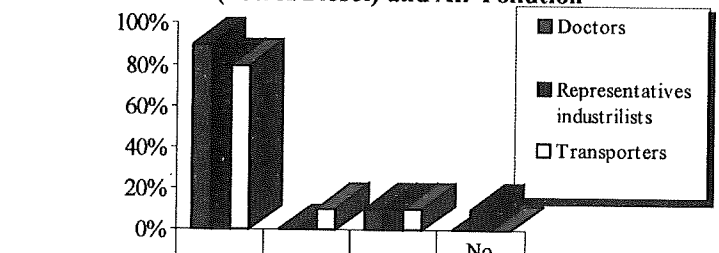
[25] *http://timesofindia.indiatimes.com/city/Ludhiana/City-is-vehicle-capital-of-Punjab/articleshow/18178951.cms*, accessed on 30-01-2013.

diseases have also become common among them. "Our responsibility is to stand eight hours daily under the burning sun to manage vehicular traffic. My traffic uniform turns black by evening due to dust and fumes. One can simply understand what would be occurring to my lungs," said a traffic policemen deputed at a Jagroan Bridge.

As a long-term measure, it is also necessary to consider alternative clean fuels, such as, alcohols (ethanol/methanol), compressed natural gas (CNG) and liquefied petroleum gas (LPG). Regarding, the alternative fuel, the researcher asked the respondents. The responses of *common masses* are: 60% of respondents agreed that petrol/diesel fuel must be replaced with the CNG. They also said that required CNG stations are not available in the City. On the contrary 30% of the respondents did not agree with the above view. 10% respondents did not give any answer. ***(Source: data is collected from Affected Interests)*** Further the same question was asked by the researcher to *transporters.* 50% of the transporters are of the view that petrol/diesel fuel should be replaced with CNG fuel. On the contrary 20% transporters have different view. According to them, it can be possible only if there is easy availability of CNG in Punjab. ***(Source: data is collected from Transporters)***. So far as the views of *representative industrialist* are concerned, 45% of respondents said that alternative fuel like CNG is the need of the hour. On the other hand 45% of respondents are of the view that it cannot be a success, until and unless the availability of CNG is possible as in Delhi. ***(Source: data is collected from Representative Industrialists)***. So far as the views of doctors regarding alternative fuel are concerned, 50% of doctors were found to be in favour of CNG fuel. They said that CNG is best alternative of petrol/diesel. On the other hand, 50% of respondents did not give any clear response to that question. They said May be. ***(Source: data is collected from Doctors)***

Mushrooming of three-wheelers in the City is another cause of air pollution. Diesel is used as fuel in these three wheelers. But, now three-wheeler owners are mixing kerosene oil with the real fuel i.e. diesel. Moreover, it is found that majority of three-wheelers, fitted with diesel engines, use diesel and kerosene as fuel, which comes a lots of pollution. *Therefore, it can be said that bad quality of petrol/diesel is also responsible for air pollution in the City. To confirm the above said fact, researcher asked the respondents and their responses are quoted in the following figure:*

Fig. 2
Adulterated Fuel (Petrol/Diesel) and Air Pollution



	Yes	No	May Be	No Answer
Doctors	90%	0%	10%	0%
Representatives industrilists	80%	0%	10%	10%
Transporters	80%	10%	10%	0%

Source: ***Data is collected from the responses of Transporters, Doctors and Representative Industrialists.***

The above figure show that 90% of *doctors* of the city agreed that bad quality of fuel is another major reason of air pollution. On the other hand 10% *doctors* said 'may be'.

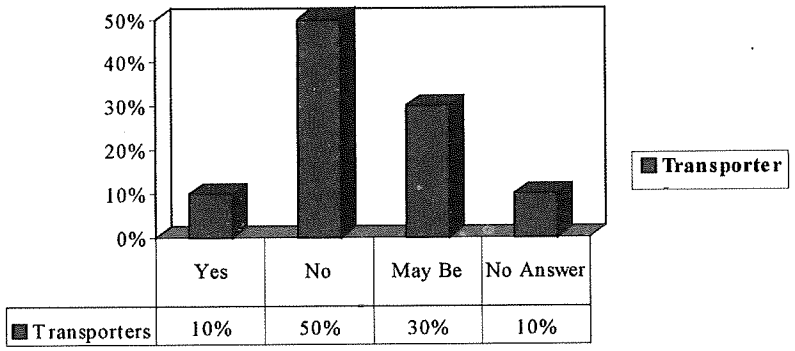
So far as *Representative Industrialists* are concerned, 80% are of the view that cheap quality of petrol and diesel is very easily available in the city. Therefore people used it especially for their three-wheelers. For that, people as well government both are responsible, because pollution checking centers in the city are just doing paper work. They are not checking the pollution from vehicles in a serious and accurate manner. On the other hand 10% said may be and no answer.

Apart from that 80% of the *transporters* were also agreed with the fact that bad quality of petrol and diesel is responsible for air pollution in the city. 10% respondents have contrary view. It was interesting to know from the respondents that apart from bad quality of petrol/diesel, transporters are equally responsible. They said that because of cheap rates more than 60% truck owners are using kerosene oil instead of petrol/diesel. Moreover, they use cheap quality of petrol/diesel instead of good quality. This fact shows that, transporters are also responsible for air pollution in the city. The responsibility is on the shoulders of

administration to check the bad quality of petrol/diesel used by people of the city particularly by the transporters. Therefore, administration has to check the activities of pollution checking centers. Now SPM, CO2 and NOx have exceeded the ambient levels. *Therefore, the researcher tried to get information from the* ***transporters,*** *regarding the performance of pollution checking centers.*

Fig. 3
Role of Pollution Checking Centers for the

Prevention of Air Pollutio



Source: ***Data is collected from Transporters***

Only 10% respondents said that pollution checking centers are playing satisfactory role for the prevention of air pollution. 50% respondents are of contrary view. *One of the transporters (Jagtar Singh) of Transport Nagar Ludhiana,* said that pollution checking centers are not performing well. Usually, without checking the pollution level of vehicles, they are issuing the pollution certificates. The above facts show that administration has failed to perform their duties for controlling the air pollution in the City.

From the above discussed facts, the researcher submits that mushrooming of vehicles in the city, is a major cause of air pollution. 100% respondents are aware of this fact. Vehicular emissions create adverse effects on respiratory and immune system of the human body.

4.3 Effects of Vehicular Pollution

It will not be wrong to say that vehicular pollution is one of the major sources of air pollution-a slow poison. The health impact from air pollution is felt

worldwide and is one of the greatest causes of major global diseases. Undoubtedly, increasing number of vehicles is a sign of development in the City. But, it is also true that it releases major pollutants in the air, which adversely affect the environment

Table 2
Environmental Affects of Air Pollutants

Pollutant	**Affect on Environment**
Carbon monoxide	Effects the cardiovascular system
Nitrogen Oxides	Ozone (smog) effects; precursor of acid rain which damages trees, lakes, and soil; aerosols can reduce visibility. Acid rain also causes building, statutes, and monuments to deteriorate.
Ozone	Damages crops, forests, and other vegetation; damages rubber, fabric, and other materials; smog reduces visibility.
Sulphur dioxide	Might effect the functions of the lungs
Solid Particulate Matter (SPM)	Small particles might be poisonous per se; they might also be carries of poisonous or carcinogenic tracer elements.
Volatile Organic Substance(VOC)	Ozone (smog) effects, vegetation damage.
Lead	Harm to wildlife and livestock

Source: ***Central Statistical Organization, Department of Statistics, Ministry of Planning and Programme Implementation, Government of India, New Delhi.***

Pollution releases from vehicles has also adverse impact on human health. The health effects of major pollutants are listed as under:

Table 3
Health Effects of Major Air Pollutants

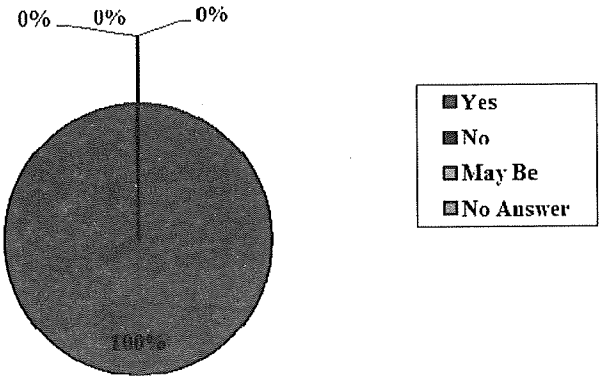
Pollutants	**Effect on Human Health**
Carbon monoxide	Effects the cardiovascular system
Nitrogen Oxides	Effects the respiratory system
Ozone	Causes increased sensitivity to infections, lungs diseases, impaired functions of the lungs, irritation in eyes, nose and throat.
Sulphur dioxide	Might effect the functions of the lungs
Solid Particulate	Small particles might be poisonous per se, they might also

Pollutants	Effect on Human Health
Matter (SPM)	be carries of poisonous or carcinogenic tracer elements.
Volatile Organic Substance (VOC)	Some of them eg. Benzene is carcinogenic.
Lead	Risk of nervous diseases, anemia, fetal damages and miscarriages.

Source: ***Central Statistical Organization, Department of Statistics, Ministry of Planning and Programme Implementation, Government of India, New Delhi.***

So far as the affect of air pollution (vehicular pollution) on the residents of Ludhiana City is concerned, the fact is that about 200 people die prematurely every year in the City- Punjab's financial capital[26]. Moreover, air pollution related problems include diseases like bronchitis, tightness in the chest and wheezing, lung cancer and heart ailments. Due to air pollution in Ludhiana, the number of asthma patients is on the rise. Children are particularly susceptible to illnesses precipitated by pollutants. To know whether vehicular pollution is responsible for respiratory diseases, researcher interviewed Doctors. The responses are given as below:

Fig. 4
Vehicular Pollution in the City and Respiratory Diseases



Source: ***Data is collected from the responses Doctors.***

[26] The Tribune-Online Edition, March 30, 2010.

Doctors are more concerned with the problem of respiratory diseases, because they usually deal with asthma patients. 100% respondents said that pollution from vehicles is a major cause of respiratory diseases in the city. Following are the responses of the doctors of the city regarding respiratory diseases in the City. *Dayanand Medical College and Hospital Vice- Principal Jagdeep Whing* said that, "Nearly 80 patients visit OPD with chest blockage and 30% of them are those suffering from asthma[27]. *Apollo Hospital Chest Specialist Akashdeep* told that "about 10 asthma patients visit him everyday and most of them were young men. The number of men is more because they are more exposed to pollution and consult doctors frequently as compared to women". According to *Shamsher Singh Harika, Chairman of Road Safety Minded Citizen's Council*, "pressure horns are very harmful, especially for pregnant women"[28].

The researcher has found that following are the effects of air pollution on the residents of Ludhiana City:

- *Respiratory diseases*: Due to vehicular pollution in the Ludhiana, asthma, nasal itching, choking of throat and breathlessness are very common diseases in the City. Children are particularly susceptible to illnesses precipitated by pollutants. Many of them are using inhalers. Exposure to dust and pollution is said to be its main cause of this kind of diseases.
- *Low visibility:* Air pollution is also responsible for low visibility, resulting in a number of accidents in the City. It is produced by the scattering of light from surface of air-borne particles.
- *Pre-mature deaths:* it is a fact that about 100 people die prematurely every year in the City. According to WHO report 2012, because of outdoor air pollution, it is estimated that in both urban and rural areas cause 3.7 million premature deaths worldwide in 2012. Some 88% of those premature deaths occurred in low-and middle-income countries, and the greatest number in the WHO Western Pacific and South-East Asia regions[29].
- *Noise Pollution:* it resulted in hearing impairment. It is fact that pressure horns are very harmful especially for pregnant women.

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27 *See*; *http://timesofIndia.Indiatimes.com/city/ludhiana/asthma-incidence-on therise/articleshow/ 7421271 cms.* retrieved on 23-11-2012.

28 Anupam Bhagria, "Respiratory tract diseases on the rise", The Tribune (Ludhiana Stories) ,4-10-2012.

29 *http://www.who.int/mediacentre/factsheets/fs313/en/*, accessed 2-08-2014.

4.4 Major Findings

After analyzing and interpreting all the collected data, some findings were arrived at. The researcher has observed that despite international conferences, conventions and commitments, constitutional mandate, legislative sanctions, administrative actions and judicial activism, the vehicular pollution in the city is still on increase. The following findings can be deduced from an analysis of the empirical data.

1. Majority of the three-wheelers and trucks are using kerosene oil or cheap oil instead of petrol/diesel. Researcher observed that the alternatives of petrol/diesel are easily available in the market at lower rates. Moreover, administration has no check on these anti-pollution activities of transporters and three-wheelers drivers. Inefficiency of pollution checking centers is a responsible cause for use of adulterated fuel. No doubt, administration emphasized that alternative fuel like CNG must be used in place of petrol/diesel. But it is found that sufficient numbers of CNG filing stations are not available in the City.
2. Increase in vehicular number is itself an indicator of increase in vehicular pollution over the years in the State. Besides increase in the numbers of vehicles the poor maintenance of vehicles is major reason for the high vehicular emission.
3. Majority of the three-wheelers are using kerosene oil as fuel, which causes a lot of pollution in the State.
4. The mélange of slow moving vehicles (three-wheelers, rickshaws, cycles and ladies scooters) with high-speed moving vehicles (Cars, trucks and Motor Bikes etc.) also create traffic obstructions. The fact could be seen at Ludhiana- Chandigarh road (National Highway no. 95). There are no separate lanes and foot-paths for slow moving traffic.
5. It is very frequent practice of the shopkeepers to occupy the public roads for presenting their items, and it diminishes the size of the roads, which in turn creates traffic jams in number of times.
6. Mushrooming of shopping malls, especially on Mall road (Capital Plaza, Red Cross Bhawan, Elite Tower etc.) without sufficient parking places has another reason for vehicular traffic in the city.
7. Further, most of esteemed higher educational institutions are situated in the fast-moving areas of the city, which are also responsible for vehicular traffic and environmental pollution. Khalsa College for Women,

Government College for Boys and Government College for Girls are the best example of the above said fact.

8. Improper traffic management is also responsible for vehicular pollution.
9. The average roads of the city are congested, resulted high traffic congestion and serious problem of air pollution.
10. Moreover, poor conditions of roads also creates traffic congestion, hence air pollution.

4.5 Suggestions for Improvement

- It is submitted that since Stockholm Declaration in 1972, the concept of environment preservation has been welcomed all over the world, but only in theory, not in practice. For the pollution free society, already prevalent efforts are not sufficient. In reality, more efforts are required to further diminish the range of air pollutants. Administration is needed to be more empowered and enhanced to a preponderant range.
- In order to control the menace of vehicular pollution efforts from both sides i.e. *government and community* are required.
- There is a need of strict enforcement of traffic regulations. There is also a need for efficient public transportation system in the city and heavy penalties should be imposed for the violation of traffic regulations. The introduction of Road Transport and Safety Bill 2014 will prove an effective step for traffic regulations and for the prevention of vehicular pollution.
- Pollution checking centers must be under the control of the civic authorities to ensure that vehicles are releasing emissions with in permissible limits.
- Most importantly, for the protection of environment, more emphasis must be given on public awareness about the need to save the environment.
- Another way to control the vehicular pollution is *'carbon taxes'*. The objective behind the 'carbon taxes' is to compensate the negative impacts of unsustainable development and non-green services. It is recommended that same approach must apply in the Ludhiana City (an industrial hub).

As it is already mentioned that vehicles are major source of air pollution. 100% of respondents, including administrative bodies and common people agreed to this fact. Therefore, it is submitted that *green transportation* is need of the hour. Green transport aims at making the transport system eco-friendly and counter pollution. Apart from that, use of eco-friendly fuel is demand of the time.

ENERGY LAW AND ENVIRONMENT LAW- NEED FOR SYNCHRONIZATION IN INDIA

Amita *

1. Introduction

The question motivating this conference is what the future of environmental law holds, keeping in mind the context of present developments. In present time, the Energy requirement is the sin qua non to the growth of India or any country in the world. Henceforth, It requires a unified and well defined and systematic approach to fulfill that need, but being below the laws of nature and natural environment. That approach must be laid down in form of norms to govern the conduct of people. Energy Law is a set of norms i.e. Laws and Policies, which governs to achieve the goal with the help of both defensive and offensive approach to protect Energy. The aspects of Energy Law Seems to be in contradiction in Environmental law sometimes or the other, wherein this needs to be in consonance keeping in mind the both approaches.

Present paper focuses on the energy need, its creation similar issues and analogous critical and pressing question of climate change, where energy law must become more Integrated with environmental law to overcome other issues of both fields altogether. Indeed, Paper argues that we need to reimagine energy policy in a way that draws on much of the best thinking in both energy law and environmental law circles, but that creates an integrated energy and environmental law. Such a law will streamline the requirements for energy producers and make clear to the public what our collective energy choices mean for nature.

This question needs to be looked with beginning of dealing with the most basic of issues: Energy Creation and Consumption and while creating and consuming energy; the factors affecting the ecological environment. Such factors can be dealt by both energy law and the environmental law by examining the environmental impacts of energy production and consumption. The need of such laws and their working need to be in hand in hand, collaborative and in a synchronized fashion. This synchronization will lead to

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two consequences: *one,* less friction of laws and *two,* better output result in term of better efficiency and safe future.

Renewable energy has become an important agenda of India's energy planning process especially since climate change has taken centre stage in the domestic and international policy arena. To demonstrate its commitment to renewable energy, the government has set aggressive targets for renewables, which have a shown progressively increasing share in the energy mix. This achievement has been possible because of the policy framework and guidelines put in place by the central and state governments. Despite provisions for several incentives, policy initiatives, and overall an enabling environment, there are certain bottlenecks that need to be addressed for renewable energy to play a significant role in India's energy future.[1]

2. Overview of the energy sector in India

The energy consumption in India is the fourth biggest after China, USA and Russia.[2] The total primary energy consumption from crude oil (29.45%), natural gas (7.7%), coal (54.5%), nuclear energy (1.26%), hydro-electricity (5.0%), wind power, biomass electricity and solar power is 595 Mtoe in the year 2013.[3] In the year 2013, India's net imports are nearly 144.3 million tons of crude oil, 16 Mtoe of LNG and 95 Mtoe coal totalling to 255.3 Mtoe of primary energy which is equal to 42.9% of total primary energy consumption. About 70% of India's electricity generation capacity is from fossil fuels. India is largely dependent on fossil fuel imports to meet its energy demands — by 2030, India's dependence on energy imports is expected to exceed 53% of the country's total energy consumption.[4] In 2009-10, the country imported 159.26 million tonnes of crude oil which amounts to 80% of its domestic crude oil consumption and 31% of the country's total imports are oil imports.[5] The growth of electricity generation in India has been hindered by domestic coal

1 PR Kritika and Mahajan, "Governance of Renewable Energy in India: Issues and Challanges" Working Paper no. 14 (TERI, New Delhi, 2014) *available at: http://www.teriin.org/projects/nfa/pdf/working-paper-14-Governance-of-renewable-energy-in-India-Issues-challenges.pdf*

2 "World Energy Consumption Clock" US debt clock org.

3 BP, "Statistical Review of World Energy, 2015" (64th Edition, 2015) available at: *http://www.bp.com/content/dam/bp/pdf/energy-economics/statistical-review-2015/bp-statistical-review-of-world-energy-2015-full-report.pdf.*

4 Eric Yep, "India's Widening Energy Deficit" Wall Street Journal (9 March, 2011) available at: *http://blogs.wsj.com/indiarealtime/2011/03/09/indias-widening-energy-deficit/*

5 India Energy Profile, available at: *http://www.eia.gov/cabs/india/Full.html*

shortages[6] and as a consequence, India's coal imports for electricity generation increased by 18% in 2010.[7]

Due to rapid economic expansion, India has one of the world's fastest growing energy markets and is expected to be the second-largest contributor to the increase in global energy demand by 2035, accounting for 18% of the rise in global energy consumption.[8] Given India's growing energy demands and limited domestic fossil fuel reserves, the country has ambitious plans to expand its renewable and most worked out nuclear power programme.[8] India has the world's fifth largest wind power market[9] and also plans to add about 100,000 MW of solar power capacity by 2020.[10] India also envisages to increase the contribution of nuclear power to overall electricity generation capacity from 4.2% to 9% within 25 years.[11] The country has five nuclear reactors under construction (third highest in the world) and plans to construct 18 additional nuclear reactors (second highest in the world) by 2025.[12]

2.1 Renewable Energy Sector

Renewables contribute about 12.3% of the total installed capacity in the country.[13] Around 97% of the installed capacity is grid-connected and off-grid power constitutes a small share.[14] Wind continues to be the mainstay of grid connected renewable power in India (Figure 1). Globally, India ranks sixth in terms of renewable electric power global capacity.[15] The historical growth of renewables has been tremendous with a compounded annual growth rate of

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6 Rakesh Sharma, "India Electricity Output Misses Target" Wall Street Journal (April 21, 2011) available at: *http://www.wsj.com/articles/SB10001424052748703983704576276253056119 700.*

7 Dinakar Sethuraman, "Indian Power Plants Boost Coal Imports 18%, Market Watch Says" Bloomberg News (21 April, 2011) available at: *http://www.bloomberg.com/news/articles/ 2011-04-21/indian-power-plants-boost-coal-imports-18-market-watch-says*

8 "India energy security scenarios up to 2047 (IESS 2047)". NITI Aayog, GoI. Retrieved 29 August, 2014 available at: *http://www.indiaenergy.gov.in/default.php*

9 See *http://www.evwind.es/noticias.php?id_not=11182*

10 "Will try to achieve pledged renewable energy targets in less than four and half years: Piyush Goyal" The Economic Times (6 November, 2015) available at: *http://articles.economictimes.indiatimes.com/2015-11-06/news/68071702_1_power-minister-piyush-goyal-team-india-indcs*

11 "Slowdown not to affect India's nuclear plans". Business-standard.com. (21 Jan. 2011) available at: *http://www.business-standard.com/article/economy-policy/slowdown-not-to-affect-india-s-nuclear-plans-109012100091_1.html* .

12 "Going Nuclear" The Economist (24 March, 2011) available at: http://www.economist.com/blogs/dailychart/2011/03/global_nuclear_power

13 (CEA, 2013).

14 (MNRE, 2013).

15 REN21, 2013.

22% over the last decade (2002–2012). The rate of growth has been particularly significant for solar over the last three years (2009–2012), which grew from less than 10 MW to more than 0.7 GW MW in 2005–2006 to about 30 GW in 2013.[16]

Further, the Government of India has projected capacity addition of 72,400 MW by end of the Thirteenth Plan (2022), of which solar is expected to contribute 28%.[17] The National Action Plan on Climate Change (NAPCC, 2008) envisages a dynamic RPO target of 10% at the national level for 2015 with an annual increase of 1% so as to reach around 15% by 2020.

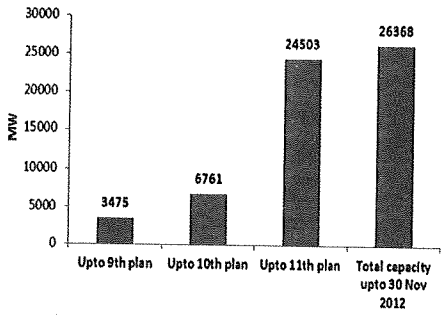

Figure 2 Plan-wise growth of the renewable energy capacity in India

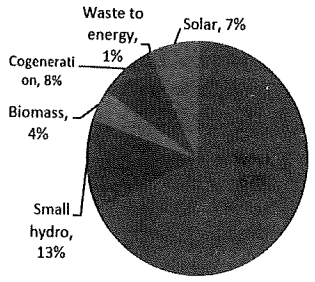

Figure 1 Break-up of grid interactive capacity (As on 30 October 2013)

Source: (MNRE, 2013)

2.2 *Regulatory and Policies Landscapes*

Regulations supporting the development of renewable energy in India are the Electricity Act of 2003 and the National Electricity Policy of 2005. The Electricity Act of 2003 stipulates purchase of a certain percentage of the power procurement by distribution utilities from renewable energy sources. Under this act, implementation of the renewable portfolio obligation (RPO) is to be guided by the regulatory provisions issued by the respective State Electricity Regulatory Commissions (SERCs). The National Electricity Policy of 2005 also mandates that the share of electricity from non-conventional sources has to be increased progressively. Several other incentives in the form

16 As on 31 October, 2013; *See Supra* note 4, MNRP, 2013.

17 *Supra* TERI Working Paper.

of generation based incentives (GBI), Feed-In-Tariffs (FIT), depreciation benefits and tax incentives have also been introduced.[18]

In March 2011, the Government of India launched the Renewable Energy Certificates (REC) – a market-based mechanism – to drive renewable energy development and spur further investments.[19]

3. Environmental Law and Policies

3.1 Constitution and National Policies

India took a bold step to include environmental protection rights and duties in its Constitution. The Constitution of India specifies that the State shall endeavor to protect and improve the environment and to safeguard the natural resources of the country. According to the Constitution, it is the fundamental duty of every citizen of India to protect and improve the natural environment and to have compassion for living creatures. By raising environmental concerns to the constitutional level, India has provided its citizens with a powerful policy tool to protect the environment.

3.2 National Policies

In addition to the Constitutional mandate, India has a number of national policies governing environmental management, including the National Policy on Pollution Abatement (NPPA, 1992) and the National Conservation Strategy and Policy Statement on Environment and Development (NCS/PSED, 1992). While these national policies are not judicially enforceable, they serve as guiding principles for the central and state governments to follow.

The NPPA encourages the use of economic instruments to complement traditional command-and control approaches to pollution abatement. To integrate environmental considerations into decision making at all levels, the policy adopts the following guiding principles:

- Prevention of pollution at source;
- Adoption of best available technology;
- The polluter pays principle; and

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18 Reegle Energy Database available at: http://www.reegle.info/policy-and-regulatory-overviews/IN

19 *Ibid.*

- Public participation in decision making.

The NCS/PSED provides an overarching policy framework on environmental management, including conservation of natural resources and economic development. Key instruments for promoting environmental change include conducting environmental impact assessments, developing educational campaigns, and ensuring public participation. As the nodal agency, the Ministry of Environment and Forests (MOEF) is responsible for implementing the NPPA and the NCS/PSED.

3.3 National Environment Policy of 2006

Building on earlier policies, the National Environment Policy (NEP) of 2006 is the most recent pronouncement of the government's commitment to improving environmental conditions while promoting economic prosperity nationwide. The NEP's key environmental objectives include conservation of critical environmental resources, intra-generational equity, livelihood security for poor, integration of environment in economic and social development and environmental governance etc.

With respect to regulatory reforms, the NEP recommends revisiting the policy and legislative framework to "develop synergies among relevant statutes and regulations, eliminate obsolescence, and amalgamate provisions with similar objectives." The NEP identifies a new framework for legal action that includes application of a mix of civil and criminal sanctions, adoption of innovative economic instruments, and public-private partnerships in strengthening environmental compliance and enforcement. The MOEF is responsible for implementing the NEP.

3.4 Legal Framework

India has an elaborate legal framework with over two hundred laws relating to environmental protection. Key national laws for the prevention and control of industrial and urban pollution include the following:

- Water (Prevention and Control of Pollution) Act of 1974, amended in 1988
- Water (Prevention and Control of Pollution) Cess Act of 1977, amended in 1991

- Air (Prevention and Control of Pollution) Act of 1981, amended in 1987
- Environment (Protection) Act of 1986 (EPA)
- Public Liability Insurance Act of 1991
- National Environmental Tribunal Act of 1995
- National Environmental Appellate Authority Act of 1997

4 Energy's Environmental Perspectives

India is presently the sixth largest and the second fastest contributor to global greenhouse gases.[20] This is largely because power generation in India is heavily dependent on thermal energy using coal and petroleum, both highly polluting sources of energy. Therefore, increasing consumption of energy and its power supply would require careful policy choices. In March 2007, India's installed capacity for electricity generation stood at 132,000 MW. The governments eleventh Five Year Plan set up an ambitious target to provide electricity to all by 2012. This would mean an increase of around a 100,000 MW in five years between 2007 and 2010, to an estimated 225,000 MW.[21] Scenarios also predict that based on India's performance, by 2030 India's electricity generation has to increase to 400,000 MW. Naturally, the government is way behind in realising this goal.[22]

The environmental concern of energy is often collides with the growing need of Energy as Energy need is analogous to growth rate. Some 'development experts point out that a binding emissions agreement would prove to be extremely detrimental not only to India's economic growth in the coming decades, but any progress made towards reducing energy poverty. This represents the conflict of interests.'[23]

For the developing countries like India, when they have to undertake any future responsibilities regarding climate change, the developed and industrial

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20 Amitav Mallik *et al., Renewable Energy Technologies:Special Focus on Distributed Power Generation: Potential for Applications to Rural Sector in India,,* (2008, 1st ed.).

21 Planning Commission, Government of India (2010).

22 Kumar Amitav Chaliha, *Indian Electricity: Miles to Go,* KWR Special Report, (August 20, 2007) available at http://www.kwrintl.com/library/2007/indianelectricity.html

23 *Suddha Chakravartti* "India's energy policy challenges: a development perspective" Environmental Law & Practice Review Vol.1 (2011) 115-128 at p. 126

countries should first address the responsibility towards the environment.[24] Only when these historical responsibilities towards the climate are met by developed countries, developing countries like India can be forced to adopt any future responsibility arising out of a binding climate agreement.[25] This argument is further manifested by the fact that India's per capita emissions are far below most developed countries, and any legitimate future climate agreement should address this notion of equity.[26]

On the other hand, Environmental Concerns regarding energy is a pressing issue which requires global cooperation, and hence we have seen a shift from the "polluter pays principle" to the adoption of "precautionary principle". If India aspires to have a platform in international leadership, then it must make certain commitments to these rules. Many analysts believe that instead of a binding climate agreement, a historical responsibility by developed nations as well as a technological commitment towards developing countries would be more valuable in addressing and mitigating climate change, by making a quicker transition towards cleaner fuel technologies. India would tremendously benefit from a binding technological commitment from the developed countries in pursuing its economic growth as well as taking a stand on climate change.

Recently, a Draft on "*National Renewable Energy Act 2015*" came into limelight. Its main purpose is to promote the production of energy through the use of renewable energy sources in accordance with climate, environment and macroeconomic considerations in order to reduce dependence on fossil fuels, ensure security of supply and reduce emissions of CO2 and other greenhouse gases. This Act shall in particular contribute to ensuring fulfillment of national and international objectives on increasing the proportion of energy produced through the use of renewable energy sources.[27]

The Indian government has released the draft National Renewable Energy Act 2015 (NREA).Right now, over 70% of the country's electricity is generated from fossil fuels, but the government has a target to generate 175 GW through

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24 Ligia Noronha, *Climate Change and India's Energy Policy: Challenges and Choices,* in India's Climate Policy: Choices and Challenges, (David Michel and Amit Pandya eds.,2009) at 7.

25 *Ibid.*

26 *Supra* note 23.

27 Available at *mnre.gov.in/file-manager/UserFiles/draft-rea-2015.pdf* (Last visited on 2nd June, 2016)

renewable sources by 2022.[28]The draft NREA puts out the strategic reason for pushing renewable energy – apart from being environment friendly, it is reliable energy, since it is independent of imports, as well as of domestic fossil fuel supplies.[29]

The draft on "*National Renewable Energy Act 2015*" has certain strengths and shortcomings.[30] The *strengths* are:

i) The proposed NREA takes into account the Electricity Act 2003, the Land Acquisition and Rehabilitation and Resettlement Act, 2013 and the Environment Protection Act, 1986 to address the issues of environment protection and displacement due to renewable energy (RE) installations. This is in view of the potential tensions on land acquisitions.

ii) All the existing missions on RE are brought under the proposed Act to ensure complementary of actions and avoid duplication.

iii) The main thrust of NREA 2015 is to establish an effective institutional mechanism and provide a direction to RE sector policies.

iv) The proposed advisory body will develop policies in the sector, and a National Renewable Energy Committee will oversee implementation by ensuring facilitative mechanisms and coordination between different line ministries of the centre and states.

v) Apart from the institutional mechanism, the thrust on creating separate funds has been recognised, and in an attempt to reduce burden on the cash strapped distribution companies (discoms), a separate fund for RE promotion has been proposed at the state level. The initial funding is to come from the *National Clean Energy Fund*.[31] There is also an attempt to provide space for private firms to be part of the programme through corporate social responsibility (CSR) initiatives.

vi) In the proposed Act, state governments are given enough flexibility to formulate their own RE policies and targets and also to raise their

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28 The target of renewable energy capacity is 175 GW till 2022 comprising of 100 GW of solar energy, 60 GW of wind energy, 10 GW of Biomass and 5 GW of hydro energy.

29 Government of India, Report of the Expert Group on 175 GW RE by 2022. (NITI Aayog, 2014).

30 *Supra* note, at 27.

31 National Clean Energy Fund (NCEF) was proposed in Union Budget 2010-11 for funding research and innovative projects in clean energy technology.

own money. The idea is to set up separate State Green Funds, which can have different options to raise and allocate money without the oversight of the central government. This will hopefully create a competitive atmosphere in which private investors can flourish.

But there are certain important issues which are still not addressed adequately in the draft. They are institutional, financial, operational and stakeholder related challenges. The *shortcomings* are:

i) Institutional shortcomings

The concept of two separate bodies for promotion of the sector is welcome since this will allow complementary actions. But bureaucrats are overrepresented in both the National Renewable Energy Committee and the National Advisory Body, leaving little space for experts. The omission of experts from decentralised RE sector is particularly glaring. The structure of the bodies does not allow even representations from them. On top of that, there is no space for state government officials. This weakness will affect coordination and make it more difficult to address state specific challenges. Another big omission – there is no regulator who can help develop tariff and distribution policies.

ii) Financial challenges

The National Clean Energy Fund (NCEF) now supports various projects based on proposals received. Funded by a cess of Rs 100 on every ton of coal that is mined, it has a capital base of a little over Rs 16,000 crore ($2.5 billion). The draft Act says a percentage of NCEF money will be directed to a RE fund. Since there is little difference between NCEF and the proposed RE fund, this may do no more than add a layer of red tape. More fundamentally, NCEF money is inadequate to meet the 175 GW target. So the government has to increase the coal cess again, or attract more private investment, or both. As for private investment, the draft talks of CSR and investments in specified RE zones. But there is no clear roadmap for what is globally the most successful way to raise money for RE – issuing green bonds. Instead, the draft talks mostly of cess, taxes and other fiscal incentives. There is need for further thinking on this aspect. Solar panel manufactures and wind component importers have been asking the government for tariff rationalisation. The draft should have addressed their concerns.

The new law should also create appropriate import and export mechanisms for the RE sector. In their absence from the current draft, there is a big question mark on how effective RE zones can be. The draft should have had a separate section on how to promote decentralised off grid RE systems. There is separate recognition of decentralised systems, but that is not enough to promote the sector – it needs dedicated financial mechanisms.[32]

iii) Operational challenges

The draft proposes bodies for execution of plans and also for developing midterm and long term RE policies. It also proposes separate state level bodies for independent policymaking. The missing link is proper representation of state governments at the national bodies. From the central government list too, the finance ministry is missing.[33] Considering that it hosts the NCEF, this is a surprise. So is the absence of the National Bank for Agricultural and Rural Development, which is actually implementing several RE programmes and is the national designated entity for the UN's *Adaptation Fund.*[34]

NREA 2015 is meant to create a conducive environment for the RE sector and its future growth. The current draft fulfils only a part of these objectives. In conceptual terms, the draft should put energy access as its highest priority and reorient some of its objectives and provisions to reflect this priority. The current draft is a good beginning, but it has substantial shortcomings, and these may actually end up working against the growth of the RE sector. The government needs to carry out more extensive consultation with external stakeholders and take their comments on board to achieve a milestone achievement in the field of RE sector.

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32 Tirthankar Mandal, "Renewable Energy Act has Miles to Go" Available at *http://indiaclimatedialogue.net/2015/08/04/renewableenergyacthasmilestogo/* (Last Visited on 23rd April, 2017).

33 *Ibid.*

34 The Adaptation Fund is a financial instrument under the UNFCCC and its Kyoto Protocol (KP) and has been established to finance concrete adaptation projects and programmes in developing country Parties to the KP, in an effort to reduce the adverse effects of climate change facing communities, countries and sectors. The Fund is financed with a share of proceeds from Clean Development Mechanism (CDM) project activities as well as through voluntary pledges of donor governments. The share of proceeds from the CDM amounts to 2% of Certified Emission Reductions (CERs) issued for a CDM project activity.

5. Energy and Environment: Need of Regulatory Synchronization

The stand on the protection of Climate change[35] may be seen as the linking point between the two settled laws, having different subject matter; i.e. Energy Law and Environmental Law.[36] Climate change extends to all such activities affecting the climate perse such as energy. However, whether most people want a climate change law also remains to be a question.[37]

The synchronization of Energy and Environment Law, particularly those for climate change, into energy realities will require an understanding of the many possible strategies for meeting the desired emission reductions.[38] Professors Driesen and Sinden argue that dirty limits would lead to fewer dirty outputs throughout the energy production, generation, and consumption process.[39] It would be easier to administer and monitor and it would encourage conservation as well as innovation, including greater efficiency.[40] Ultimately, they contend, it would inspire the kind of change that should come of the integration of energy law and environmental law because this approach "helps us to reframe the question so that we ask not just about air pollution or

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35 The international protectionist approach and effort seems to be adding glow to it. Some scholars are of the view that Environmental would be enough to protect climate change with its regulatory extension; while some others think it to be quite different in nature and believe that the "Law of Climate Change" shall have a varied and expanded scope, including the regulatory aspects of other fields having impact on Climate Change, whether or not included into environmental law. E.g. Energy Laws, etc.

See, Schipper, Lisa, and Mark Pelling. "Disaster Risk, Climate Change and International Development: Scope for, and Challenges to, Integration". *Disasters* 30, no. 1 (2006): 19-38. And Craig, Robin Kundis. "Stationarity is dead' - Long Live Transformation: Five Principles for Climate Change Adaptation Law." *Harvard Environmental Law Review* 34.1 (2010): 9-75.; Bodansky, Daniel. "The legitimacy of international governance: a coming challenge for international environmental law?." *American Journal of International Law* (1999): 596-624.

36 *See,* Amy J. Wildermuth, "The next step: the integration of energy law and environmental law" *Utah Environmental Law Review* V. 31 No. 2 (2011) 369-388 *See* Part IV. Recognizing the Divide Between Energy Law and Environmental Law at 380.

37 Ryan Lizza, *As the World Burns: How the Senate and the White House Missed Their Best Chance to Deal with Climate Change*, The New Yorker (Oct. 11, 2011), available at: *http://www.newyorker.com/reporting/2010/10/11/101011fa_fact_lizza* (describing the failure of the bipartisan climate change legislation).

38 Robert Socolow et al., *Solving the Climate Problem: Technologies Available to Curb CO2 Emissions*, 46 ENVIRONMENT 8 (2004), *available at http://www.princeton.edu/mae/people/faculty/socolow/ENVIRONMENTDec2004issue.pdf.*

39 David M. Driesen & Amy Sinden, *The Missing Instrument: Dirty Input Limits*, 33 HARV. ENVTL. L. REV. 65, 69 (2009)., at 71-73.

40 *Id* at 88-96.

water pollution, but about whether we should consider fossil fuel use itself as the problem to solve."[41]

As Prof. Wildermuth suggests, to fully integrating energy law and environmental law, the statutory provisions and regulatory approaches would need the experts on creation and consumption energy markets who knows the limits of environment.[42] "In particular, there would need to be four basic considerations:

(1) how to translate environmental goals into input limits;
(2) knowledge of the current and future mix of available energy sources, including conservation and efficiency measures;
(3) a method for ensuring reliable energy, which by definition encompasses energy transport, distribution, and delivery; and
(4) cost structures for energy that maintain reasonable prices but also encourage behaviors that are consistent with the goals of the new statute."[43]

6. Conclusion

India faces an enormous challenge if it is to meet its energy needs as well as match energy growth with its desired economic growth rate of 8%. This challenge can be met through careful and coherent planning. Reforms must be actively implemented to ensure a shift to clean energy sources.[44] The challenge remains in matching these "green" reforms with the ambitious new industrial model and the need for a sustainable and energy efficient future. The policy and regulations' synchronization with the environmental law would lead the way.

The integration of energy law and environmental law faces many barriers. In the current political context, few observers have any illusion that outcome of the Paris Conference will be implemented soon, by enacting comprehensive statute that reimagines the entire energy landscape. It is clear that energy has great impacts on the environment and thus should be more closely intertwined

41 *Id* at 115.

42 *See* Amy J. Wildermuth, "The Next Step: The Integration of Energy Law and Environmental Law" *Utah Environmental Law Review*, V. 31 No. 2 (2011) 369-388 at: 386.

43 *Ibid.*

44 Armin Rosencranze, "Modi Government's Energy and Environment Policies: More Harm than Meets the Eye" *Law & Policy Brief*, Vol. I (5) May 2015 at p. 4.

with environmental law. However, Energy law, because of its economic viability, leaves the environmental regulations at bay in practice. "Until we move toward a more integrated legal approach, one that is able to combine and harmonize the goals of each area of the law, both our energy landscape and our natural landscape will continue to suffer".[45]

[45] *Supra* note 34 at 387.

BIOLOGICAL DIVERSITY ACT - A TOOL FOR PROTECTION OF TRADITIONAL KNOWLEDGE IN INDIA

Dr. Manisha Narula *

1. Introduction

The knowledge is considered as source of power. But, knowledge, now, is not only the source of power, but also primary source of property. Knowledge available through centuries to communities regarding all aspects of life is termed as traditional knowledge. The traditional knowledge is also called the indigenous knowledge.[1] There is no concise definition of traditional knowledge. It has been defined in so many ways depending upon the particular context in which it occurs. In simple words, traditional knowledge means the knowledge developed and possessed by the traditional people, who are living in the forest, relating to all the fields. Article 8 (j) of The Convention on Biological Diversity (CBD), 1992[2] defines traditional knowledge as knowledge, innovation and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity. The World Intellectual Property Organisation (WIPO) defines traditional knowledge as traditional based literary, artistic or scientific works, performances, inventions, scientific discoveries, designs, marks, names and symbols, undisclosed information and all other tradition based innovation and creations resulting from intellectual activity in the industrial, scientific and artistic fields.[3]

The model law for the protection of traditional knowledge and expressions of culture defines the traditional knowledge as the knowledge that has been developed or acquired or inspired for traditional economic, spiritual, ritual,

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1 Ravi Krishna Srinivas, "Traditional Knowledge and Intellectual Property Rights: A note on issues, some solutions and some suggestions", *Asian Journal of World Trade Organisation & International Health Law*, Vol. 3, No. 1, March 2008, p. 85

2 The Convention was opened for signature at the Earth Summit in Rio—de—Janerio on June, 1993 and entered into force on 29 December, 1993. This agreement intends to sustainable use and conservation of biodiversity.

3 J.K. Das, *Human Rights and Indigenous People*, APH Publishing Corporation, New Delhi, 2001, p. 21.

narrative, decorative and recreational purpose.[4] So, traditional knowledge reflects the aesthetics, beliefs, history, ethics and traditions of a particular group of people.[5]

The basic feature of the traditional knowledge is that, it is not created or produced systematically. But it is created or produced collectively or individually in relation to one's cultural and traditional environment. Besides, traditional knowledge represents cultural values of a particular group. In other words, traditional knowledge evolves over a period of time by contributions of members of a particular society. It is, generally, an attribute of a community intimately linked to a particular socio-ecological context through various economic, cultural and spiritual activities.[6]

Traditional knowledge is not static, but inherently dynamic, as it evolves in response to challenges posed by the environment. The changing social environment alters its form and content, thus, it is subject to a continuous process of verification, adaptation and creation.[7] This kind of knowledge refers to the long-standing practices and locally developed innovations preserved and utilized over centuries by communities. It is generally passed down by word of mouth from generation to generation and most of the part is undocumented. Traditional knowledge also reflects a community's interests. Some communities depend on their traditional knowledge for survival.[8]

Traditional knowledge is not necessarily indigenous. Term traditional knowledge should not be understood as denoting or even connoting notions of antiquity, stagnation and immutability. As the Four Directions Council of the First Nations of Canada has pointed out what is traditional about traditional

4 Section 4 of the *Modal Law For The Protection of Traditional Knowledge* provides Traditional Knowledge include any knowledge that generally 1) is or has been acquired or inspired for traditional economic, spiritual, ritual, narrative, decorative or recreational purposes and 2) is or has been transmitted from generation to generation and 3) is collectively originated and held

5 V.K. Gupta, "Intellectual Property Rights in Agriculture", S. Satarkar (ed.) *Intellectual Property Rights and Copyrights*, 2003, p. 166.

6 Shahid Ali Khan, "Protection of Cultural Heritage, Biodiversity, Traditional Knowledge and Practices, Folkfore and Sustainable Socio- Economic Development" Shahid Ali Khan and R.A. Mashelkar (eds.) *Intellectual Property and Competitive Strategies in the 21st Century*, Aditya Books Pvt. Ltd., New Delhi, 2006, p. 77.

7 N.S. Sreenivasulu, K.S. Kariyanna, H.S. Murthy Narsimha, "Protection of Traditional Knowledge under the Human Rights Framework", *Indian Bar Review*, Vol. XXXIX, 2012, pp. 59-81.

8 Kamal Puri, "Indigenous Knowledge and Intellectual Property Rights - The Interface" P. Thomas and J. Serveas (eds.) *Intellectual Property Rights and Communications in India: Conflicting Traditions*, Sage Publications, New Delhi, 2006, pp. 116-117.

knowledge is not its antiquity but the way it is acquired and said. In other words, the social process of learning and acquiring which is unique to each indigenous group lies at the heart of its traditionality.[9] The knowledge is traditional because it is created in a manner that reflects the traditions of the communities, therefore, not relating to the nature of the knowledge itself, but to the way in which that knowledge is created, preserved, and disseminated.

2. Traditional Knowledge of India

In India, there are fifty three million tribal people and they belong to five hundred and fifty tribal communities and each tribal community possesses one or other sort of traditional knowledge.[10] India is having eight percent of bio diversifiable and traditional knowledge resources of the world. In international market, share of the medicinal plants related trade is at United States dollars sixty billion per year and which is rapidly growing at the rate of seven percent annually.[11]

Biodiversity of India amounts to approximately 12.53% of the global biodiversity. India covers about 2.5% of the world's land area and accounts for 7.8% of the recorded species of the world including 5,500 plants and 91,200 animals. India is one of the seventeen megadivers countries and houses world's two diversity hotspots, namely eastern Himalayas and the Western ghats because of the presence of tropical rain forests that are typically the richest habitats for the species. India is also acknowledged centre for rich crop diversity and is considered to be place for 167 important cultivated plant species and 320 wild species.[12] India has rich biodiversity over 6,500 species of the medicinal plants. Forests cover 23.68 per cent of India's total geographical area and provide optimum conditions for survival and conservation of the genetic and species diversity.[13]

The immense biotic wealth of India has approximately seven thousand species reportedly used for the medicinal purposes mostly for the extraction of rare

9 Sachin Malhan, "Protecting Traditional Knowledge Systems", *Indian Journal of Environmental Law*, Vol. 2, No. 1, 2001, p. 90.

10 Jetling Yellosa, "Traditional Knowledge –An Overview", *Andhra Law Times*, Vol. 2, 2002, pp. 14-17.

11 N. Gopalakrishnan, "Traditional Knowledge, Information and Technology and Development-The Challenges", *Cochin University Law Review*, Vol XXIX, No. 2, 2005, pp. 135-145

12 National Biodiversity Authority, Annual Report (2007-2008).

13 State of Forests Report, India, (2003).

drugs. Utilization extent shows that there are about over 0.36 million Ayurveda practitioners, 29.7 thousand Unani and 11.6 thousand Siddha specialists in India.[14] Village based health traditions are, still, carried on by housewives, birth attendants and vaid-hakeems (herbal healers), making it seventy percent of the health care needs of India which is dependent on the medicinal plants. Such biodiversity rich regions or hotspots are found in various continents across the globe and harbour flora of immense medicinal importance.[15]

3. Importance of Traditional Knowledge

The role of traditional knowledge with its spiritual, cultural and economic value is being increasingly recognized today. The products based on traditional knowledge are important sources of income, food, and health care for large parts of the population in developing countries in particular, and, in turn, for their sustainable socio economic development. The diverse and rich body of knowledge held and practiced by local and traditional farmers, concerning the users of plants for food, medicinal and other purposes is of immense global value and significance.[16] Traditional knowledge is sometimes used to develop commercial products, such as, new pharmaceuticals, herbal medicines, seeds, cosmetics, personal care and crop protection products, For example, traditional medicine may be used to guide the screening of plants for medically active compounds or traditional crop varieties may be used to develop new commercial crops. The companies involved in Research & Development do use this knowledge for commercial exploitation and extracting their property.[17]

According to World Intellectual Property Office, up to eighty percent of the world's population depends on traditional medicine for its primary health needs. It has been estimated that the present world market of sixty billion dollars on herbal products is expected to grow to over five trillion dollars by

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14 *http://www.tkdl.res.in/tkdl/langdefault/common/Biopiracy.asp* last accessed on 10 October 2012.

15 National Biodiversity Authority, Annual report (2007-2008).

16 Ikech Mgbeoji, *Global Biopiracy- Patents, Indigenous and Traditional Knowledge and Biopiracy*, Cornell University Press, New York, 2006, p. 141.

17 Nirmal Sen Gupta (ed.), *Economic Studies of Indigenous and Traditional Knowledge*, Academic Foundation, New Delhi, 2007, p. 203.

the year 2020.[18] The biological diversity comprising the plants and animals for tropical countries is worth more than twenty billion pounds a year to major pharmaceutical companies and unfortunately, very little money has gone back to the developing world. The interest of multinational corporations in exploiting the treasure of traditional knowledge has been stimulated by the importance of traditional knowledge as a lead in new products development.

Indigenous people have discovered a vast array of medicinal plants and are still using many of these from generations. World Bank Report (1998) has shown that 25% of medicines come as contribution from indigenous knowledge world. Of the 119 drugs developed from higher plants, in the world market today, an estimated 74% were discovered from a pool of traditional knowledge derived from medicinal plants.[19]

4. Mis-Appropriation of Traditional Knowledge

Since the adoption of the Universal Declaration of Human Rights, 1948, intellectual property has been considered a fundamental human right of all people. Only recently, however, has the need to protect, preserve and provide for the fair use of indigenous intellectual property, traditional knowledge entered the domestic and international debate on intellectual property rights.[20] Indigenous people have been concerned about the unlicensed use of their knowledge by non-indigenous groups and the exploitation by corporate entities of their knowledge that has been developed over centuries. Because of rapid advancement and growth of science and technology, the very survival of traditional knowledge is at stake. The localized knowledge, which communities have possessed since time immemorial, has been facing tremendous strain in hands of multinational companies. The cultural survival of communities is under threat as the local languages and cultures have been greatly affected. There is lack of respect and appreciation for such knowledge.[21]

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18 Aparna Bhagirathy, "Intellectual Property Rights: Options Assessment", Nirmal Sen Gupta(ed.) *Economic Studies of Indigenous and Traditional Knowledge*, Academic Foundation, New Delhi, 2007, p. 178.

19 N. Sreenivasulu(ed.), *Intellectual Property Rights*,Regal Publications, New Delhi, 2007, pp. 266-273.

20 Topi Basar, "Legal Protection of Traditional Knowledge in India: An Appraisal", *Delhi Law Review*, Vol. XXX, 2011, p. 75.

21 Jetling Yellosa, "Traditional knowledge An Overview", *Andhra Law Times*, Vol. 2, 2002, pp. 14-17.

Traditional knowledge has always been an easily accessible treasure and thus, has been susceptible to misappropriation as it is conveniently assumed that it is in public domain. The problem with indigenous intellectual property rights is that they are informal and unwritten, which makes it easy for outsiders to violate them. But indigenous intellectual property rights deserve respect. Simple respect for human rights imposes on civilized societies a moral obligation to treat indigenous intellectual property rights as though they were formally registered. Indigenous intellectual property rights should be thought of as comparable to aboriginal land title, not written down or formally registered, but deserving of moral respect and entitled to legal protection.[22] Most, if not all, indigenous knowledge is considered to be already in public domain and hence, commercially, heritage of mankind. The world is increasingly being made aware that this free rider or public domain syndrome is causing untold financial and cultural harm to indigenous owners of traditional knowledge. Existing intellectual property laws are strongly tilted towards the unambiguous identification of owners; indigenous knowledge holders are conveniently ignored and therefore, left out in the cold.

The protection of traditional knowledge has become a mainstream issue in recent times partly because of concerted efforts by indigenous people all over the world and partly because of the great economic potential as evidenced by the massive research and development investment by multinational companies to commercialize traditional knowledge, especially medicinal knowledge.[23] The number of businesses that derive large profits from the production and sale of goods obtained from traditional knowledge is increasing. As demand for commercialization of biodiversity and traditional knowledge increases at a rapid pace and as the world globalizes, develops and modernizes, indigenous societies are being encroached upon faster than traditional knowledge can be protected. Their cultures and knowledge are being lost.[24] The claims on their knowledge without their consent amounts to misappropriation of their identity

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22 Jayanta Perera, *International Law and Indigenous People' Rights , Land and Cultural Survival: the communal land rights of indigenous people in Asia* available on *http://www.ccc-cambodia.org/downloads/adi/adireport/ADB_ADI_land-cultural-survival.pdf* (Last accessed 12 February, 2012).

23 Kamal Puri, "Indigenous Knowledge and Intellectual Property Rights - The Interface" P. Thomas and J. Serveas (eds.) *Intellectual Property Rights and Communications in India: Conflicting Traditions*, Sage Publications, New Delhi, 2006, pp. 116-117.

24 Michael Balick, *Traditional knowledge: Lessons from the Past, Lessons for the Future*, paper presented at conference, "Biodiversity, Biotechnology and the Protection of Traditional knowledge," Washington University in St. Louis School of Law, 4-6 April, 2003.

and heritage, a violation of their fundamental, inalienable and collective human right. Traditional knowledge is being used without the authorization of the indigenous people or communities who have originated and legitimately controlled it since ages.[25]

The pharmaceutical and other industries manufacturing food, personal care products, dyes and industrial oils and other compounds have benefited from the knowledge and resources of indigenous people. Companies have often investigated useful attributes of substances known to indigenous community, and after isolating the active principle, thereof; they have modified the products or sometimes used it as a lead for the design of a new compound. It is an intriguing and potentially unstable combination, some of the world's most globalised and hypermodern companies seeking deals with some of the world's most local and traditional people.[26]

Indigenous people do not use their knowledge to amass limitless private profit and wealth. They practice what is in India called as *gyan daan*, the gifting of knowledge. By their very logic, on the other hand, patents exploit knowledge for profit by excluding others from its use during the life of the patent. Since patents are often based on local knowledge, they amount to an intellectual and material enclosure. Consequently, people lose access to the knowledge and resources vital to their survival and creativity and also, to the conservation of cultural and biological diversity.[27]

A little publicized fact about India is that there are around 100 million forest dwellers in India, most of whom belong to tribal communities. The forests provide them with sustenance. The forest dwellers have over the centuries gathered knowledge from the natural environment around their community. This community has carried on the traditions of their ancestors. The forests and its dwellers give to India an abundant knowledge about the traditional value of various forest products.[28]

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25 Sanjit Chakraborty, "Conservation of Biodiversity and Farmer's Rights in India: Issues and Perspective", *Legal News and Views*, Vol. 24, No 10, October 2010, pp. 16-17.

26 Vandana Shiva, *The Plunder of Nature and Knowledge Bio Piracy*, Natraj Publishers, New Delhi, 2012, pp. 65-87.

27 Vandana Shiva, *The Plunder of Nature and Knowledge Bio Piracy*, Natraj Publishers, New Delhi, 2012, pp. 120-126.

28 Mohan Dewan, *Inside Views: The Realities of Traditional knowledge And Patents in India*, Intellectual Property Watch, 27 September, 2010 available at *http://www.ip-watch.org/2010/09/27/the-realities-of-traditional-knowledge-and-patents/* (Last visited on 22 October 2013).

Some traditional knowledge especially in India have through history become disclosed as a result of codification (that is, formalization in written form), wide use[29], or through collection and publication by anthropologists, historians, botanists or other researchers and observers. India has a rich and ancient heritage of medicinal knowledge based on its vast resources of medicinal plant biodiversity. Even today, over seventy per cent of health care needs of India are met by these systems of traditional knowledge. Everywhere local people have made independent appraisals of their local resources. Today, these production systems and their technologies are under severe threat from the new monopolistic protections being carved out for multinational corporations.

The sharing and exchange of biodiversity and knowledge of its properties and use has been the norm in all indigenous societies, and it continues to be the norm in most communities including the modern scientific community. Sharing and exchange get converted to piracy when individuals, organizations or corporations who freely receive biodiversity from indigenous communities and knowledge convert the freely received gifts into private property.[30]

5. Protection of Traditional Knowledge

There has been a lot of debate on the systems of protection that can be adopted to provide legal protection to the traditional knowledge of India, but there are no uniform norms regarding the protection of different types of traditional knowledge owned by local communities. The extension of the recognition of rights to traditional knowledge is still new. It has been aided by the increasing activism and awareness of indigenous people and the increasing recognition of indigenous rights by national governments.[31] The Government of India has made efforts at different levels to protect the traditional knowledge of its indigenous people. These initiatives have resulted in positive protection of traditional knowledge. Patent (Amendment) Acts of 2002 and 2005, the Protection of Plant Variety and Farmers Rights Act, 2001; the

29 M. Koning, "Biodiversity Prospecting and the Equitable Remuneration of Ethnobiological Knowledge: Reconciling Industry and Indigenous Interests", *Intellectual Property Journal*, Vol. 12, 1998, p. 261

30 Vandana Shiva, *The Plunder of Nature and Knowledge Bio piracy*, Natraj Publishers, New Delhi, 2012, pp. 65-87.

31 S. Savitha, "Protection of Traditional Knowledge –A Cause for Concern" in C.B. Raju (ed.), *Intellectual Property Rights*, Serials Publications, New Delhi, 2006, p. 217.

Biological Diversity Act, 2002; the Scheduled Tribes and Other Traditional Forests Dwellers (Recognition of Forest Rights) Act, 2006; and the Geographical Indication of Goods (Registration and Protection) Act, 1999 are the examples of initiatives taken by the Government. These acts have certain provisions that can be utilized for protecting traditional knowledge.

6. Biological Diversity Act, 2002

India became a signatory to the Convention on Biological Diversity signed at Rio De Janerio on June 5, 1992.[32] The said Convention reaffirms the sovereign rights of the states over their biological resources. India is rich in biological diversity and associated traditional knowledge system relating thereto. In order to implement and give effect to the Convention on Biological Diversity, India enacted the Biological Diversity Act, 2002, an Act with the principal objective to provide for conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources, knowledge and for matters connected therewith or incidental thereto.

The Biological Diversity Act, 2002, primarily aims at regulating access to genetic resources and associated knowledge for the purpose of securing equitable sharing of benefits arising out of the use of these resources and knowledge with the local people, who are conservers of biological resources and holders of knowledge and information relating to the use of these resources.[33] This Act also protects knowledge of local communities related to biodiversity. The concept of benefit sharing is innovative under this Act so far as it provides that the authority can decide joint ownership of monopoly intellectual rights to both the inventor and the authority or to the actual contributors, such as, farmers, if they can be identified.[34]

The Act creates a three tier system for the implementation of its purpose, the National Biodiversity Authority (NBA) at the national level, State Biodiversity Board (SBB) at the state level and Biodiversity Management Committees (BMC) at the local level. This system was meant to restrict biodiversity based trade. Its mandate was also to look at conservation of

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32 The Convention came into force on 25 December, 1993.

33 D.K. Belsare, *Introduction to Biodiversity*, APH Publishing Co., New Delhi, 2007, p. 125

34 Sanjit Chakraborty, "Conservation of Biodiversity and Farmers' Rights in India: Issue and Perspective", *Legal Views and News,* Vol. 24, No 10, October 2010, pp. 16-17.

biodiversity and traditional knowledge as a whole.

The National Biodiversity Authority is the nodal agency in the country for implementing the Biological Diversity Act, 2002. For obtaining any biological resource occurring in India or knowledge associated thereto for research or for commercial utilization or for bio-survey and bio utilization or transfer the results of any research relating to biological resources occurring in, or obtained from India, an application is to be made to this authority for its approval.[35] Approval by National Biodiversity Authority is also required for applying for a patent or any other form of intellectual property protection for any invention based on biological resource obtained from India.[36] The authority can grant approval subject to such terms and conditions as it may deem fit such as imposition of royalty, sharing of profits etc.[37] No person shall transfer any biological resource or knowledge associated without the permission of the authority.[38]

A National Biodiversity Fund has been created, where the National Biodiversity Authority may direct any amount of money given by way of benefit sharing to be deposited. The fund is to be applied for channeling benefits to the benefit claimers, conservation and promotion of biological resources, socio-economic development of areas from where such biological resources or knowledge associated thereto has been accessed.[39] If biological resource or knowledge is accessed from specific individual or groups of individuals or organizations, the National Biodiversity Authority may direct that the amount be paid to them directly in accordance with any agreement or as decided by the authority. The provisions for such a right are essential for the proper recognition of farmer's contribution to develop, preserve and sustainable use of biodiversity.[40]

The National Biodiversity Authority may, on behalf of the Central Government, take any measures necessary to oppose the grant of intellectual property rights in any country outside India on any biological resource

35 The *Biological Diversity Act, 2002*, S. 19(1).
36 *Id* ., S. 19(2).
37 *Id* ., S. 6(2).
38 *Id* ., S. 20
39 *Id.*, S. 27.
40 Sanjit Chakraborty, "Conservation of Biodiversity and Farmers' Rights in India: Issue and Perspective", *Legal Views and News*, Vol. 24, No 10, October 2010, pp. 16-17.

obtained from India or knowledge associated with it.[41]

The Act, subject to Sec. 21 and Rule 20 of the Biodiversity Rules, insists upon including appropriate benefit sharing provision in the access agreement on mutually agreed terms related to access and transfer of biological resources or knowledge occurring in or obtained from India for commercial use, bio-survey, bio-utilization or any other monetary purposes.[42] The suggested benefit sharing measures may include monetary benefits such as royalty, joint ventures, technology transfer, product development and non monetary benefits such as education and awareness raising activities, institutional capacity building, venture capital fund, etc.[43]

At the state Level, the State Biodiversity Board (SBB) has the authority to deal with matters of access to biological resources and associated knowledge by Indians for commercial purposes and to restrict any activity, which violates the objectives of conservation, sustainable use and equitable sharing of benefits. The State Biodiversity Board shall also create a State Biodiversity Fund that will be used for management, conservation and promotion of biological resources. It is compulsory to give prior intimation to the State Biodiversity Board by any citizen, body corporate, association or organization for obtaining any biological resource for commercial utilization. But, this is not applicable in case of local people or communities, growers and cultivators of biodiversity and vaids and hakims practicing indigenous medicine.[44]

At the local level, there are the Biodiversity Management Committees, created for the purpose of promoting conservation, sustainable use and documentation of biological diversity, preservation of habitats and preservation of knowledge relating to biological diversity.[45] The main function of the Biodiversity Management Committee is to prepare People's Biodiversity Registers, which shall contain comprehensive information on the availability and knowledge of local biological resources and medicinal or

41 Sec. 18(4) of the *Biological Diversity Act*, 2002.

42 K. Venkataraman & Swarna S. Latha, "Intellectual Property Rights, Traditional Knowledge and Biodiversity of India", *Journal of Intellectual Property Rights*, Vol. 13, July 2008, pp. 326-335.

43 D.K. Belsare, *Introduction to Biodiversity*, APH Publishing Co., New Delhi, 2007, p. 58.

44 The *Biological Diversity Act, 2002*, S. 7.

45 The *Biological Diversity Act, 2002*, S. 41(1).

any other traditional knowledge associated with them.[46] It is obligatory for the National Biodiversity Authority and the State Biodiversity Board to consult the Biodiversity Management Committees while taking any decision relating to the use of biological resources and knowledge associated within its territorial jurisdiction.[47] Also, a Local Biodiversity Fund shall be constituted by the state at the local level.[48] The fund shall be used for conservation and promotion of biodiversity and for the benefit of community within the jurisdiction of the local bodies.[49]

Most importantly, the Central Government is empowered to protect the knowledge of local people relating to biological diversity, as recommended by the National Biodiversity Authority through such measures, which may include registration of such knowledge at the local level, state and national levels, and other measures for protection, including a *sui generis* system[50] in the light of Art 8(j) of the UN Convention on Biological Diversity, 1992.

6.1 Biological Diversity Rules, 2004

In exercise of the powers conferred by the Biological Diversity Act, 2002[51], the Central Government has made the following rules for better protection of traditional knowledge[52]

1) To organize comprehensive programmes regarding conservation of bio-diversity, sustainable use of its components and fair and equitable sharing of benefits arising out of the use of biological resource and knowledge.

2) To build database for information and documentation of biological resources and associated traditional knowledge through bio-diversity registers and electronic data bases.

3) The National Biodiversity Authority shall take steps to widely publicize the approvals granted and periodically monitor compliance of conditions.

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46 Prabodh K. Maiti and Paulami Maiti, *Biodiversity: Perception, Peril and Preservation*, PHI Learning Pvt. Ltd., New Delhi, 2011, p. 78.

47 The *Biological Diversity Act, 2002*. S. 41(2).

48 *Id.*, S. 43(1).

49 *Id.*, S. 44(2)

50 The *Biological Diversity Act, 2002*, S. 36.

51 *Id.*, S. 62.

52 *at http://nbaindia.org/upload/BiodiversityIndia/Legal/33.%20Biological%20Diversity%20Rules%202004.pdf* last accessed on 10 October, 2012.

4) The formula for benefit sharing shall be determined on case-by-case basis.

5) The quantum of benefits shall be mutually agreed between the persons applying for such approval and the National Biodiversity Authority in consultation with the local bodies and benefit claimers.

6) Where biological resources or knowledge is accessed from a specific individual or a group of individuals or organizations, the agreed amount is to be paid directly to them through district administration.

7) The Biodiversity Management Committees will maintain data about the local vaids and practitioners.

7. Conclusion

Traditional knowledge is in demand as a source of information of the possible properties of biological material. It is valuable knowledge. In spite of the legal provisions and efforts at national and international level for the protection of traditional knowledge, there is increasing erosion of traditional knowledge over their natural resources and cultural rights. Decision makers should balance the possible benefits and costs of establishing legal systems and evaluate what other policies would be needed in order to effectively protect traditional knowledge from erosion and ensure its continuous development and wider use.

Poor countries and communities still complain of biopiracy because access to biodiversity is difficult to restrict and control and there is a structural imbalance between countries rich in biological diversity and those strong in technological and legal instruments. Effective legal instruments are, therefore, needed to prevent the loss of this traditional knowledge.

The protection of traditional knowledge has, now, acquired recognition, still a lot need to be done. An urgent action is needed to protect the knowledge systems through national policies and international understanding linked to intellectual property rights, while providing for its development and proper use for the benefit of its holders. India has always been a rich country when it comes to knowledge and sharing knowledge. From ancient times, Indians have shared their knowledge without any intention of earning from such sharing. This traditional of sharing of the knowledge is prevalent even today. The developed countries are taking advantage of this tradition of sharing

knowledge. The efforts made, at international and national level, have, to some extent, led to protection of traditional knowledge, but still, India has a long way to go. The Government should take immediate steps for protection of traditional knowledge, so that, this rich heritage should be preserved and conserved and the future generations can benefit from the traditional knowledge of this rich country.

END TO END ENCRYPTION: SOME UNRESOLVED ISSUES

Dr. Shiva Satish Sharda*

1. Conceptual Dimensions of Encryption

Encryption can be termed as scrambling of information sent from one person to another into a lengthy code making it unreadable for anybody else attempting to access it. Cryptographic techniques are used to control access to critical and sensitive data/information in transit and storage on the internet. This is a complex process with trillions of possible combinations depending on the key length and may be impossible to crack with conventional computers. Cryptography, however, predates technology. It has been around for as long as there has been information to protect. It is hardly surprising then, that some of the earliest references to encryption appear among pottery traders in 1500 B.C. Mesopotamia for the protection of trade secrets.[1]

When the data is encrypted, the sender and the receiver are the only people that can decrypt the scrambled info back to a readable condition. This is achieved via 'keys', which grant only the users involved access to modify the data to make it unreadable and then readable again.[2] With digital networks increasingly becoming the preferred conduit for commerce and personal correspondence, encryption is critical to maintaining security and trust in this medium. It involves scrambling readable text (plaintext) with a secret key to transform it into cipher text, incomprehensible to anyone not in possession of the said key.[3] The schedule attached to Information Technology Act, 2000 provides the definition of Encryption.[4] Encryption can be classified in two forms:

1.1 Asymmetric Encryption

Asymmetric encryption (public-key cryptography) uses separate keys for encryption and decryption. Although, encryption key (public key) can be used by

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1 Bedavyasa Mohanty "Going Dark' in India: The legal and Security Dimensions of Encryption" Retrieved from *http://www.orfonline.org/research/going-dark-in-india-the-legal-and-security-dimensions-of-encryption/* assessed on 24 February, 2017.

2 *Ibid.*

3 Retrieved from *http://www.wired.co.uk/article/wired-explains-encryption-how-do-apps-keep-our-private-data-safe* on 24 February, 2017

4 Schedule V of the Information Technology (Certifying Authorities) Rules, 2000, "*The process of transforming plaintext data into an unintelligible form (cipher text) such that the original data either cannot be recovered (one-way encryption) or cannot be recovered without using an inverse decryption process (two-way encryption).*"

anyone to encrypt a message, decryption keys (private keys) are kept secret to ensure that it is only the intended receiver who can decrypt the message.[5]

1.2 Symmetric Encryption (pre-shared key encryption)

Such encryption uses a single key for both encryption and decryption of data. Here, both the sender and the recipient need the same key to make a communication. Symmetric keys, being smaller in size, pose lesser computational burden. These key sizes are generally in the range of 128 or 256 bits. It is also to be noted that the larger the key size, the harder it is to crack the key. Since asymmetric keys are bigger than symmetric keys, data that is encrypted asymmetrically is tougher to crack than data that is encrypted symmetrically.[6]

Secure Socket Layer (SSL) is a standard security technology for establishing an encrypted links between a server and a client—typically a web server (website) and a browser (Mozilla, Chrome, etc.); or a mail server and a mail client. It allows personal and sensitive information (credit/debit card numbers, social security numbers, passwords, etc.) to be transmitted securely.

In order to establish a secure connection, the browser and the web server may need an SSL Certificate. As of today, Extended Validation Secure Sockets Layer (EV-SSL) Certifications are increasingly being used for such purposes these days. It is to be noted that SSL Certificates do not dictate what key size is used.

Google, for instance, has made the Secure Socket Layer (SSL) encryption the default standard for its Gmail service and Google searches since 2010 and 2011, respectively.[7] The user are being felicitated by generation of Content online by having an access to more sophisticated end-to-end encryption services for free, through applications like WhatsApp, Skype and viber. There have been instances in the past wherein Government enforcement agencies have sought special access to its Blackberry Messenger. Encryption is also available as built-in security for devices such as Apple's iPhone. This ubiquity has seen the resurgence of claims by

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5 *Id.*, Public Key Cryptography "*A type of cryptography that uses a key pair of mathematically related cryptographic keys. The public key can be made available to anyone who wishes to use it and can encrypt information or verify a digital signature; the private key is kept secret by its holder and can decrypt information or generate a digital signature.*"

6 Vivek Kumar Verma , "Data Protection, Internet & Privacy, Technology, digital encryption laws in India", Retrieved from *https://indiancaselaws.wordpress.com/2015/02/10/digital-encryption-laws-in-india/* on 5 February, 2017

7 Steve Ragan, Salted Hash- Top Security News "Bleeding clouds: Cloud flare server errors blamed for leaked customer data" Retrieved from *http://www.csoonline.com /article/3173639/security/bleeding-clouds-cloudflare-server-errors-blamed-for-leaked-customerdata.html* on 31 January, 2017.

law enforcement agencies that their ability to 'lawfully' intercept communication for criminal and terrorism-related investigations has been hampered.[8]

II
Legal Dimensions of Encryption in India

End-to-end encryption is not without its drawbacks. The high, unbreachable level of security and privacy available is in favour of users and against governments. It will make such systems the favorite for illegal activities as well. For example, tracing voice calls made by terrorists using Voice-Over-IP is extremely difficult because of its routing over fake networks. The issue raised in the Apple vs FBI[9] case was also the same, whether an individual user's privacy can be compromised in favour of the larger public interest. A balance between the two is needed, maintaining user privacy and allowing interception for lawful purposes is required.[10]

As of today, India does not have any clear and well established laws and policies regarding encryption or encryption techniques to secure electronic communication. The extant laws[11] only prescribe for use of such encryption standards or algorithms which are well established and in conformity with the international standards.[12] India does not have a dedicated law on encryption.

Although, a number of sectoral regulations including in the banking[13], finance and telecommunication industries carry stipulations such as the minimum

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8 *Supra* note 1

9 In 2015 and 2016, Apple Inc. has received and objected to or challenged at least 11 orders issued by United States district courts under the *All Writs Act* of 1789. The most well-known instance of the latter category was a February 2016 court case in the United States District Court for the Central District of California. The FBI wanted Apple to create and electronically sign new software that would enable the FBI to unlock a work-issued iPhone 5C it recovered from one of the shooters in a December 2015 terrorist attack in San Bernardino, California, that killed 14 people and injured 22. The two attackers later died in a shootout with police, having first destroyed their personal phones. Instance Quoted by Alina Selyuk, Camila Domonoske retrieved from *http://www.npr.org/sections/thetwo-way/2016/02/17/467096705/apple-the-fbi-and-iphone-encryption-a-look-at-whats-at-stake* on 2 February, 2017.

10 Retrieved from https://ccgnludelhi.wordpress.com/2016/08/18/encryption-in-indiathe-way-forward/ on 2 February, 2017

11 Information Technology (IT) Security Guidelines, 5.3 Sensitive Information Security *(1) Highly sensitive information assets shall be stored on secure removable media and should be in an encrypted format to avoid compromise by unauthorized persons.*

12 Schedule-ii [Rule 19(2)] Information Technology (IT) Security Guidelines Information Management

13 Reserve Bank of India (RBI) as a part of the Report on Internet Banking released by RBI in 2001, a minimum security standard of SSL or 128 bit encryption has been mandated for conducting all online transactions, securing passwords, and ensuring a secure connection between web browser to servers.

standards of encryption to be used in securing transactions.[14] Furthermore, in the pertinent rules, the requirement of high standard encryption has been highlighted.[15] Most of the standards[16] listed under these rule resort to an encryption strength higher than 40 bits, which is the maximum permitted standard under the license terms of an agreement between an Internet Service Provider (ISP) and Department of Telecommunications(DoT).[17]

Encryption policy under this section is urgently required as a national policy, since at present encryption is restricted to 40-bits under the telecom licensing policy regime. This level of encryption is weak, and does not promote client confidence – clients require strong encryption for data protection and privacy protection. The government, however, has legitimate need to access encrypted data for monitoring of suspected criminals and terrorists in what is considered as lawful interception. Encryption policy, therefore, requires consideration of various technical issues, national security issues, business privacy, and international competitive pressures for the growth of e-commerce and e-governance applications. Continued economic growth of Indian industries and business in an increasingly global economy

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14 Securities and Exchange Board of India (SEBI) Guidelines on Internet based Trading and Services As per the Report on Internet Trading by the SEBI Committee on Internet based Trading & Services, 2000, a 64/128 bit encryption standard is advisable to secure transactions and online trading's.

15 Sensitive Systems Protection: For sensitive data, encryption of data in storage shall be considered to protect its confidentiality and integrity. Private Key Protection and Backup (1) The Certifying Authority must protect its private keys from disclosure. (2) The Certifying Authority must back-up its private keys. Backed-up keys must be stored in encrypted form and protected at a level no lower than those followed for storing the primary version of the key.

16 PKCS#1 RSA Encryption Standard (512, 1024, 2048 bit), PKCS#5 Password Based Encryption Standard or PKCS#7 Cryptographic Message Syntax Standard.

17 *In order to provide internet services in a particular service area, an ISP ("Licensee"), is required to enter into a License Agreement with the Govt. of India through DoT ("Licensor"). Some of the mandatory conditions that ISP, as a Licensee, is required to abide by, under this License Agreement are –*

> The Licensee shall ensure that bulk encryption is not deployed by them at any point. Further, Individuals/ Groups/ Organizations are permitted to use encryption up to 40 bit key length in the symmetric key algorithms or its equivalent in other algorithms without obtaining permission from the Licensor. However, if encryption equipments higher than this limit are to be deployed, individuals/groups/organizations shall obtain prior written permission of the Licensor (Government of India through DoT) and deposit the decryption key, split into two parts, with the Licensor. The Licensee shall not employ bulk encryption equipment in its network. However, the Licensee shall have the responsibility to ensure protection of privacy of communication and to ensure that unauthorised interception of message does not take place. Retrieved from *http://www.trai.gov.in/sites/default/ files /Recommendation10may07.pdf* on 24 February, 2017.

requires availability of cryptography to all legitimate users that include employees and business associates of the corporate sector.[18]

III
Issues pertaining to End To End Encryption

The Company needs to abide by the encryption limit of 40 bits imposed on the ISP under the License Agreement.[19] However, if the Company needs to use an encryption level of more than 40 bits, it should make an application before the Deputy Director General (Security/ AS-II) of Department of Telecommunications (herein after referredas DoT), Govt. of India through registered post with the complete details of the applicant Company and an undertaking to submit the decryption key with the DoT. Further, it is to be noted that there are no specific procedure provided for making such an application and a waiver can be obtained only with prior permission of DoT unless it has been specifically approved by them.

In April 2016, WhatsApp, a messaging application enabled end to end encryption[20] for all its users at 256 bits. This service is owned by Facebook Inc. and is not an individual, group, or organization as is covered under the license terms between the DoT & ISP. Applications like WhatsApp are termed as 'Over The Top' (OTT) services and in the absence of any specific regulation pertaining to them, are governed by the provisions of the IT Act and/or other legislations applicable to their services. Currently, OTTs are not regulated and as such, there are no encryption requirements, nor are there any other requirements in the name of security which these have to comply with.

An application that is only making its service available to consumers is not bound by any license agreement that restricts encryption usage. The onus in this regard falls on the ISPs who have a license agreement with the DoT that only

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18 Retrieved from *https://www.dsci.in/taxonomypage/602* on 21 February, 2017.

19 *Supra* note 17.

20 WhatsApp's website blog dated 5, April 2016 available onhttps://blog.whatsapp .com /10000618/ "*WhatsApp has always prioritized making your data and communication as secure as possible. And today, we're proud to announce that we've completed a technological development that makes WhatsApp a leader in protecting your private communication: full end-to-end encryption. From now on when you and your contacts use the latest version of the app, every call you make, and every message, photo, video, file, and voice message you send, is end-to-end encrypted by default, including group chats. The idea is simple: when you send a message, the only person who can read it is the person or group chat that you send that message to. No one can see inside that message. Not cyber-criminals. Not hackers. Not oppressive regimes. Not even us. End-to-end encryption helps make communication via WhatsApp private--sort of like a face-to-face conversation.*"

permits encryption up till 40 bits without prior permission. However, the extremely low threshold of 40 bits is a practice that needs to be upgraded.

The Telecom Regulatory Authority of India came out with an OTT Consultation Paper in 2015. Data Security Council of India (DSCI)[21] has engaged with the government to help formulate the encryption policy. Further, a draft National Policy on Encryption under Section 84A of the *Information Technology Act, 2000*[22] was published on 21st September, 2015 and invited comments from the public, but was withdrawn on 23rd September, 2015. In the absence of any regulations at present, it's clear that WhatsApp's new end-to-end encryption policy is perfectly legal, even though it presents a new dilemma for the government.

3. Highlights of the Draft Policy on End to End Encryption

The Draft Policy sought to establish the protocols and algorithms for encryption, key exchanges and digital signatures for all government entities, businesses and citizens. It allowed businesses and citizens to use encryption as long as they handed in the plaintext, encrypted text and the hardware/software used for encryption when such information was sought by law enforcement agencies. In what was among the most controversial provisions of the Policy, it mandated all businesses and citizens using encryption to retain the plaintext of encrypted communication for 90 days from the date of transmission or transaction. The Policy also mandated that every service provider (whether they were based in India or abroad) would need to enter into an agreement with the government to operate within the Indian market. The nature of this agreement and what it would entail was not clarified.[23] The Draft Policy, therefore, wanted to ensure lawful access to encrypted data through a combination of three measures.

- First, it imposed a quasi-licensing model where a vendor or encryption service provider would presumably enter into an agreement with the government to allow unrestricted access to data. Without complying

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21 The DSCI & NASSCOM with other industry inputs submitted recommendations to the Department of Information Technology in 2009 regarding an Encryption Policy for India.

22 *Information Technology (Amendment) Act*, 2008 provides for encryption under Section 84A, which reads as follows:

> *"84A. The Central Government may, for secure use of the electronic medium and for promotion of e-governance and e-commerce, prescribe the modes or methods for encryption."*

23 Retrieved from *https://info.publicintelligence.net/IN-DraftEncryptionPolicy.pdf* on 19 February, 2017.

with this provision, they will not be allowed access to Indian markets.[24] This would have the effect of establishing a backdoor within the service for Indian law enforcement and intelligence agencies. The Indian government is known to have deployed this pre-condition at least once in the past, when it compelled Blackberry to allow special access to its Blackberry Messenger and Blackberry Internet Service email;[25]

- Second, the Draft Policy also required encryption service providers to provide the government with working copies of the software and hardware used for encryption. This 'key recovery' mechanism meant that even without the backdoor requirement, the government would probably retain the capability to decrypt all symmetric encryption that used the same key to encrypt and decrypt[26]; and

- Third, in cases of information sent through end-to-end encryption and other methods that used asymmetric public-private keys — the government would not be able to obtain the plaintext through the service provider because the information is not retained on the service provider's servers — the policy mandated that senders of such information would have to retain the unencrypted plaintext for 90 days. This would enable the government to bypass the service provider and obtain the content of communication straight from the source.[27]

India's now withdrawn draft encryption policy took the first step towards overcoming these problems and obtaining access. It required service providers, from both India and abroad, which are using encryption technology, to enter into agreements with India in order to be able to provide such services. One essential requirement of these agreements was to comply with data requests as and when they're made by the government. This will include any interception, monitoring and decryption requests made under Section 69 of the IT Act. Though it was later clarified that WhatsApp is not within the purview of this policy, this indicates the route that may be taken by the government to obtain access. If WhatsApp refuses to comply with such a regime, that would make WhatsApp illegal in India.

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24 Andrew Regenscheid, "Roots of Trust in Mobile Devices" *National Institute of Standards and Technology*, February 2012, Retrieved from *http://csrc.nist.gov/groups/SMA/ispab/documents/minutes/2012-02/feb1_mobility-roots-of-trustregenscheid.pdf* on 5th Feb, 2017

25 Bhairav Acharya, "Comments on the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011", *Centre for Internet and Society*, March 31, 2013, Retrieved *fromhttp://cis-india.org/internet-governance/blog/comments-on-the-it-reasonable-security-practices-and-procedures-and-sensitive-personal-data-or-information-rules-2011* on 21 February, 2017.

26 *Ibid.*

27 *Supra* note 1.

Moreover, the point to be considered here is look for the legal dilemma caused by the terminology used as to classification of the end to end encryption service providers such as WhatsApp as an intermediary, is expected to comply with directions to intercept, monitor and decrypt information issued under Section 69[28] of the Information Technology Act, 2000. Complying with such a direction will now be impossible for WhatsApp in view of its end-to-end encryption. However, at the same point of time, the Indian government grants intermediaries a conditional safe harbour under *the IT Act*, 2000 and *the Information Technology (Intermediaries Guidelines) Rules* 2011 ("Intermediary Law"). Section 79 of the *IT Act* provides that an intermediary is not liable for any third-party content hosted/made available through such intermediary when:

(i) the function of the intermediary is limited to providing access to the system; or
(ii) the intermediary does not initiate, select the receiver of or select/ modify the information contained in a transmission; and
(iii) the intermediary observes due diligence and abides by other guidelines prescribed by the Government.

The 2011 Intermediary Regulations attached to *IT Act*, 2008 Law provides a diligence framework to be followed by intermediaries in order to avail of the exemption under Section 79.

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[28] 69. Powers to issue directions for interception or monitoring or decryption of any information through any computer resource.- *(1) Where the central Government or a State Government or any of its officer specially authorized by the Central Government or the State Government, as the case may be, in this behalf may, if is satisfied that it is necessary or expedient to do in the interest of the sovereignty or integrity of India, defense of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence, it may, subject to the provisions of sub-section (2), for reasons to be* recorded *in writing, by order, direct any agency of the appropriate Government to intercept, monitor or decrypt or cause to be intercepted or monitored or decrypted any information transmitted received or stored through any computer resource.*

(2) The Procedure and safeguards subject to which such interception or monitoring or decryption may be carried out, shall be such as may be prescribed.

(3) The subscriber or intermediary or any person in charge of the computer resource shall, when called upon by any agency which as been directed under sub section (1), extend all facilities and technical assistance to -(a) provide access to or secure access to the computer resource generating, transmitting, receiving or storing such information; or (b) intercept or monitor or decrypt the information, as the case may be; or(c) provide information stored in computer resource.

(4) The subscriber or intermediary or any person who fails to assist the agency referred to in sub-section (3) shall be punished with an imprisonment for a term which may extend to seven years and shall also be liable to fine.

The requirement 'to act' caused much speculation in the industry as it was not clear what constituted appropriate action. The Government published a clarification in March 2013 which stated that the intermediary is required to respond to or acknowledge a complaint regarding any prohibited information and "initiate appropriate action as per law" within 36 hours of receiving the grievance/complaint.[29] The immunities are now available to an intermediary which has been defined under Section 2(w).[30] The question now is given the end to end encryption introduced by the watsapp in April 2016; how watsapp is going to comply with the requirement of *Information Technology Act*, 2000.

In *Karmanya Singh Sareen and Ors. v. Union of India and Ors.*,[31] the Delhi high court dismissed the petition pertaining to regulate this issue on the ground that the issue relating to the existence of an individual's right of privacy as a distinct basis of a cause of action is yet to be decided by a larger Bench of the Supreme Court in the case of *K.S. Puttaswamy (Retired) and Anr. v. Union of India & Ors.*[32] Having taken note of the inconsistency in the decisions on the issue as to whether there is any "right to privacy" guaranteed under our Constitution, it was considered appropriate to issue directions to protect the interest of the users of "WhatsApp."

The Supreme Court has refused to ban WhatsApp and has asked the petitioner to approach the Government in a petition filed seeking a ban on the messenger app WhatsApp. The petition, filed by RTI activist Sudhir Yadav said that WhatsApp and other messenger services violate provisions of the Indian Telegraph Act, 1885, and Information Technology Act, 2000. The petition said that end-to-end encryption poses a security threat to the country. Other than WhatsApp, the petition also names other messaging platforms like Hike, Viber and Secure chat asserting the apprehension that it may provide militants a safe an easy platform to communicate. Yadav further adds that terrorists and criminals can easily communicate on WhatsApp and make plans which are impossible to access even by supercomputers as decrypting a single 256-bit encrypted message would take

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29 Smitha Krishna Prasad, Rakhi Jindal *et. al.*, "Intermediaries – Messengers or Guardians? How India and US Deal with the Role and Liability of Intermediaries", *USA INDIA Business Council News letter*, Fall 2013, pp. 2-6.

30 The most significant ramification of the amendment is that the immunity under the IT Act now extends not only to the liabilities arising under the *IT Act*, 2000 but to liabilities arising under any law in force in India. s 79. This change has been brought about by the introduction of a non – obstante clause in Section 79 which provides that the immunity shall be available to intermediaries 'notwithstanding anything contained in other law for the time being in force'.

31 MANU/DE/2607/2016

32 (2015) 8 SCC 735.

hundreds of years. The apex court has asked the petitioner to approach Telecom Disputes Settlement and Appellate Tribunal (TDSAT).[33]

4. Conclusion

Requiring decryption of information involves a higher degree of intrusion than standard search and seizure of electronic documents. Therefore, due to the absence of stipulated encryption standards under the IT Act, or a comprehensive encryption policy, OTTs, such as WhatsApp that use higher encryption standards are currently operating in a grey area with no legal precedent or rules to deny or allow its use of a 256 bit, end to end encryption for the communications made on its service. Shortly after the release of the Draft Policy in 2015 the government issued a clarification that mass-market encryption products would be excluded from the ambit of the policy; that effectively excluded services like WhatsApp and standards like Open SSL from the policy's effects. It is unclear whether the second iteration of the encryption policy will apply to mass-market encryption tools. The security concern of the nation is the paramount concern in the encryption debate. One of the important stakeholder that has not yet weighed in on the debate is the intelligence community. Not unlike law enforcement agencies, espionage organisations also prefer easy access to information. Unlike law enforcement agencies, however, intelligence organisations are mandated with maintaining 'information assurance.' This involves protecting domestic data from being intercepted and exploited by foreign intelligence agencies and non-state actors. A "good" encryption policy can have the effect of harmonizing the regulatory landscape around information security, in turn triggering changes to decades-old laws. This is because encrypted information can generally be presumed to be sensitive material that the creator of the information would seek to protect. In this respect, India's surveillance laws, that prescribe an administrative authorisation model for interception of communication, are inadequate.

[33] Retrieved from www.thehindu.com/news/national/No-ban-on-Whatsapp.../article14408732.ece on 25 February, 2017.

TRANSNATIONAL CORPORATIONS AND STATES: LEGALITIES AND LIAISONS

Dr. Dinesh Kumar*

1. Introduction

> The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and the nature depends on the needs of the community. Throughout history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international place by certain entities which are not States.[1]

In 1949, the International Court of Justice (hereinafter 'ICJ'), in *Reparations for Injuries Suffered in the Service of the United Nations* (*Reparations* Case) confirmed that states could confer international legal personality on international organizations such as the UN and also expressed that keeping in view the needs and requirements of the community at international level that legal personality as a legal tool that serves practical purposes can be served on other non-state entities as well like corporations. Further to support this view, there are evidences that Transnational Corporations (hereinafter 'TNCs') have had a international legal personality and have participated in the international legal system for some time. Examples of such participation include application of public international law to contracts with state entities and participation in dispute settlement forums established either by treaty or intergovernmental organizations.[2]

Moreover, in the 21st century, the TNCs has become more relevant even for a common man as they are active in most of the dynamic sectors of national economies. As Steiner observed that "Since the end of the cold war . . . business are now playing a role in economic development once reserved to states," a role which "has both stemmed from and strengthened the contemporary process of globalization with its stress on developing market economies, deregulating business activities, privatizing state enterprises, lowering national barriers, and

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1 Reparations for Injuries Suffered in the Service of the United Nations, ICJ, Rep. 1949, Available at *<http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=41&case=4&code=isun&p3=4>* Accessed on 23 November, 2016.

2 Jonathan I. Charney, "Transnational Corporations and Developing International Law", *Duke Law Journal*, Vol. 1983, No. 4, (September), 748-788 at 763.

expanding world trade and investment".[3] Since 1960 there has been a proliferation of TNCs. TNCS grew from 3,500 in 1960 to 60,000 in 1999. The aggregate stock of FDI worldwide increased in tandem from $66 billion in 1960 to over $4,000 billion in 1999, as compared with only $14 billion in 1914.[4]

The number of TNCs and their activities increased many folds in the last two decades, which further, raised many issues before the academicians, economists, and jurists. And ever since Raymond Vernon published his ground breaking analysis *Sovereignty at Bay* in 1971, with a feeling that sovereign states were feeling naked, issues concerning the legal relationship between the TNCs and States emerged with various ends.

2. Definition of Transnational Corporations

It is pertinent to mention here that many expression like Multinational Corporations MNCs, Multinational Company, MNEs, International Firm, Global Firm, TNCs has been used in the international texts in various contexts. However, the legal literature is divided between two terms: 'MNEs' and 'TNCs'. The UN Economic and Social Council have embraced the term 'TNCs' whereas the Organisation for Economic Co-operation and Development (OECD) and the International Labour Organization (ILO) continue to employ the term 'MNEs'. In comparison with these two terms other terms are of recent origin and are also used with few exception regarding their explanation in domestic law, whereas MNEs and TNCs become a part of the international instruments adopted by various intergovernmental bodies like the UN, EU, ILO, etc. The present research work uses the term 'TNCs'.

P. Muchlinski defines MNCs in simplest version as "an enterprise which owns or controls production or service facilities outside the country in which it is based."[5] However, Underhill Higgott and Bieler use the term MNCs to describe the more "traditional horizontally organized company which replicates it activities within different regions of the global economy, in contrast to the traditional company which seeks to establish global operations, using an international division of labour with little regard for national boundaries."[6] Recently, Richard T. De

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3 Jack Mahoney, *The Challenge of Human Rights Origin, Development, and Significance*, 163 (2007).

4 *United Nations Conference on Trade and Development (UNCTAD) 1996*, IX 4 (1999).

5 Peter Muchlinski, *Multinational Enterprises and the Law*, 13 (1995).

6 Underhill Higgott and Bieler, "Introduction: Globalisation and Non-State Actors", R. Higgott et. al. (eds.) *Non-State Actors in the Global System*, 1-2 (2000).

George defined, "Multinational corporations are corporations that have operations in more than one country (host countries) but are controlled by a headquarters in a home country."[7]

In India, *the Foreign Contribution (Regulation) Act*, 2010 defines the term MNC as:[8]

> A Corporation incorporated in a foreign country or territory shall be deemed to be a multinational corporation of such corporation - (a) has a subsidiary or a branch or a place of business in two or more countries or territories; or (b) carries on business, or otherwise operates, in two or more countries or territories.

In 1968, Raymond Vernon defined the term MNEs as "a cluster of corporations of diverse nationality joined together by ties of common ownership and responsive to a common management strategy."[9] However, in 1970 Detlev F. Vagts criticized the definition as "a business concept, not a legal one." He further explained "it includes foreign based as well as American firms, but excludes simple one-subsidiary enterprises, firms holding foreign shares for investment only, intergovernmental ventures and other structure of lesser size or complexity."[10]

Even the *OECD Guidelines for Multinational Enterprises*, 1976 states that a precise definition of MNEs is not required for the purpose of the guidelines. However, it further states that: [11]

> These usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways . While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed.

The ILO's *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 1977 defines multinational enterprises

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7 Richard T. De George, "Multinational Corporations," Dale Littler (ed.) *The Blackwell Encyclopedia of Management*, Vol. II, 372 (2005).

8 Section 2 (g)(iv) of the *Foreign Contribution (Regulation) Act*, 2010.

9 Raymond Vernon, "Economic Sovereignty at Bay," *Foreign Affairs*, Vol. 47, 114 (1968).

10 Detlev F. Vagts, "The Multinational Enterprise: A New Challenge for Transnational Law," *Harvard Law Review*, Vol. 83, No. 4, 746 (February, 1970).

11 *OECD Guidelines for Multinational Enterprises*, 1976, Concepts and Principles, Para. 4 (2011). *<http:// www.oecd.org/document/28/0,3343,en_2649_34889_2397532_1_1_1_1,00.html>* Accessed on 21 February, 2017.

includes:[12]

> [E]nterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based.

The ILO declaration further states that "this Declaration does not require a precise legal definition of multinational enterprises; [rather, the foregoing definition] is designed to facilitate the understanding of the Declaration and not to provide such a definition." Rather, the term "multinational enterprise" is used in this Declaration to designate the various entities (parent companies or local entities or both or the organization as a whole) according to the distribution of responsibilities among them, in the expectation that they will cooperate and provide assistance to one another as necessary to facilitate observance of the principles laid down in the Declaration.[13]

The Sub-Commission Resolution on the Promotion on Protection of Human Rights constituted a Working Group to examine the working methods and activities of TNCs in order to ensure the protection of human rights, and considering the scope of the state's obligation to regulate TNCs. As a result, the *Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights* was drafted in 2002 and adopted in 13 August 2003.[14]

The main concern about drafting the Norms and to apply the same only to TNCs was due to an inadequate definition of TNC or MNE would allow businesses to use financial and other devices to conceal their transnational nature, and thus to avoid responsibility under the Norms. The Norms define the term 'TNCs' as: [15]

> an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.

The Norms, however, does not limit their application to TNCs but also

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12 International Labour Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 16 November 1977, Para. 6 (March, 2006). *<http://www.ilo.org/empent/Publications/ WCMS_094386/lang--en/index.htm>* Accessed on 21 February, 2017.

13 *Ibid.*

14 *Norms on the Responsibilities of Transnational Corporations and other Business Enterprise with Regard to Human Rights*, UN. Doc. E/CN4/Sub.2/2003/12/Rev.2 (2003).

15 Definition 20. *<http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En>* Accessed on 21 February, 2017.

include other business enterprises. The working group defines the phrase "other business enterprise" as:[16]

> [A]ny business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity.

The World Investment Report 2011 provides that, "transnational corporations are incorporated or unincorporated enterprises comprising parent enterprises and their foreign affiliates. A parent enterprise is defined as an enterprise that controls assets of other entities in countries other than its home country, usually by owning a certain equity capital stake. An equity capital stake of 10% or more of the ordinary shares or voting power for an incorporated enterprise, or its equivalent for an unincorporated enterprise, is normally considered as the threshold for the control of assets. A foreign affiliate is an incorporated or unincorporated enterprise in which an investor, who is a resident in another economy, owns a stake that permits a lasting interest in the management of that enterprise (an equity stake of 10% for an incorporated enterprise, or its equivalent for an unincorporated enterprise)."[17]

3. Legal Status of Transnational Corporations

The traditionally preeminent position of the nation-state has played an important role in keeping the international legal system viable. From its inception, international law focused upon the sovereign territorial entity, giving natural persons and other entities a peripheral role. The birth of modern international law at the signing of the Treaty of Westphalia was the product of a power struggle pitting the nascent state system against the Church and the Holy Roman Emperor. Public international law was developed in order to legitimate and support the new system. Since that time, national governments have held most of the political, economic, and military power, thereby making them the natural *foci* of international law.[18]

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16 Definition 21. *<http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En>* Accessed on 21 February, 2016.

17 In *WIR*, subsidiary enterprises, associate enterprises and branches - defined below - are all referred to as foreign affiliates or affiliates. *World Investment Report 2011*, 3. *<www.unctad-docs.org/UNCTAD-WIR2011-Full-en.pdf>* Accessed on 21 February, 2017.

18 *Supra* note 2, at 758-59.

all spheres of the functioning of the State's. The activities of the TNCs are directly related with the fiscal issues, which further laid impact not only on the government but also on the people residing in a particular State. In the era of globalization, when most of the States can't afford to live in isolation by avoiding the TNCs, the relationship between TNCs and States becomes more relevant and meaningful.[27]

In an attempt to characterize the relationship between TNC and government, the economists drew on the great historical paradigms: liberalism, neo-mercantilism and neo-imperialism. The liberal tradition condoned government intervention only to enhance competition and correct for market failures; it tended to be agnostic about the nationality of firms and the source of capital or technology (or products) and was inclined to pursue cooperative economic solutions that promoted global welfare. The neo-mercantilist tradition showed a way of meeting national needs, stressed the need to avoid dependence on outsiders and was prone to seek relative advantage over other nations. The neo-imperialist tradition exhibited a propensity for direct public sector participation in economic activity, displayed a concern about class as well as national roots of ownership, and sought to prevent an exploitative distribution of benefits within, as well as among, nations. The tension between these three intellectual traditions has persisted throughout the attempts to conceptualize TNC-government relationship.[28]

In 1971, Vernon argued that TNCs are able to conduct their operations with a scope and flexibility which sometimes renders governmental efforts to control them impotent. Further Vernon predicted, multilateral efforts in which home and host states pooled their own sovereignty might be needed to restore public accountability on the part of TNCs. In 1993, Jean-Jacques Servan-Schreiber looked at the same phenomenon as Vernon, i.e., the growing presence and expanding power of transnational investors and drew conclusion that in part resembled Vernon's. However, there was a subtle difference between the Vernon and the Servan-Schreiber perspective. Whereas Vernon hinted that TNCs might be becoming more a-national ("stateless") in their perspective, Servan-Schreiber revived the neo-mercantilistic postulation that home-country needs better than

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27 Florian Wettstein, *Multinational Corporations and Global Justice Human Rights Obligations of a Quasi-Governmental Institution*, 249 (2009).

28 Theodore H. Moran, "Governments and Transnational Corporations", *Transnational Corporations and World Development*, 418-447, at 418-19 (1996).

foreigners.[29]

In 1993, Osvaldo Sunkel, like Fernando Henrique Cardoso and other third world writers, introduced a neo-imperialist critique (using the term *dependencia*[30]) in to the conceptualization of TNC-government relations in the developing countries. Development and underdevelopment, he concluded in his statement of the *dependencia* view, "are simultaneous processes: the two faces of the historical evolution of the capitalist system." A reaction to the uncontrolled spread of TNCs in the third world was politically inevitable. Sunkel further observed that "What we are seeing is the assertion of the national interest of our countries in their international economic relations. The aim is greater autonomy, in order to achieve development without *dependencia* and without marginalization."[31]

The deviation from the neoclassical model of perfect competition is particularly pronounced in the activities of TNCs in developing countries. There has consequently been an ongoing tension between the idea of allowing markets to work without government interference and the requirement for public sector intervention to prevent distortion and exploitation. In a setting of highly imperfect competition, Edith Penrose first proposed that, to understand TNC-government relations in the third world, one needed a framework of bilateral monopoly, with the firm controlling sector-specific capabilities and the host country controlling the conditions of access. Using the same bilateral monopoly model, Kindleberger countered that TNCs are entitled to the scarcity value of their activities. According to him, there was no justifiable way to claim exploitation as long as TNCs were only appropriating the scarcity value of their services.[32]

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29 *Ibid.*

30 The aim of the *dependencia theory* was to provide a theoretical explanation for underdevelopment and to develop strategies on how this underdevelopment could be overcome. Underdevelopment was linked to foreign trade and international relations. Contrary to *new growth theories,* which were dominant in the field of economics and which argued that underdevelopment is a consequence of endogenous entailed deficits to modernize, *dependencia theory* focused on exogenously caused reasons of underdevelopment. Critics of *dependencia theory* stress that a major deficit of the theory is its generalization of the postulated relationship between the centre and the periphery since advocates of this theory claim that all negative effects that hamper development account for all countries of the periphery regardless of the state of development and the geographical location or other equally relevant factors. For details see: Raphael Schaub, "Transnational Corporations and Economic Development in Developing Countries" 12, 13, 17 (April 2004). < *http://www.pik-potsdam.de/members/edenh/theses/masterschaub.pdf*> Accessed on 10 September, 2016.

31 *Supra* note 28, at 420.

32 *Id.*, at 420-21.

Later on Vernon suggested that it is necessary to move beyond the static conceptualizations of Penrose and Kindleberger. Vernon argued that what gives dynamism to the bargaining process is the evolution of risk and uncertainty over the life of a TNC investment. This produces a dynamic phenomenon which Vernon called the "obsolescing bargain" later called the "bargaining school". This model was tested and it shown that tax rate rose from 38 percent to 68 percent in copper cases and 50 percent to 92 percent in petroleum cases. But the cases studies revealed unanticipated difficulties as governments in the third world sought majority ownership of the project, or moved all the way to nationalization. So, the obsolescing bargain model offered the beginnings of a theory of economic nationalism based on rational self-interest.[33]

The relationship between TNCs and governments in manufacturing sector become much more complex, with the success of the obsolescing bargain depending upon the diverse characteristics of the project itself. India's initial attempts to control foreign TNCs by demanding joint ownership did not prove efficient, nor did subsequent efforts to build a national champion computer company by excluding foreign competition. Ultimately, however, a host strategy which allowed indigenous computer companies to shop around among alternative foreign suppliers as they expanded their own operations, both lowered the cost per bit of memory and shortened the time lag between the introduction of innovation outside the country and the adoption of the innovation internally. Grieco concluded from the Indian experience that third world policies that take advantage of competition among foreign TNCs can strengthen the bargaining position of the host country even in industries in which TNC domination of technology might otherwise be decisive.[34]

Moving from the developing countries to the developed countries, neo-mercantilism takes the place of the neo-imperialist (or *dependencia*) paradigm as the counterpoise to liberalism in the debates about appropriates policies towards TNCs. In contrast to the neo-imperialist preoccupation with exploitation on the part of TNCs which benefits the ruling classes in both home and host countries, neo-mercantilism adopts the more state-centric view that a developed nation must nurture its own firms as a means of enhancing the home country's power and autonomy. In contrast to the liberal impulse to encourage transborder flows of capital and management (as well as goods and services) to maximize economic

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33 *Id.*, at 421-22.
34 *Id.*, at 422-25.

efficiency and economic welfare, the neo-mercantilism impulse focuses on preserving control over vital sectors of the country's economy in national hands and launching national champion firms to serve home-country interests with a vigilant eye to the relative power among states.[35]

Independence of the overseas colonies of the major European countries tried to establish a pattern in the regulatory forms of TNCs. Two of the most important political and economic implications of this proposed pattern were: firstly, the political influence of the colonial powers over the independent countries diminished and secondly, most of the newly independent countries considered the foreign TNCs as the extended part of the colonial imperialism, though not through the colonial administrators. Therefore, with the sovereign power and separate identity in the United Nations Organizations (UNO), these new countries[36] formed 'Group of 77'- a new international pressure group and earned voting majority in the UNO. One of the important objectives of this group of countries was to come out from the influence of the colonial countries' owned TNCs. Thus, the concept of the "New International Economic Order'' (NIEO) emerged.[37] The purpose of NIEO was to develop a suitable trade environment. But in the development process of that environment, TNCs were not included at all, rather, through NIEO, developing countries declared that they must be entitled to regulate and supervise the TNCs operating in their territories.[38]

One could divide the relations between TNCs and Governments of host countries since 1945 in three eras: era of confrontation between Governments and TNCs from mid 1960 to 1979; era of negotiation between TNCs and governments in 1980s; and emergence of liberalisation, privatization and globalization which encouraged inflow of foreign direct investment to promote development goals since 1990s.[39]

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35 *Id.*, at 425-26.

36 This new group of countries also got supports from the then communist block and thereby, the issues of their developmental goals got the top most priority in the UNO's social and economic agenda.

37 The bases of NIEO were 'equity, sovereign equality, interdependence, common interest and cooperation among all countries...to eliminate the widening gap between the developed and developing countries' (Preamble of the Declaration on the Establishment of a New International Economic Order, 1974).

38 Article 4(e) of the Declaration on the Establishment of a New International Economic Order, 1974.

39 Charles R. Kennedy, "Relations between Transnational Corporations and Governments of Host Countries: A Look to the Future", *Transnational Corporations*, Vol. 1, No. 1, 67-91 at 67-68 (February, 1992).

In the first era of confrontation, a selected group of Governments of third world adopted a number of expropriation acts which amounts to nearly two thirds of all acts of expropriation to seize foreign direct investment (FDI). In 1985, Kobrin studied the demonstration effect on expropriation in connection with the old industry. He identified 28 government as mass expropriators because they nationalized FDI in all major sectors of the economy. Those sectors included banking, natural resources (agriculture, petroleum and mining), service (insurance, utilities, transportation, communication and trade) and manufacturing. From 1967 to 1975, the Indian parliament passed 6 expropriation acts under the leadership of Indira Gandhi.[40]

For example, between 1974 and 1976, the Indian government fully took over the three foreign oil companies, Esso, Burmah-Shell and Caltex, all wholly owned subsidiaries of the largest oil TNCs, commonly known as the Oil Majors. The interesting thing about these takeovers has been the willingness with which the oil companies complied with the government's plans, a willingness quite contrary to what would normally have been expected from the Oil Majors, since in earlier periods these companies had put up stiff resistance to governmental 'interference' and consistently fought against attempts to break their monopoly over the Indian petroleum industry.[41]

Charles Kennedy observed that one or more of three condition were present which resulted into mass expropriation: (1) firms domiciled in the former colony held the largest percentage of total or industrial FDI; (2) foreigners owned politically sensitive and strategic natural-resource industries that generated large volumes of foreign exchange for the Government; (3) revolutionary leaders were severing a range of geopolitical, military and economic relationships that had developed between deposed monarchs and a decadent West, particularly the United States.[42]

In the era of negotiation, the number of expropriation acts declined dramatically in 1980s due to changes in external dependency relationships. A study by Michael

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40 *Id.*, at 71.

41 Saumitra Chaudhury, "Nationalisation of Oil Companies in India", *Economic and Political Weekly*, Vol. 12, No. 10, 437 & 439 - 444 (March 5, 1977). Coal mines were nationalized in early seventies in view of the then existing dissatisfactory mining conditions e.g. slaughter mining, violation of mine safety laws, industrial unrest, failure to make investments in mine-development, reluctance to mechanise etc. and in order to meet the long range coal requirements of the country. The private coal mines of the country were nationalized in two phases during 1971-1973. For further details see: <*http://coal.nic.in/legislation.htm*> Accessed on 17 June, 2016.

42 *Supra* note 39, at 76.

Minor speculated that the dramatic decline in expropriation activity can be explained by two factors: a drop in commodity prices increased the need for capital in developing countries; and, the government realised that they can gain greater economic benefits from TNCs without resorting to expropriation. In large part, developing countries became less dependent on external factors because their internal capabilities and resources increased.[43]

In 1992, Charles Kennedy argued that the explanation by Minor are not entirely convincing and a resurgence of expropriation could be expected to occur, since an increased need for external capital could trigger a radical response within developing within developing countries if TNCs, both industrial and financial, are perceived as being responsible for the capital shortage and any resulting economic hardship. However, the third era of liberalisation, privatization and globalisation has proved that nothing of that short happened and rather the developing opened their gates for more inflow of foreign direct investment to achieve their goals of development in all spheres.[44]

Given that investment is one of key to economic growth, governments are motivated to seek as many sources of new investment as possible. Small wonder that so many have been putting out the welcome mat to TNCs and fattening the incentive packages on offer to bias firms' location decisions. Within Europe, there are constant contests both among nations and among regions within nations to attract mobile wealth-creating capital. More generally, there has been a general liberalization of investment has accelerated. Of 82 policy changes adopted by 35 countries during 1991, 80 reduced restrictions on foreign investors. Furthermore, 64 bilateral investment treaties for the promotion and protection of FDI were signed during the first 18 months of the 1990s, compared with 199 such treaties signed during the 1980s. Privatization and deregulation of communications, as well as of financial markets, have also helped extend the sense of greater mobility of critical resources.[45]

In the third era of globalization, the developing countries ensured that the TNCs - government relationship laid down a positive impact on development. The Encarnation - Wells survey of almost 200 projects in some 30 countries over more than a decade is particularly useful. They find that in between 55 and 75 per cent

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43 *Id.*, at 68-70.

44 *Ibid.*

45 John M. Stopford, "The Growing Interdependence between Transnational Corporations and Governments", *Transnational Corporations*, Vol. 3, No. 1, 7 (February, 1994).

of the cases examined, TNC operations had a clearly beneficial impact on growth and development. Equally significant, however, is the observer discovery that between 25 and 45 percent has a demonstrably negative impact on the host societies.[46]

Through the liberal approach, non country actors as TNCs have become the agents of change and governance. Changes in the global production and the rise of economic liberalism- financial trade and FDI liberalisation - have been argued to place TNCs in a different type of bargaining relationships. Whilst the economic and structural power of TNCs has been difficult to determine precisely, it has rapidly increased in the last decades. TNCs play an increasing role in the redistribution of resources as a result of privatization in different countries of the world, of TNCs capacity to create employment in developing countries, of their role in labour management relations since they employ around 10 percent of the population in developed countries and 21 million in developing ones and of the fiscal weight in economies. Moreover, TNCs have doubled in number, operating in practically all economies, dramatically enhanced their revenues and increased their share of global trade to a third of global exports while representing a quarter of all FDI. Intra-firm trade, though hard to measure, as well as cross-border inter-firm agreements has also increased precipitously, creating a new division of labour.[47]

5. Conclusion

Consequently, the relationships between countries and TNCs are not a zero-sum game; the increasing power of TNCs does not mean the inevitable decline of the power of countries. Owing to the multiple sources of power, there is now a deepened interaction between countries and TNCs. Countries have to negotiate with TNCs creating a type of 'triangular diplomacy'. Moreover, countries and TNCs power often vary over time, issues and cases. Hence, the researcher is of the view that the country-TNC relationship is a complex one that has indeterminate results. This complex relationship becomes very complex when the countries are divided into many groups with different interests. United Nations initiative to prepare a code of conduct for TNCs would be a glaring example in this regard.

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46 *Supra* note 28, at 434.

47 Mia Mahmudur Rahim, "Who's Who: Transnational Corporations and Nation State Interface over the Theoretical Shift into Their Relationship", *African Journal of Political Science and International Relations*, Vol. 4, No. 6, 195-200 at 196-97 (June 2010).

METATAGS AND KEYWORDS: TRADEMARK INFRINGEMENT IN VIRTUAL WORLD

Rajinder Kaur[*]
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1. Introduction

In a relatively short period, the internet has morphed from a source of information to a multidimensional market for goods, services, and ideas.[1] It has become a key platform for commerce that is increasingly happening between buyers and sellers located in different countries, thereby driving international trade. It has totally changed the way businesses are taking place. The expansion of the Internet has created an enormous consumers' market where many businesses now advertise their products or services and communicate directly with consumers.[2]

Unfortunately, at the same time the internet has provided these positive benefits, it has also become a battlefield. Firms, government agencies, and individuals probe each others' websites, and they also seek protection from privacy violations, data theft, counterfeit and rogue web sites, and computer intrusions. Democratic and authoritarian governments alike use "security software" to restrict and even disrupt the free flow of online information.[3]

In the case of intellectual property the Internet has made intellectual property rights more vulnerable to violations by every sector of society; business,

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*** Jatinder Maan, LL.M. Student, Department of Laws, Panjab University, Chandigarh.

1 S. A. Aaronson, *Trade and the Internet The risks and challenges of this new technology*, The International Economy (Winter 2012), available at *http://www.international-economy.com/TIE_W12_Aaronson.pdf* last seen on 10/06/2015. Today, Around 40% of the world population has an internet connection. In 1995, it was less than 1%. The number of internet users has increased tenfold from 1999 to 2013. There are three billion users in 2014 and there are more than 1 billion websites, available at *http://www.internetlivestats.com/internet-users/* also Available at *http://www.internetlivestats. com/total-number-of-websites/#trend*, last seen on 01 November, 2016.

2 Yelena Simonyuk, *The Extraterritorial Reach Of Trademarks On The Internet*, 1 DUKE L. & TECH. REV 1(2002), available at *http://scholarship.law.duke.edu/cgi/viewcontent. cgi?article =1050&context=dltr*, last seen on 10 September, 2016.

3 *Supra* note 1.

students, and, of course, the committed infringers.[4] It has put pressure on traditional intellectual property protections such as copyright, patent and trademark.[5]

In the cases of trademark as companies expanded their businesses globally and they have an array of goods and services, the trademarks became susceptible to the threat of misuse and infringement.[6] The Internet has provided countless new ways for ingenious businesses and individuals to refer to trademarks in a manner that impacts the trademark holder's business. These new methods may not directly associate the mark with goods or services that the user is offering for sale and may even be hidden from the consumer's view(as in case of meta tags). The practices such as the unauthorized use of trademarks as keywords by search engine operators or within listings for non-genuine goods on auction sites, or the use of trademarks on virtual objects that are traded in virtual worlds, constitute clear challenges to the traditional application of trademark law.[7]

Metatags are hidden words that are used within the hypertext mark-up language (HTML)[8] computer code that is used to program and compose a webpage. Although hidden from the average users, search engines can detect and use metatags to determine how well a web site matches to the search. The method of tying a particular website to a search request varies depending on the search

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4 M. L. Arias, *Internet Law - Violation of Intellectual Property Rights on The Internet: For Digital Risks, Digital Solutions,* available at *https://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=1711*, Last seen on 10/09/2016.

5 James Bessen and Eric Maskin, *Intellectual Property on the Internet: What's Wrong with Conventional Wisdom?*
Revised 2004 (This article is a revised updated version of a presentation originally presented at "Internet Publishing and Beyond: The Economics of Digital Information and Intellectual Property," January, 1997) available at *http://www.researchoninnovation.org/iippap2.pdf*, Last seen on 11 September, 2016.

6 A. Negi and B. J. Thakuria, *Principles Governing Damages in Trademark Infringement,* 15 Journal of Intellectual Property Rights 374, (Sept. 2010).

7 Trademarks and the Internet, Document prepared by the Secretariat (Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications), Twenty-Fourth Session SCT/24/4, Geneva, November 1 to 4, 2010 available at *http://www.wipo.int/edocs/mdocs/sct/en/sct_24/sct_24_4.pdf*, last seen on 20 June, 2015.

8 Hypertext Markup Language, the authoring language used to create documents on the World Wide Web. HTML is similar to SGML (Standard Generalized Markup Language), although it is not a strict subset.
HTML defines the structure and layout of a Web document by using a variety of tags and attributes. The correct structure for an HTML document starts with <HTML><HEAD>(enter here what document is about)<BODY> and ends with </BODY></HTML>. All the information you'd like to include in your Web page fits in between the <BODY> and </BODY> tags. By Vangie Beal available at *http://www.webopedia.com/TERM/H/HTML.html*, last seen on 25 December, 2016.

engine being employed but often analyzes a combination of a site's metatags and visible text to make the determination.[9]

This research paper is divided into six parts. Part- I of the paper will give a background information of internet and working of search engines. Part-II explains the concept of metatags and their significance. Part-III discusses the meaning and significance of trademarks and brief overview of trademark law and trademark infringement provisions. Part-IV outlines the interface between metatags and trademarks and what all legal issues arises because of the use of trademarks in metatags. Part-V of the paper presents the readers the judicial viewpoint regarding cases involving metatags. And finally Part-VI contains the concluding remarks.

2. Internet, World Wide Web and Search Engines

2.1 Internet and World Wide Web

The terms internet and World Wide Web (commonly referred as web) are often used interchangeably and mistakenly considered to be same. The internet and the web are two separate but related things. The internet is the hardware part - it is a collection of computer networks connected through either copper wires, fibre-optic cables or wireless connections, whereas, the world wide web can be termed as the software part – it is a collection of web pages connected through hyperlinks[10] and Uniform Resource Locator (URLs)[11]. In short, the world wide web is one of the services provided by the Internet.[12]

Internet users have two basic options to locate needed information. The first option allows a web surfer[13] to access a specific site by entering the site's domain

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9 Neil Smith, "Trademarks, Infringement and unfair competition online, in Internet Law and Practice by International Contributors Vol. 2, 13-1, 13-7 (Thomson Reuters, South Asian Edition, 2013).

10 In computing, a hyperlink is a reference to data that the reader can directly follow either by clicking or by hovering or that is followed automatically. Often represented as bolded or underlined text, or as an image. By "clicking" on a hyperlink, the contents of another Web page referenced by the hyperlink are then displayed by the Web browser.

11 A uniform resource locator (abbreviated URL; also known as a web address, particularly when used with HTTP) is a specific character string that constitutes a reference to a resource. Most web browsers display the URL of a web page above the page in an address bar. A typical URL might look like: *http://www.example.org/wiki/Main_Page*

12 *Internet* v. *World Wide Web Available* at *http://www.diffen.com/difference/Internet_vs_ World _ Wide_Web*, last seen on 20 October, 2016.

13 Surf means to move from place to place on the Internet searching for topics of interest. Web surfing has become a favorite pastime for many Internet users. The links on each page enable you to start virtually anywhere on the Web and eventually find interesting pages. The term surfing is generally used to describe a rather undirected type of Web browsing in which the user(Web

name[14] into his web browser 's[15] address window. Domain names are used to identify web pages on the Internet. Every webpage has an assigned domain name that serves to distinguish it from millions of other web pages. Essentially, a domain name serves as a street address by which different pages on the Internet can be located. A user can either type the domain name directly into the address bar on his browser immediately and bring up the desired webpage, or, if he does not remember the specific domain name, he can use a search engine.[16]

2.2 *Search Engines*

The second strategy websurfers use to locate information involves search engines[17]. If a user does not know the exact domain name of the website he needs to access, he can enter keywords[18] into a search engine.[19] The search engines helps user to find information related to the keywords. But how do these

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surfer) jumps from page to page rather whimsically, as opposed to specifically searching for specific information. Available at *http://www.webopedia.com/ TERM/S/surf.html*, last seen on 25 November, 2016)

14 Domain names are used to identify one or more IP addresses. By Vangie Beal, available at *http://www.webopedia.com/TERM/D/domain_name.html* , last seen on 25 June, 2015. In simple terms, the Domain Name System (DNS) helps users to navigate their way around the Internet. Every computer on the Internet has a unique identifier-similar to a telephone number-known as its "IP address" (IP stands for Internet Protocol). IP Addresses, as a string of characters, are hard to remember. The DNS makes using the internet easier by allowing a familiar string of letters (the "domain name") to be used instead of 207.151.159.3 becomes *www.internic.net* This "mnemonic" device makes addresses easier to interpret. These "domain name" are often consists of a person's name, a corporate's name, or a trademark. See Rajinder Kaur & Rashmi Aggarwal, *Cyber-squatting: Legal implications and judicial approaches-An Indian perspective*, 27 Issue 6 Computer Law & Security Review 653, 654 (2011).

15 Short for Web browser, a browser is a software application used to locate, retrieve and display content on the World Wide Web, including Web pages, images, video and other files. The two most popular browsers are Microsoft Internet Explorer and Firefox. Other major browsers include Google Chrome, Apple Safari and Opera. While most commonly use to access information on the web, a browser can also be used to access information hosted on Web servers in private networks. By Vangie Beal Available at *http://www.webopedia.com/TERM/B/browser.html*, last seen on 25 November, 2016.

16 Y. Dunaevsky, "Don't Confuse Metatags with Initial Interest Confusion", Vol. 29, Issue 3 Article 24 *Fordham Urban Law Journal* (2001).

17 A search engine is a web-based tool that enables users to locate information on the World Wide Web. Search engines are programs that search documents for specified keywords and return a list of the documents where the keywords were found. A search engine is really a general class of programs; however, the term is often used to specifically describe systems like Google, Bing and Yahoo! Search that enables users to search for documents on the World Wide Web. By Vangie Beal, available at *http://www.webopedia.com/TERM/S/search_ engine.html*, last seen on 21 October, 2016.

18 When someone uses a search engine, they type in one or more words describing what they are looking for: 'florist' or 'cheap holidays India', for example. These words or phrases are known as keywords.

19 *Supra* note 16

search engines work? And what makes some search engines more effective than others? Are some important questions to be answered to understand the importance of search engine?

2.3 *Working of Search Engines*

A search engine operates in the following order[20]:

- Web Crawling
- Indexing
- Searching

Search engines not only help to locate information but also function to organize information on the Web. Web users utilize search engines such as Yahoo!, Webcrawler, HotBot, Alta Vista and Infoseek, to locate Web sites that match their particular interest. Like any typical computerized searching mechanism, a user types a keyword query into the search engine, and the program searches its database and returns a list of results. The results returned by search engine programs are a list of hyperlinks to related Web pages. The design of each of these immense databases is unique to the particular search engine. Each search engine does, however, use a specific kind of software, usually called a spider or web crawler[21], to gather the addresses of Web pages available on the Internet. These programs, in turn, index text on the Web pages, thereby enabling the search engines to associate a user's keyword query with the indexed Web pages.[22] The site owner can exclude specific pages by using robots.txt[23].

The search engine then analyses the contents of each page to determine how it should be indexed[24] (for example, words can be extracted from the titles, page

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20 W. S. Jawadekar, Knowledge Management : Text & Cases 278 (Tata McGraw-Hill Education Private Ltd 1st ed. 2010)

21 A Web crawler is an Internet bot that systematically browses the World Wide Web, typically for the purpose of Web indexing. A Web crawler may also be called a Web spider, an ant, an automatic indexer, or (in the FOAF software context) a Web scutter.

22 J. R. Kuester And P. A. Nieves *Hyperlinks, Frames and Meta-Tags: An Intellectual Property Analysis* The Journal of Law and Technology, 243 (1998)

23 The Robot Exclusion Standard, also known as the Robots Exclusion Protocol or robots.txt protocol, is a convention to advising cooperating web crawlers and other web robots about accessing all or part of a website which is otherwise publicly viewable. When a site owner wishes to give instructions to web robots they place a text file called robots.txt in the root of the web site hierarchy (e.g. *https://www.example.com/robots.txt*). This text file contains the instructions in a specific format. A robots.txt file on a website will function as a request that specified robots ignore specified files or directories when crawling a site.

24 Search engine indexing collects, parses, and stores data to facilitate fast and accurate information retrieval. Index design incorporates interdisciplinary concepts from linguistics,

contents, headings or special fields called meta tags). The crawler returns all that information back to a central depository, where the data is indexed. Data about web pages are stored in an index database for use in later queries. The crawler will periodically return to the sites to check for any information that has changed. The frequency with which this happens is determined by the administrators of the search engine. A query from a user can be a single word. The index helps find information relating to the query as quickly as possible. When we query a search engine to locate information, we are actually searching through the index that the search engine has created —we are not actually searching the Web. These indices are giant databases of information that is collected and stored and subsequently searched. This explains why sometimes a search on a commercial search engine, such as Yahoo! or Google, will return results that are, in fact, dead links. Since the search results are based on the index, if the index hasn't been updated since a Web page became invalid the search engine treats the page as still an active link even though it no longer is. It will remain that way until the index is updated.[25]

When a user enters a query into a search engine (typically by using keywords), the engine examines its index and provides a listing of best-matching web pages according to its criteria, usually with a short summary containing the document's title and sometimes parts of the text. The index is built from the information stored with the data and the method by which the information is indexed.

The general and basic purpose of the search engines is to help users find the right and appropriate site that they are looking for. So when the search engines display result from their indexes they try to provide the best possible result based on the relevance to the keyword. While there may be millions of web pages that include a particular word or phrase, some pages may be more relevant, popular, or authoritative than others. The search engines employ different methods and evaluate different factors to rank the results to provide the "best" results. One such important factor in ranking the result is meta tags.[26]

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cognitive psychology, mathematics, informatics, and computer science. An alternate name for the process in the context of search engines designed to find web pages on the Internet is web indexing.

25 How Do Web Search Engines Work (updated on Feb.17, 2006) Available at *http://www.webopedia.com/DidYouKnow/Internet/HowWebSearchEnginesWork.asp*, last seen on 22 October, 2016.

26 Relevance is primarily determined by the number of times a given search term appears on a Web page. Other Factors also figure into the relevance formula including the title of the Web page, the number of visitors who come to the Web page, the number of other Web pages that link to the Webpage, and whether the search term appears in the address (or URL) of the Web

3 Metatags

3.1 Concept of Meta Tags

The web pages have an underlying code that represents the entire webpage through a coded language (Hypertext Markup Language (HTML)). In 1995, a working group of the World Wide Web Consortium[27] added a new tag line to HTML called "meta". Meta tags were intended to allow web authors to describe their creations for indexing machines, not to provide actual content for users viewing documents.[28]

A meta tag is a special HTML tag that provides information about a Web page. Unlike normal HTML tags, meta tags do not affect how the page is displayed. Instead, they provide information such as who created the page, how often it is updated, what the page is about, and which keywords represent the page's content. Many search engines use this information when building their indices.[29]

Meta tags provide information that does not appear on the page as displayed to web surfers, though the tags can be seen through the use of the "view source" option on a browser.[30] Meta tags are optional tags containing information inserted under the <HEAD> section of the Web pages. These are called Meta tags because they define a tag rather than being tags themselves. Apart from the Title tag, all tags specified under the <HEAD> section are the Meta Tags. Meta tags tell search engines, how to handle, index, rank and display your web pages. This information goes towards helping search engines rank your pages and website.[31]

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page. See F. Gregory Lastowka, *Search Engines, HTML, and Trademarks: What's the Meta for?* Vol. 86, No. 4. Virginia Law Review, 835 (May, 2000), available at *http://www.jstor.org/stable/1073847,* last seen on June 25 October, 2016.

27 The World Wide Web Consortium, known as W3C, was founded in 1994. The World Wide Web Consortium is an international community where Member organizations, a full-time staff, and the public work together to develop Web standards. Led by Web inventor Tim Berners-Lee and CEO Jeffrey Jaffe, W3C's mission is to lead the Web to its full potential. For more information see *http://www.w3.org/*

28 F. George Lastowka, *Search engines, HTML and Trademarks: What's the Meta for?* Vol. 86, No.4 Virginia Law Review, 835 (May, 2000) available at *http://www.jstor.org/stable/1073847,* Last seen on 25 November 2016.

29 Vangie Beal, *Meta tag*, available at *http://www.webopedia.com/TERM/M/meta_tag.html*, last seen on 28 June, 2015.

30 Dan McCuaig, *Halve the Baby: An Obvious Solution to the Troubling Use of Trademarks as Metatags,* 18 J. Marshall J. Computer & Info. L. 643 (2000).

31 S Blankson, Meta Tags - Optimising Your Website for Internet Search Engines 1(Lulu Inc 1st 2007), available at *https://books.google.co.in/books?id=OW0krCbdNBsC&printsec=*

3.3 Types of Meta tags

There are different types[32] of Meta tags, but two of them are most important and widely used. Two of the most popular meta tags today are the keyword and description meta tags, which help Web directories to properly index, categorize, and list Web pages.' The keyword Meta tag allows page authors to identify relevant search terms under which they feel their pages should be listed by search engines and directories. The keyword Meta tag, in theory, increases search engine accuracy by offering more efficiently condensed and accurate information about the contents of a page than the search engine's machine-driven algorithm might provide. For example, the author of a page about "Billy the Kid" may have never used the word "gunslinger" in the actual text of the page, yet used the words "horses" and "shoes" multiple times in the page. A search engine using an algorithm to index the page may conclude that the page should be highly relevant to users searching for "horses" or "shoes," but not at all relevant to users searching for "gunslingers." Yet the page is essentially about a gunslinger, and not of primary relevance to those looking for pages about shoes or horses. Hence, keyword Meta tags (in theory) make the search engine's index more accurate.[33]

Search engines also read description metatags. The description metatags allow authors to give a brief description of the contents of their pages in plain English. The description metatag provides search engines and directories with a kind of "blurb" by the page's authors, which appears beneath the page's link in a search result. This description is helpful because it is usually superior and more efficiently condensed than any description that could be created by a mechanical algorithm based on a Web page's content. The brief description is generally intended to aid web users in deciding whether they want to visit the page.[34]

3.3 Significance of Meta Tags

Although hidden from average users, search engines can detect and use meta tags to determine how well a web site matches the criteria of a given internet search. The method of tying a particular website to a search request varies

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frontcover&dq=meta+tags&hl=en&sa=X&ei=FrGXVMb5IMWPuAT924DoCQ&ved=0CB4Q6wEwAA#v=onepage&q=meta%20tags&f=false, last seen on 26 Noember, 2016.

32 There are different metatags that are used like "Keyword" metatag", Description" metatag", robots" metatag", revisit-after" metatag, "copyright" metatag," googlebot" metatag etc.

33 *Supra* note 28.

34 *Ibid.*

depending on the search engine being employed but often analyses a combination of a site's meta tags and visible text to make the determination. A listing of search results is then provided to the user, prioritized according to the extent of correlation determined by the analysis. The sites with the highest priority are presented early in the search and are likely to be viewed first by the user.

So, buying a website is only the start of finding success on the internet. Next, you have to be found by web users. Being found on Google, Yahoo!, MSN, Alta Vista, AOL, Alltheweb, Fast, GigaBlast, Netscape, Snap, WISEnut and thousands of other search engines is the next major hurdle you have to climb. Whilst offline advertising can help, it can be very expensive – and depending on your website – this may be too localized for a global market. You could use online advertising. Again, this is useful and effective if carefully planned; however, it can be time consuming and also expensive. There are other avenues such as blogs, press releases, affiliation banner exchange and link exchange to name but a few. All these methods have their place in your overall marketing plan; however, before you even start all that, you need to optimize your website so that web users searching through search engines like Google, Yahoo!, MSN, Alta Vista, AOL, Alltheweb, Fast, GigaBlast, Netscape, Snap, WISEnut and thousands of other search engines, can quickly find you. This means optimizing your website so that it will be found on the first search results page and preferably in the top ten highest ranking results.[35]

Web authors seeking to attract attention to their sites spend considerable energy redesigning their sites and Meta tags to improve search engine rankings for key terms. Numerous Web sites are devoted entirely to offering the best methods for improving search engine ranking authors have used their meta tags in misleading ways to "beat the system" and top the lists of categories where they have little or no relevance.[36]

4. Trademark Law

4.1 Concept of Trademark

A trademark is any word, name, symbol, device or any combination thereof used by a manufacturer or retailer of a product, in connection with that product, to help consumers identify that product and distinguish that product

35 *Supra* note 31.
36 *Supra* note 28

from the product of competitors. Trademarks indicate to consumers that a particular product comes from a distinct source, even if the name of that source is unknown to the consumer.[37]

The practice of putting marks on the products has been used since long to fix liability.[38] However, it was only with the turn of twentieth century that the marks became recognized as intellectual property and codified in state statutes[39].

Trademarks basically serve two-fold function. Firstly, they are the indicators of the source and origin of the product which helps consumers to choose the product. Secondly, they give a distinct personality to the product which helps the businesses and manufacturers to improve the quality of the product and build goodwill among the consumers (Brand value).

It is becoming increasingly common for a manufacturer or trader to give a distant name or get-up to his product, so that the consumer, relying on its quality, price or some such peculiar feature, identifies the product, goods or services of the same description. There is always an attempt to give the goods or services a separate distinct identity. This process of giving distinct identity to wares or services involves the use of trademarks or of trade names.[40] The companies spend considerable amount in advertising and building the brand value so as to reap the benefits of these marks later on.

4.2 Trademark Infringement

Trademark infringement is the use by another of the same or a similar mark that violates the prior trademark rights of another in the jurisdiction where such use occurs. The legal definition of infringement varies from one jurisdiction to another. The most common standards for infringement are:[41]

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37 M. A. Epstein, Epstein on Intellectual Property (Aspen Publishers Fifth edition, 2008 supp.)

38 Dr. S. Ono, Overview of Japanese Trademark Law, Chapter 2. The History And Development Of Trademark Law Section 1: The History Of Trademark Law available at http://www.iip.or.jp/translation/ono/ch2.pdf , Last seen on 28 November, 2016.

39 In India, The Trade Marks Act, 1999 deals with trademarks, repealing the earlier The Trade and Merchandise Marks Act, 1958. The Lanham (Trademark) Act (Pub.L. 79–489, 60 Stat. 427, enacted July 5, 1946, codified at 15 U.S.C. § 1051 et seq. (15 U.S.C. ch. 22)) is the primary federal trademark statute of law in the United States.

40 Prof. Ashwani K. Bansal, Law of Trade Marks in India: With Introduction to Intellectual Property 33 (Thomson Reuters, 3rd ed. 2014).

41 The International Trademark Association, Fact Sheets Protecting a Trademark, available at *http://www.inta.org/TrademarkBasics/FactSheets/Pages/TrademarkInfringement.aspx* (Last seen on 25 June, 2015)

(a) close similarity of a mark and its associated goods and/or services to a prior mark and its associated goods and/or services; or

(b) use of a mark that creates a likelihood of confusion with a prior mark among the relevant consumers. Trademark law in some jurisdictions incorporates both concepts.

In order to have a valid case for trademark infringement, a plaintiff must establish that (1) he has a valid mark entitled to protection under the Act; (2) he owns the mark; (3) a copy of the mark was used by another; (4) such use was commercial; and (5) the use is likely to cause confusion as to the origin of the mark.[42] The two important requirements out of the above five are use of the trademark as "use in commerce" and "Likelihood of confusion" among the consumers because of the use of the mark as to its origin. However these requirements can be proved in actual world without much difficulty but to prove them in the virtual world may be problematic. They are not easy to establish. The tests for "use in commerce' ' which courts use to determine whether the use of a trademark is commercial, are exceedingly broad and are, therefore, easy to satisfy. Proving the likelihood of confusion, however, can be difficult. The requirement of "likelihood of confusion," is considered to be the cornerstone of trademark infringement.[43] The Second Circuit American court in Sleekcraft case[44] has employed an eight-factor test to establish consumer confusion.

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42 In India, Section 29 of the *Trademarks Act* 1999 deals with trademark infringement. In the U.S. actions for infringement of trademarks can be brought under Section 32 of the *Lanham Act* 1946 and Section 43 (a) of the *Lanham Act* - protects against confusion or the likelihood of confusion as to source, sponsorship, or association between the goods and services of competitors in the marketplace. Section 43 (a) (1) (A) provides essentially the same protection for unregistered marks, and is commonly referred to as unfair competition.

43 *Nissan Motor* v. *Nissan Computer*, 89 F. Supp. 2d 1154, 1162 (C.D. Cal. 2000)

44 *AMF Inc.* v. *Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir.1979) The eight factors are
(1) strength of the mark;
(2) proximity of the goods;
(3) similarity of the marks;
(4) evidence of actual confusion;
(5) marketing channels used;
(6) type of goods and the degree of care likely to be exercised by the purchaser;
(7) defendant's intent in selecting the mark; and
(8) likelihood of expansion of the product lines.
See *Polaroid* v. *Polaroid Elec.*, 287 F.2d 492, 498 (2d Cir. 1996); *N. Y. State Soc'y of Certified Pub. Accountants* v. *Eric Louis Assocs.*, 79 F. Supp. 2d 331, 340 (S.D.N.Y. 1999) it added an another factor "the sophistication of the purchasers" in cases specifically involving trademark issues in cyberspace.

5. Metatags and Trademarks: An Interface

As stated above, Meta tags allow the web authors to describe their creations for search engines and search engines rely to these tags to locate the pages and sites. Meta tags are of great importance as they help the search engines to locate the web pages. So, meta tags were quickly picked up by web designers and were used illegally to attract more and more of internet traffic.

It became a common practice for web designers to include all kinds of words, names, symbols, or even trademarked terms in their meta tags "to capture the attention of every possible interested user." Problem arose when the web designers started using competitors trademarks as keyword meta tags in their own web pages so as to attract consumers originally wanting to visit the official site of the company who actually owns the trademark. Some started using trademarks that were totally unrelated to their sites. The most blameworthy two usual aspects are: sex and money. With the eruption of web sales and advertising, and especially the lucrative traffic in pornography, the (implicit) suggestion that Meta tags should be fairly used was drowned out by the fact that meta tags had become blank checks. Every hit on a page became another penny in the cash register.[45]

The trademarks owners soon realized that how their trademarks were being used in meta tags without their permission to attract consumers on sites and were being diverted from their official sites. The trademark owners brought law suits against these infringing sites claiming trademark infringement, passing off and trademark dilution.

It is argued that the use of competitor's trademarks in one meta tags to attract web traffic constitutes infringement under the trademark laws and unfair competition practices; The practice also results in Trademark dilution when the site is totally unrelated to the mark. But other view is that such use is fair. As metatags are hidden tags that are embedded on a web page and are never seen by the end user. The question is not simple.

Gaining unsolicited attention is the essence of advertising, and as the current blizzard of dot-com advertisements has demonstrated, businesses on the Web are engaged in a pitched battle to attract web users to their sites. In

[45] *Supra* note 28. (The death of Princess Diana might be seen as a benchmark moment in this tragedy of the commons.' Within hours of Princess Diana's untimely death, numerous Web sites sprang up (most of them pornographic) that used the term "Princess Diana" in their meta tags in an attempt to gain higher traffic)

conventional space consumers often decide where to shop for goods or services based in part on the physical proximity of shopping locations. In the "no there" of the Web, every site is equally accessible if a user can locate it. As a result, the fight to be located is fierce. Thus the real space maxim of "location, location, location" is translated on the Web as "promotion, promotion, promotion".[46]

6. Metatags and Trademark Infringement: Judicial Perspective

The trademark owners brought law suits against these infringing sites claiming trademark infringement, passing off[47] and trademark dilution[48]. Since these internet related issues were totally new, there were no earlier cases to refer to and the traditional trademark laws (like most other law) were not built with the architecture of cyberspace in mind. So the courts referred to the usual factors of infringement as discussed in Part-IV. "Use in commerce" and "consumer confusion" are two important factors to be proved to establish trademark infringement.

But the requirement of likelihood of confusion, however, is not easily apparent in cases involving trademark infringement through the use of meta tags (because the trademarks used as meta tags are hidden and are never visible to

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46 *Supra* note 28

47 In common law countries such as the United Kingdom, Australia and New Zealand, passing off is a common law tort which can be used to enforce unregistered trade mark rights. The tort of passing off protects the goodwill of a trader from a misrepresentation. The law of passing off prevents one trader from misrepresenting goods or services as being the goods and services of another, and also prevents a trader from holding out his or her goods or services as having some association or connection with another when this is not true. The plaintiff has to prove three essentials before he can succeed in his claim of passing off.

(1) Goodwill owned by a trader; (2) Misrepresentation by the defendant to the public; (3) Damage to goodwill. The tort of passing off has now been included in the statutes of various countries also.

48 Trademark dilution is a trademark law concept giving owner of famous trademark standing to forbid others from using that mark in a way that would lessen its uniqueness. Professor McCarthy offers a clear and concise explanation of the basics of trademark dilution:

> *The dilution theory grants protection to strong, well-recognized marks even in the absence of a likelihood of confusion, if defendant's use is such as to diminish or dilute the strong identification value of the plaintiffs mark even while not confusing customers as to source, sponsorship, affiliation or connection. The underlying rationale of the dilution doctrine is that a gradual attenuation or whittling away of the value of a trademark, resulting from use by another, constitutes an invasion of the senior user's property right in its mark and gives rise to an independent commercial tort.*

For trademark dilution see Dan McCuaig, *Halve the Baby: An Obvious Solution to the Troubling Use of Trademarks as Metatags,* 18 J. Marshall J. Computer & Info. L. 643, 649 (2000).

the end user). Therefore to prove the requirement of likelihood of confusion remained an issue. The court in *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*[49] used "initial interest confusion"[50] doctrine (the transient confusion that Internet users may experience while searching for a particular product or service on the Internet) to lower the legal threshold for the required proof of confusion.[51]

Initial interest confusion arose as a court-created subcategory of likelihood of confusion. Under the initial interest confusion theory, competitors attempt to side-track consumers into buying their product instead of the one that the consumers initially searched for.[52] Initial interest confusion occurs before the sale is made. The consumer discovers his initial confusion before the sale, but instead of correcting his mistake he proceeds to purchase the product he initially mistook for the original. Courts agree that when a vendor intentionally diverts consumer attention from his competitor by using the competitor's trademark, or something that may be confused for the competitor's trademark, the vendor benefits unjustly from the competitor's goodwill and can be accused of trademark infringement.[53]

The court in Brookfield's observed:

> West Coast's use of "moviebuff.com" in meta tags will still result in what is known as initial interest confusion. Web surfers looking for Brookfield's "MovieBuff" products who are taken by a search engine to "westcoastvideo.com" will find a database similar enough to "MovieBuff" such that a sizeable number of consumers who were originally looking for Brookfield's product will simply decide to utilize West Coast's offerings instead. Although there is no source confusion in the sense that consumers know they are patronizing West Coast rather than Brookfield, there is nevertheless initial interest confusion in the sense that, by using "moviebuff.com" or "moviebuff" to divert people looking for "MovieBuff" to its web site, West Coast improperly benefits from the goodwill that Brookfield developed in its mark. Recently in Dr. Seuss, we explicitly recognized that the use of another's trademark in a manner calculated 'to capture initial consumer attention, even though no actual sale is finally completed as a result of the confusion, may be still an infringement.

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49 *Brookfield Communications Inc.* v. *West Coast Entertainment Corp.* 174 F.3d 1036 (9th Cir. April 22, 1999)

50 The Second Circuit first used initial interest confusion in Grottian, *Helfferich, Schuly, Th. SteinwegNachf* v. *Steinway & Sons*, 523 F. 2d 1331 (2d Cir. 1975)

51 *Supra* note 16

52 Kristin Kemnitzer, *Beyond Rescuecom* v. *Google: The Future of Keyword Advertising*, 25 Berkeley Tech. L.J. 401 (2010) available at: *http://scholarship.law.berkeley.edu/btlj/vol25/iss1/16*, last seen on 02 July, 2015.

53 *Supra* note 16

To illustrate the lack of good faith, the Ninth Circuit in Brookfield analogized the metatags situation to purposefully posting an inaccurate sign or billboard on a highway. The court said:

> "Suppose West Coast's competitor (let's call it "Blockbuster") puts up a billboard on a highway reading—"West Coast Video: 2 miles ahead at Exit 7"—where West Coast is really located at Exit 8 but Blockbuster is located at Exit 7. Customers looking for West Coast's store will pull off at Exit 7 and drive around looking for it. Unable to locate West Coast, but seeing the Blockbuster store right by the highway entrance, they may simply rent there. Even consumers who prefer West Coast may find it not worth the trouble to continue searching for West Coast since there is a Blockbuster right there".

Since Brookfield's a number of cases have arisen and courts have used the initial interest confusion doctrine to decide the liability of the infringing sites.[54] Still, several important questions have currently received little attention. How should initial interest confusion be defined? How should initial interest confusion be conceptualized? How much confusion is enough to justify a remedy? Who needs to be confused, when, and for how long? How should courts determine when initial interest confusion is sufficient to support a finding of trademark infringement?[55] Are some questions on which courts are still pondering. Courts, since Brookfield have come a long way and devised different tests to fix the liability of websites under the initial interest confusion doctrine.

Another important judicial outcome in meta tags related cases is the defence of fair use, which the courts have recognized. The court in *Playboy Enters., Inc. v. Welles*[56] allowed Welles to use the trademarks of the plaintiff as meta tags in her website citing fair use defence. This judgment assumes importance as by displaying good faith and fair use in the use of one trademarks as meta tags the defendant can avoid liability.

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[54] See Playboy Enterprises, *Inc.* v. *Calvin Designer Label*, 985 F. Supp. 2d 1220 (N.D. Cal. 1997); *Playboy Enterprises, Inc., Plaintiff*, v. *Asiafocus International*, Inc., Internet Promotions, Inc., Graham Daley, and Alan Smith, 1998 WL 724000 (E.D.Va.); Niton Corporation, v. Radiation Monitoring Devices, Inc., No. Civ.A. 98-11629-REK. United States District Court, D. Massachusetts. Nov. 18, 1998; The New York Society of Certified Public Accountants v. Eric Louis Associates, Inc. 79 F.Supp. 2d 331 (S.D.N.Y., Dec. 2, 1999); SNA, Inc. v. Array 51 F. Supp. 2d 554 (E.D. Pa. 1999); Australian Gold, Inc. v. Hatfield 436 F.3d 1228 (10th Cir. 2006); Venture Tape Corp. v. McGills Glass Warehouse 540 F.3d 56 (1st Cir. 2008)

[55] Chad J. Doellinger, *Trademarks, Metatags, And Initial Interest Confusion: A Look to the past to Reconceptualize The Future*, 41 Idea — The Journal of Law and Technology 173 (2001).

[56] *Playboy Enters., Inc.* v. *Welles* 7 F. Supp. 2d 1098 (S.D. Cal. 1998) (preliminary injunction), aff'd, 162 F.3d 1169 (9th Cir. 1998); 78 F. Supp. 2d 1066 (S.D. Cal. 1999) (summary judgment), aff'd in part, rev'd in part 279 F.3d 796 (9th Cir. 2002), aff'd 30 Fed. Appx. 734 (9th Cir. 2002)

The court in this case observed:

> "Ms. Welles' use of the terms Playmate and Playmate of the Year constitute identification of herself. The use of those terms, in the website and in the meta tags, allows websurfers and potential customers to identify her services, whether it be her line of cigars, her promotional services, or her nude photographs. Given that Ms. Welles is the "Playmate of the Year 1981," there is no other way that Ms. Welles can identify or describe herself and her services without venturing into absurd descriptive phrases. In cases where the trademarked term must be used to identify the individual or good, infringement and dilution laws do not apply". [57]

This case made it clear that courts may allow the use of trademarks in meta tags where such use is not misleading or unfair.[58] The courts must perform a fact intensive, case-by-case analysis when determining trademark infringement. Much depends on the intent of the defendant. If the use of trademark keywords is to really divert and confuse the consumers or it is only a legitimate comparative advertising practice.

7. Conclusion

As search engines relied heavily on meta tags to ensure relevancy of the sites with the searched term. The web designers quickly picked up these tags and used them illegally to attract web traffic. Different sites were gaining unsolicited attention on the web by the use of trademark in which the owners had invested heavily to make their goodwill. These sites were illegally diverting consumers from the official sites of the trademark holders to these sites. So, the trademark owners soon filed case law in courts citing trademark infringement, dilution and unfair competition. The courts by using the initial interest confusion doctrine have tried to address the issue of trademark infringement in meta tags.[59]

But the doctrine of initial interest confusion has been criticized since its inception in the Brookfield's case. Regarding fixing the liability of search engines, search engines do not "take" web surfers to any site, they just respond to

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57 *Ibid.*

58 *Refer Bally Total Fitness Holding Corporation* v. *Andrew S. Faber* 29 F. Supp. 2d 1161 (C.D.Cal., Nov. 23, 1998); NumtecInterstahl, OGH, December 19, 2000, 4 Ob 308/00y. Original text (in German) at *http://www.internet4jurists.at/entscheidungen/ogh4_308_00y.htm.*; Philippine Long Distance Telephone Company, Inc. v. Philippine League for Democratic Telecommunications, Inc. and Gerardo B. Kaimo, Republic of the Philippines Regional Trial Court, National Capital Judicial Region, Quezon City, Branch 90, Civil Case No. 99-38800; Bihari v. Gross, 119 F. Supp. 2d 309 (S.D.N.Y. 2000); An order issued by the United States Court of Appeals for the Seventh Circuit on 18 October, 2002, modified its earlier opinion in *Promatek Industries Ltd.* v. *Equitrac Corporation*, (No. 00-4276, 13 August, 2002).

59 See Part-V

the requests for information by providing lists of sites that, depending on the situation-specific accuracy of the search engines' individual algorithms, are most likely to meet the surfer's needs. The surfer then chooses from amongst the list of hyperlinks returned which site(s) she wishes to examine.[60]

It is also argued that trademarks do not provide their holders with patent-like property rights and they should not be enforced by courts in such a manner as to suppress competition.[61]

Even if a consumer get confused the Initial Interest confusion cannot be applied blankly (Especially the analogy drawn by Brookfield's of a billboard on a highway) because there is little cost involved in the mistake in case of virtual world. The Internet user simply must click back to the previous page if he realizes he made a mistake. He does not invest the same amount of time or energy in the online context as he does in the brick and mortar situation.[62] While deciding the liability of infringing sites Courts seldom keep in mind the consumer sophistication. Since, it is generally argued that internet users are smart and intelligent and are less likely to get confused. To prove likelihood of confusion among consumers is really a difficult task. It may be possible only through specific consumer surveys.[63]

The court should also keep numerous other factors in account. The use of competitor's trademark as a keyword is not necessarily meant to confuse consumers into purchasing a competitor's product. Instead, the practice can be used to entice consumers to buy the competitor's product, with the consumer knowing full well what he is purchasing. Consumers want choice and simple comparative advertising should be promoted.[64]

The issue relating to the use of trademarks in metatags is a complicated issue. It has broadened the applicability of Trademark law in cyber space and has opened a new Pandora box. No doubt, the search engines have started relying less on keyword meta tags while displaying results but still many search engines still consider these tags. The web designers, search engines, auction sites are operating in the grey area of Intellectual property by using the trademarks of

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60 *Supra* note 30.

61 *Ibid.*

62 See *Savin Corporation* v. *The Savin Group*, 391 F.3d 439, 2004 U.S. App. Lexis 25479 (2d Cir., 10 December, 2004); Hearts on Fire Co., LLC v. Blue Nile, Inc.___ F. Supp. 2d ____, 2009 WL 794482 (D. Mass. 27 Mar., 2009) other also put click in find option.

63 *Supra* note 50

64 *Ibid.*

others as keywords. There is no specific and comprehensive law dealing with these peculiar practices on internet. Though, judiciary has made an attempt to provide a solution but without the recognition and admission of the problem in the form of law, not much can be expected.

ACID ATTACKS – A GRAVE VIOLATION OF HUMAN RIGHTS OF WOMEN

Dr. Sharanjit

Human goodness has limits. Human depravity has none. However, the need of the hour is not exasperation or helplessness, but to mould and evolve the law so as to make it more sensitive and responsive to the demands of the time in order to resolve the basic problem.[1]

1. Introduction

Crimes against women are rampant. Deep rooted gender inequality, particularly in South Asian countries like India, Pakistan, Bangladesh etc. culminates into serious forms of human rights abuses against women. In the recent few years the safety of women both inside and outside her home has become a matter of serious concern. With every passing day the safety of women is compromised with. Unfortunately, we are living in the worst of times as far as the safety of women is concerned.

In India, male domination with a complementary suppression of women has been continuing since pre-historic times. There has been discrimination between the male and female child, between man and woman. Women are considered as goods and chattels. They are considered as objects of sense-gratification. The history of suppression of women in India is very long. Indian women "have suffered and are suffering discrimination in silence. Self sacrifice and self denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination."[2]

Acid attacks on women is a burning issue nowadays. Women are often attacked with acid by stalkers, husband or other male partners. Reasons can be widespread, for instance denying an offer of marriage or love relationship, indulging into a relationship with some other man, denying sexual and physical advances so on and so forth. The audacity of such crimes had increased to such a large extent that the law makers by way of the Criminal Law (Amendment) Act,

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1 *Bharwala Bhoginbhai Hirajibhai* v. *State of Gujrat*, 1983 AIR 753.

2 Justice K. Ramaswamy in *Madhu Kishwar* v. *State of Bihar* (1996) 5 SCC 148.

2013 brought forward significant provisions to curb acid attacks in the country and to provide stringent punishment to those indulging in such atrocious crimes against women.

According to the Acid Survivors Foundation India, with the amendment in Indian Penal Code in 2013, incidents of acid attack are now being recorded as a separate offence under section 326A and 326B. The first data available after the amendment relate to the year 2014 when 225 cases were reported from all over India. This indicates a steep rise compared to the previous years-106 in 2012 and 116 in 2013. In 2015 according to the AFSI Statistics, 802 cases of acid violence have occurred in India. Uttar Pradesh has the highest number -147, in West Bengal there were 125 cases of acid attacks, in Delhi UT 96 cases, in Madhya Pradesh 61, in Haryana 45, in Punjab 42, whereas in the States of Arunachal Pradesh, Mizoram, Andaman and Nicobar islands, D&N Haveli, Daman and Diu, Lakshadweep no incidents of acid attacks were witnessed .[3]

Since buying acid is simple, it is being used to settle most minor disputes. An acid attack survivor needs surgeries throughout his/ her lifetime with each surgery costing very high. This crime is mainly committed in four countries of the world, namely, Bangladesh, Pakistan, Cambodia and India. All the other three countries have engaged in paving the way to an effective remedy for the survivors of acid attack. Bangladesh has passed a law in 2002, which is much stronger law than the Indian law as Indian law neither effectively address the gravity of acid attacks nor does it adequately help the acid attack victims.[4]

Men resort to acid attacks as a means to intimidate women and to impose their authority over her. Such kind of barbaric attacks nurture s his male ego that he is the proud creator of god and has created the patriarchal society. Females between 11 and 30 years are the most vulnerable to such attacks, in 36% of the incidents the victims are targeted for rejection of marriage proposals. Therefore, the main cause that is seen to be behind acid attacks is rejection of sexual advances.[5]

Around 1500 acid attacks are reported globally each year, with 80% of them on women, according to a London based charity, Acid Survivors Trust International. Though it is a gross under estimation of the crime, as most victims are scared to speak out, especially in the Asian countries. Hundreds of women lead a life of

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3 ASFI Statistics, *http://www.asfi.in/webpage.php?title=1&parent=76&catid=78.*

4 *Parivartan Kendra* v. *Union of India,* 2016 (1) RCR (Criminal) SC 338.

5 Nargis Yeasmeen, *Acid Attack in the Back Drop of India and Criminal Amendment Act,* 2013, *International Journal of Humanities and Social Science Invention,* Vol. 4, Issue 1 January, 2015, p. 8.

suffering, hiding from public eye for their shockingly mutilated faces. Many of them turn blind and deaf, facing physical and mental agony for which they need a proper rehabilitation plan. There is no official statistics available for India, but a study conducted by Cornell University in January 2011 said there were 153 attacks reported in the media from 1999 to 2010. Most of these attacks said the study, are acts of revenge, when a woman spurns sexual advances or rejects a marriage proposal she is made to suffer for saying 'no' to a man.[6]

The likeliness of the victim getting a job which involves physical exertion of energy is very low. The social stigma and the pain that she has to go through for not being accepted by the society cannot be neglected. Furthermore, the general reaction of loathing which she would have to encounter and the humiliation that she would have to face throughout the life cannot be compensated in terms of money. As a result of the physical injury, the victim will not be able to lead a normal life and cannot dream of marriage prospects, since her skin is fragile due to the acid attack she would have to take care of it for the rest of her life. Therefore, the after care and rehabilitation cost that has to be incurred will have huge financial implications on her and her family.

2. Nature and Causes

Acid attacks are becoming a growing phenomenon in India. Although acid attack is a crime which is gender neutral, it has a specific gender dimension in India. Most of the reported attacks have been committed on women for spurning suitors, for rejecting proposals of marriage, for denying dowry etc. Acid attack is an extremely violent crime by which the perpetrator of the crime seeks to inflict severe physical and mental suffering on the women. It is motivated by a deep seated jealousy or feelings of revenge against a women. The attacker cannot bear the fact that he had been rejected and seeks to destroy the body of the woman who has dared to stand up against him. For instance in Bangladesh, 78% of the reported acid violence is inflicted on women with the most common reasons for attack being the refusal for marriage, the denial of sex and the rejection for romance.[7]

Acid attacks are used as a weapon to silence and control women. They are used to negate a women's right to exercise her choice, her assertion of independence through an act of refusal, her right to loveand not to love and her right to live a

6 The *Tribune*, Chandigarh, 9 January 2013, p. 10.
7 Acid Survivors Foundation, Acid Throwing Fact Sheet, Dhaka, Bangladesh, 2001.

life of dignity. [8]

The acid is usually thrown on a victim's face. The perpetrator wants to disfigure the victim. Aside from the reasons stated above and the other reasons for acid attacks include robbery, land disputes etc.

In *Devanand* v. *State,*[9] a man threw acid on his estranged wife because she refused to cohabit with him. The wife suffered permanent disfigurement and loss of one eye. The accused was convicted under section 307 and was imprisoned for 7 years.

In *Ravinder Singh* v. *State of Haryana,*[10] acid was poured on a woman by her husband for her refusing to give him divorce. The husband was involved in extra-marital affair. Due to this attack the victim suffered multiple acid burns on her entire body, which latter led to her death. The accused was charged under section 300 of IPC. However life imprisonment was not imposed even though the victim died.

In *Gulab Sahiblal Shaikh* v. *State of Maharashtra,*[11] acid was thrown on a woman, while she was holding her two and a half year old baby, by her brother-in-law for refusing to give money to maintain her husband's second wife.

In *Marepally Venkata Sree Nagesh* v. *State of A.P.*,[12] the accused was suspicious about the character of his wife and inserted mercuric chloride into her vagina. The victim died due to renal failure. The accused was charged and convicted under section 302 and 307 IPC.

In *Syed Shafique Ahmed* v. *State of Maharashtra,*[13] a personal enmity with his wife was the reason behind a gruesome acid attack by the husband on his wife as well as another person. This caused disfiguration of the face of both the wife as well as that of the other person and loss of vision of the right eye of the wife. The accused was charged under sections 326 and 324 of the IPC and was awarded rupees five thousand as fine and three years imprisonment.

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8 Burnt not Defeated, Women fight against Acid Attacks in Karnataka, A Report by CSAAAW Bangalore), 2007. p. 15.

9 1987 (1) Crimes 314.

10 SC 856 AIR (1975).

11 1998 Bom. CR (Cri).

12 2002 Cri. LJ 3625.

13 Cri. LJ 1403 (2002).

In *State of Uttar Pradesh* v. *Smt. Aqueela,*[14] due to enmity acid was poured by a mother and son duo over the victims. One of the victims suffered from multiple acid burns on the whole back extending from scapular spine to iliac crest. The other victim suffered chemical burns on the right side of the forehead just above medial end of right eye brow and the skin was blackened. The accused was convicted under section 304 and 323/34 IPC.

3. Impact of Acid Attacks

Acid attack is a grave human rights violation as it has a long lasting impact on the life of the victim and her family. The victim faces perpetual torture, permanent disfiguration and other emotional and psychological problems through out her life.

They may become too traumatized and embarrassed to walk out of their house and carry out simple tasks let alone get married, have children, get a job, go to school etc. Even if they are willing to pursue a normal life, there is no guarantee that society itself will treat them as normal human beings given their appearance and disabilities after the attack. They may not be able to work, or be able to find a job, and thus perpetually struggle to survive.[15]

Hydrochloric, Sulphuric and other acids all have a catastrophic effect on human flesh. These corrosive substances cause the skin tissue to melt. The bones of victims become exposed and sometimes the acid dissolves the bones too. Permanent scars disfigure a human being's body for life. Furthermore, if the acid enters the eyes of the victim during the attack, as is common in acid attack cases, it damages these vital organs permanently. Many acid attack victims have lost the use of one or both eyes.[16]

Laxmi was the victim of a gruesome acid attack and she had filed a writ petition in the Supreme Court of India in May 2006. The petition stated that Laxmi, a young girl, was subjected to an acid attack following her refusal to marry the accused. As a result of the attack the victim's arms, face and other body parts were severely disfigured and deformed. Even after four plastic surgeries the

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14 1999 Cri. L.J. 2754.

15 Baseline Survey with International Comparative Analysis of the Legal Aspects of Acid Violence in Uganda, Commissioned by: Acid Survivors Foundation Uganda with funding support from the US Democracy and Human Rights Fund, Legal Consultant: Rachel Forster, November 2004.

16 The Law Commission of India, Two Hundred and Twenty-Sixth Report on *"The Inclusion of Acid Attacks as Specific Offences in the Indian Penal Code and a Law for Compensation for Victims of Crime"*, p. 226.

victim's physical appearance remains horrific and many more surgeries be required to make her physical appearance a semblance of what it was. The victim can never look as she did before the attack.

Acid attacks destroys the eyes, ears, nose and mouth of the victim. It may result in blindness, deafness, breathing failure, burning of the skin, shock and even death. Other than bodily consequences the victim undergoes traumatic changes psychologically. The victim may suffer depression, insomnia, nightmares, persistent fear and insecurity, difficulty in concentrating etc.

The injuries range from burns to permanent disfigurement to death. In many acid attacks the victim suffers a slow and painful death. Acid attack survivors are physically, psychologically and socially traumatized. The physical extent of their injuries are deep, permanent and have a direct impact on their psychological well-being and social functionally. [17]

The victim may also feel socially cut off. They may hesitate to leave their homes, walk out on streets etc. the victim has to discontinue with her studies or job.

It is relevant to mention that in 2006 CSAAAW (Campaign and Struggle Against Acid Attacks on Women) filed a Public Interest Litigation in the Karnatka High Court seeking a court order to the State government to ensure speedy and gender –sensitive trials for victims of acid attacks as well as better medical treatment and rehabilitation . The CSAAAW also demanded the production, distribution and storage of toxic acids be strictly monitored by the State.[18]

4. Law and the Offence of Acid Attacks

4.1 The Law Commission of India

The Law Commission of India in its two hundred and twenty-sixth report on *"the Inclusion of Acid Attacks as Specific Offences in the Indian Penal Code and a Law for Compensation for Victims of Crime"* had thoroughly examined the relevant provisions of the Indian Penal Code and made the following recommendations-[19]

Firstly, a new section 326A be added to IPC providing a minimum punishment of ten years imprisonment which may extend to life imprisonment and with a

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17 *Id.* at 226.7.

18 The Hindu, Acid Attack victims yet to get assistance, 27 April, 2007.

19 *Supra* note 16 at 226.3.

fine which may extend to Rs. 10 lakhs for committing the offence of acid attacks;

Secondly, a presumption as to acid attack be incorporated in the Indian Evidence Act, 1872 as section 114B;

Thirdly, a law "Criminal Injuries Compensation Act" be enacted providing interim as well as final monetary compensation to victims of acts of violence like rape, sexual assault, acid attacks, etc.

4.2 The Indian Penal Code, 1860

Earlier the offence of acid attack was not specifically defined in the Indian Penal Code, 1860 nor was there any special provisions to deal with the victims of acid attacks in the procedural laws. Thus the victims of acid attacks were dealt under sections 320, 322, 325 and 326 of the Indian Penal Code.

Section 320 of the IPC deals with Grievous Hurt. The following kinds of hurts only are designated as grievous-

First-	Emasculation.
Second –	Permanent Privation of the sight of either eye.
Third -	Permanent Privation of the hearing of either ear.
Fourth –	Privation of any member or joint.
Fifth -	Destruction or permanent impairing of the powers of any member or joint.
Sixth –	Permanent disfugration of the head or the face.
Seventh –	Fracture or dislocation of the head or the face.
Eighth –	Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow the bodily pursuits.

The Criminal Law Amendment Bill, 2013 had defined acid attack as a separate offence and had proposed punishment of not less than 10 years to a maximum of life imprisonment for the perpetrators and fine that could go up to Rs. 10 lakh.

In 2013, after the brutal gang rape of a physiotherapy student in New Delhi, there were country wide protests and demonstrations on the issues concerning

security of women in the country. People from all walks of life came together and raised the issue of growing crime against women in the country. This lead to significant changes in penal as well as procedural criminal laws. Sections 326-A and B were also inserted in the IPC, 1860 to provide better protection to women from acid attacks. The new sections have provided for a minimum sentence in the case of acid attacks.

Section 326-A. Voluntary Causing Grievous Hurt by use of Acid, etc- Whoever causes permanent or partial damage or deformity to, or burns or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine:

> Provided that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim:
>
> > Provided further that any fine imposed under this section shall be paid to the victim.
> >
> > Section 326-A is a revolutionary and much needed provision in the penal law. It has made acid attack a specific offence. In the absence of section 326-A, the crime of acid attack was dealt under section 326 (grievous hurt). This section reflects the proposals of the Law Commission of India in its report dealing with acid attacks.

Section 326-A is one of the very few sections wherein provision for minimum mandatory sentence of ten years have been made while the maximum sentence is imprisonment for life. The number of acid attacks have increased manifold and consequently this stern punishment. The amount of fine to be paid to the victim will be decided taking care of the medical expenses of the victim. Mensrea in the form of intention or knowledge as provided is a necessary ingredient of the offence.[20]

Section 326-B. Voluntary throwing or attempting to throw acid- whoever throws or attempts to throw acid on any person or attempts to administer acid on

[20] T. Bhattacharyya (Prof.), *The Indian Penal Code,* Central Law Agency, Allahabad, 2014, p. 555.

any person, or attempts to use any other means, with the intention of causing permanent or partial damage or deformity of burns or maiming or disfigurement or disability or grievous hurt to that person, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

Explanation 1.- for the purposes of section 326-A and this section "acid" includes any substance which has acidic or corrosive character or burning nature, that is capable of causing bodily injury leading to scars or disfigurement or temporary or permanent disability.

Explanation 2.- For the purposes of section 326-A and this section, permanent or partial damage or deformity shall not be required to be irreversible.

The new law has only increased the punishment for the perpetrators, it does not have provisions to aid acid attack victims who have to live with not just the physical disfigurement but also psychological scars and social ostracisation. A separate law is needed to tackle the crime of acid attacks, including ban on easy sale of nitric and sulphuric acid, available for Rs. 30 a bottle. Also the new law makes no mention of concrete solutions such as insurance plan or long –term and proper medical care for the victims. [21]

In the landmark judgment of *Laxmi* v. *Union of India,*[22] the Apex Court directed the government and private hospitals to provide free medical treatment to victims of acid attacks. The State authorities were directed to ensure that the private hospitals provided free medical facilities and treatment. The Court observed that despite the directions given by this court in *Laxmi* v. *Union of India,*[23] the minimum compensation of three lakhs rupees per acid attack victim has not been fixed in some of the States/ Union Territories. The Court opinioned, it will be appropriate that member secretary of the State Legal Authority takes up the issue with the State Governments so that the orders passed by this court are complied with and a minimum of three lakhs rupees, is made available to each victim of acid attack.

The Court also issued a direction that the State Governments/ Union Territories should seriously discuss and take up the matter with all the private hospitals in their respective States and Union Territories to the effect that the private hospitals should not refuse treatment to victims of acid attack and that full

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21 Acid Attacks and the Rhetoric of Love, The *Tribune*, Chandigarh, 5 June, 2013.
22 2015 (2) RCR (Criminal) SC 585.
23 (2014) 4 SCC 427.

treatment should be provided to such victims including medicines, food, bedding and reconstructive surgeries.

The court also gave a direction that the hospitals were the victims of acid attack is first treated, should give a certificate that the individual is a victim of acid attack. This certificate may be utilized by the victim for further treatment or reconstructive surgeries or any other schemes that the victim may be entitled to with the State Governments/ Union Territories, as the case may be.

With regard to the banning of sale of acid across the counter, the Court directed the secretary in the Ministry of Home Affairs and secretary in the Ministry of Health and Family Welfare to take up the matter with the State Governments/ Union Territories to ensure that an appropriate notification to this effect is issued within a period of three months from the date of this order.

In *Parivartan Kendra* v. *Union of India,*[24] the victim did not respond to the sexual advances of the miscreants. They threw acid on the victim and her sister. The victim suffered 28% burns on her body and 90% on her face. Due to the acid attack the victim had undergone several surgeries, and had to undergo many more corrective and curative surgeries for her treatment. As the victim was robbed of the enjoyment of life, the Apex Court directed the State Government to pay compensation of Rs. 10 lakhs to victim and Rs. 3 lakhs to her sister.

Further the States were directed to pay at least Rs 3 lakhs to the victim of acid attack as compensation. The States were also directed to follow the guidelines in cases of acid victim and sale of acid as contained in *Laxmi* v. *Union of India* .[25]

By way of the present writ petition filed in public interest litigation under article 32 of the Constitution of India, the petitioner had sought justice, compensation and restoration of the dignity of the survivors of the acid attack, and also the assurance that these horrific events are not repeated elsewhere. It was contended that despite the orders and directions of the Apex Court in Laxmi's case, acid is still readily available to most of the population in India and the acid attackers are living with impunity, and the victims are not in a position to afford basic care or services.

In *Anju* v. *State of Haryana,*[26] the husband threw acid on his wife and she suffered 40% defacement. Compensation of six lakh rupees was awarded to be

24 *Supra* note 4 at 336.
25 2015 (2) RCR (Cri.) 583.
26 2016 (2) RCR (Criminal) (P & H) 794.

paid by the government. A monthly financial assistance of Rs. 8000 was also granted to the victim. It was further provided that if the victim, after having recovered applies for the allotment of a fair price shop, the Food and Supply Department, Haryana shall give preference to her in that matter as provided in the scheme dated 25. 3. 2016.

In a landmark judgment in September 2016, special women's court judge sentenced 25 year old Ankur Panwar to death for a fatal acid attack on 23 year old nurse Preeti Rathi in May 2013. Panwar attacked her as he was jealous of her success and because she had rejected his marriage proposal. This is the first time that a convict of acid attack in India has been awarded death penalty. The judge said, "rape destroys the soul of the victim. But she can be kept in isolation, without disclosing her identity, and be rehabilitated. But for an acid attack victim she has to move around with her destroyed body."

5. Conclusion

As discussed previously, acid is a cheap weapon of revenge but it can cause immeasurable and unthinkable devastation in a person's life? Sadly, the unfortunate victims of acid attack have to suffer severe mental trauma and physical pain. The victim may have to spend lakhs of rupees for plastic surgery of her disfigured face and body. While the victim has to live with her disfigured appearance, the attacker may not suffer the same pain and agony.

There is a need to ensure that the guidelines are implemented properly. Keeping in view the impact of acid attack on the victim and her social, economical and personal life, we need to enhance the amount of compensation. We cannot be oblivious of the fact that the victim of acid attack requires permanent treatment for the damaged skin. Suffice it to say that the compensation must not only be awarded in terms of the physical injury, there is also a need to take note of the victim's inability to lead a full life and to enjoy those amenities which is being robbed of her as a result of the acid attack.

It is suggested as under:

(i) The law must include guidelines for handling and supporting the victims of acid attack economically, socially and psychologically. There is a need for speedy and gender- sensitive trials for victims of acid attacks.

(ii) The production, distribution and storage of toxic acids should be strictly monitored by the government to prevent there misuse.

(iii) If a person has thrown acid on another a presumption should be raised against the person, who has thrown the acid that he had done the act deliberately.

(iv) Gender sensitization is the urgent need of the hour keeping in mind the increasing trend of crime against women.

(v) Need to mobilize public opinion towards recognizing acid attacks as a serious form of human rights violation.

(vi) As acid attack leads to serious injuries and deformities therefore adequate compensation should be provided to the victim for meeting the medical expenditure. Provisions for interim payments should also be made.

ADMISSIBILITY RULES OF DNA EVIDENCE IN COURT

Deepti Singla*

1. Introduction

As the DNA evidence is versatile and powerful, its impact on the criminal justice system is significant. DNA evidence constitutes circumstantial evidence used to identify the perpetrator of a serious crime by comparing the DNA profile of a suspect with the DNA profile of a bodily substance found at the crime scene or on or in something associated with the crime. It can provide compelling evidence linking a suspect to the crime. Aided by use of DNA evidence, prosecutors are often able to establish the guilt of an accused person. At the same time, DNA evidence has been influential in assisting in the search for truth by exonerating the innocent.[1] For instance, in 1987, Colin Pitchfork was the first person to be convicted of murder through the use of DNA evidence and Buckland who was already serving time for the rape, made history by becoming the first person to be exonerated by DNA evidence. Therefore, DNA evidence can be used to convicts the criminals as well as exonerates the innocent people.

DNA fingerprinting technique is now accepted as a robust and reliable technique. It was developed by Prof. Alec Jeffrey in 1986[2] and was later accepted as admissible in evidence by courts all over the world including India and has proved to be a great boon in identifying people, eliminating suspects and convicting criminals. Although states like UK, USA, and Canada are still wrestling with the issue of admissibility of DNA evidence, the FRYE standards and DAUBERT standards of the U.S.A. Supreme Court have established special rules for the admissibility of DNA evidence. The FRYE test established that where the scientific evidence offered has been generally accepted by the scientific community to which it relates, and DNA standards were followed in collecting and processing the evidence, the trail court should admit that scientific evidence. The DAUBERT case replaced the FRYE standard with one that requires a trail court to act as a "gatekeeper" and ensure that any scientific evidence that was admitted was not only relevant to the issue at hand but was

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1 FPT Heads of Prosecutions Committee Report of the Working Group on 'the Prevention of Miscarriages of Justice', available at *http://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/pmj-pej/p8.html* (assessed on 02 January, 2017).

2 The DNA technique was first developed in 1986 and the first criminal conviction based on DNA testing was in 1986 United States case *Andrews* v. *State* (Fla. Dist. Ct. App. 1988).

also reliable. A number of variable factors bear upon the admissibility of the results of DNA testing, such as:-

I. Whether the scientist involved is sufficiently expert in the area;
II. Whether the Trier of the fact needs or would benefit from the evidence;
III. Whether the evidence bears upon an ultimate question to be decided by the Trier of fact; and
IV. Whether the basis of the expert's opinion have been properly proved.[3]

These rules of evidence that controls the admissibility of DNA evidence are not statutory but based on judicial standards.

Though the scientific basis for DNA evidence is now established by laying down the rules and standards for its admissibility but it does not spell the end of challenges to its use. The admissibility of the DNA evidence in court is still a debatable issue and the main problem is the method of collection, preservation, contamination of samples, laboratory errors, etc. The admissibility of the DNA evidence, in general, depends on its accuracy and proper collection, preservation and documentation which can satisfy the court that the evidence which has been put in front of it is reliable. The court admits the DNA test results as evidence if it is satisfied that the appropriate standards and controls have been complied with.

2. Admissibility Rules of DNA Evidence in Court

Before a court accepts DNA evidence as admissible, DNA evidence must pass the baseline test of relevancy and what evidence is relevant is defined by the Rule 401 of the *Federal Rules of Evidence* as:

> "Evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Once a court determines that the DNA evidence is relevant, there are two different legal standards that courts apply in determining the admissibility of DNA evidence, one standard is that articulated in FRYE's general acceptance test, the other standard is that articulated in DAUBERT's relevancy-reliability standard.

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[3] Jyotirmoy Adhikary, *DNA Technology in Administration of Justice,* LexisNexis Butterworths, New Delhi, India, 2007, p. 321.

The original test for admissibility of DNA was developed in *Frye* v. *United States*[4]. The Supreme Court in this case held that scientific evidence to be admissible must be "sufficiently established to have gained general acceptance" in the particular field in which it belongs. In a *Daubert* v. *Merrell Dow Pharmaceuticals Inc.*[5], the Supreme Court held that the judge assumes the role of a "gatekeeper" and ensure that any scientific evidence that was admitted was both relevant and reliable.

2.1 The Frye Standard / General Acceptance Standard

The FRYE standard or general acceptance test is a test to determine the admissibility of scientific evidence. It provides that expert opinion based on a scientific technique is only admissible if the technique or procedure is generally accepted as reliable within the relevant scientific community.

"Reliability" is the touchstone for admission which relates to both the scientific procedure employed, and the facts relied upon by the expert in conducting her testing or reaching her opinion. That is to say, this applies to procedures, principles or techniques that may be presented in the proceedings of a court that are sufficiently established and accepted.[6] In essence, for the results of a scientific DNA technique to be admissible, the technique must be sufficiently established to have gained general acceptance in its particular field.

Frye v. *United States*[7] was the first important judgment regarding standards for the admissibility of scientific evidence. In this case, Frye was charged for robbery and murder despite "systolic Blood Pressure test". The accused offered to produce the results of a systolic Blood Pressure test but it was not allowed by the court on the ground that the test was not based on a well- recognised scientific principle (i.e. it has not gained general acceptance). The appellant court upheld the conviction[8] and announced the rule of "general acceptance" a necessary precondition to the admission of any scientific evidence.

The FRYE standard requires the trail court to determine whether the scientific method used generally accepted as reliable in the scientific community.

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4 293 F. 1013 (D.C. Cir.).

5 509 U.S. 579:113 S. Ct. 2786.

6 Available at *https://en.wikipedia.org/wiki/Frye_standard* ((assessed on 22 December 2016).

7 *Ibid.* 4.

8 Though the accused in this case was exonerated of the charge after three years when real culprit confessed to his guilt.

The FRYE test asks[9]:

I. Is the scientific theory generally accepted in the scientific community;
II. Is the scientific method used generally accepted in the scientific community; and
III. Has the technique been applied correctly.

The ultimate object of the FRYE test is to ensure that only scientific evidence that is reliable will be admitted.

2.2 The Federal Rules of Evidence/ the Federal Standard

The FRYE rule was criticised for its overly conservative approach and therefore, in 1975, more than a half-century after Frye was decided, the *Federal Rules of Evidence* were enacted. They included rules on expert evidence. It was seen to be more flexible than the FYRE rule and did not strictly require general acceptance.

Rule 702[10] concerns about the admissibility of scientific evidence and states that:

> 'If scientific, technical or other specialized knowledge will assist the Trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.'

RULE 403[11] of the *Federal Rules of Evidence* excludes evidence that would cause undue prejudice or confusion.

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9 H. James and J. Nordby, *Forensic Science - An Introduction to Scientific and Investigative Techniques*, CRC Press, USA, 2003, p-583.

10 Rule 702 should be read in conjunction with rules 401, 402 and 403.
Relevant evidence is defined by the Rule 401 of the Federal Rules of Evidence as:
'Evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' (i.e. to possesses sufficient probative value to justify receiving it in evidence).
Rule 402 deals with the general Admissibility of Relevant Evidence and states that:
'Relevant evidence is admissible unless any of the following provides otherwise:
- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court pursuant to statutory authority.

Irrelevant evidence is not admissible.' i.e. all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible. The exclusion of relevant evidence occurs in a variety of situations, examples are evidence obtained by unlawful means, or incriminating statement elicited from an accused in violation of his right to counsel, etc.

11 Relevant evidence is defined by the Rule 401 of the Federal Rules of Evidence as:

In a 1993 case, *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*[12], the United States Supreme Court held that the Federal Rules of Evidence superseded FRYE's "general acceptance" test.

2.3 The Daubert Standard/ Judicial Gatekeeping Function

The *Federal Rules of Evidence* were more flexible even than FRYE's general acceptability test. These rules did not accept any of the criteria of FRYE rule rather it confused the matter and therefore, the conflict between the general acceptance standard and the *Federal Rules of Evidence* was resolved in DAUBERT approach. A more flexible approach to the admissibility of any scientific evidence including the DNA evidence is the DAUBERT's approach. The court in this case "REJECTED" the more basic Frye test of "general acceptance" in the scientific community. This test requires special pre-trial hearings for scientific evidence and an independent judicial assessment of reliability. The court held that the judge assumes the role of a "gatekeeper" and ensure that any scientific evidence that was admitted was both relevant and reliable.

In 1993, the Supreme Court, in a *Daubert* v. *Merrell Dow Pharmaceuticals*[13], suggested factors that might prove helpful in determining the reliability of a scientific technique.

They were:

I. Whether the theory or technique has been tested;
II. Has the theory or technique been subjected to peer review and publication (ensuring soundness and reliability of the methodology and analysis Employed);
III. Are there standards controlling the technique's operation;
IV. What is the known or potential error rate in using a particular scientific technique; and

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'Evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' (i.e. to possesses sufficient probative value to justify receiving it in evidence).

However, at times, even relevant evidence is not deemed admissible and is to be excluded from consideration and in that context the Rule 403 states that:

'Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'

12 *Supra* note 5.

13 *Ibid* 5.

V. Whether the theory or technique is generally accepted within the relevant scientific community (although this is only a factor, not determinative, as under the Frye test).

The essence of Daubert is that the Court has represented trail court judges as "gatekeepers," authorizing them to exercise broad discretion to exclude whatever evidence they deem to not meet scientific standards of admissibility.

Three years later the Supreme Court decided DAUBERT, it was forced to again review the standard of admissibility of DNA evidence used by a trail court. In *General Electric Co.* v. *K. Joiner*[14], the Supreme Court of the United States evaluated the question of admissibility and proper standard of review for an appellate court reviewing a trial court's decision on the admissibility of expert testimony. In this case, the Supreme Court held that in case involving the issue of scientific evidence the Appellate court should only consider whether there is any abuse of discretion in admitting such evidence by the trail courts and should not go into reviewing the evidence itself as it is for the trail courts to assume the "gatekeeper's role" in screening such evidence to ensure whether it is not only relevant but also reliable.[15]

Kumho Tire Co. v. *Carmichael*[16] is a United States Supreme Court case that applied the Daubert standard to expert testimony from non-scientists. In this case, the 'gate keeping' obligation of the trail judge to ensure the relevancy and reliability for admitting the evidence extended not only to scientific but also to all kinds of expert evidence (scientific as well as non-scientific[17]).[18]

3. Admissibility of DNA Evidence: World Scenario

In general, the courts across the world have increasingly accepted DNA evidence as admissible if it produces a trustworthy and reliable result. The New York Supreme Court in *The People of the State of New York* v. *William*

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14 522 U.S. 136 (1997).

15 K. Kaul and H. Zaidi, *Narco Analysis, Brain Mapping, Hypnosis and Lie Detector Tests in Interrogation of Suspect*, Alia Law Agency, Allahabad, Lucknow, 2009, p. 952.

16 526 U.S. 137 (1999).

17 Nonscientific expert evidence includes testimony of engineers and other experts who are not scientists.

18 *Supra* note 15.

Daniels[19] has observed that "if the evidence has substantial probative value and is relevant to the issue and does not endanger defendant's rights or prejudice the jury, nor mislead the proper administration of justice, then it should be admitted as any other evidence."[20] The first forensic use of DNA occurred in England in 1983[21], when samples from a murder and sexual assault exonerated the main suspect in the case. Three years later, DNA from a second murder was used to link the crimes and convict a different man[22]. DNA Fingerprinting has gained tremendous popularity in the U.S. It has been accepted in the U.S. in a number of high profile cases, like for instance, O.J. Simpson's case which was decided mainly on the basis of DNA evidence. In India too, DNA evidence has been relied on in number of case, such as, Priyadarshini Matto rape and murder case, Goutam Kundu case, etc. In this section, the position in various countries like USA, UK, and INDIA in regard to the admissibility of DNA evidence is discussed.

3.1 Position in USA

In USA, all scientific evidences in criminal trials including evidence derived from DNA identification analysis must satisfy the test of admissibility in effect in a particular jurisdiction. In general, the court uses one of two tests. Under the FRYE test, a novel scientific technique must have gained general acceptance in the relevant scientific community before it is admitted by the court.[23] The second test follows the basic relevancy standard of the *Federal Rules of Evidence* and is used in a majority of state jurisdictions for admissibility under the federal rules, scientific evidence must have some relevance to the issues in the case, and its probative value must outweighs the potential for prejudice.[24]

In *Daubert* v. *Merrell Dow Pharmaceuticals*[25] the United States Supreme Court ruled that the *Federal Rules of Evidence* have replaced the FRYE test in Federal Courts trials. Additionally, the court defined a new federal standard

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19 102 Misc.2d 546 (1979), available at *http://www.leagle.com/decision/1979642102 Misc2d540_1541/PEOPLE%20v.%20DANIELS* (accessed on 12 December, 2016).

20 *Supra* note 15 at 935.

21 In Colin Pitchfork case, Richard Buckland was exonerated.

22 *Id.*

23 Subhash Chandra Singh, "DNA Profiling and the Forensic Use of DNA evidence in Criminal Proceedings", The *Indian Law Institute*; Vol. 53 No. 2, April-June 2011, pp. 195-226, at p. 203.

24 *Ibid.*

25 *Supra* note 5.

where the trial judge has to ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.[26],[27]

3.1.1 Standards established for the admissibility of DNA evidence

In *United States* v. *Sylvester Young*[28], the US District Court held that DNA evidence is generally accepted by the scientific community and that the technique used was reliable, the testing was properly performed and the evidence was more probative than prejudicial. In this case, the accused was charged with aggravated sexual abuse and sexual abuse of a minor when he raped a fourteen-year-old girl. The court went into a hearing to determine the criteria to use when deciding whether to accept DNA evidence in trial and eventually developed a rigorous five-prong test that assimilated several previous standards:

I. Whether DNA evidence is generally accepted by the scientific community [Frye standard];
II. Whether the testing procedures used in this care are generally accepted as reliable if performed properly [Rule 702];
III. Whether the test was performed properly in this case [Castro standard, and Federal Rules of Evidence];
IV. Whether the evidence is more prejudicial than probative in this case ([Downing standard, and Rule 403]; and
V. Whether the statistics used to determine the probability of someone else having the same genetic characteristics is more probative than prejudicial under Rule 403 [Rule 403].[29]

A pre-trial hearing scheduled to determine whether the DNA evidence satisfied all five prongs, and it was concluded that the evidence would be allowed.

3.1.2 First DNA based conviction in USA

Andrews v. *State*[30] was the first DNA based conviction case in USA as well as the case upholding the admissibility of DNA evidence. In 1987, Tommy Lee Andrews became the first American ever convicted in a case on the basis

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26 *Id.* at 2795.
27 *Id.* at 23.
28 754 F. Supp. 739; 1990.
29 (--), Project Report on 'DNA Fingerprinting', available at *https://www.wpi.edu/Pubs/E-project/Available/E-project 08241103717/unrestricted/Markus_Mikhail_Jessica_IQP_Final .pdf*, p.40 (accessed on 11 February, 2017).
30 Fla. Dist. Ct. App. 1988.

of DNA evidence. In this case, accused broke into a Florida woman's home in the middle of the night and burglarized and raped the woman at knife-point. DNA samples of semen retrieved from the crime scene matched blood drawn from Andrews, a serial rapist, who is now serving a twenty-two year prison sentence for rape and aggravated burglary.[31]

3.1.3 Admissibility and Reliability of DNA evidence

In *People of the State of New York* v. *Joseph Castro*[32], the accused was charged with murder of his neighbour and her two-year-old daughter. A blood stain on Castro's watch was analysed for a match to the victim' blood sample and the result of DNA test conducted showed that blood was of the victim. Then, the New York Supreme Court, in 1989, formulated a so-called three prong test for admitting DNA fingerprinting evidence:

I. Is there a generally accepted scientific theory arguing that DNA sequence differ between individuals and that difference can be tested;
II. Is there a reliable technology that can be performed to detect these DNA differences; and
III. Was that DNA technology applied correctly in this particular case.[33]

In the case, the Supreme Court after applying the three prong test for admissibility of results of DNA test found that there is a general scientific acceptance of the theory underlying DNA identification and that DNA identification technique is generally accepted in the scientific community and can produce reliable results and after eliciting the convincing reasoning in support of the accuracy and reliability of DNA evidence, the court ordered the pre-trial hearing to determine whether the testing laboratories procedure meets the scientific standards and produced reliable results and concluded that it failed prong three, and the testing was not conducted correctly in this case and hence, the DNA evidence was found inadmissible in this case.[34]

The outcome of the Castro case was a thorough critique of the new DNA science and the establishment of the three prongs for determining whether to

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31 Michelle Hibbert, 'State and Federal DNA Database Laws Examined', available at: *http://www.pbs.org/wgbh/pages/frontline/shows/case/revolution/databases.html* (accessed on 03 January, 2017).

32 545 NYS 2d. 985 Supp. Ct. 1989.

33 *Supra* note 23 at 201.

34 The case never went to trial as Castro admitted his guilt.

admit evidence at each trial. Another outcome was the recommendation to standardize DNA testing protocols, so a *Technical Working Group on DNA Methodology (TWGDAM)* was formed to establish universal procedure for testing DNA. The result of this case produced recommendations of:

> "...extensive discovery requirements for future proceedings, including copies of all laboratory results and reports; explanations of statistical probability calculations; admissions of any observed defects or laboratory errors, including observed contaminants; and the requirement for chain of custody documents."[35]

Alike in *Schwartz* v. *State*[36], the Supreme Court of Minnesota refused to admit the DNA evidence analyzed by a private forensic laboratory; the court noted the laboratory did not comply with appropriate standards and controls. In particular, the court was troubled by failure of the laboratory to reveal its underlying population data and testing methods. Such secrecy precluded replication of the test.[37]

3.2 Position in UK

England is widely recognised as having the most effective and efficient approach to the use of DNA technology in the world. Since the establishment of the *National DNA Database* in 1995, England has become a world leader in discovering innovative ways to use DNA to identify suspects, protect the innocent and to convict the guilty.[38]

3.2.1 First DNA based exoneration as well as conviction in the UK

The famous case of *Colin Pitchfork*[39] was the first case in UK to use DNA fingerprinting to convict a criminal (Colin Pitchfork) as well as was the first case to exonerate Richard Buckland (the prime suspect) who was wrongly convicted of crime. In 1986, police were investigating the rape and murder of Lynda Mann and Dawn Ashworth,. Semen samples were taken from both victims. Richard Buckland, a 17-year-old kitchen porter, was in custody of police. Buckland suffered from learning disabilities and had confessed to the murder of Dawn

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35 Project Report: DNA Fingerprinting, p. 39 (Footnote 29).

36 447 N.W.2d 422 (1989).

37 The DNA "Wars" Are Over, Excerpted from "Convicted by Juries, Exonerated by Science" National Institute of Justice, 1996, available at *http://www.pbs.org/wgbh/pages/frontline/shows/case/revolution/wars.html* (assessed on 04 January, 2017).

38 *Supra* note 23 at 207.

39 Exact citation not found. Available at *http://en.wikipedia.org/wiki/Colin_Pitchfork* (assessed on 18 January, 2017).

Ashworth but denied murdering Lynda Mann. The police called in Prof. Alec Jeffreys to perform a DNA test to link Buckland to the Mann murder and DNA test was performed by matching semen from the crime scenes to Buckland. The test results revealed that semen from the two bodies was from the same man, but that man was not Buckland. Buckland had given a false confession and the real killer was still at large. Leicestershire police then decided to undertake the world's first DNA mass screening. No profiles matched the profile of the killer. A year later, a woman told police that she had overheard, Ian Kelly, bragging that he had given his sample while he was masquerading as his friend. Colin Pitchfork had persuaded Kelly to take the test for him. Pitchfork was arrested and his DNA profile found to match with the semen from both murders.[40] Therefore, Colin Pitchfork, a 27 years old local baker, was the first criminal caught based on DNA fingerprinting evidence.

3.3 Position in India

The admissibility of DNA evidence in courts of law has become routine and the courts in India have not disapproved its use. So far, however, no convictions solely on the basis of DNA evidence have been there. In the absence of any specific legislation in India on the persuasion of DNA evidence, it have been utilised in number of Indian cases. To some extent, the courts in India have relied on US standards for admissibility of DNA evidence in *Chandradevi* v. *State of Tamil Nadu*[41]. The main issues raised before the court in this case were:

I. Whether the technique is generally acceptable by the scientific community;
II. Whether the DNA testing procedure is reliable;
III. Whether the DNA tests were performed properly; and
IV. Whether the conclusion is acceptable.

3.3.1 DNA Evidence- A Circumstantial Evidence

In *Hanumant, son of Govind Nargundkar* v. *State of Madhya Pradesh*[42], the Court held as follows:

> "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance, be fully established and all the facts so established should be consistent only with the hypotheses of the guilt of the accused. Again,

40 *Ibid.*
41 Manu/TN/2335/2002.
42 AIR 1952 SC 343.

> the circumstances would be of a conclusive nature and tendency and they should be such as to exclude but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

Each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. Even when there is no eye-witness to support the criminal charge, but prosecution has been able to establish the chain of circumstances which is complete leading to inference of guilt of accused and circumstances taken collectively are incapable of explanation on any reasonable hypothesis save of guilt sought to be proved, accused may be convicted on the basis of such circumstantial evidence.

3.3.2 Opinion of DNA expert

In *Patangi Balarama Venkata Ganesh* v. *State of A.P.*[43], the Andhra Pradesh High Court held that the opinion of DNA expert is admissible in evidence as it is a perfect science. In this case, the DNA expert had deposed as under:

> "If the DNA fingerprint of a person matches with that of a sample, it means that the sample has come from that person only. The probability of two persons except identical twins having the same DNA fingerprint is around 1 in 30 billion world population." It means that DNA test gives the perfect identity. It is a very advanced science, the court observed.[44]

The Supreme Court in *Madan Gopal Kakkad* v. *Naval Dubey*[45] held:

> A medical witness called in as an expert and the evidence given by the medical officer is really an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspects of the case by explaining the terms of science so that the court although not an expert, may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted it is not the opinion of the medical officer but of the court.[46]

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43 2003 Cri. LJ 4508.

44 *Id.* para 47. available at *http://indiankanoon.org/doc/810006/* (accessed on 16 February, 2017).

45 (1992) 3 SCC 204 at 221-22.

46 Available at *http://indiankanoon.org/doc/1314858/* (assessed on 03 November, 2016).

3.3.3 *Acceptability of DNA Report*

While addressing the issue of acceptability of the DNA Report in *Dharam Deo Yadav* v. *State of Uttar Pradesh*[47], the Apex Court observed:

> "The DNA stands for deoxyribonucleic acid, which is the biological blueprint of every life. DNA is made up of a double stranded structure consisting of a deoxyribose sugar and phosphate backbone, cross- linked with two types of nucleic acids referred to as adenine and guanine, purines and thymine and cytosine pyrimidines. The most important role of DNA profile is in the identification, such as an individual and his blood relations such as mother, father, brother, and so on. Successful identification of skeleton remains can also be performed by DNA profiling. DNA usually can be obtained from any biological material such as blood, semen, saliva, hair skin, bones, etc. The question as to whether DNA tests are virtually infallible may be a moot question, but the fact remains that such test has come to stay and is being used extensively in the investigation of crimes and the court often accepts the views of the experts, especially when cases rest on circumstantial evidence. More than half a century, samples of human DNA began to be used in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in court. DNA profile, however, is consistently held to be valid and reliable, but of course, it depends on the quality control and quality assurance procedures in the laboratory. Close relatives have more genes in common than individuals and various procedures have been proposed for dealing with a possibility that true source of forensic DNA is of close relative. So far as this case is concerned, the DNA sample got from the skeleton matched with the blood sample of the father of the deceased and all the sampling and testing have been done by experts whose scientific knowledge and experience have not been doubted in these proceedings. We have, therefore, no reason to discard the evidence. Prosecution has, therefore, succeeded in showing that the skeleton recovered from the house of the accused was that of Diana daughter of Allen Jack Routley and it was none other than the accused, who had strangulated Diana to death and buried the dead body in his house."

3.3.4 *First DNA case in India*

Kunhiraman v. *Manoj*[48] case was the first paternity dispute which required DNA testing and court had accepted the DNA evidence as conclusive in deciding paternity. To sort out the paternity dispute to an unmarried woman, Vilasini, the High Court ordered for the DNA test. When the DNA profile of Manoj was compared with those of Kunhiraman the court found Kunhiraman is the biological father of the child, Manoj.

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47 (2014) 5 SCC 509, para 36.
48 (1991) 3 Crimes 860 (Ker).

Likewise, *Naina Sahani/Tandoor murder case (State* v. *Sushil Sharma)*[49] was the first case in India where DNA fingerprinting was used for investigation of crime. Naina Sahani was the victim of Tandoor murder case. In 1995, Mrs. Naina Sahani was murdered by her husband Sushil Sharma. The body was tried to char in tandoor. The incident was revealed by a police constable. The charred body was connected to the victim by using DNA profile. On that basis her husband was convicted for the murder and awarded life imprisonment by the Supreme Court.

3.3.5 Guidelines relating to DNA tests

The Supreme Court in *Goutam Kundu* v. *State of West Bengal*[50] expressed the most reluctant attitude in the application of DNA evidence in resolving the paternity dispute arising out of a maintenance proceeding. In this case, the father disputed the paternity and demanded blood grouping test to determine parentage for the purpose of deciding whether a child is entitled to get maintenance under section 125 of the Cr PC from him. In this context, the Supreme Court held that:

> Where the purpose of the application was nothing more than to avoid payment of maintenance, without making out any ground whatever to have recourse to the test, the application for blood test couldn't be accepted. It was also held that no person could be compelled to give sample of blood for analysis against his/ her will and no adverse inference can be drawn against him/her for such refusal.[51]

The court has laid down certain guidelines regarding DNA tests and their admissibility to prove parentage. These are:[52]

I. That the courts in India cannot order blood test as a matter of routine.
II. Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
III. The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.
IV. No one can be compelled to give sample of blood for analysis.

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49 2007 Cri. LJ 4008.
50 (1993) 3 SCC 418.
51 *Supra* note 23 at p. 215.
52 *Ibid.*

3.3.6 Admissibility and Reliability of DNA evidence

In *M. V. Mahesh* **v.** *State of Karnataka*[53], the Court acquitted the accused, one of the grounds being that the requisite amount of DNA of high molecular weight was not present so as to make the test results sufficiently conclusive and accurate. The Court further went on to say that the DNA test was not a fool proof one and also commented on the fact that there were no national standards set or established for DNA testing in India. Such scrutiny of the DNA testing procedure is commendable and any benefit of doubt arising from malpractices or irregularities in the scientific processes involved ought to go to the accused.

Santosh Kumar Singh v. *State through CBI*[54] is one more case describing to malpractices or irregularities in the scientific processes. In this case, Priyadarshini matto was a 25-year-old law student who was found raped and murdered at her house in 1996. The defence argued and challenged the scientific procedure adopted in DNA probe. The trail court gave the accused benefit of doubt on the basis of tampering of the evidence. The acquittal was turned into conviction by the High Court, amongst other grounds on the basis of the DNA Test conducted in the case by The Centre for Cellular and Molecular Biology, Hyderabad, which had clearly established the fact of rape even though the surgeon who had conducted the post mortem had ruled out rape. DNA test was conducted and test confirmed and connected the crime with the criminal. In 2006, the Delhi High Court sentenced the accused, the son of a Police Inspector-General, to death for the rape and murder of a law student. However, the Supreme Court of India commuted the death sentence to life imprisonment. Therefore, it is necessary to keep in mind that any procedure adopted in the scientific DNA process should have no scope left to benefit the accused giving him the benefit of doubt at all. Any benefit of doubt arising from malpractices or irregularities in the scientific process involved ought to go to the accused.

It is clear from the case laws examined above that the science underlying the DNA evidence is not doubted by the courts in India. Though the admissibility of the DNA evidence is still a subject of discussion but there is no negative approach of court towards the use of results of the test. Most courts rule in favour of admitting it, though with caution. Thus, some caution is advised in evaluating the DNA evidence.

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53 1996 Cri. LJ 221 (Kant).
54 (2010) 9 SCC 747.

4. Conclusion

The admissibility of the DNA evidence depends on the discretion of the courts which varies from case to case. Generally, DNA evidence is admitted in courts across the world. The technique or process of DNA Fingerprinting is not under dispute throughout the world. The objection can only revolve around questions related to the methods of collection, preservation, forwarding and authentication of collected samples. It is also seen that each laboratory has its own set of standards. There are yet no national or international guidelines for control and standardisation. Some courts are still hesitant to accept DNA test but, it is generally held that unless there is some special circumstance, all relevant evidence is admissible.

As stated in the National Research Council's 1996 report on DNA evidence:

> "The state of the profiling technology and the methods for estimating frequencies and related statistics have progressed to the point where the admissibility of properly collected and analyzed DNA data should not be in doubt."[55]

Thus, a perusal of the above discussion shows that DNA evidence is having an immense impact on the criminal justice system. DNA is accepted as admissible in evidence due to statements given by the judges and having strong scientific backbone adherence. There is not, and has never been, controversy about the soundness of the scientific technology. Debate still continues, however, concerning the issues raised in relation to scientific reliability, standardisation of testing techniques, laboratory accreditation and quality control, and problems of possible technical or human errors. Once standard norms monitoring laboratory procedure, quality control, etc. are set, the challenges to the admissibility of the DNA evidence are likely to be lessened than they are now because the only question that remains is whether standard procedure has been adhered to or not.

[55] NRC Report 1996. In: "Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial", U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, June 1996, p. 6.

LEGAL STATUS OF TRANSGENDER IN INDIA: AN APPRAISAL

Dr. Harpreet Kaur*

1. Introduction

Asian Countries have centuries old histories of gender-variant males who in present times would have been labelled as transgender women. India is no exception. Kama Sutra provides vivid description of sexual life of people with "third gender". In India people with a wide range of transgender, related identities cultures as experiences exist-including Hijras, Aravanis, Kothis Jogtas/Jogappas and Shiv Shaktis. Often these people have been part of the broader respect at least in the past, although some are still accorded particular respect even in the present. The term transgender people are generally used to describe those who transgress social gender norms. In contemporary usage transgender has become an umbrella term that is used to describe a wide range of identities and experiences including, but not limited to preoperative, post operative and non-operative trans-sexual people (who strongly identify with the gender opposite to their biological, male and female cross dresses times referred to as transvestites, 'Drag Queens' or 'Drag Kings' regardless of sexual orientation, whose appearance are perceived to be gender atypical. A male to female transgender person is referred women to as transgender women and a female to male transgender person, as transgender man.[1]

There are many references available in religious mythology for example Lord Rama in the epic Ramayana was leaving for the forest upon being banished from the Kingdom for 14 yrs turns around to his followers and asked all the men and women to return to the city. Among his followers the hijras alone do not feel bound by this direction and decided to stay with him impressed with their devotion. Rama sanctions them the power to confer blessings on people on auspicious occasions like childbirth and marriage and also at inaugural functions which it is believed set the stage for the custom of badhai in which hizras sing, dance and confer blessings.[2]

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1 Shobharam Sharma, 'Transgender in India: Human Rights and Social Exclusion', *All India Reporter*, Vol. 100, 2013, p. 87.

2 *National Legal Service Authority* v. *Union of India & Others*, AIR 2014 SC 1863.

There is need to analyse the human rights of transgender in the context of socio-legal Indian System. Human Rights are basic rights and freedoms which are guaranteed to a human by virtue of him being a human which can neither be created nor can be abrogated by any government. It includes the right to life, liberty, equality, dignity and freedom of thought and expression.[3] The Dominant discourse on human rights in India has yet to come to terms with the production/reproduction of absolute human right less of transgender communities. It has been explicitly accepted that family is the fundamental group of society and the natural environment for the growth and well being of all its members. Undoubtedly, this right shall be available to transgender community. Before moving further, there is need to have overview of the problems of transgender in Indian democracy.[4]

2. Problems of Transgender

2.1 Segregation from Family and Society

Most families do not accept if then male child starts behaving in ways that are considered femine or inappropriate to the expected gender male. Consequently, family members may threaten, scold or even assault their son/sibling from behaving or dressing-up like a girl or women. Some parents may outright disown and evict their own child for crossing the prescribed gender norms of the society and for not fulfilling the roles expected from a male child. Parents may provide several reasons for doing so: bringing disgrace and shame to the family; diminished chances of their child getting married to a women in the future and thus end of their generation, and perceived inability on the part of their child to take care of the family.[5]

2.2 Exclusion from Economic Participation and Lack of Security

Transgender communities face a variety of societal security issues. Since most hijras run away or are evicted from home, they do not expect support from their biological family in the long run. Subsequently, they face a lot of challenges especially when they are not in the position to earn. Due to health concerns, lack of employment opportunities or old age.[6]

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3 Saumya agarwal, 'What are the rights of transgenders in India', *available at:* <http:// blog. Ipleaders.in/legal-rights-of-transgender-India/> accessed on 24 March, 2017.

4 Ms. Adya Surbhi, Transgender Marriage- Legal acknowledgement, *Indian Bar Review*, Vol. Xxxix (3) 2012, pp. 221-222.

5 Shobharam Sharma, 'Transgender in India: Human Rights and Social Exclusion', *All India Reporter*, Vol. 100, 2013, p. 90.

6 *Supra* note 1, p. 91.

2.3 Lack of Livelihood

Most employers deny employment for even qualified and skilled transgender people.[7] In such a situation, where recognition of identity of transgender person is debatable issue and are moving towards for recognition of their rights as well as protection of the same. Article 19 and 21 provides the right of livelihood to ordinary citizen of country. Then transgender are also covered in the definition of person and have right of equality without any discrimination.

2.4 Lack of specific social Welfare Schemes and Barriers

Social Welfare departments provide a variety of social welfare scheme for socially and economically disadvantaged group. However, so far no specific schemes are available for hijras except some rare cases of providing land for Aravanis in Tamil Nadu. Recently the state Government of Andhra Pradesh has ordered the Minority welfare Department to consider hijras as a minority and develop welfare scheme for them stringent and cumbersome proceeding need for address proof, identity proof and income certificate all hinder even deserving people from making use of available schemes.[8]

2.5 Lack of Access of life and Health Insurance Schemes

Health insurance are not under any life or health insurance schemes, because of lack of knowledge, inability to pay premiums, not able to enrolled in the scheme.[9]

2.6 Unresolved Legal Issues of Transgender

Legal issues include legal recognition of their gender identity, same sex marriage, child adoption, inheritance, wills and trusts, immigration status, employment discrimination and access to public and private health benefits. Especially, getting legal recognition of gender identity as a woman or transgender woman is complicated process. Transgender people now have option to vote as a women or other, however the legal validity of the voter identity and in relation to conferring one`s gender identity is not clear. Right to contest in election is yet to be realised.[10]

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7 *Supra* note 1, p. 91.

8 *Hijras/transgender Women In India:HIV Human Rights And Social Exclusion, United Nations Development Programme (UNDP), India, <http://www.undp.org/content/dam/india/docs/hijras_transgender_in_india_hiv_human_rights_and_social_exclusion.pdf.* accessed on 27th March, 2017.

9 *Supra* note 1, p. 91.

10 *Supra* note 1, p. 92.

3. Infringement of Rights of Transgender

3.1 LGBT Section

Section criminalizes the same sex relations among consenting adults. This colonial era law makes the transgender person vulnerable to police harassment, extortion and abuse.[11] The stigma and prejudice created and perpetuated a culture of silence around homosexuality and resulted in denial and rejection at home along with discrimination in workplaces and public spaces.[12]

3.2 The Criminal Tribes Act, 1871

The Act was amended and under the provision of this statute an eunuch deemed to include all members of the male sex, who admit themselves or on medical inspection clearly appear to be impotent. The local Government was required to keep a register of the names and residence of the all eunuch who are reasonably suspected of kidnapping or castrating children or of committing offences u/s 377 of IPC.[13] And "any eunuch so registered who appear dressed or ornamented like a woman in a public street.....or who dances or plays music or takes part in any public exhibition, in a public street.....[could] be arrested without warrant and Hijras were also reportedly harassed by police by threatening to file a criminal case under Sec-377 IPC. In July 2009, the Delhi High Court ruled that consensual same-sex relations between adults in private cannot be criminalized. Soon after that judgement, appeals in the Indian Supreme court objecting to the ruling were lodged; the Indian government has yet to submit a formal response.[14]

4. Civil and Political Rights of Transgender

Transgender are deprived of civil and Political rights guaranteed under constitution under the head of Fundamental Rights. It has also been noticed that the community also faces discrimination as they are not given the right to contest election, right to vote.[15]Even they are treated like outcast or untouchable.[16]

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11 *The Indian Penal Code,* 1860, Section 377.

12 'LGBT Section 377', available at: <*http://www.lawyerscollective.org/vulnerable-communities/lgbt/section-377.html* > accessed on 25 March, 2017.

13 *Supra* note 1, p. 91.

14 *Hijras/transgender Women In India: HIV Hman Rights And Social Exclusion, United Nations Development Programme (UNDP), India,* < http://www.undp.org/content/dam/india/docs/hijras_transgender_in_india_hiv_human_rights_and_social_exclusion.pdf. accessed on 27 March, 2017.

15 *The Constitution of India,* 1950, Article 326.

5. The Constitution of India, 1950

Article 14 of the Constitution also ensures equal protection and hence a positive obligation on the state to ensure equal protection of laws by bringing in necessary social and economic change, so that everyone including Transgenders may enjoy equal protection of laws and nobody is denied such protection. Article 14 does not restrict the word 'person' and its application only to male or female. Hizras/ transgender persons who are neither male or female fall within the expression 'person' and hence, entitled to legal protection of laws in all spheres of state activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country.[17] The discrimination on the ground of 'sex' under Article 15 and 16, therefore, includes discrimination on the ground of gender identity. The term 'sex' used in article 15 and 16 is not just limited to biological sex of male or female, but intended to include people to consider themselves to be neither male or female. Transgender have been systematically denied the rights under Article 15 (2) that is not to be subjected to any disability, liability, restriction or condition in regard to access to public places. Transgender have also not been affordable special provision envisaged under Article 15(4) for the advancement of the socially and educationally backward classes (SEBC) of citizen.[18]

This socially and educationally backward classes category needs preferential compensatory treatment so that they become better-off in all fields of life thus enjoying the fruits of reservation in educational institutions, employment inasmuch as that equality, life, liberty and dignity become meaningful. This is possible only if the people of India start realizing or caring to realize the trauma, agony and pain which the members of transgender community undergo or start appreciating their innate feelings and change their mindset by bringing such class of citizenry within the fold of We the People of India functionally.[19]Article 19(1) (a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one`s right to expression of this self-identified gender. Self-identified gender can be expressed through dress. The right to choose one`s gender identity is an essential part to lead a life with dignity

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16 *Id.*, Article 17.

17 *Supra* note 2, at p. 1890.

18 *Supra* note 15, Article 15 and 16.

19 Dr. K.L. Bhatia, 'Constitutional and Legal Status of Transgender, Their Gender Identity and Sexual Orientation', p.1, *Available at: <http://www.academia.edu/8833934/ CONSTITUTIONAL_AND_LEGAL_STATUS_OF_TRANSGENDERS_1>* accessed on 25 March, 2017.

which, words, action or behaviour or any other form. No restriction can be placed on one`s personal appearance or choice of dressing, subject to the restrictions contained in Article 19 (2) of the Constitution.[20] The gender to which a person belongs is to be determined by the person concerned. The court has given the people of India the Right to gender identity. Further, they cannot be discriminated against on the ground of gender as it is violation of Article 14, 15, 16 and 21.[21]

6 The *Hindu Marriage Act*, 1956

Section 5 provides conditions for marriage. However, the Act does not provide any definition of marriage and also does not deal with eligibility with regard to 'sex' of person concerned. The only expression of concern occurring in the section 5 is "suffering from mental disorder of such kind or to such an extent as to be unfit for marriage and the procreation of children". But it is with regard to mental disorder, which is making a person to be unfit for marriage and procreation of children. And in no way we can term transsexuals as illness, much less mental disorder. However, on ground of non-consummation of marriage, it is voidable at the option of either spouse, but this does not make a marriage void ab initio. The word 'impotency' has not been defined in the Hindu Marriage Act, 1955. But it is a ground to avoid a marriage if it is established that at the time of marriage either of the spouses was incapable of effecting the consummation either due to structural defect in the organs of generation rendering complete sexual intercourse impracticable or due to some other cause.[22]The Supreme Court of India has determined that right to marry is not an absolute right and it can be curtailed in certain circumstances though he deserves full sympathy and equal treatment in all walks of life. This limitation imposed by the Apex court should not be understood as a constraint on recognition of same-sex marriage.[23]

7. The Transgender Bill, 2016

Salient Features of the proposed bill are as follows:

- Bill makes it illegal to force transgender person to leave residence or village, removed their clothes or parade them, naked and force them into begging or

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20 *Supra* note 15, Article 19 (1) (a)

21 *Id.*, Article 14, 15, 16 and 21

22 Ms. Adya Surbhi, Transgender Marriage- Legal acknowledgement, *Indian Bar Review*, Vol. xxxix (3) 2012, p. 226.

23 *Mr. 'X'* v. *Hospital 'Z'*, (2006) 5 SCC 475.

other kind of bonded labour, would be punishable with two years of imprisonment along with fine.[24] Constitutional protection is provided to citizens of India against forced labour.[25]

- But also criminalized the act to deny a transgender person access to any public place and causing them any physical or mental harm within or outside the home.[26]Similar protection is provided under the head of Fundamental Rights in Constitution of India.[27] Judicial activism is clearly visible on this account in *National Legal Service Authority Case.*
- It guarantees Other Backward Class (OBC) status to transgender either they belong to SC, ST category and entitles them for reservation in respective categories.[28]This protection already is provided in Grundnorm called as fundamental norm i.e.(Constitution of India).[29]
- Bill identifies transgender as the third gender and give freedom to transgender to identify as man or women as transgender. They cannot be referred to as the 'other' but only called as transgender. A certificate of identity as transgender needs to be issued by state level authority and certificate should be accepted as gender identity for any official document like passport, adhaar card etc.[30]
- It also ensures that transgender persons or children enjoy all rights provided under constitution like right to equality, right to life and personal liberty as guaranteed under the constitution.[31]
- All government institution shall provide education to transgender students without any discrimination and also provide scholarships, textbooks, hostel accommodation and other facilities on subsidized need to have anti discrimination cell to monitor discrimination against transgender students.[32]
- The government shall also set up rehabilitation centres and welfare programmes, information centres, sensitization programmes etc. for transgender.[33]

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24 *10 Things You Need To Know About the Transgender Bill 2016, <https://www.jaagore.com/articles/simplify/10-things-you-need-to-know-about-the-transgender-bill-2016* > accessed on 26 March, 2017.

25 *Supra* note 15, Article 23

26 *Supra* note 22.

27 *Supra* note 15, Article 15 (2),

28 *Supra* note 22.

29 *Supra* note 15, Article 16 (4)

30 Sections 4-8, *The Transgender Bill, 2016.*

31 *Supra* note 22.

32 *Supra* note 30, Ss. 10-13.

33 *Id.*, S. 9.

- The Bill instructs the police to provide assistance under the law to an aggrieved transgender person. And also to put the person in touch with the nearest organisation for rehabilitation of aggrieved transgender person.[34]
- The Bill instructs the government to facilitate employment of transgender persons, especially for vocational training and self employment and easy loan facility. It also prohibits discrimination at workplace.[35]Under this Bill transgender person has right of cultural life, leisure and recreational activities.[36]
- Bill aims to ensure that transgender persons enjoy life of dignity and equality as an Indian Citizen and guarantees a basic human right which has been denied to them for so long.[37]

8. Judicial Activism on the Rights of Transgender

Supreme Court held that non- recognition of identity of Hijras /transgender persons results in them facing extreme discrimination in all spheres of society, especially in the field of employment, education, healthcare etc. Hijras / transgender persons face huge discrimination in access to public spaces like restaurants, cinemas, shops, malls etc. Further, access to public toilets is also a serious problem they face quite often. Since, there are no separate toilet facilities for Hijras/transgender persons; they have to use male toilets where they are prone to sexual assault and harassment. Discrimination on the ground of sexual orientation or gender identity, therefore, impairs equality before law and equal protection of law and violates Article 14 of the Constitution of India.[38]

Supreme Court declares Section 377 of IPC violative of Articles 14, 15, 19(1) (a)-(d) and 21 so long and so forth Section 377 of IPC criminalizes consensual sexual acts of adults --- men having sex with men (MSM), lesbians (WSW) or homosexuals or gays and transgender individuals --- in private, and it shall not be possible to prevent HIV/AIDS.[39]The Supreme Court held that recognition of transgender as a gender is not a social or medical issue, but a human rights

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34 *Supra* note 22.

35 *Id.*, S. 15.

36 *Id.*, S. 14.

37 *10 Things You Need To Know About the Transgender Bill 2016, <https://www.jaagore.com/articles/simplify/10-things-you-need-to-know-about-the-transgender-bill-2016>* accessed on 26 March, 2017.

38 *National Legal Service .Authority* v. *Union of India & Ors.*, 1947, *<https://indiankanoon.org/doc/169908548/>* accessed on 26 March, 2016.

39 *Suresh Kumar Koushal and Another* v. *NAZ Foundation and Others* (2014)1 SCC.

issue.[40]Constitution of India, Article 21- Protection of Human rights Act, Sec. 2(d)-Human Rights of transgender community-absence of Municipal Law Protecting their rights-International Conventions have to be recognised and followed to protect them from discrimination.[41]constitution of India, Article 14-Equality-word 'person' in Article 14-not restricted to male and female-includes even Hijras/Transgender person-such persons who are neither male nor female are also entitled to equal protection of laws and equality in all spheres-Discrimination on ground of sexual orientation or gender identity impair equality. Court further held that discrimination on the basis of 'sex' is not limited to biological sex of male or female- includes transgender being discriminated on the ground of sex are entitled to benefit as socially and educationally backward class citizens-also entitled to reservation in public employment-government directed to take affirmative action in this regard.[42]

High Court criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. By 'adult' we mean everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to a sexual act. This clarification will hold till, of course, Parliament chooses to amend the law to effectuate the recommendation of the Law Commission of India in its 172nd Report which we believe removes a great deal of confusion. Secondly, we clarify that our judgment will not result in the re-opening of criminal cases involving Section 377 IPC that have already attained finality.[43] In another case Supreme court held by amendment of 1986 in immoral Traffic Act, 1956, the domain of the Act not only covers male and female sex workers rather it is applicable on those whose gender identity is undetermined.[44] Naz Foundation case did not address marriage. But in explicitly describing the worth of same-sex relationships, the court captured more precisely its value of intimacy outside the confines of the home. This observation may suggest that Naz Foundation offers broader protection to same_sex intimacies by extending this

40 Shobharam Sharma, "Transgender in India: Human Rights and Social Exclusion", *All India Reporter*, Vol. 100, 2013, p. 93.

41 *Supra* note 2, AIR 2014 SC 1863.

42 *Ibid*, p. 1864.

43 *Naz Foundation* v. *NCT Delhi* WP(C) No.7455/2001, *available at: <https://indiankanoon.org/doc/100472805/>* accessed on 26 March, 2017.

44 *Supra* note *AIR* 2014 SC 1863.

Protection to public spaces with potentially dramatic effects on the rights of sexual minorities in India.[45]

9. Concluding Observation

On the basis of above analysis, it is viewed that there is need to change the definition of person given in IPC. Arena of rights given under constitution and in other laws would be widened with the amendment of this definition. Judicial activism on transgender issues can strengthen the position of same community. Further, case laws like Naz foundation Case, National Legal Service Authority case have played key role to provide recognition and to provide fundamental rights to transgender, which had not available earlier. Moreover legal framework cannot work efficiently until social attitude is changed. There is common saying that India is country of diversity in languages and religions, same attitude can be adopted to provide freedom to all citizens including transgender to grow at fullest extent in socio-legal environment of country, which ensure their human rights within legal framework. It will support to change social attitude towards transgender community.

[45] Adya Surbhi, Transgender Marriage - Legal acknowledgement, *Indian Bar Review*, Vol. xxxix (3) 2012, p. 233.

GOODS AND SERVICE TAX AND CENTRE-STATE RELATIONS IN INDIA : AN ANALYSIS

Dr. Manoj Sharma*

1. Introductory

Seventh Schedule of the Constitution of India demarcates items of revenue resources and liabilities of centre and the states. The chief sources of revenue of the centre are Income Tax, Corporation Tax, Custom Duties, Excise Duties, Wealth Tax, Service Tax, Export Duties, Stamp Duties on bills of exchange, letter of credit, promissory notes, bill of lading etc. The liabilities of the centre include the expenditure on defence, atomic energy, banking, international trade and those items which have interstate base. Railways, posts and telegraphs, national highways, shipping and navigation on inland waterways, air transport, atomic energy, space, regulation and development of oilfield, mines, minerals and regulation and development of interstate rivers are the major functions assigned to the centre for reasons of economies of scale and spillovers in respect of services with benefits spanning over more than one state.[1] The revenue resources of the states include sales tax, entry taxes, entertainment taxes, taxes on luxuries, excise duties on opium, Indian hemp, alcoholic liquors and other narcotic drugs, land revenues, taxes on agricultural income, tolls, taxes on land and building etc.

Perusal of the Constitutional scheme shows that there is demarcation of taxing powers of the Union and the States. Whereas direct taxes are levied by the Union, Indirect taxes are levied by the Union and the States separately. In consequence of legislative competence, States have enacted their indirect tax laws, however, it has divided the economy into different markets owing to the fact that rates of tax, commodities amendable to taxation, exempted commodities etc are different in different states and there is hardly any co-ordination between states. Not only this, the imposition of entry taxes creates another obstacle in free flow of goods throughout the territory of India. In addition, services are dealt with by the Union and there arises a problem with regard to Works contracts where the goods and services are intermingled leading to complex tax structure.

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1 M. Govinda Rao and Nirvikar Singh, *Political Economy of Federalism in India*, Oxford University Press, New Delhi, (2005), p. 131.

In this backdrop, Goods and Service Tax has been levied from 01st July 2017 to deal with these issue among others.

2. Goods and Service Tax: Meaning, Need and Importance

Goods and Service Tax (GST) is an indirect tax which is levied on the supply of goods and services, right from the manufacturer to the consumer. Indirect taxes have been levied in India since British regime. GST is a single tax on the entire supply chain and is a destination based consumption tax based on VAT (Value Added Tax) principle. Under this regime, credits of input taxes paid at each stage are available at the subsequent stages of value addition, which makes GST essentially a tax only on value addition at each stage. The final consumer has to bear only the GST charged by the last dealer in the supply chain, with set-off benefits at all the previous stages.[2]

GST in India is a landmark tax reform which was long overdue. GST has been levied in more than 160 countries across the world and there have been demands from the domestic entrepreneurs and Multi National Companies for indirect tax reforms in India in line with GST.[3] However, apart from being a tax reform, its levy will also have an impact on union-state relations.

Advent of liberalisation, privatization and globalization has reduced the world into a global village wherein multinational corporations are operating across the countries. This has widened the scope of economic activities undertaken by private entrepreneurs and infact there has been a consistent push to foreign direct investment so as to generate more economic activity and thus employment and development. In this backdrop, it was desirable to ensure ease of business and to reduce artificial tax barriers existing in the territory of India. In this backdrop, indirect tax reforms were almost necessitated.

However, indirect tax reforms to levy GST was not that simple since the field indirect taxes in India is divided among the union and states unlike direct taxes which are levied mostly by the Union. Perusal of Schedule VII of the Constitution prior to Constitution (One Hundred and First Amendment) Act, 2016, brings to surface that there were following entries in List-I dealing with indirect tax powers of the Union.

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2 Press Information Bureau, Ministry of Finance, Government of India, 03 August, 2016

3 Manoj Kumar Sharma, *Fiscal Federalism and Indian Constitution*, Satyam Law International, New Delhi, 2017, p. 236

Entry	Subject
83	Duties of customs including export duties.
84	Duties of excise on tobacco and other goods manufactured or produced in India except— (a) alcoholic liquors for human consumption; (b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry
92	Taxes on the sale or purchase of newspapers and on advertisements published therein.
92A[4]	Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.
92B[5]	Taxes on the consignments of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce.
92C[6]	Taxes on Services

Source : List I, Seventh Schedule, *Constitution of India*

In pursuance of the above subjects, Union government had enacted various laws, including but not limited to,

- *Central Excise Act*, 1944
- *Central Excise Tariff Act*, 1985
- *Additional Duties of Excise (Goods of Special Importance) Act*, 1957
- *Additional Duties of Excise (Textile and Textile Article) Act*, 1978
- *Customs Act*, 1962
- *Customs Tariff Act*, 1975
- *Central Sales Tax Act*, 1956

By virtue of the laws enacted by the union legislature following indirect taxes were levied by the Union:

4 The *Constitution (Sixth Amendment) Act*, 1956.
5 The *Constitution (Forty Sixth Amendment) Act*, 1982.
6 The *Constitution (Eighty Eighth Amendment) Act*, 2003.

- Central Excise Duty
- Additional Excise Duty
- Additional Customs Duty (Countervailing Duty)
- Special Additional Duty of Customs
- Central Sales Tax
- Service Tax

It is pertinent to mention here that entries 92A, 92B and 92C were inserted in the Constitution through various Constitutional amendments. By virtue of entry 92A, Central Sales Tax Act, 1956 was enacted. CST is levied by the Union but it is administered by the States and the revenues arising from levy of CST do not form part of Consolidated Fund of the Union and are assigned to the States. No legislation has been enacted under Entry 92B since its insertion in 1982 despite the fact that some states have been demanding the legislation under this entry. It is worth mentioning that if any law is enacted under entry 92B, the revenue arising therefrom is required to be assigned to the States in totality.[7]

Service Tax was levied in 1994 through *Finance Act*, 1994 under the residuary entry. There was no express provision in the Constitution regarding the levy of Service Tax. *Constitution (Eighty Eighth Amendment) Act*, 2003 has inserted entry 92Calongwith Article 268A. However, Article 268Awas never notified before its omission by *Constitution (One Hundred and First Amendment) Act*, 2016

The above account suggests that there are various indirect taxes levied by the Union Government in pursuance of legislative powers conferred upon the Union.

List-II of Schedule 7, prior to 101st Amendment, gave the following indirect tax fields to State Legislatures

Entry	**Subject**
51	Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:— (a) alcoholic liquors for human consumption; (b) opium, Indian hemp and other narcotic drugs and narcotics, but not including medicinal and toilet preparations containing alcohol or any

7 *Supra* note 3.

	substance included in sub-paragraph (b) of this entry.
52	Taxes on the entry of goods into a local area for consumption, use or sale therein
54	Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I
55	Taxes on advertisements other than advertisements published in the newspapers and advertisements broadcast by radio or television.
62	Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

Source : List II, Seventh Schedule, *Constitution of India*

Owing to the above subjects, the State legislatures have enacted various laws levying indirect taxes. Some of these are:

- Sales Tax/ Value Added Tax
- Purchase Tax
- Octroi/Entry Taxes
- Entertainment Tax
- Luxury Tax
- Taxes on Lottery, Betting and Gambling

The above account shows that there are multiple indirect taxes levied by different agencies of the Union and State governments. This apart, entry taxes have been levied in some states by the Local governments. All these indirect taxes are taxes on the sale/purchase or supply of goods or taxes on supply on services. There is very little co-ordination between various governments and between the departments of same government leading to tax leakages. The multiple levy also leads to cascading effect. For example, CST levied and paid on interstate sale/purchase of goods is not available as input tax credit and is not adjusted against the payment of future taxes. Consequently CST becomes part of the cost and State Sales Tax/VAT is paid on the total cost including CST. This leads to cascading effect i.e. tax on tax. Furthermore, the rates of tax on different products in various states were different. Certain products which were tax free in one state were taxable in other states. There was competition among various states to attract business activity and accordingly, the tax incentives were given by various governments leading to concentration of economic activity in those parts of the country. Furthermore, taxes like Entry Taxes and Octroi created

artificial tax barriers which are against the Constitutional mandate enshrined in Part XIII of the Constitution which contemplates freedom of trade, commerce and intercourse throughout the territory of India. [8]

3. *The Constitution (One Hundred and First Amendment) Act*, 2016

In this backdrop, *The Constitution (One Hundred and First Amendment) Act*, 2016 was enacted to facilitate levy of GST in India. Various indirect taxes levied by the Union and States have been subsumed into GST. Prior to 101st amendment, there were no concurrent taxation powers under the Indian constitution. The Constitution of India has introduced Dual GST i.e. National level GST and State level GST. Initially before 2009 it was thought that GST will be charged at the national level. However, after the First Discussion Paper by the Empowered Committee in 2009, it was made clear that India will have Dual GST which implied that both Union and States will have power to levy GST. [9]

3.1 Levy of GST on Intra-State Transactions

Constitutional amendment paved the way for levy of dual GST in India i.e. concurrent levy by the Union and the States on the same tax base on both goods and services. For this purpose, Article 246 A has been inserted in the Constitution which reads as under:

(1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Explanation.—The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council.''

The amendment has not included any tax entry in the concurrent list rather it has enacted a special provision to deal with the same while empowering both the Union and States to levy taxes (GST) on all goods and services except alcoholic

8 *Ibid.*

9 *Ibid.*

liquor for human consumption.[10] Using the alternative method of inserting entries in the concurrent list to confer concurrent tax powers would have brought in the application of the doctrine of Repugnancy making the system complex and causing unnecessary litigation between the Union and States. Further, Article 246A(1) makes it clear that the powers under this provision are not regulated or controlled by Articles 246 and 254.

Consequent to the subsuming of various indirect taxes in GST, entry 84 of List I and entry 54 of List II have also been amended. Amended entry 84 provides as under:

Duties of excise on the following goods manufactured or produced in India, namely:

(a) Petroleum crude;
(b) High speed diesel;
(c) Motor spirit (commonly known as petrol);
(d) Natural gas;
(e) Aviation turbine fuel; and
(f) Tobacco and tobacco products.

Since GST has not been levied for the time being of Petroleum and Petroleum products as detailed above, Union will continue to levy excise duty on them and the States will continue to levy VAT under entry 54 on them. However, GST Council has been authorized to recommend the date/dates from which GST shall be levied on them. It must be remembered that the blue print for the amendments is approved by Empowered Committee on the basis of consensus arrived at in their meetings. States have not given their consent to levy GST on petroleum products because it is a very potent revenue resource for the Union. Infact Union has also not made worthwhile efforts to include the same due to revenue buoyancy from this source to the union.

Corresponding amendments have been made in entry 54 of List II. Further, States have retained the power to levy VAT on alcohol for human consumption as it is also an important revenue resource for the States.

In pursuance of the powers conferred by Article 246A(1) Union has enacted, Central Goods and Service Tax Act, 2017 and the States have also enacted State GST Laws in 2017. Union and States are competent to levy GST on goods and services covered by GST on all intra state supplies i.e. on all intra-state supplies

[10] See the Constitution of India, Art. 366 (12A).

(supplies within the State) of goods and/or services, both Central GST (CGST) and State GST (SGST) shall be levied. The rates of GST are prescribed by GST Council constituted under Article 279A. The rate prescribed is divided equally into CGST and SGST i.e. if the prescribed rate is 18%, 9% will be CGST and 9% will be SGST.

As explained earlier, GST is levied on VAT principle and accordingly, taxes paid in the earlier stages of the supply chain are allowed as input tax credit in the subsequent stages and therefore, the problem of cascading of taxes will be resolved to a large extent.

3.2 Levy of GST on Inter-State Transactions

Clause (2) of Article 246A confers exclusive power on the Union to levy GST on supply of goods and/or services in the course of inter-state trade or commerce. It implies that whereas Union and States have concurrent powers to levy GST on intra state transactions, power to levy GST on inter-state transactions is exclusively with the Union. This is in consonance with the situation as it existed prior to 101st amendment. Before the amendment also, Union used to levy Central Sales Tax (CST) on inter-state transactions in order to avoid conflicts among various states regarding their tax jurisdictions.

Article 269A has been enacted to deal with GST on inter-state transaction which provides as under:

(1) Goods and services tax on supplies in the course of inter-State trade or commerce shall be levied and collected by the Government of India and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council.

Explanation.—For the purposes of this clause, supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce.

(2) The amount apportioned to a State under clause (1) shall not form part of the Consolidated Fund of India.

(3) Where an amount collected as tax levied under clause (1) has been used for payment of the tax levied by a State under article 246A, such amount shall not form part of the Consolidated Fund of India.

(4) Where an amount collected as tax levied by a State under article 246A has been used for payment of the tax levied under clause (1), such amount shall not form part of the Consolidated Fund of the State.

(5) Parliament may, by law, formulate the principles for determining the place of supply, and when a supply of goods, or of services, or both takes place in the course of inter-state trade or commerce.

Consequent to the insertion of Article 269A read with 246A(2), Union has enacted Integrated Goods and Service Tax Act, 2017 (IGST). IGST is levied by the Union on inter-state transactions. Purpose of levy of IGST is to ensure seamless flow of input tax credit and to ensure seamless flow of goods ands services throughout the territory of India. Under IGST model, Union IGST and the rate of IGST is equal to the combined rate of CGST and SGST.

GST is a destination based consumption tax. Accordingly, IGST shall be levied by the Union and shall be apportioned between the Union and the destination state (i.e. the State where the goods are destined for use or consumption). The share of the State shall not form part of the Consolidated Fund of India. Similarly, as explained earlier that credit of taxes paid on inputs shall be allowed, accordingly, the portion of GST which is claimed as credit to discharge SGST liability shall not form part of Consolidated Fund of India and shall be transferred to the destination State (importing state). In other words, the tax levied as IGST in one state can be utilized as tax credit in the subsequent stage of the supply chain in discharging SGST and CGST liability.[11] Therefore cross utilization of SGST and IGST as well as cross utilization of CGST and IGST is permissible by virtue of Article 269A clauses (3) and (4).

3.3 Sharing of Union GST Proceeds

After *Constitution (Eightieth Amendment)Act*, 2000, all Union taxes and duties except taxes levied under articles 269, 269 and cesses and surcharges levied under Article 271 were sharable with the States. The same practice has been adopted for GST. Article 270 has been amended by 101st amendment to make CGST as a sharable tax[12] as the union taxes subsumed in CGST were sharable before the amendment also. Further, Union's share of IGST is also sharable with States on the recommendations of Finance Commission.[13] Before 101st Amendment, Central Sales Tax on inter-state sales/purchases was levied and

11 Central Goods and Service Tax Act, 2017, S. 49(5).
12 Art. 270 (1A).
13 *Id.*, Art. 270 (1B).

collected under Article 269 by the Union but was assigned to the States in totality. Therefore, after the amendment also, centre's of IGST is sharable. Service taxes levied by the Union were also shared by the Union with the States on the recommendations of the Finance Commission. Therefore, so far as sharing pattern is concerned, there is no major change.

However, an important amendment has been in Article 271. Earlier, cesses and surcharges on all taxes i.e. direct and indirect taxes could be levied by the Union unilaterally and the revenue collected therefrom was not sharable with the States. 101st Amendment has curtailed the power of the Union with regard to GST i.e. cesses and surcharges on GST can not be levied by the Union unilaterally and if they are levied, they shall be sharable. The states have been pleading for either abolition of theses cesses and surcharges and increasing the basic rate of taxes or in the alternative making these cesses and surcharges shareable with the states. As a matter of fact, cesses and surcharges accounted for around 13.14% of the Gross Tax Revenues of the Union in 2013-14.[14] 101st Amendment has taken away the power levy cesses and surcharges on indirect taxes from the Parliament and has placed such power in the hands of GST Council.[15]

This apart, some consequential amendments have been made in Articles 248, 249 and 250.

3.4 GST Council

Article 279A has been incorporated in the Constitution by 101st Amendment to provide for the constitution of GST Council. Immediately after the amendment was notified, Union Government constituted GST Council under Article 279A. As per Article 279A, Union Finance Minister shall be the Chairman of the GST Council and State Finance Ministers shall be the members alongwith the Union Minister of State in charge of Revenue or Finance. It is pertinent to mention here that for the purposes of Article 246A, 269A and 279A, expression 'State' includes Union Territory with Legislature.[16] Accordingly, Union Territories with legislature also have representation in GST Council.

Analysis of Article 279A shows that the GST Council shall discharge the following functions

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14 Government of India (2014), *Report of the Fourteenth Finance Commission*, (2004) para 8.10, p. 89.

15 *Supra* note 3.

16 The *Constitution of India*, Art. 366 (26 B).

- Identifying union taxes, cesses and surcharges which shall be subsumed in GST
- Identifying cesses and surcharges levied by the States and Local bodies which shall be subsumed in GST
- Identifying goods and services which shall be exempt from GST
- Identifying goods and services on which GST shall be levied
- Identifying and determining threshold limit below which GST shall not be levied and the conditions for composition levy
- Determination of rate of tax
- Prescribing the date/dates when GST should be levied on Petroleum products
- Prescribing Model GST for the guidance of States and the Union
- Prescribing principles for determination when a transaction takes place in the course of intra state trade and when it takes place in the course of inter-state trade or commerce
- Recommending any special provisions for Special Category States
- Prescribing special rates in case of natural calamity or disaster
- To establish a dispute resolution mechanism in case of disputes between Union and States, Union and some States on one side and some States on the other side and between States inter se
- Any other matter relating to GST.[17]

GST Council is to be a permanent body unlike Finance Commission which is a non-permanent body. The Council is a powerful Constitutional Body which shall deal with indirect tax structure of the country. All decisions pertaining to indirect tax structure shall be taken by the GST Council by 3/4th majority of the weighted votes. As per clause (9) of Article 279A, the weightage of the Union vote shall be 1/3rd of the total votes cast and all other states shall have a weightage of 2/3 (all states/UTs taken together). Therefore, Union can not have its unilateral say in increasing or altering indirect tax structure unless it takes along States with it.

However, it must be noted that the Union has almost a veto power in GST Council since all decisions are to be taken by 3/4th majority and Union's vote

17 *Supra* note 3.

carries 1/3rd weightege. Accordingly, even if all the States/UTs combine and take a decision they can not compel the amendment since their votes will carry only 2/3rd weightege whereas Union may sail through the amendment even if it takes around half the States along which is possible for the Union governments given its fiscal superiority and the fact that generally party in power at the Union does have governments in some of the States as well. However, so far this has not happened and all decisions in 23 meetings held so far have been taken by consensus. Therefore, it can be said so far the working of the GST Council has demonstrated spirit of co-operative federalism for various reasons including lack of clarity about the actual impact of GST on States.

4. GST and Centre-State Relations

Amendment of the Constitution by 101st Amendment Act has not only introduced reform in the indirect tax structure but is also bound to impact Union-State relations. Implementation of GST presents various difficulties and challenges to Indian Fiscal Federalism.[18]

The major issue is regarding depletion of state autonomy regarding levy of indirect taxes i.e. rate of tax, threshold limit, exemptions etc, raising additional revenues by levying cesses and surcharges. In this regard, an analysis of Receipt budget of Punjab (FY 2014-15 and FY 2015-16) is relevant. The analysis shows that the indirect taxes levied by State which are subsumed in GST constituted around 78.75% of own Tax revenue of the State in 2014-15 (Budget Estimates) and it constituted around 78.32% of the Own Tax Revenue of the State in 2015-16 (Budget Estimates).[19] Analysis of receipts budgets of other states also show similar trend. Therefore, indirect taxes to be subsumed in GST constitute around 75% - 80% of own tax revenues of the States and the State would lose the autonomy to determine the rates of tax since the rate of tax shall be determined and recommended by the GST Council. Therefore, the sovereignty of the State shall be ceded to the GST Council regarding their major tax revenue resource. Many States in India had declared various items as tax free, such policies can not continue unless there is consensus in the GST Council. Therefore, State will lose the power to determine their indirect tax policy as per the specific needs of the State. Moreover, the States willing to raise additional resources for funding welfare

[18] Y.V. Reddy, Former Governor of RBI, *Indian Express*, 4 December, 2016.
[19] RBI (2016) : Study of State Budgets, 2015-16, Appendix 1, p. 155.

schemes will also face a problem as they may not be in a position to do the same. Already states have very limited revenue resources and they are dependent on the Union for around more than 1/3rd of their needs and any further dents in their sphere would be problematic in future.[20] Further, it would be wrong to suggest that State autonomy has been ceded to the Union rather it has been ceded to GST Council i.e. decisions will be taken in coordination and cooperation with other states and the union which appears to be an ideal situation but to what extent this will continue that only the time will tell more particularly in view of political changes in future.

This apart, implementation of GST has already created conflicts in Union-State relations in the short run. The consumption (destination) States have already been accusing the union of not releasing the share of the States in IGST[21]. As stated earlier, IGST is levied on inter-state transactions and as such IGST paid on inputs (purchases) can be claimed as credit while discharging SGST liability in the State. For example if a dealer from Punjab procures goods from Maharashtra, IGST shall be levied by the Union and the tax collected on such transaction is to be apportioned between the Union and the State (Punjab). When the Punjab dealer who had purchased goods from Maharashtra, sells those goods in Punjab, he will claim credit of IGST paid on his purchases (i.e. IGST paid when he purchased goods from Maharashtra). Therefore, when he will compute his tax liability he will deduct the IGST already paid by him to Maharasthra dealer and as such destination State will not get tax in cash rather it will get only the tax on value addition in treasury. The portion of IGST used to discharge SGST liability will be transferred by the Union to the State. Prior to 101st Amendment Act, the States used to get the tax amount instantly. However, due to initial problems in implementation, due dates for filing returns have been extended time and again and in the event of non-filing of returns, the share of the States could not be released for months altogether leading to acute cash crunch for the destination (consumption) States. Therefore, in the short run, destination States will have to wait for their share from the Union and it is causing issues in Union-State Fiscal Relations.

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20 *Supra* note 3.

21 Business Standard, 5 December, 2017. Ruling dispensation in Punjab has accused the Union government of not releasing the share of Punjab in GST to the tune of Rs. 3500 crore.

Article 279A has contemplated establishment of Dispute Resolution Mechanism under Clause (5) by GST Council. It will be interesting to know the constitution, composition of such mechanism and the status accorded to the decisions of such mechanism. Whether the mechanism established would suggest constitutional amendments to take away the jurisdiction of the Supreme Court and vesting the same in Tribunal/body with regard to GST. All these issues will compel reordering of Union State relations.

Challenge to the amendment on the ground of being anti-federal is also required to be explored in greater details. It is interesting to find out whether any State can challenge the amendment on the ground that it is against the federal structure of the Constitution which has been declared to be part of basic structure of the Indian Constitution[22]. Further, taxing power is sovereign power of the State and the limitation on the taxing power of the State in the manner that they can not reduce/increase the rate of tax and exempt goods/services without the approval of GST Council is a serious encroachment on the taxing power of the State and that is further complicated by the fact that the revenue from the taxes subsumed in GST were more than 75% of their total revenues. In this context if a State contends that they have granted the consent to levy GST and as a necessary corollary they can also withdraw such consent and hence they don't want to be part of GST. In the future, when the conflict between the Centre and States arise, it would be interesting to note the Union's approach and the judicial approach towards this aspect of the matter.

Furthermore, the implementation of GST has been hit by various roadblocks like GST Network issues and frequent amendments.[23] Moreover, it is only a partial GST since electricity duties, petroleum products and alcoholic liquor for human consumption have been left out of GST regime. Under the circumstances, it is not possible to realize the full fruits of introduction of this important tax reform. However, inclusion of these items in GST net is a tedious issue between Union and States, and both the layers have differences on this issue. It will be challenge to Union and States to work out a negotiation on this aspect.

Compensation to States is yet another aspect which can adversely affect the Union-State relations in the years to come. As per the mandate of GST

22 *S.R. Bommai* v. *Union of India*, AIR 1994 SC 1918.

23 So far eleven amendments have been made in CGST Rules and many notifications have been issued from time to time.

Council, Centre has enacted *Goods and Service Tax (Compensation to States) Act*, 2017 for providing compensation to the States, in case of any loss occasioned to the States by implementation of GST. Compensation claims will necessarily lead to some conflicts between the two layers of governments.

GST implementation is also going to impact State-Local government relationship to an extent. Abolition of entry 52 i.e. Entry taxes etc. will dents n the resources of the local governments. Further, in case of many States, on the recommendations of the State Finance Commissions, the part of VAT was straight away deposited in Municipal Infrastructure Development Fund e.g. 10% of VAT was deposited in this account at the time of deposit of tax by the dealers/tax payers. Therefore, local governments used to get their share of tax immediately and they had immediate resources to meet their expenditure. Under the GST regime, States have not got their own share of IGST from the Union, how they will react to immediate shortfall in resources of the local governments will be interesting to note.

5. Concluding Observations

From the foregoing analysis, it is clear that amendment of far reaching consequences in Union-State Relations has been introduced by 101st Amendment Act. The amendment, apart from being a much needed tax reform, would also impact, Union-State and State-Local relation. The establishment of a constitutional body in the shape of GST Council to decide about indirect taxes is an important step. GST Council, a permanent body will play a prominent role in Centre-State fiscal sphere more particularly in the sense that it will provide a platform to the States to sit collectively and decide about the future of indirect tax structure of the country. Not only, it may lead to cooperative federalism in the real sense of the term but also it will provide a platform to the States to share their views and their concerns regarding Union-State issues. This may prove to be a game changer in Union-State relations particularly when we did not had any Constitutional body where only the tax structure was discussed and debated. Further, it must also be remembered that Union has also ceded a part of its sovereignty to GST Council and Union alone is also not competent to carry forward its agenda without the cooperation of the States.

However, for the success of GST and for cordial Union-State relations confidence building measures are of utmost importance. The experience of the States regarding payment of compensation promised by the Union at the time

of implementation of VAT was not very healthy and therefore, there was and there is trust deficit. It is therefore, required that the Union should be sensitive towards the concerns of the States and should keep with the present trend of taking all decisions by consensus in GST Council in the future as well.

UNCONVENTIONAL SOLUTIONS FOR ENVIRONMENT PROTECTION

Prof. K. Vidyullatha Reddy *

1. Introduction

Environment degradation remained a matter of concern world over for few decades now. United Nations efforts to address the issue started more than four decades ago[1]. These efforts led to States accepting to certain binding principles[2] and entering into some enforceable treaties[3]. These had a huge impact domestically also for each State party. Domestic actions in many States included enacting legislations, developing policy guidelines, setting up enforcement agencies, creating opportunities for education, making provision for financial allocation etc. the above indicate the multidimensional approach necessary to combat environment degradation. The concern for environment degradation is not a luxury rather it is a necessity as it threatens the existence of the species and the quality of life on this planet. The number of legislations, technological and financial challenges, numerous non-governmental organizations it brought with this was phenomenal. The world was literally forced to have a new vision. At this juncture the role religion has and shall have on environment protection also was not out of place, this led to many studies in this direction.

There are scholars who have justified with their studies that religion can have

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1 United Nations Conference on Human Environment (UNCHE) held from 5-12 June, 1972. June 5th is declared as the World Environment Day to mark the conference dates. There were many factors which highlighted the degrading environment thus invoking the conscience of the international community to take note of it, which include a novel namely 'Silent Spring' and a report namely 'Limits to Growth'. Silent Spring' was published in 1962 by Rachel Carson which spoke about the harmful effects of the use of pesticides on the birds and killing of them leading to a silent spring season. 'Limits to Growth', a report prepared by an International team of researchers at Massachusetts Institute of Technology which predicted that we need to limit our growth for the earth resources to sustain our life style.

2 Principles such as Polluter pay, Precautionary principle, Common but differentiated responsibility have led to guide many actions across States. They influence every decision making including legislation, State policies, judicial decisions etc.

3 United Nations Convention on Biological Diversity, 1992; United Nations Framework Convention on Climate Change, 1992; Basel Convention on Trans boundary Movements of Hazardous Wastes and their Disposal, 1989; Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973; The Convention on Wetlands of International Importance, 1971 etc. are few examples of international agreements.

positive role on environment protection[4]. There are scholars who asserted that religion attitude towards environment was responsible for environment degradation[5]. There are also studies which held that the relationship between religion and environmental behaviour is a very weak link[6]. The author in this paper intends to study the interface of Hindu religion on environment protection in India.

2. Hindu Religion

Hindu religion is the religion of the majority in India. Hinduism is considered a way of life that has been practiced in India. There are many criticisms to this statement; however there is a justification for the saying. The geographical territory of India is vast and it is a combination of diverse languages, cultures and practices. It is believed that Sri Adi Shankaracharya who travelled across India had contributed immensely in unifying many different practices and ideologies under one domain i.e. Hindu religion. The people who profess or practice the religion are called Hindu's. Hindu's disagree with the fact that Hindu religion emerged like few other religions which earlier had believed in pagan deities. The reason for disagreement is that the religion believes in the existence of multiple deities. Religion believes in the existence of multiple rituals and practices associated with these deities. In view of this diversity, what is stated as religious rituals by one scholar may not be considered by the other Hindu scholars. This enhances the chances of the critics because what one Hindu religious scholar states may not be accepted in its entirety by the other Hindu scholars. In these situations it becomes difficult to state with certainty that this is Hinduism.

Hindu religion besides believing in multiple deities also believes that they are worshiped with different names in different parts of the State, for example: Lord Shiva is worshipped as Vishwanath in Benares, while he is worshipped as Eshwar in Rameshwaram, he is worshipped as Mallikarjun in Srisailam etc. In the State of Telangana alone village goddesses are known as Pochamma, Maisamma, Uppallamma, Maremma, Poleramma, Ankallama etc. It is even contradictory to call them as village goddesses or as one and the same. Every deity has a different ritual and different festivities etc. Understanding Hindu religion in its entirety is more than a life time job for any scholar. Ideally speaking it should be less tedious

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4 Harold Olofson, "Cebuano and tagbanuawa: Two cases of indigenous management of natural resources in the Philippines and their relation to religion" *Philippine Quarterly of Culture and Society*, 1995, Vol. 23, pp. 20–34

5 Mark Stoll, "The Quest for Green Religion" Religion and American culture: *A Journal of Interpretation, 2012,* Vol. 22, pp. 265–274

6 Heather Hartwig Boyd, "Christianity and the environment in the American public", *Journal for the Scientific Study of Religion, 1999,* Vol. 38, pp. 36-44.

and more interesting for scholars who follow the religion.

Hindu religion besides having divergent rituals and practices has common beliefs; believing in the existence of multiple deities itself is a unifying factor. Believing that Vedas are the actual utterances of god and should be followed is a unifying factor; however the expositions on Vedas in the form of Smritis by learned scholars such as Manu and Yagnavalakya differed in their views on few aspects. Bhagavad Gita is considered a cream/summary of Vedas and it is believed to be uttered by the god himself (Lord Srikrishna), it is a sacred book for all Hindu's in India. However the religion as such is not bound by the sacred book it acts as a moral guide or an ethical code. There are many other Upanishads and other sacred literatures that guide people in different parts of India, for example Tiruppavai is considered fifth Veda by shrivaishnavities in South India. This is believed to be sung by goddess Goda/ Andal who is believed to be reincarnation of goddess laxmi[7]. Tamilnadu State Government seal/emblem carries the temple tower of srivilliputhur temple. Tiruppavai shows the path for seeking the blessings of Lord Sri Ranganadha (the other name for Lord Sri Krishna). The unifying factors of the religion keep the religious followers intact while allowing each one of them to follow divergent rituals and practices.

3. Hindu Religion and Environment

One of the major beliefs of the Hindu religion is that god is supreme and god created the whole universe. There are verses in Bhagavad Gita which state the same, as Gita is believed to be the actual utterance of god, the belief also is very strong[8]. Gita asserts that God is the creator of mobile and immobile things on this universe and every action in this Universe is dictated by the god. There is also a belief that god exits in all beings and everywhere.

Hindu's believe that god exits in trees, water, animals etc. and in human beings as

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[7] The birth place of Godess Andal/Goda (Godess Laxmi reincarnation) is believed to be Srivilliputhur. This place is in the State of Tamil Nadu. Dravidian Sri King Sri Krishna Deva Raya has written a book on goddess Andal/ Goda and tirrupavai which was titled "Amukta Malyada"; the book is a very popular book on the subject. Tirrupavai impact can be clearly seen in the region which was under this ruler.

[8] *Bhagavad Gita* (chapter VII –4th and the 6th verse).
Bhoomiraapo'nalo vaayuh kham mano buddhireva cha;
Ahamkaara iteeyam me bhinnaa prakritirashtadhaa.
(Earth, water, fire, air, ether, mind, intellect and egoism-thus is my Nature divided eightfold).
Etadyoneeni bhootaani sarvaaneetyupadhaaraya;
Aham kritsnasya jagatah prabhavah pralayastathaa.
(Know that these two (My higher and lower Natures) are the womb of all beings. So, I am the source and dissolution of the whole universe).

well. India is a biologically rich nation and this belief helped in environment protection. For example, many people pray to tress and few trees are planted in temples especially for the purpose of prayer. There are particular species of tress/ plants which have greater religious significance[9] over others[10].

Hindus consider rivers as goddess[11]. There is a belief that when people were suffering with drought and lack of water king Bhagiratha made tapasya/prolonged prayer[12] and the god is pleased with his tapasya and asked him to seek a boon. He asked god to give ganga/water to the public, and then the river course followed[13]. Telangana State Government project on supplying drinking water to every household is named as Mission Bhagiratha this signifies the importance of the beliefs on its followers on the present day to day life. This also indicates the belief that Hindu's believe that rivers have divine origin.

Hindu's also consider rain as god. There is a belief that when people were suffering with drought the sages advised the villagers that young girls should perform puja to seek the blessings of rain god. This required them to know the ritual to perform the puja. It was believed that Goddess Laxmi reincarnated herself as Andal/Goda and she described the puja ritual. The god was pleased and gave the followers worldly benefits[14]. This indicates the fact that people believe that if god

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9 Ocimum tenuiflorum popularly known as tulasi/ thulasi plant has an important place in srivaishnava tradition of Hinduism.

10 Oraons (Fourth largest tribal group in India) orientation to nature is shaped by their religious beliefs. They believe in spiritual beings and their hierarchy, 1) Dharmes (Supreme) 2) ancestors 3) spirits ex. Chandi is their spirit of war, Baranda is their house hold spirit etc. In karam festival they dance around karam tree. Young boys cut branches from an unflowered tree and they are planted in village court yards. These branches are not allowed to fall down and there are stories which speak of punishment for people treating the karam branches with disrespect. They conduct marriage ceremony of the earth. Before the ceremony no one is allowed to gather new fruits or cut yield etc. Many of them converted to Christianity, however they celebrate the festivals in same way. Converts attitude towards nature reflects departure from traditional attitude (Source: Virginius XAXA, "Oraons: Religion, Customs and *Environment" India International Centre Quarterly,* 1992, Vol. 19, pp. 101 – 110)

11 Arti/Harati is a part of prayer wherein small flame of fire is given (shown) to god which is then given (Shown) to the people who visit the temple. Similar Arti is given to river ganga in Haridwar and few other places on specific time or on specific occasions.

12 Tapsya is prolonged worship disassociating the practitioner with the world. The worship is usually continued until the god/godess blesses the worshipper or the worshipper seeks the boon from the god/godess.

13 King Bhagiratha is considered to be the forefather of lord Rama, Rama is believed to be an incarnation of lord srimahavishnu. While many kings ruled the region (Ayodhya) it was Bhagiratha who is still remembered, In fact Bhagiratha left the kingdom and the regime for the sake of tapsya. This indicates the fact that people do not remember kings as much as those who relinquished their kingdom for a good cause.

14 The day when god was pleased and blessed the people with worldly pleasures (Such as jewellery, food grains etc.) is celebrated as Bhoghi, and the day when goddess united with the

is happy then there will be showers otherwise it will be hit by drought[15].

Hindus consider animals, birds etc. as god/godess. Snakes are considered as god and there is a belief that if a snake is harmed or killed its spouse or progeny will kill the entire family of the accused and his/her progeny[16]. Lord Hanuman is prayed to attain bravery, good health etc[17]. Cow is regarded as a sacred animal by Hindus from Vedic times in India. The religious importance given to the cow and its progeny is recognized by the makers of the Constitution. There was a debate in the constituent assembly to ban cow slaughter and protect cow as part of fundamental right, however few members such as Jawarharlal Nehru and Dr. B.R. Ambedkar did not agree with the argument, finally it was agreed to be made part of Directive Principles of State Policy[18]. Many States in India legislated to preserve cow and prohibit cow slaughter[19]. There were cases filed in the Courts

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god is celebrated as sankranthi. (There are other stories as well for the same). The importance here is that while usually many prayers end in salvation or heavenly abode this prayer ends in worldly benefits. The ritual requires thirty day puja performed early in the morning everyday ending on the day sankranthi when goddess andal unites with lord srirangannatha. The symboloic wedding of the god and the goddesses is performed on the sankranthi day in many srivyshnavite temples in south India.

15 Telangana State Chief Minister performed 'Ayutha Chandi Maha Yagam' from 23 to 27th December, 2015. It is believed that the yagam will bring fortune and ensure welfare of the people of the State. This yagam is usually performed to please the goddess when a wish is fulfilled. It is said in the near past (at least in the last ten centuries) no one not even a king has performed a yagam in such a large scale. People also thought that the chief minister may be performing it as his wish for attainment of new State is fulfilled.

16 There is a festival called nagulachavithi celebrated in few States wherein people offer prayers at snake termites. There are many beliefs associated with it such as lack of children or prolonged illness is due to snake bane etc. there are many temples for snakes, besides finding themselves a small place in other temples. There are many names of the people who have been named after snake god.

17 There are innumerable temples for lord hanuman. There are many devout followers of this god. There are many Indian names which have their origin in this god.

18 Article 48 of Indian Constitution speaking for Directive Principles of State Policy reads as follows:

> "The state shall endeavour to organize agriculture and animal husbandry on modern and scientific lives and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter of cows and calves and other milch and draught cattle"

19 *The Bombay Animal Preservation Act, 1954*
The Bihar Preservation and Improvement of Animals Act, 1955
The Punjab Prohibition of Cow Slaughter Act, 1955
The Himachal Pradesh Prohibition of Cow Slaughter Act, 1955
The Uttar Pradesh Prohibition of Cow Slaughter Act, 1955
The Tamil Nadu Animal Preservation Act, 1958
The Madhya Pradesh Agricultural Cattle Preservation Act, 1959
The Orissa Prevention of Cow slaughter Act, 1960
The Pondichery Prevention of Cow Slaughter Act, 1968
The Karnataka Prevention of Cow Slaughter and Cattle Preservation Act, 1964
The Maharashtra Animal Preservation Act, 1976

challenging the validity of these legislations and their amendments as they violated freedom of trade[20]. Court has upheld the validity of these legislations and interpreted the terms of these statutes and their impact[21]. Even mountains and oceans are considered gods for Hindus[22].

The above are only few examples to ascertain the fact that Hindu's see god in every element of nature and in all living beings. This made few scholars to identify Hindu religion as pro-environment religion or so to say green religion. Hindu religion world over is generally seen as religion close to nature, the religion is much more complex than its one dimensional impression as a conservationist. However the religion and its practices are predominantly pro-environment.

4. Hindu Religious Practices and Environment Degradation

Hindu religion is a pro-environment religion; hence its religious practices should ideally be pro-environment. However not all of its practices are pro-environment. There are few religious practices which are environmentally challenging and require consideration.

Ganesh chathurthi celebrations are one of it. Ganesh chavithi is a festival wherein Lord Sri Ganesha is prayed. It is believed that Lord Ganesha is the remover of hurdles; hence images of the god are placed in many shops, cars, front doors of houses etc. Lord Ganesh is prayed before offering other prayers so that there is no hindrance for conducting other prayers. The festivities across the State for Ganesh chavithi receive huge attention from Hindu's besides few from other religious followers as well. The festivities include placing the image of the idol on the day of Ganesh chavithi and after offering prayer for few days immersing the idol in water bodies. This festival is celebrated with great splendour and people gather near the places where these idols are placed for prayer. The numbers of idols in

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The Andhra Pradesh Prohibition of Cow Slaughter and Animals Preservation Act, 1977
The Goa Daman & Diu Prevention of Cow Slaughter Act, 1978 and The Goa Animal Preservation Act, 1995)
The Delhi Agricultural Cattle Preservation Act, 1994
The Rajasthan Bovine Animal (Prohibition of Slaughter and Regulation of Temporarily Migration of Export) Act, 1995.

20 Article 19 (1) (g) of *Indian Constitution* deals with the fundamental right to 'practice any profession or to carry on any occupation, trade or business'. This right is subject to Article 19(6) which permits reasonable restrictions to be imposed on it in the interests of the general public.

21 *Mohammed Hanif Quareshi and Others* v. *State of Bihar and Others* (1959 SCR 629); *Haji Usmanbhai Hasanbhai Qureshi and Others* v. *State of Gujarat,* (1986) 3 SCC 12.

22 There are two mountains in Bhadrinath (Bhadrinath is a temple town in Uttarakhand State) which are believed as Nar and Narayan Parvath i.e. one mountain as human being and the other as lord Vishnu. It is also believed that life in India started from this place.

each city are in thousands and of huge size thus posing environmental challenge to the administration. There are people trying to educate people to use clay idols instead of idols made with chemical compounds or chemical colours[23]. There are efforts by people to inform them that Hindu religion accepts only clay idols as they can be properly immersed and are spiritually acceptable[24]. In spite of this huge number of idols painted with chemical colours reach the water bodies every year for immersion. Government effort to impose conditions on the place and size of idols is generally not accepted by the organizers[25]. The organizers opposition to government is seen by public as a protection against interference with religious faith and this leaves the Government with no option but to support them eventually. Government spends huge amount of money to clean up the water bodies subsequently.

Jallikattu is another example of the same. Jallikattu is a traditional or cultural practice in few southern States in India, especially in Tamilnadu. Jallikattu according to the belief is that, in olden day's silver or gold coins were tied to the bull's horns and those brave young men who get at the money tied to the bull's horns would marry the daughter of the owner. Jallikattu presently is celebrated wherein bulls in huge number were made to flight in small arena so that they flight or fight. Crowd gathers in huge numbers to watch it. This is usually performed at the end of the harvest season during pongal (between 13th to 16th January). There were cases filed against the organizers of this event to ban it. Organizers of jallikattu took the stand that this ritual is performed as an age old tradition and they stated that it is not only practiced during pongal but sometime during temple festivals. It was argued by the petitioners (voluntary organizations working for environment protection) that this activity has no religious significance and they stated that Tamil tradition and culture are to worship the bull and the bull is always considered as the vehicle of Lord Shiva. The petitioners also argued that bulls are injured/mutilated/poked etc. so that they take flight or fight. Even the crowd gathered would also try to further make noise/poke or jump on them etc. The Supreme Court held that Jalllikaatu and bullock cart race violate Section 3,11 ,21 and 22 of Prevention of Cruelty to Animals Act, 1960 . Bulls cannot be used as performing animals either for Jallikattu or for bullock cart race in India[26]. There was large scale protests on the ban imposed on this activity in the State of

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23 *www.firstpost.com/ganesh-chthurthi-remeber-environmental-crisis*

24 *The Forum for Hindu Awakening (FHA), a charitable organization is trying to educate people. This organization is in USA.*

25 *http://www.thehindu.com/news/cities/Hyderabad/meaningless-rules-irk-ganesh-utsav-samithi/article7631464.ece,* dated 9 September, 2015

26 *Animal Welfare Board of India* v. *A. Nagaraja and Others* (MANU/SC/0426/2014)

Tamilnadu[27]. According to the protestors Jallikattu helps in protecting the native breed bulls and helps in sustainable cattle growth[28]. Finally the Government has to allow the organizers to hold it.

In Manoj Misra v Union of India[29], the National Green Tribunal (Delhi Bench) has considered pollution of river Yamuna in the National Capital Territory (NCT) region. Besides various other reasons for the pollution it was also noticed that dumping of waste generated from puja/prayer was also one of the contributing factors. The tribunal in this case ordered that whoever dumps prayer material shall be liable to pay rupees five thousands in accordance with the polluter pays principle.

Indian courts have always held public good and order above the religious practices; while protecting the religious beliefs and faith of its people. The Court drew the distinction between religious faith and belief and religious practices. The Court held that State protects religious faith and belief, if religious practices are counter to public good, morality or public order then religious practices must give way for the good of the people as a whole[30].

5. Religious Solutions for Environment Degradation

Environmentalists are enthusiastic to try every possible remedy for mitigation of environment damage; however use of religion requires more prudent approach. States which have a single religion may find it relatively easy when compared with States like India. However it has to be seen whether State and its people yet the given time period are willing to undertake this new moral code. There are efforts made by religious heads in some parts of the world to include environment concerns softly into the religious domain[31]. Religious preaching's are enlightening

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27 *http://www.news18.com/news/india/jallikattu-ban-live-tamil-nadu-police-clear-protesters-from-marina-beach-1339307.html* dated 23 January, 2017

28 *http://www.bbc.com/news/world-asia-india-36798500* dated 19 July, 2016.

29 *www.greentribunal.gov.in* (order dated 13 January, 2015).

30 *State of Bombay* v. *Narasu Appa Mali* (AIR 1952 Bom. 82).
Court restricted the use of loud speakers violating the noise pollution laws by the religious followers in the following cases:
In *P.A. Jacob* v. *Superintendent of Police* (AIR 1993 Ker 1) use of loud speakers by the Church was restricted by the Kerala High Court. Court held that freedom of speech guaranteed under Article 19 (1) (a) of the Constitution do not cover use of loud speakers.
In *Maulana Mufti Syed Barkati* v. *State of West Bengal* (AIR 1999 CAL 15) use of loud speakers for Azan was restricted during 9.00 p.m to 7 a.m. as it interfered with sleep and order in the society and violated the noise pollution laws.

31 In 1990, Pope John Paul II said: "There is growing awareness that world peace is threatened not only by the arms race, regional conflicts, and continued injustices among peoples and

words and the followers seldom take it as a directive, they may have far reaching moral impact provided they are done in proper manner while keeping the social fabric of the State intact.

India is a country with people following divergent religions live in cordial relations with each other. Freedom of religion is guaranteed by the Indian Constitution, which includes freedom to profess and practice ones religion. The Preamble to the Indian Constitution states that Indians have resolved it to be a Secular State. The Courts have refused to examine the validity of the personal laws on the ground of violation of fundamental rights as they are not laws strictly within the meaning of Article 13 of the Indian Constitution[32]. The Supreme Court of India held that secularism mentioned in the preamble to the Constitution of India is part of the basic structure of the Constitution[33]. There are amendments made to Indian Penal Code[34] and Representation of Peoples Act[35] besides many other similar echoes that unequivocally reiterate the fact that maintaining harmony among different religious groups, caste groups etc. and retaining the Secular nature of the State is non-negotiable in India.

There is a recent Supreme Court decision which held the use of religion among other things in elections as amounting to corrupt practice under the Representation of Peoples Act[36]. This can be seen as furthering the Indian Constitutional ethos as enshrined in its preamble that India shall be a secular country. This decision also voices the concern of the Supreme Court and its intolerance to unhealthy influences in the name of religion, caste etc.

The Courts, Government and State functionaries have always refrained from interfering in religious matters leaving it to the personal choice of the person. In fact law actively help in peaceful enjoyment of religious practices and in following religious faith. There is no legal demarcation of public life and private life. However it is amply clear from the Supreme Court decisions and the legislations that in the name of religion, caste, race etc. people will not be allowed to induce hatred or disturb peace in any manner. While people are allowed to profess and

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nations, but also by a lack of due respect for nature, by the plundering of natural resources, and by the progressive decline in the quality of life

In 2002 a joint declaration by Roman Catholic and the Greek Orthodox Churches, which called for an "objective moral order" within which to articulate a code of environmental ethics

32 *Krishna Singh* v. *Madhura Iher* (AIR 1980 SC 707)

33 *S.R. Bommai* v. *Union of India* (MANU/SC/0444/1994)

34 Section 153 A is introduced in the *Indian Penal Code*

35 New clause (3A) in Section 123 of the Representation of Peoples Act, 1951

36 *Abhiram Singh and Others* v. *C.D. Commachen (Dead) by L.Rs. and Others* (MANU/SC/0010/2017)

practice religion freely without fear, religion also should not be heading to expand its horizon and enter into new arenas of public sphere. While people are not allowed to use religion to justify legally unacceptable actions, religion also should refrain from encouraging legally acceptable actions to be executed in the name of religion. In this context it becomes difficult to accept the argument that environment conservation should be reasoned to people of all religions as a religious ethic than as a measure necessary for human survival.

The failure of environmentalists and State effort to regulate Jallikattu, Ganesh immersion etc. prove the point that India shall not accept interference with faith. Interference with faith is highly risky as it can have a devastating retribution on the exponents. The so called civilized changes in the life style and secular thinking has brought in lot of rational thinking, let alone new religious practices to be imparted few older ones are fading. If the religion has to be used for environment conservation then it has to come from gurus or other religious preachers fortunately most of them seem to be mindful of the environment degradation. Religious preachers usually want the traditional lifestyle to be continued so that the religion tenets, customs and practices are intact, as the traditional life style was eco-friendly to that extent their preaching's are incidentally helping the environment protection. Multiple religious gurus and religious preaches in India will face challenging task in carefully carving religious solutions for environment degradation without playing foul of the religious and social harmony. If other than religious gurus take up the issue and try to use the religion for the cause it may invite the backlash from the religious followers and it will be even more difficult task for them. Hence it requires a more calculated approach and the ability to say it/impress upon to the public without distorting the existing religious beliefs.

JUVENILE AND CRIMINAL RESPONSIBILITY

Pankaj Mahawar *

This essay is on the topic of Juvenile and Criminal Responsibility. This essay analyses about criminal responsibility, policy of state on minimum age, constitutional guarantees and role of state towards child or juvenile and juvenile in conflict with law, fundamental principles and objectives of juvenile justice (Care & Protection of Children) Act, 2000, and top 10 risks factors in childhood for future offending or anti-social behavior.

This essay also discuss about the various reason behind juvenile crime or juvenile delinquency such as poverty, non implementation of existing laws related to child, family, social factor, peer risk factors and violation of the provision of uniform civil code and law of equity. This essay says that how poverty indulge a child or juvenile to commit a crime, this essay says that laws related to child or juvenile or juvenile in conflict with law are in conflict in terms of defining the word child and these laws are violating the provision of Uniform Civil Code and Law of Equity. This essay discusses that how a good or positive environment of a family or a society decrease the risk factors of a child to commit an offence.

In this essay I have discussed that how we can prevent child or juvenile not to commit an offence and if a child or juvenile commit a crime then how we have to deal with them. I have also discussed to increase the period of maximum punishment from 03 to 07 years as per the provision of section 8(1) of Reformatory Schools Act 1897.

"Youth people should never be seen as a burden on any society,
But as it's most precious asset"

UN Secretary General[1]

1. Criminal Responsibility

In simple language, criminal responsibility means, the minimum ages at which children may be charged for a criminal offences, or we can say that criminal responsibility means, the age at which a child becomes criminally responsible for

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* Advocate, Civil Court, Sahibganj, Jharkhand.

1 Stated by UN Secretary General on the occasion of International Youth Day, 12 August, 2003.

their actions and the consequences of their actions. The accurate definition of criminal responsibility varies from place to place. But in general, we can say to be responsible for a criminal act implies perpetrator must understand what they are doing and that it is wrong. It is clear that most young children are too immature to fully understand the difference between right and wrong. Most countries have fixed an age below that a child cannot be held criminally responsible for their actions. Commonly this is set at ten years although the age of criminal responsibility, may vary between 06 to 15 years.

The minimum age of criminal responsibility in India is 07 years (12 years in the case wherein he is unable to understand the consequences of his action on account of immaturity of understanding). 'In Scotland, while the age of criminal responsibility is 08 years but a child below the age of 12 years cannot be prosecuted. In England, Wales and Northern Ireland this age is 10 years. In Netherlands and Canada it is 12 years. In Sweden, Finland and Norway the age of criminal responsibility is 15 years. In United States, the age of criminal responsibility varies between its states, but the age of criminal responsibility is normally not lower than 07 years.'[2]

2. State Policy on Minimum Age

In India, at present, the age of criminal responsibility is 07 years (12 years in the case wherein he is unable to understand the consequences of his action on account of immaturity of understanding), and the maximum age is 18 years to recognize a child as a juvenile[3]. In other language, the maximum age is 18 years to enjoy the benefit of Juvenile Justice (Care and Protection of Children) Act, 2000 by a child. Before it, as per the provision of Juvenile Justice Act 1986, the maximum age was 16 years for a boy and 18 years for a girl to enjoy the benefit of Juvenile Justice Act 1986.

Nowadays, especially after "the Nirbhaya Case" or "Damini Case" which has taken place on 16th December 2012, a strong discussion has generated to reduce the maximum age from 18 to 16 years for fixing criminal responsibility for heinous serious criminal offences by Juveniles specially for male Juvenile. In this regard, parliamentary committee on empowerment of women advocates to reduce the age of male Juvenile from 18 to 16 years, because this committee has observed that 22,740 crimes which punishable under Indian Penal Code (IPC),

2 *at*,en.m.wikipedia.org/wiki/the-juvenile-justice-(care_and_protection_of_children)-Act-2000(last accessed on 25 August, 2013.

3 A.K. Sinha, *Jharkhand Juvenile Laws*, Eastern Book Agency, Patna, 2007, pp. 45-46.

1860 has committed by Juveniles in the years 2010 and most of the crimes has committed by male juveniles of 16 to 18 years of age.[4]

Although, the another school of thought, which is by the pro-child rights and Juvenile Justice advocates says that the maximum age to enjoy the benefit of Juvenile Justice Act, 2000 must be 18 years and it is for the best interest of Juvenile or juvenile in conflict with law. In this regard the Justice Verma committee has opposed to reduce the age of Juvenile from 18 years to 16 years.

3. Constitutional Guarantees and Role of State

3.1 Some important constitutional guarantees[5]*:-*

(i) Article 21(A) of our constitution says that "the state shall provide free and compulsory education to all children of the age of 06 to 14 years in such manner as the state may, by law, determine."

(ii) Article 24 of our Constitution says that "no child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment."

(iii) Article 39(e) of our Constitution says that "the health and strength of workers, men and women and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength."

(iv) Article 39(f) of our Constitution says that "Children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment."

3.2 Some important roles of State:-

(i) It is the role of the state to see that children of tender age are not forced to work as laborers.[6]

(ii) It is the role of the state to prevent juvenile or juvenile in conflict with law to become a hardcore criminal.

(iii) It is the role of the state to see and ensure that their basic human rights are fully protected.

(iv) It is the role of the state to provide speedy trial of offences against children or of violation of child rights.

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4 www.ithought.in/catalyst_essay.html (Last accessed on 31 August, 2013).

5 P.M. Bakshi, *The Constitution of India*, Universal Law Publishing Co. Pvt. Ltd., Delhi, 2009, pp. 57-88, ISBN:9788175347335

6 M. Arora, *Universal's Legal GK, General Knowledge on Law*, Universal Law Publishing Co. Pvt. Ltd., Delhi, 2008, p. 79, ISBN: 9788175346901.

4. Fundamental Principles and Objectives of Juvenile Justice (Care & Protection) Act 2000

The object of the Juvenile Justice (Care and Protection of Children) Act, 2000 is to provide a juvenile justice system for juveniles in conflict with law and children in need of care and protection by adopting a child friendly approach in the adjudication and disposition of matters in the best interests of children and for their rehabilitation keeping in view the developmental needs of the children.[7]

4.1 Some important principles of Juvenile Justice Act, 2000[8]

4.1.1 Principle of presumption of innocence

A juvenile or child is presumed to be innocent of any mollified or criminal intent up to the age of 07 years in all cases and up to twelve years in the case wherein he is unable to understand the consequences of his action on account of immaturity of understanding.

4.1.2 Principle of Best Interest

This principle seeks to ensure physical, emotional, intellectual, social and moral development of juvenile or child, to make him a good citizen by ameliorating the impediments to healthy development.

4.1.3 Principle of family cushion

The family biological, adoptive or foster, must be involved in the processes, preferred as placement cushion and strengthened as the said act (Juvenile Justice Act, 2000) unless the best interest measures or mandates dictate otherwise.

4.1.4 Principle of no harm, no maltreatment

The Juvenile or child who is placed in any institution under the Juvenile Justice (Care & Protection) Act, 2000 or under any placement cushion, shall not be subjected to any harm, abuse, neglect, maltreatment, corporal punishment or solitary confinement.

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7 A. K. Sinha, *Jharkhand Juvenile Laws*, Eastern Book Agency, Patna, 2007, p. i

8 *Id.*, at, 45-47.

4.1.5 Principle of non-stigmatizing semantics, decisions and actions

The non-stigmatizing semantics of the Juvenile Justice (Care & Protection) Act, 2000 must be strictly adhered to, and the use of adversarial or accusatory words, such as, arrest remand, accused charge sheet, trial, prosecution, warrant, summons, conviction, inmate delinquent neglected, custody etc, is prohibited in the processes pertaining to the juvenile or child under the Juvenile Justice (Care & Protection) Act, 2000.

4.1.6 Principle of balancing

This principle aims at striking a balance between the provisions of the Juvenile Justice (Care & Protection) Act, 2000 on one hand and constitutional safeguards and social methods on the other, in the dispensation of matters pertaining to juvenile or child.

4.1.7. Principle of non-waiver of rights

No waiver of rights of the juvenile or child, whether by himself or the competent authority or anyone acting or claiming to act on behalf of the juvenile or child, is either permissible or valid.

4.1.8. Principle of equality

Equality of access, equality of opportunity, equality under the Juvenile Justice (Care & Protection) Act, 2000, is guaranteed to the juvenile or child, and as such there shall be no discrimination on the basis of age, sex, place of birth, disability, race, ethnicity, status, caste, cultural practices, work, activity or behavior of the juvenile or child or that of his parents or guardians, or the civil and political status of the juvenile or child.

4.1.9. Principle of right to privacy and confidentially

According to this principle the juvenile's or child's rights to privacy and confidentiality shall be protected by all mean and through all the stages of the proceedings.

4.1.10. Principle of fresh start

The principle of fresh start promotes new beginning for the juvenile or child by ensuring erasure of his past records.

4.1.11. Principle of last resort

Institutionalization of juvenile or child will be a step of the last resort after reasonable enquiry and that too, for the minimum possible duration.

4.1.12. Principle of repatriation

Any juvenile or child, who is a foreign national and who has lost contact with his family, shall also be eligible for protection under the Juvenile Justice (Care & Protection) Act, 2000 and he shall be repatriated, at the earliest, to his country.

5 Reasons behind Juvenile in conflict with law

All Juvenile in conflict with law are influenced not only by what goes on in the environment in which juveniles live, but also by what they observe from adults, what they listen to, learn from peer groups, parents, relatives and society at large. Juvenile delinquency is not an inherent human condition, but, rather is learned through association, imitation, observation, pressure, needs, wants, influence and desires. Some reasons are as follows:-

5.1 Poverty

At present poverty is the most vulnerable reason behind doing a crime by a juvenile. Due to poverty they are not able to take basic education, they are not able to have proper and sufficient meal, and they are not able to live in their own home. If they are trying to get these facilities, they have only one option, which is "do crime" such as theft, begging etc.

Dr. Adam Graycar, Director of Australian Institute of Criminology said that "A growing body of research evidence drawn from studies of individual families suggests that economic and social stress exert their effects on crime by disrupting the parenting process."[9]

5.2 Child Labour

According to Labour Investigation Committee "Indulging Child in employment illegally is a black spot in Indian labour conditions".[10] Working from childhood is good even in the eye of societary. It is also good for nation but the custom of child labour in those circumstances, in which child labour has customized, is rampant. There is a direct relation between labour and health. It dissolves the

[9] www.aic.gov .au/media/1998/April/980424.html (last accessed 26 August, 2013).

[10] Kunwar Singh Tilara, *Industrial Sociology,* Prakashan Kendra, Lucknow, 1982, pp. 173-174.

usual family life of child and decreases the social control upon the child. Due to this Juvenile Delinquency increases and child become a problem for the society.

5.3 *Non implementation of existing laws related to child:-*

In our country many laws rules and guidelines are there for the welfare of child, juvenile and juvenile in conflict with law such as the Child Labor (Prohibition and Regulation) Act;1986; Child Labor (Prohibition and Regulation) Rules, 1988; Immoral Tariff (Prevention) Act, 1956; The Prohibition of Child Marriage Act, 2006; Children (Pledging of Labor) Act, 1933; The Right of Children to free and Compulsory Education Act, 2009; Integrated Plan of Action to Prevent and Combat Human Trafficking with Special Focus on Children and Women etc.. But if we analyze about the implementation of these laws, rules and guidelines, then we can found that we don't take appropriate efforts which is necessary for the implementation and most important, most of our politicians are not serious for the implementation of these laws, rules and guidelines.

5.4 *Family*

A family plays a big role in shaping a child towards a good citizen of a country. A positive environment of a family provides a strong base for the development of a child in adolescence stage. A positive environment of a family decreases the risk factor of a child to commit an offence; like that a negative environment of a family increases the risk factor of a child to commit an offence. In this regard, study shows that children who receive adequate parental supervision are less likely to engage in criminal activities.

'In an investigation of high-delinquency areas in New-York City, Craig and Glick, found three factors related to increased likelihood of delinquency (a) careless or inadequate supervision by the mother or surrogate mother, (b) erratic or overly strict discipline and (c) lack of cohesiveness of the family unit.'[11]

5.5 *Social Factor*

The causes of and conditions for juvenile crime are usually found at each level of the social structure, including society as a whole, social institutions, social groups and organizations, and interpersonal relations. For example, if we see the case of 'Kayla Rolland (age 6), who was shot in the chest by another 6 year old classmate. It raises fears about parenting and concerns about the difficult life of a

[11] Joseph A. Wickliffe,"Family factor that causes Juvenile delinquency", Why *Juveniles commit crimes*, at www.yale.edu.ynhti/curriculum/units/2000/2/00.02.07.x.html (last accessed on 01 February, 2014).

little boy. The boy who killed Kayla was full of hate. He spent much of his time watching violent movies. The boy did not seem to understand what he had done to his classmate. He was the product of an environment and family that was a broken home surrounded by gangs and drugs. The boy who did the killing had seen his uncle's friend with a gun and he found the gun under a pile of blankets in the bedroom.'[12]

From the above example, we can say that raising a child is not easy. It is a full time job requiring a great deal of attention and offering no guarantee that the child will become a productive member of society as a mature adult. Children may have the ability to understand that lying, stealing, cheating and hurting others are wrong behaviors, but how old would a child have to be to know that these actions are morally wrong? The age at which a child reaches the stage of reasoning varies according to how the body develops, how he/she is raised and how those around the child act. Children sometimes learn to reason by observing the behavior of the people most important to them. So we can say that the society and the community have to work together with the family and the parents to make a child, a better and responsible citizen.

5.6 Peer risk factors or peer group

Peer risk factors refer to the problems that may arise when a young person associates with a friend who is already engaged in offending or other anti-social behavior. These friendships can become a training ground for anti-social behavior. Studies have shown that association with anti-social peers increase, the possibility of offending. Some studies said, that puberty represents a maturity-gap for adolescents. Puberty produces a strong desire to be older peer who are committing offences appear to be more mature because the things they are doing resemble the independence and choices that come with adulthood such as drinking alcohol, or driving cars. In this way, exposure to the activities of anti-social peers can increase the possibility of offending.

5.7 Media

Many researchers have concluded that the young people who are violent by nature, tend to behave more aggressively or violently, especially when provoked. This is mainly characteristic of 08 to 12 years old boys, who are more vulnerable to such influences. Movies that demonstrate violent acts excite spectators and the

[12] Joseph A. Wickliffe, "Summary" Why *Juveniles commit crimes, www.yale.edu.ynhti/curriculum/units/2000/2/00.02.07.x.html* (last accessed on 01 February, 2014).

aggressive energy can then be transferred to everyday life, pushing an individual to engage in physical activity on the streets.[13]

5.8 Violation of the Provision Of Uniform Civil Code and Law of Equity

Many laws of our country related to child are violating the provision of uniform Civil Code such as[14]:-

(i) Immoral Tariff (Prevention) Act, 1956 says that:-
- A "Child" means "a person who has not completed the age of 16 years."
- A "Minor" means " a person who has completed the age of 16 years but has not completed the age of 18 years"
- A "Major" means "a person who has completed the age of 18 years"

(ii) Children (Pledging of Labor) Act, 1933 says that:-
- A "Child" means " a person who is under the age of 15 years"

(iii) The Prohibition of Child Marriage Act, 2006 says that:-
- A "Child" means " a person, who if a male, has not completed 21 years of age and if a female, has not completed 18 years of age."

(iv) The Reformatory Schools Act, 1897 says that:-
- "Youthful Offenders" means "any boy who has been convicted of any offence punishable with transportation or imprisonment and who, at the time of such conviction, was under the age of 15 years."

(v) The Right of Children to Free and Compulsory Education Act, 2009 says that:-
- A "Child" means "a male or female child of the age of 06 to 14 years."

(vi) Integrated Plan of Action to Prevent and Combat Human Trafficking with Special Focus on Children and Women says that:-
- A "Child" shall means "any person under 18 years of age"

All these laws are in conflict in terms of defining the word child. The child labor (Prohibition and Regulation) Act, 1986 says that a person who has not completed the age of 14 years is a child and cannot earn or work in any place. According to this law, it means, a person who has completed his/her 14 years of age is a youth or adult and he/she can earn or work in any place. But the Juvenile Justice (Care and Protection of Children) Act, 2000, says that a person who is not completed the age of 18 years is a child. Now how a common man decide that who is a child or who is not a child. A common man think that (according to Labor Act

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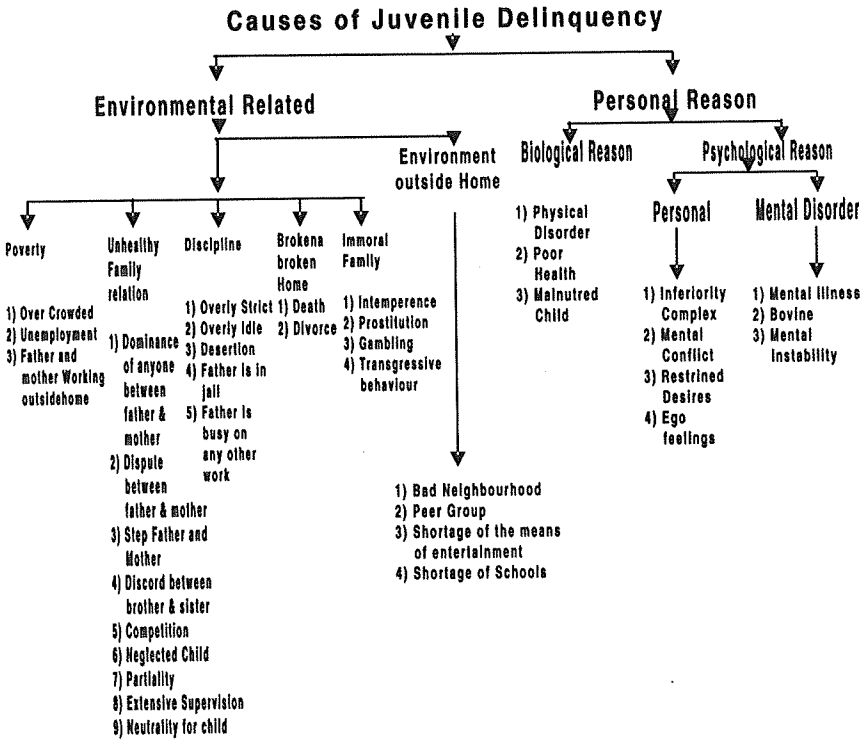
[13] Alexander Salagaev, *Juvenile Delinquency*, Part 1, World Youth Report 2003, United Nations Publication, New York, 2003, p. 196, available at, *www.un.org/youth*

[14] R. P. Kataria and Salah Uddin, *Commentary on Human Rights*, Orient Publishing company, New Delhi, 2013, pp. 285-668.

1986) if a person above 14 years is not a child and can do work and earn, then it means that he/she has the mental and moral ability to understand the difference between right and wrong. If we see in the purview of a common man regarding this, if a person above 14 years of age commit a crime then why he/she is not liable to trial as an adult. After every heinous serious crime like "Nirbhaya Case" and "Shakti Mill Gang Rape Case" (Which has taken place in Mumbai) common people always say to reduce the age of juvenile in conflict with law.

6. Causes of Juvenile Delinquency according to Government of India[15]



(Published in "Social Welfare" magazine on February 1959)

Top 10 risk factors in childhood for future offending or Anti-social behavior[16]

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15 Dr. Kiran Baghel, *Criminology and Social Disorganisation*, Jay Prakash Nath and Company, Merruth, 1983, pp. 88-90.

6.1. ***Risk factors for children under 13:-***

(i) History of anti-social behavior, behavior problems, conducts disorder during childhood (lying, stealing, bullying, non-compliance etc) including contact with the law and arrest before the age 12.

(ii) Use of tobacco, alcohol or other drugs either weekly or more frequently, before age 12.

(iii) Male gender

(iv) Low self-control, impulsive, poor ability to stop and think before acting during childhood.

(v) Hyperactive, poor ability to pay attention during childhood.

(vi) Involved in fighting, aggression, acts of violence before age 12.

(vii) Low family income during childhood.

(viii) Neither parent had skilled work (that is, one or both are unemployed or in unskilled or semi-skilled jobs)

(ix) Neither parent left school with any qualifications.

(x) One or both parents have a history of anti-social criminal behavior.

6.2 ***Risks factors for adolescents 13 and over:-***

(i) Contact with anti social peers (those involved in law, breaking, drugs, violence, gangs etc) (the more peers on contact, the higher the risk) from age 13 onwards.

(ii) General offences, number or prior offences (the more prior offences, the higher the risk before the current age).

(iii) Aggression, fighting, violent offences.

(iv) Low self-control, impulsive, poor ability to stop and think before acting.

(v) Hyperactive, poor ability to pay attention.

(vi) Poor supervision by parents/care givers (knowing where young person is, who they are with, rules and consequences).

(vii) Low levels of warmth, affection and closeness between parent(s) and young person.

(viii) Tendency towards anxiety and stress.

(ix) Few friends and social or recreational activities.

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[16] *www.justice.govt.nz/courts/youth/publications-and-media/speeches/what-causes-youth-crime-and-what-can-we-do-about-it*, (last accessed on 27 August, 2013.

(x) Length of first incarceration (the longer the period, the greater the risk).

7. Suggestions and Conclusion

It is impossible to definitive about the causes of juvenile crimes. Juvenile crime is not caused by specific and easily identifiable list of factors or reasons. So instead of discussing the cause of juvenile crime, it is better to approach the issue by identifying the various risk factors of juvenile crime and talk about the interventions that can either reduce those risks or increase protective factors in a child's life. To prevent child not to commit an offence we can do some of these things:-

(i) Communities have to try hard to incorporate youth into community functions.

(ii) More positive role models should come forward whereby children or youths can inspire by them.

(iii) The police have to play an active role in communities, for example speaking at schools and participating in local functions.

(iv) Schools and parents have to discuss the elements of delinquency and crime.

(v) Authorities and community groups must acquire a broader knowledge and understanding juvenile gangs.

(vi) More resources are to be allocated to the prevention of youthful drug and alcohol abuse.

(vii) Juvenile and the criminal justice system should make a joint effort to address the issues of concern to them.

(viii) Community must try that child or juvenile may take part in religious karyashala such as yoga, art of living etc.

We all know about UN Convention on Rights of Child, 1989. This convention is binding by nature. According to this convention the maximum age of a juvenile must not be below 18 years. India acceded this convention on 11 December 1992. So the provision related to the age of a Juvenile is also binding on India.

The maximum age of a Juvenile which is 18 years in India is morally right and it is for the best interest of a child. But what we will do when a child or juvenile commit a crime? This question becomes serious, when a child or juvenile commit a crime of a heinous serious nature. Our Juvenile Justice (Care and Protection) Act, 2000 says that if a child or juvenile commits a crime of any

nature, then he/she will be liable for 'punishment'[17], that is maximum for 03 years. Now there are two things, which we have to think about, one is, if a person wants to become a good and responsible citizen of a country then it is not necessary for him/her to go to jail or any correction home. We can see this in various policies of government related to Naxalite.

[18]

And second is; if a person doesn't want to become a good or responsible human being, then he/she will never become a good or responsible human being whether you kept him/her in jail even for 50 to 60 years. But the matter of a juvenile in conflict with law is slightly different not totally. In my opinion, first of all we have to increase the 'punishment'[19] from 03 to 07 years as per section 8(1) of Reformatory Schools Act, 1897 for juvenile in conflict with law of 14 to 18 years of age. There should be a provision that if a child or juvenile of 14 to 18 years of age commit an offence then he/she will be liable for punishment for a period which shall be not less than 03 years or more than 07 years. The term of the punishment whether it will be 04 years or 05 years or 07 years, should

17 The *Juvenile Justice (Care and Protection of Children) Act*, 2000, Sections 15 and 15(f).
18 Awareness against Naxalite, *Hindustan*, 26 September, 2013, p. 04.
19 The *Juvenile justice (Care and Protection of Children) Act*, 2000, Sections 15 and 15(f).

depend on Board of Juvenile Justice. Except this we have to do, day to day counseling of all the juveniles in conflict with law, who punished by Juvenile Justice Board, we have to give them proper education which they want or capable to take, if they want vocational training, we have to provide them if they are capable to take vocational training. Now if a juvenile in conflict with law who completed his/her whole punishment will commit another offence of any nature then it should be the duty of judges or members of Juvenile Justice Board or any other court to give him/her maximum punishment according to law.

In this way we can prevent our child or juvenile to become a criminal and child or juvenile who are in conflict with law to become a hardcore criminal.

ASSISTED REPRODUCTIVE TECHNOLOGIES AND MATERNITY LEAVE BENEFITS: RECENT DEVELOPMENTS IN INDIA

Gagan Preet*

1. Introduction

For effective dispensation of justice, law has to change in tune with the change in the society, be it sociological or technological. Twenty first century has been announced as the Bio-Tech Century, as remarkable advancements have been made in this field. Bio-technology is one such area of development which has allowed mankind to manipulate genes and has given him phenomenal powers to tamper with the nature's processes of reproduction and procreation. In other words, these technologies have enabled man to procreate without the usual intercourse between partners. Although, these biotechnological advancements have proven to be a boon for infertile childless couples, yet, on the other hand, they have given rise to a plethora of ethical, social, legal, cultural and human rights issues, with far reaching implications for humanity.

The techniques which have enabled the childless to conceive and bear children are commonly grouped under the heading "Assisted Reproductive Technologies (ART)" Any "procedure or method designed to enhance fertility or to compensate for infertility" outside the traditional means of procreation can be labeled as assisted reproductive technology.[1]As per Sec 2(a) Surrogacy (Regulation) Bill, 2014 "assisted reproductive technology" means techniques that attempt to obtain a pregnancy by handling or manipulating the sperm or the oocyte outside the human body, and transferring the gamete or the embryo into the reproductive tract. It includes a number of scientific techniques that assist reproduction, for example, artificial insemination (AI), *in vitro* fertilization (IVF), gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT), and intracytoplasmic sperm injection (ICSI),cryopreservation etc. Traditionally speaking in-vitro fertilization and artificial insemination were the two most popular form of interventions which were used for the treatment of infertility. The usage of these techniques has challenged the people's understanding of parenthood and biological relationships. Surrogacy is considered to be the most controversial assisted reproductive technique. The very

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1 R. Blank & J.C. Merrick, *Human Reproduction Emerging Technologies*, 85 (1995).

word 'surrogate' means substitute[2]. According to Section 2(zb) of the Surrogacy (Regulation) Bill (2016) "surrogacy" means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth;[3]

Commercial surrogacy was quite rampant in India before the coming up of the Surrogacy Bill (2016), for the regulation of surrogacy arrangements. Foreigners, overseas citizens, homosexuals and even single persons were permitted to take recourse to the benefits of surrogacy, under medical tourism policy of India since 2002.[4] And in order to regulate surrogacy in India, Indian Council of Medical Research formulated 'National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India' guidelines in the year 2005.[5]. This was the very first step towards regulation of surrogate arrangements in India. Due to lack of any statutory regulation on the subject, these guidelines are the only guiding force for the regulation of assisted reproduction in India. Although in the case of *Baby Manji Yamada v. Union of India*[6] in the year 2008, the apex court formally legalized the commercialization of surrogacy in India. The verdict of the Supreme Court in this case laid foundation for the devising of Assisted Reproductive Technologies (Regulation) Bill, 2008. This draft Bill has been subject of revision for number of times since its inception and the present form is in the shape of Surrogacy Bill 2016, which has been placed for deliberation before the appropriate legislative bodies which is placed before the legislative body for deliberation, awaiting enactment. During the pendency of the Bill in order to regulate overseas surrogacy by foreign nationals a public Interest Litigation was filed by Jayashree Wad, an advocate on record in Supreme Court[7], namely *Jayashree Wad v. Union of India* [8]before Supreme Court of India

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2 Malini Karkal, *Surrogacy from a Feminist Perspective*, 5(4) Indian Journal of Medical Science (IJME), (1997), http//www. Issuesinmedicalethics.org/054mi15.html

3 http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20%28Regulation%29%20Bill,%202016.pdf,visited on 10th, May, 2017

4 Sunita Reddy, Imrana Qadeer, Medical Tourism in India: Progress or Predicament?, Economic & Political Weekly May 15, 2010 vol xlv no 20, *available* at http://www.india environmentportal.org.in/files/Medical%20Tourism%20in%20India.pdf(Lastvisited on 25.01.17 .

5 ICMR National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, 2005, *available at* http://icmr.nic.in/art/art_clinics.htm (Last visited 12thMay, 2017).

6 (2008) 13 S.C.C. 518

7 SC notice to govt. on PIL seeking ban on commercial surrogacy ,The Times of India, 26th February, 2015 also available at http://timesofindia.indiatimes.com/india/SC-notice-to-govt-on-PIL-seeking-ban-on-commercial-surrogacy/articleshow/46376012.cms, (Last visited on 14th, May, 2017)

seeking prohibiting on commercial, overseas surrogacy for foreigners in India alleging that lax laws had allowed rampant commercialization of motherhood, exploiting poor women to turn India into the world's surrogacy capital.[9] The Union Government filed an affidavit in response to the said PIL, stating in it that the Government seeks to impose complete ban on commercial surrogacy and also overseas surrogacy, thereby prohibiting foreigners to commission surrogate arrangements in India.[10] The final verdict is yet to be pronounced, but during this interim period of pendency of litigation, there is a prohibition on clinics to undertake, offer surrogacy services to foreigners overseas couples.

2. Judicial Intervention: Maternity Benefits to Commissioning Mother

Due to the fact that there is absence of codified law for the regulation of assisted reproductive technologies in India, lot of debates and controversies are involved in the use of assisted reproductive Technologies. This absence of law for the regulation of assisted reproductive technologies have all led to certain unprecedented issues, which has created lot of confusion in the implementation of other related issues. Taking a lead in this situation, High Courts of different states have taken lead by pronouncing series of judgments starting with *K. Kalaiselvi v. Chennai Port Trust*[11] of Madras High Court, *P. Geetha v. The Kerela Livestock Development Board Ltd*[12] *of* Kerala High Court, *Rama Pandey v. Union of India & Ors.*[13] of Delhi High Court and *Dr. Hema Vijay Menon* v. *State of Maharashtra*[14] of Mumbai High court respectively granted child care leave for the commissioning mother/intending mother after granting the status of legal mother to her on equal footing as that of adoptive mother. Another surprising fact, is that till date number of Draft Bills have come for consideration for regulation of surrogacy (one of the assisted reproductive technique) in India

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8 Writ Petition (Civil) 95/2015

9 SC Notice To Govt. On PIL Seeking Ban On Commercial Surrogacy ,The Times of India, 26th February,2015 also availableathttp://timesofindia.indiatimes.com/india/SC-notice-to-govt-on-PIL-seeking-ban-on-commercial-surrogacy/articleshow/46376012.cms,Last visited on 14th, May, 2017

10 Limitations & Legal Boundaries Of Fertility Treatments In India available at http://www.medicoverfertility.com/blog/limitations-legal-boundaries-fertility-treatments-india/,Last Visited on 14th, May, 2017

11 Writ Petition(Civil) No. 8188/2012

12 2015 (1) Kerela Law Journal 494.

13 Writ Petition (Civil) No. 844/2014.

14 Writ Petition (Civil) No 3288.15, available at *https://indiankanoon.org/doc/106417919/*_last visited on 14th, May, 2017

but none of the drafts had a provision for 'child care leave' or 'maternity leave' for the intending mother or surrogate mother for that matter.

Equally it is significant to note that the judiciary is advancing a right based perspective, seeking to extend the exercise, realization of right to privacy family formation for all sections of society through beneficial interpretation of laws despite the absence of legislation on the same[15]. Judiciary has taken a very expansive view of the meaning of 'motherhood' and while interpreting the same, courts have granted the benefits related to this to the commissioning mother and in certain states while making policies for the regulation of child care leave have granted benefits of this leave not only to commissioning mothers but even to the surrogate mother also.[16]So, it can be very well said that the judiciary is playing a proactive role in granting rights to the parties involved in the use of Assisted Reproductive Technologies and there is development and evolution of the concept of Child care leave in case of surrogacy, through government policy and judicial precedents. These landmark legal developments are discussed summarily below.

3. Judicial Precedents

3.1 K. Kalaiselvi v. Chennai Port Trust[17]

Perhaps the first of its kind, and the maiden step in developing the meaning of parenthood vis-à-vis surrogacy was taken by the Madras high court in this case .The petitioner was working as an Assistant Superintendent in the Traffic department of the Chennai Port Trust. She was a married female and had worked for twenty four years in the department. Her son (Shyam Sundar) aged 20 years died in a road accident on 31.01.2009. The petitioner has removed her uterus due to some problem on 30.04.2008. Therefore, in order to have a child through surrogate arrangement entered into an arrangement with Prashanth Multispeciality hospital, Chennai .Finally with the her husband's consent and his cooperation, a female baby was born on 08.02.2011 through a surrogate mother. She had incurred substantial expenditure for this arrangement. In order to look after the newly born baby, she had applied for maternity leave. But she was

15 Judicial Precedents & Policy making on Child care leave in Surrogacy in India, available at http://www.familiesthrusurrogacy.com/wp-content/uploads/2016/05/Childcare-Leave-For-Indian-Surrogates.pdf Last visited on 29.3.17

16 Judicial Precedents & Policy making on Child care leave in Surrogacy in India, available at http://www.familiesthrusurrogacy.com/wp-content/uploads/2016/05/Childcare-Leave-For-Indian-Surrogates.pdf Last visited on 29.3.17

17 Writ Petition (Civil) No. 8188/2012

informed that she was not entitled for maternity leave (post delivery) for having a child through surrogate procedure though such a rejection was not possible in case of a person adopting a child as per Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987,[18] which benefit was granted to adoptive parents. The controversial point raised in this case was whether the petitioner, who had a child via commercial surrogacy, was entitled to maternity leave. While granting the relief of maternity leave to the petitioner the court noted:

> "This court does not find anything immoral and unethical about the petitioner having obtained a child through surrogate arrangement. For all practical purpose, the petitioner is the mother of the girl child G.K.Sharanya and her husband is the father of the said child. When once it is admitted that the said minor child is the daughter of the petitioner and at the time of the application, she was only one day old, she is entitled for leave akin to persons who are granted leave in terms of Rule 3-A of the Leave Regulations. The purpose of the said rule is for proper bonding between the child and parents."

The court in this case recognized the rights of the petitioner with respect to the child on the basis of the admission of all parties that the child is the daughter of the petitioner. Thus, the court first ruled out a challenge to the maternity and then conferred it to the petitioner post-delivery. The interpretation given by Maras High Court was slightly modified by the Kerala high court.

3.2 P. Geetha v. The Kerela Livestock Development Board Ltd[19]

In this case, the petitioner P.Geetha who was working as the Deputy General Manager in the Kerela Livestock Development Board, a Kerela Government Undertaking, applied for a leave for taking care of her baby born out of a surrogate arrangement. The petitioner in this case was childless for over twenty years, and in order to have a child, she along with her husband entered into a

[18] Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987 provides: A female employee on her adoption a child may be granted leave of the kind and admissible (including commuted leave without production of medical certificate for a period not exceeding 60 days and leave not due) upto one year subject to the following conditions :

(i) the facility will not be available to an adoptive mother already having two living children at the time of adoption;

(ii) the maximum admissible period of leave of the kind due and admissible will be regulated as under :

(a) If the age of the adopted child is less than one month, leave upto one year may be allowed.

(b) If the age of the child is six months or more, leave upto six months may be allowed.

(c) If the age of the child is nine months or more leave upto three months may be allowed

[19] 2015 (1) Kerela Law Journal 494.

surrogate arrangement with a fertility clinic in Hyderabad. As a result of his arrangement, a child was born on 18th, June 2014. After the birth of the child, the petitioner (genetic mother) and her husband were given the custody of the child by the surrogate mother .The petitioner, in order to take care of her newly born child, applied on 19.06.2014 for leave '*as applicable for child birth in the normal processes*. In response to her leave application the first respondent replied through a letter dated 10.07.2014, that the staff rules and regulations under which the petitioner is employed does not provide for any maternity leave other than what is understood in normal course. Furthermore, the petitioner was informed through another letter dated, 16.07.2014 that she can avail herself of loss of pay leave on medical ground. Being aggrieved by the refusal to grant leave for taking care of her child born as a result of surrogacy arrangement, by the first respondent, the petitioned filed the present writ petition.

All the employees of the Kerela Livestock Board are governed by the provisions of the Kerela Livestock Development Board Limited Staff Rules & Regulations,1993. *Chapter IV of the staff Rules deals with Leave Rules, which mandate that leave cannot be claimed as a matter of right, and that under exigent circumstances, the leave sanctioning authority has the discretion to refuse, postpone ,curtail or revoke leave of any description and/or to recall to duty any employee on leave. The kinds of leave that can be provided are: Casual leave, Compensation Leave, Special Casual Leave, Earned Leave, Half Pay Leave, Maternity Leave, Special Disability Leave, Extra Ordinary Leave and Study Leave.*

According to Staff Rules, Rule 50 of the Kerela Livestock Development Board Limited Staff Rules & Regulations, 1993 maternity leave of up to ninety days from the date of commencement of maternity leave. Maternity benefit is admissible to insured women in the event of confinement or miscarriage etc., for twelve weeks and the rate of about hundred percent of the wages. It also specifies that maternity benefit is admissible in the case of confinement and also in the case of miscarriage. This benefit is admissible for sickness arising out of pregnancy/miscarriage or confinement period for a specified period, additionally. The rate of this benefit is equal to or a little more than the wages i.e. double the standard benefit rate. Maternity benefit continues to be payable even in the death of an insured woman during her delivery or immediately following the date of her delivery leaving behind a child, fot the whole of that

period and in case the child also dies ,during the said period, until the death of the child.[20]

In this petition the court noted that there should be no discrimination on the basis of the means of maternity or the fact that the commissioning mother herself did not undergo the pregnancy. On the question of maternity the court observed that from the moment the child is born, the commissioning mother is to be treated as the mother of the child. As opposed to in the *Kalaiselvi* case, the Kerala high court unilaterally traced the maternal rights with the commissioning mother post-delivery. In this manner, the court very clearly negated any right of the surrogate mother with respect to the child post-delivery. With regard to motherhood the court noted: *It (motherhood) is no longer one indivisible instinct of mother to bear and bring up a child. With advancement of reproductive science, now, on occasions, the bearer of the seed is a mere vessel, a nursery to sprout, and the sapling is soon transported to some other soil to grow on.* The above interpretation reduces the surrogate mother to a passive, inert repository, who holds the child safely under an agreement, till it is ready to be delivered to the commissioning parents. However, despite the issues associated with the court recognizing the maternity of the commissioning mother only post-delivery, the court seems to at least recognize the rights of the surrogate with regards to the child during the pregnancy.

3.3 Rama Pandey v. Union Of India & Ors., 2014[21]

The facts of this case are like this, the petitioner, Rama Pandey a central government employee, married Atul Pandey on 18.01.1998. The desire of the petitioner to have a child got rewarded on 9th February, 2013 by taking recourse to surrogacy agreement. To effectuate the aforesaid purpose, the petitioner had entered into an agreement with, one, Ms Aarti, wife of Mr Surya Narayan, who agreed to act as a surrogate mother. This agreement mandated the surrogate mother to bear a child by employing the In-Vitro Fertilization (IVF) procedure. The procedure involved, required the in-vitro fertilization of the sperm of the genetic father with the ovum supplied by a designated donor. The fertilized embryo was then to be transferred and implanted in the surrogate mother's womb. This whole arrangement, specifying all the terms and conditions, as well as the right and obligations of the surrogate mother and the commissioning

[20] Rule 50 of the Kerela Livestock Development Board Limited Staff Rules & Regulations, 1993
[21] Writ Petition (Civil) No. 844/2014

parents was reduced into writing on 08.08.2012 [22].This arrangement resulted in the birth of twins, commissioned by the petitioner along with her husband. The petitioner on the birth of twins applied for grant of maternity leave. The application was accompanied with the birth certificate of the surrogate twins along with surrogacy agreement. Maternity leave was denied to her on the ground that she was not biologically related to the children. Aggrieved by rejection of leave claim the petitioner filed a writ petition under Article 226 of the Constitution to claim the same. The Delhi HC in this case held that "*a commissioning mother is similarly circumstanced, as an adoptive mother or an adoptive parent is no different from a commissioning parent, who seeks to obtain a child via a surrogacy arrangement*". Delhi High Court granted the commissioning mother her claim to maternity leave as well as child care leave. The HC held that denial of leave would be detrimental to both mother and child[23].

The Delhi HC enumerates the legal basis for grant of leave to commission mother under the existing leave rules, The HC identified the legal void that the term "*maternity leave*" is not defined under the existing central government services rules 1972 (Rule 43 - maternity leave). In the absence of such definition, there is nothing in law as well as the central services leave rules which bars or impairs the grant of maternity leave for women attaining maternity through surrogacy, rather there is scope for inclusion of the same. The Delhi HC filled up this legal void by including commissioning mothers who are central government female employee having child through surrogacy under such leave Rules.

The HC laid down the precedent that "*a woman who is under central government service as employee having a child through surrogacy is entitled to maternity leave" thereby extending similar entitlement or benefit to all central government female employee across the country to be followed in future cases. Delhi HC laid down guidelines seeking childcare leave in case of surrogacy*".

3.4 Dr. Hema Vijay Menon v. State of Maharashtra, 2015[24]

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22 Rajiv Shakdher, Delhi High Court, *Rama Pandey* v. *Union Of India & Ors.* on 17 July, 2015, Available at https://indiankanoon.org/doc/125365715/ Visited on 14.05.17

23 Live Law News , Surrogate mother is also entitled to maternity leave : Delhi High Court , Live Law News Network, July 18, 2015, *available at* http://www.livelaw.in/surrogate-mother-is-also-entitled-to-maternity-leave-delhi-high-court/(Last visited 29.03.2017)

24 2015 SCC OnLine Bom 6127

In the instant case Mumbai High Court held that "*woman attaining motherhood by having a child through surrogacy was entitled to maternity leave for 180 days*"[25]. Petitioner Central Railway (CR) employee applied for maternity leave before the birth of the surrogate child under Rule 551(C) Railway Services(Liberalised Leave) Rules, 1949 before the Central Railway Board for taking care of a child born through surrogacy. The Railways board maintained that there is no such provision on maternity leave for a mother having child through surrogacy and directed the petitioner to apply for child care leave. Following the birth of twins, this child care leave was also subsequently rejected. The Central Railway board imposed a condition,that denial of child care leave would amount to leave without pay. The petitioner challenged this refusal by filing petition against the employer Central Railways seeking the same relief before the Bombay High court. Mumbai high court provided relief to the petitioner and gave directions in this regard. The court held that the term "*mother*" to include within itself a "*commissioning mother securing a child through surrogacy*" under the Railway service (leave) Rules, after observing that "*there is nothing in Rules 551(C), (E) of Child Adoption Leave and Rules, that would disentitle maternity leave to a women who has attained motherhood through surrogacy procedure.*" Court held that "woman having a child through surrogacy was entitled to maternity leave for 180 days" and directed the Central Railway to grant the same to its woman employee. "*There should be no discrimination among women in entitlement to maternity leave on the ground using surrogacy to attain maternity. Grant of maternity leave to commissioning mother is in consonance with the objective, meaning of maternity leave. The purpose, meaning of maternity leave is inclusive of pre-natal, post-natal periods, the grant of this leave pertains to the post-natal aspect of maternity leave wherein in terms of post-natal maternal functions the commissioning mother is similarly situated and performs similar functions as any other natural or biological mother, the commissioning mother performs all the post-delivery motherhood functions including to receive custody of newly born child immediately after birth, for taking care, rearing of such new born child taking into consideration the special needs of child during the first year of life as this is crucial for development growth of child and requires maximum attention care, to develop or build emotional bonding or psychological attachment with the child,*

[25] Apoorva Mandhani, Women who obtain baby through surrogacy entitled to maternity leave: Bombay HC February 2, 2016 livelaw, *available at* http://www.livelaw.in/women-who-obtain-baby-through-surrogacyentitled- to-maternity-leave-bombay-hc-read-order/ (Last visited march, 2017

for breastfeeding of the child, thus such leave is in the best interest of child for early care, growth, development, survival and right to life of child. In keeping with these, denial of maternity leave to commissioning mother would result in frustrating the object of providing maternity leave to a mother, Hence grant of maternity leave to the commissioning mother is held imperative".

4. Commonalities in Delhi High Court and Bombay High Court Judgemments

These Judicial pronouncements laid down by the Bombay and Delhi High court share a common underlying reasoning or ratio that "a woman having a child attaining maternity through surrogacy or having a child through surrogacy was entitled to maternity leave for 180 days". Both these judicial pronouncements similarly invoke Directive Principles of the States policy, Part IV Indian Constitution under Article 39(f), Article 45 State obligation to provide early childhood care, opportunities and facilities to develop in a healthy manner. Similarly, both these judgments invoked, India's treaty obligation following signing and ratification of United Nations Convention on Rights of Child (UNCRC 1989) Article 6} state obligation to ensure to maximum extent possible right to life, survival and development of child.

5. Policy Initiatives at State Level

Judiciary has taken lead in defining and redefining the rights associated with the use of assisted reproductive technologies in India and this trend has been well appreciated by the State Governments and has helped in formulation of progressive government policy for the same. State of Maharashtra has taken a lead in this respect, and has issued a circular to initiate child care leave for its government female employees taking recourse of surrogacy.

5.1 Maharashtra State Government- child care leave for state government women employees using surrogacy, January 2016

State of Maharashtra is the first state amongst all to issue a government resolution in January 2016, to grant up to 180 days uninterrupted maternity leave to all women employees of the State Government who have had children by way of surrogacy, starting from the day the surrogate child is born.[26] This kind of leave can be availed only once during the female employees tenure of service.

[26] Government Resolution issued by Maharashtra State Government Finance Department, January 2016.

The application for same is to be addressed to the appropriate authority along with all the supporting medical documents and certificates. This kind of initiative by the state government is a positive step and will act as a credible standard which needs to be imitated and incorporated by other state governments in near future.

5.2 *Child Care Leave (CCL), Office Memorandum Issued by the Department of Personnel and Training (Dopt), April 2016*[27]

In response to these liberal verdicts of the High courts, central government intends to give constructive elucidation of the Central Government Service Rules by providing the benefits of maternity leave to the commissioning mothers as well. The central government proposed to provide child care leave to all female central government employees either as surrogate mother or intending mother within a period of less than one year .Along with grant of maternity leave provision for grant of paternity leave for intending father is also proposed to be secured for the very first time in India, despite the very fact that there is no law till date to regulate the practice of surrogacy.

The distinctive feature of this Central Government Memorandum is that its broad scope extends child care leave to both surrogate mother as well as intending mother for the first time in India. This step has been initiated mainly for two reasons, firstly to provide for special care for the newly born child, breastfeeding and to build emotional bonding or attachment between the mother and the child. It may be significant to note that the earlier state directives, judicial decisions only granted CCL to the intending or commissioning mother who used surrogacy to have child and not to surrogate mother. There was no paternity leave for intending father before this proposed circular. The intending or commissioning mother and the surrogate mother both are granted 180 days or around six months CCL.

6. The Maternity Benefit (Amendment) Act, 2017

In the latest development in this regard, amendments in the Maternity Benefit Act, 1961 have been effected, which are made effective from 1st April, 2017. By

[27] Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel & Training Proposals on Child Care Leave (CCL) and Maternity Leave –DOPT, Office Memorandum, No.13018/1/2014-Estt(L) 01.04.2016, Proposals on Child Care Leave (CCL) and Maternity Leave – Reg., APRIL 5, 2016 *available at* **http://7thcpcnews.in/proposals-on-child-care-leave-ccl-and-maternity-leave-dopt/** (Last visited March, 2017).

way of these amendments, it is for the first time in the legislative history of India, that commissioning mother or intending mother has been given the status of legal mother in any statute. Thus, after acknowledging her as legal mother, benefits associated to motherhood have been given to her in this Act. According to the provisions of Maternity Benefit (Amendment)Act, 2017 leave of twelve weeks have been provided for adoptive mothers as well as to the "commissioning mothers" who are adopting or taking a child less than three months of age.[28] For the purposes of this Act, commissioning mother is the biological mother who has given her eggs to fertilize an embryo and later to be planted in surrogate mother's womb.[29] Although one of the criticisms of this amendment is that there is difference of approach for maternity leave for a natural mother as compared to adoptive mother and commissioning mother, as for them maximum maternity leave available is still twelve weeks, as compared to twenty six weeks for the natural mother.

7. Conclusion

To conclude with we can say that with advancement in the field of reproductive technology and medical sciences, there is an eminent need of legislation in India to avoid complications arising in surrogate birth, and also to cater to various other related matters requirements. While on one side the Surrogacy Bill 2016 is being deliberated and is pending but none the less, these judicial pronouncements and Government of India's policy and the recent amendments in the Maternity Benefits Act,1961 has paved way for creating a favorable conditions for promoting of surrogacy in India. The role played by the judiciary in recognizing the rights of the commissioning mothers with respect to grant of maternity leave as well as child care leave is laudable and it has paved for the formulation of liberal policies for grant of child care as well as maternity level to female employees taking at state level also.

The judicial acumen and expertise in formulating beneficial interpretation of laws, coupled with progressive policy making of government of India for seeking to uphold the most basic , cherished individual legal and human rights is laudable and praise worthy.

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28 The Maternity Benefit (Amendment) Act, 2017, S. 5(4).

29 *Id.*, S. 3(ba).

LEGISLATION PROTECTING CHILD RIGHTS CONCERNING INTER- COUNTRY ADOPTION: A COMPARATIVE STUDY OF INDO- CANADIAN LAWS

Daksha Sharma*

1. Introduction

The Rights of the child form pivotal aspect in the history of human rights as the *United Nations Convention on the Rights of the Child* (UNCRC), 1989 is the widely ratified of all the United Nations Human treaties which is accepted globally by the member States of the United Nations Organisation (UNO).[1] Undoubtedly, such a convention is needed as children across the globe are considered to be the most vulnerable section in the society. Today, the issues of concern with respect to children are many which include but not limited to child labour, trafficking, education, health and nutrition, marriages, juvenile justice, child sexual abuse and torture.

Prior to this convention, *the Geneva Declaration of the Rights of the Child* (1924), *the Universal Declaration of Human Rights* (1948), *the Declaration of the Rights of the Child* (1959), *the International Covenant of Civil and Political Rights* (1966) and *the International Covenant on Economic, Social and Cultural Rights* (1966) encapsulated exhaustively the rights concerning children. The UNCRC defines 'Child Rights' as the minimum entitlements and freedoms that should be afforded to every citizen below the age of eighteen regardless of race, national origin, colour, gender, language, religion, opinions, origin, wealth, birth status, disability, or other characteristics.[2]

According to the United Nations Organisation, such rights are interdependent

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1 After sixty years of advocacy and a decade of consultation with various stakeholders, the United Nations Convention on the Rights of the Child (UNCRC) was adopted by the UN General Assembly in 1989 and came into force on September 2nd, 1990. One hundred and forty member countries are signatories to the United Nations Convention on the Rights of the Child (UNCRC), 1989. Canada became signatory to the said convention on May 28th, 1990 and ratified it in 1991 whereas India ratified UNCRC on December 11th, 1992, agreeing in principles to all articles except with certain reservations on issues relating to child labour. See *https://treaties.un.org/.*

2 The UNCRC, 1989 consists of 54 articles covering all four major categories of child rights: Right to life, Right to development, Right to protection and Right to participation. See *https://www.unicef.org/crc/.*

and indivisible which means that such rights cannot be fulfilled at the expense of other rights. Such inherent and fundamental rights broadly include right to survival, protection, participation and development. It is to be seen that the process of adoption of children, majorly falls under the purview of the right to protection and development of children ensuring their right to family.

2. Inter-Country Adoption: Meaning and Significance

Adoption is an effective remedy which addresses the need of the childless couple and homeless children. Generally, in cases of adoption the foremost emphasis is on the placement of the children at the national level failing which inter-country adoption is called for. Inter-country Adoption can be defined as adoption of a child by a person of another country. The term 'Inter-country adoption' represents an adoption in which the adopters and the child do not have the same nationality as well as in which the habitual residence of the adopters and the child is in different countries.[3] The *Hague Conference on Private International Law* has specifically addressed the growing concerns of Inter-country adoption in the *Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption,* 1993 ("Convention on Inter-country Adoption").[4]

The concept of inter-Country adoption aims at providing home to the homeless and child to the childless. The rational for inter-country adoption is that every child deserves a home of his own. If it is in the child's interest that it has to be taken out of the country, then so be it.[5] Our increasingly globalized world is blurring the edges of racial, ethnic or national identity by paving way to the wider acceptance of the inter-country adoption.

Family environment serves as the foundation stone of the child's personality because seeds of knowledge of children are sown first in a family environment. When the affection that otherwise to be provided by the natural parents in the family is deprived, attempts have to be made at exploring substitution sources, like adoption/foster care etc.[6]

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3 Vibha, Sharma, "Inter-Country Adoptions in India: An Appraisal", 45 (3 & 4) *Journal of Indian Law Institute* 543-54, 2003 (Jul.-Dec).

4 Lisa M., Katz, "A Modest Proposal? The Convention on Protection of Children And Cooperation in Respect of Intercountry Adoption", 9 *Emory International Law Review*, 283-328, 1995.

5 Monica, Chawla, "Hindu Law on Adoption: Need for Gender Justice Reforms", 2 *Punjab University Law Journal*, 176-182, 2008.

6 *Supra* note 4.

Adoption brings a child born to other parents into a new family. Adoption of child is mainly for progress of family and family bond. Even balanced development of a child can be achieved through various institutional and non-institutional methods, adoption is considered to be the best method of Family care for those children whose family and natural parents are not in a position to take care or unwilling to do so and therefore have legally freed any ties of the child. Adoption is thus one such process of providing family atmosphere by establishing a relation of parent and child between individuals through a legal and social process rather than biological process.

It is to be noted with miniscule inspection that there is a substantial increase in the number of Inter- country adoptions happening post World War-II where many socio-economic and political changes occurred in the nations.[7] The growing need for inter country adoption law is based on the following reasons as observed:

(i) A marked decrease in parent mortality rate left fervor orphans available for adoption in developed nations.

(ii) The prevalence of birth control usage and abortion has reduced the number of unwanted pregnancies in developed nations reducing the number of adoptable infants.

(iii) Increased infertility among families in developed nations.

(iv) Conditions like war (like II world war, Korean war, Vietnam war), famine etc., leaving many orphans open for adoption.

Pursuant to this analysis, inter-country adoption is mainly divided into two groups, namely- a) countries with low birth rates and few children in need of homes; and b) Nations with high birth rates and many children in need of homes.[8] Therefore, it is to be observed in this respect that Inter country adoption is the most logical way to remedy the imbalance in the number of children without families or with lack of care vis-à-vis families without children and crave for children.[9] Moreover, the available literature suggests that Inter country adoption specified the attitude of parents to become inter-racial and inter-cultural.

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7 B. Shiva Sankara, Rao and C.S.R., Murthy "Over-view on Inter-Country Child Adoptions for Family Care- with Special Reference to Indian Children", 4 (13) *Andhra Law Times*, 1-16, 2013 (July).

8 *Ibid.*

9 Isabelle, Lammerant and Marlene, Hofstetter, "Adoption at What Cost?" Terre des hommes – Child Relief, Lausanne, Switzerland, (2007).

3. Historical and Jurisprudential Aspects of Inter-Country Adoption

Tracing the historical aspect of inter-country adoption, it was observed by *Lisa M. Katz* that prior to World War II, adoption was alien to the common law tradition because it did not create the proper parent-child relationship for all purposes under the law. Blood relations were given whole sole importance in establishing the lineage and inheritance.[10] Further, it is provided that it was not until the middle of the twentieth century that domestic adoption laws came into being in the United States.

From the early 1900s until the 1950s, adoption was a simple procedure: a person with legal custody of a child would transfer the custody to another person, in much the same way as a land holder transfers real property. Society did not even consider the prospect of international adoptions, in all likelihood because there was an abundance of domestic children. Those who wished to adopt could do so without a waiting period and with little or no fees.

Immediately following World War II, inter-country adoption found new momentum when individuals from affluent countries took humanitarian efforts to help victims of the war.[11] States such as the U.S.S.R., Great Britain and France established programs to find homes for their orphaned or displaced children. The occupied nations of Germany, Japan, Italy, and Greece became the main sources of children for inter-country adoption.[12]

One theory for this occurrence is that the soldiers from occupying armies were aware of the problem of orphaned children and often came into contact with them. Through this intercourse, foreign governments became aware of, but took no steps to formalize mechanisms to facilitate inter-country adoptions.

Although there were an extraordinary number of homeless and available children in the aftermath of World War II, it was not until the Korean War that awareness of inter-country adoption truly became global.[13] This phenomenon occurred both because of the abundance of babies in Korea, and

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10 *Supra* note 2.

11 *Ibid.*

12 Arnold R., Silverman, "Outcomes of Transracial Adoption", 3(1) *The Future of Children*, 104-118, 1993(Spring).

13 *Ibid.*

because of the growing shortage of babies eligible for adoption in Western countries. Western society was also changing after World War II. For instance, birth control became more prevalent and single-parent homes became more acceptable in society. With the supply of children diminishing, persons wishing to adopt had to find new alternatives to domestic adoption.[14]

Thus, inter-country adoption evolved as just such an alternative. In view of the need for children, inter-country adoption developed from a completely philanthropical movement into a service for childless couples. Today, the children available for inter-country adoption are no longer only war victims.[15] These children hail from the under-developed and developing nations of the world, where there are millions of children in need of homes, and where very few adults are interested in or capable of adopting these impoverished children.[16]

It is significant to note that the *Hague Convention on Jurisdiction, applicable law and mutual recognition of decrees relating to adoption*, 1965 became the first international uniform procedure regarding inter-country adoption. According to this convention, no adoption should be granted, unless it is in the best interest of the child from inquiry relating to the adopters or adopter, the child and his/her family.

Then came *European convention on the Adoption of the Children*, 1967 that is applicable to children below 18 years and are unmarried. Even this was failed to establish a uniform adoption system, because it does not require states to respect the adoption laws and institutions of other states.

Then the *U.N. Adoption Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally & Internationally*, 1986 stressed on the fact that adoptions should be the mode of the best interest of the children and national foster care should be prioritized over inter-country adoptions.

Also, the *United Nations Convention of the Elimination of All forms of Discrimination Against Women*, 1979 (CEDAW)-Vienna Declaration to which India is a signatory having accepted and ratified it in June, 1993-contained a chapter regarding Guardianship, Custody, Adoption and other Rights of the

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14 *Ibid.*

15 Jena, Esq., Martin, "The Good, The Bad & The Ugly? A New Way of Looking at the Intercountry Adoption Debate", 13(2) *University of California*, 174-216, 2007.

16 *Ibid.*

Child which provides that every adult person shall have the right to adopt children. However, there was no provision in it to solve jurisdictional problems.[17]

Interestingly, Articles 20 and 21 of the UNCRC, 1989 elaborates the role of the state in providing the family environment to the homeless children. Further, Article 20 in particular elaborates in detail the role of the state to find alternate care for the children such as foster care or adoption.[18] Moreover, Article 21 of the said convention gives positive mandate to the states to recognize the process of adoption and that such process should be carried out by the competitive authority only keeping in mind the best interests of the child. While recognizing the subsidiarity principle of International law, it is provided under the said article that inter-country adoption is an alternative remedy and that such alternative care should be used only when such care cannot be provided by child's own country.

Finally, it is the *Hague Convention on Protection of Children and Co-operation in respect of Inter-country Adoptions*, 1993 that gives concrete suggestions on how each participating country should structure its foreign adoption scheme.[19] Article 4 (b) of the convention states that one should first try to get placement for the child in his/her country of origin and if family environment can't be found there, then only inter-country adoption can occur.[20]

It also stresses on the duty of states to create central authorities & the adopter's family-[as per Articles 6 (1), 15(2) &16(1)(a)] before adoption. It is to be noted that this convention has solved jurisdiction problems at large. Articles 23 & 24 provides that if the competent authority of the state certifies that an adoption has been made pursuant to the convention, receiving state cannot refuse to recognize the adoption, unless it is manifestly contrary to its public policy.

All the above conventions lay stress on the fact that child's best interest should

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17 *Ibid.*

18 The UNCRC, 1989, Article 20 states, "a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State and that the State Parties shall in accordance with their national laws ensure alternative care for such a child. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children."

19 Elizabeth, Bartholet, "International Adoption: Thoughts on the Human Rights Issues", 13 *Buffalo Human Rights Law Review*, 151-203, 2007.

20 *Ibid.*

be prioritized and inter-country adoption should be opted when national foster care is not available and stressed on the need for safeguards against the trafficking and abduction of children in the name of adoption.

Nicole Bartner Graff in his article beautifully traces the development of the concept of Inter-country adoption in the light of the growing problem of infertility in the couples especially in the western society.[21] Further, he discusses as to how the problem of child trafficking has become a major roadblock in smoothening the process of inter-country adoption across the globe and thereby diluting the purpose of the carrying out inter-country adoption process for protecting the best interests of the child.[22]

4. Inter-Country Adoption in the Context Of Private International Law

From legal perspective, inter- country adoptions involve questions of jurisdiction & choice of law that relate to the conditions and effects of adoption. Today, many countries have enacted law to govern the process of international adoptions. The complexity of adoption laws arose basically because the inter country adoptions deal with the jurisdiction of- (i) the country from where the child is adopted and (ii) the country where people adopting reside.[23]

Inter-country adoptions involve questions of jurisdiction and choice of law that relate to the conditions and effects of the adoption. Today, many countries have devised legal rules to govern these questions. Historically, however, the process has been complex and confusing, and has frequently created legal barriers and resulted in corruption. The complexity existed because the process of inter-country adoption fell under the laws of as many as three different jurisdictions.

Each jurisdiction had its own requirements regarding parental fitness and the status of the child.[24] Since the 1960s, several attempts have been made to bring international consistency to the legal treatment of inter-country adoption. Because of the lack of participation and practical application, however, none

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21 Nicole Bartner, Graff, "Intercountry Adoption and the Convention on the Rights of the Child: Can the Free Market in Children be Controlled?" 27 Syracuse *J. Int'l L. & Com.*, 405-430, 2000.

22 *Ibid.*

23 V.C., Govindaraj, *The Conflict of Laws in India: Inter-Territorial and Inter- Personal Conflict*, Oxford University Press, New Delhi, 1st Edition, (2011).

24 Morris, *The Conflict of Laws,* Sweet & Maxwell Publications, New Delhi, 7th Edition, (2010).

has been successful. *The Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption*, 1965 was the first international attempt to unify the process of inter-country adoption. This Convention addressed jurisdiction, choice of law, and mutual recognition of adoptions.[25]

Parties to the *Hague Convention* of 1965 bound themselves to particular rules of jurisdiction and choice of law and "agreed not to grant an adoption 'unless it will be in the best interests of the child' and has been preceded by 'a thorough inquiry relating to the adopter or adopters, the child and his family.'[26] This treaty acknowledged adoptions that were to be "recognized without further formality in all Contracting States."[27]

While covering the aspects of Private International Law and Inter-country adoption it is observed that courts play the role of a guardian angel in protecting the interests of children. While deeply examining the interrelated aspects of the Private International law and Inter-country adoptions, it is observed that the court in making an adoption order must give its first and foremost consideration to the need to safeguard and promote the welfare of the child. With this objective in view, the court must see to it that the adoption by a foreigner should be in consonance with the law of his or her country and is legally valid by that law.

5. Human Rights Aspect of the Inter-Country Adoption

The realization and the concern of the nation-states to bring up their children in an atmosphere of love and affection and their future well being, resulted in taking various steps for their enrichment.[28] The *Universal Declaration of Human Rights* (UDHR), 1948 enjoins that every child has a right to a family and it must be ensured that children are allowed to develop in a healthy manner.

The human rights perspective of the inter-country adoption is best taken care by the UNCRC, 1989, the thrust of which is in redeeming and securing the vast majority of the poor children of the world from the various guise and abuses.[29] Its further goals were to catalogue the rights of the child, restore the inherent dignity, rights and freedom and to help and promote in the child the sense of

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25 North & Cheshire, Fawcett, *Private International Law*, Oxford University Press, New York, 14th Edition, (2008).

26 *Ibid.*

27 *Ibid.*

28 T.S.N., Sastry, "Inter-Country Adoptions: Indian Scenario- 2003", 1 *Journal of Indian Legal Thought*, 70-9, 2003.

29 Savita, Bhakry, "Children in India and Their Rights", (National Human Rights Commission, Delhi), 2006.

security; self-esteem and pride with roots in his native culture and environment, which are essential for the development of one's personality.[30] *The Vienna Declaration and Programme of Action of the World Conference on Human Rights*, 1993, also stressed the need and steps to be taken by the States in ensuring respect in the protection and promotion of the rights of child.

Elizabeth Bartholet while discussing the human rights perspective of inter-country adoption in her article states, "International adoption is under siege, with the number of children placed dropping each of the last several years and many countries imposing severe new restrictions. Key forces mounting the attack claim the child human rights mantle, arguing that such adoption denies heritage rights, and often involves abusive practices. Many nations assert rights to hold onto the children born within their borders, and others support these demands citing subsidiarity principles. But children's most basic human rights, at the heart of the true meaning of subsidiarity, are to grow up in the families that will often be found only in international adoption. These rights should trump any conflicting state sovereignty claims."[31] Thus, it is to be construed that inter-country adoption serves as the best alternative for protecting human rights concerns of the most tendered section of the society.

Talking in Indian context, *Justice P.N. Bhagwati* in the landmark judgment of the Supreme Court in 1984[32] stressed, "No child can grow to his or her full stature, outside the framework of a family and that every child has a right to love and be loved and to grow up in an atmosphere of love and affection, of moral and material security and this is possible only if the child is brought up in a family. But if for any reason it is not possible for the biological parents or other near relatives to look after the child or the child is abandoned, the next best alternative would be to find adoptive parents for the child so that the child can grow up under the loving care and attention of the adoptive parent."[33]

6. Process of Inter-Country Adoption in Canada

As far as the process of inter-country adoption in Canada is concerned, since 1996 it has been a party to the *Convention on Protection of Children and Co-*

30 T.S.N., Sastry, "The Need for an Enactment on Foreign Adoption", 12(2) *The Academy Law Review*, 157-167, 1988.

31 Elizabeth, Bartholet, "International Adoption: The Human Rights Position", 1 *Global Policy* (2010).

32 *Supra* note 24.

33 Tehmina, Arora, "Children Adoption by Christians" 39 (2- 3) *Civil and Military Law Journal*, 146-7, 2003 (Apr.- Aug).

operation in respect of inter-country adoption. Citizenship and Immigration Canada (CIC) is the Federal Central Authority for the Hague Convention on Inter-country Adoption and it is responsible for the implementation of the Convention along with the provinces and territories.

Canada is not considered a country of origin in inter-country adoption. There are extremely rare adoption cases from Canada, including adoptions of Canada children by relatives in the United States, as well as adoptions from third countries by U.S. citizens living in Canada.

Inter-country adoptions are probably the most complicated adoptions in Canada as it is to be dealt at the level of provincial adoption laws, federal immigration laws, and the laws of the child's country of origin. Further, in Canada Inter-country adoptions are arranged with the help of private agencies and everything is taken care by the agency. Many provide a full range of pre and post-adoptive services, and work with more than one country. Before choosing an agency, one needs to choose a country from which to adopt.

In recent years, the most popular source of overseas infants for Canadians has been China, Russia, Vietnam, and Korea. Although the adoption requirements and process will vary from one country to another, the basic steps include getting an information package from an adoption agency explaining adoption program, attending the information sessions, completing the home study report, preparing dossier of necessary documentation and sending dossier to agency which will get it translated, notarized, legalized by External Affairs and authenticated by the Embassy of the country chosen.

When such dossier is sent to adoption authorities in child's country of origin, immigration paperwork is to be completed to sponsor the child to come to Canada. After receiving offer of child by agency, written acceptance is to be sent to the country of origin. Soon after completing the allied formalities and receiving notice to travel from adoption authorities in child's country of origin, it is required to process and finalize adoption in child's country of origin.

It is to be noted with caution that some adoptions need to be finalized in the child's country of origin, whereas others can be completed in Canada. For all international adoptions, one must complete two separate processes i.e. the adoption process and the immigration or citizenship process.[34] In order to

[34] See *http://www.cic.gc.ca/english/immigrate/adoption/internationalprocess.asp.*

bring the adopted child into Canada, it is necessary to apply for Citizenship or Immigration (Permanent Residency) for the child.

Some countries require that the adoption be completed in Canada. In these cases the Immigration (Permanent Resident) process should be used. The federal government is only involved in the Immigration or Citizenship process for an adopted child whereas the adoption process is the responsibility of the provinces or territories. Thus, as per the analysis drawn the legislative framework relating to inter-country adoption in Canada is not tardy but effective enough to protect child rights concerning inter- country adoption.

7. Process of Inter-Country Adoption in India

In India, prior to Juvenile Justice (Care and Protection) Amendment Act, 2015, there was no legislation specifically dealing with inter-country adoption. This shortcoming was noted by the Supreme Court in 'the case of *Laxmikant Pandey v. Union of India*[35]. Today, as a matter of principle, India follows subsidiarity principle of International law and great care is exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the child adopted by foreigners may be subjected to moral or sexual abuse or forced labour or experimentation for medical or other research and may be placed in a worse situation, than that in his own country. [36]

Under the present law, any Non-Resident Indian (NRI), Overseas Citizen of India (OCI) or foreign prospective adoptive parents (PAPs), living in a country which is a signatory to the *Hague Adoption Convention* and wishing to adopt an Indian child, can approach the Authorised Foreign Adoption Agency (AFAA) or the Central Authority concerned for the preparation of their Home Study Report and for their registration in Child Adoption Resource Information and Guidance System (CARINGS).[37]

In case, there is no AFAA or Central Authority in their country of habitual residence, then PAPs shall approach the Government department or Indian diplomatic mission concerned in that country for the said purpose which on ascertaining their eligibility shall get their Home Study Report (HSR)

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35 (1991) 4SCC 33.

36 Kuljit, Kaur, "Children: Custody and Intercountry Adoption", *Conference Papers-International Conference on Private International Law, The Indian Society of International Law*, 2006 (December).

37 See *http://www.cara.nic.in/Parents/Guidelines_living_Abroad.html*

completed and register their application in CARINGS. [38] The HSR and other documents of PAPs shall be scrutinised at the authority in order to determine their eligibility and suitability after which it is forwarded to the Specialised Adoption Agency (SAA) where children legally free for adoption are available.

The profiles of two children, in one or two referral(s), shall be forwarded by CARINGS to the AFAA or Central Authority or Government department or Indian diplomatic mission, as the case may be, which may further forward such profiles to the PAPs concerned as per local rules.[39] It is on the PAPs to reserve one of the referred children within ninety-six hours and the profile of the other child shall stand automatically withdrawn. Preference of PAPs shall be taken into consideration when sending referrals to them.

If PAPs reserve one of the children shown, they shall accept the child by signing the Child Study Report (CSR) and Medical Examination Report of the child within thirty days from the date of reservation.[40] The CSR, Medical Examination Report and photograph of the child, in original, shall be sent by SAA to the AFAA or Central Authority or the Indian diplomatic mission concerned.

In case, PAPs fail to accept the reserved child within thirty days, then the profile of the child shall stand withdrawn by CARINGS and the seniority of the PAPs shall be relegated to the bottom of the list while giving another opportunity to reserve and accept a child when their turn becomes due, provided that their HSR remains valid.[41]

Thereafter, AFAA shall forward the original documents of PAPs to SAA concerned for their scrutiny. All documents forming part of HSR shall be notarised and the signature of the notary is to be apostilled by competent authority of the receiving country in cases of *Hague Adoption Convention* ratified countries. No Objection Certificate (NOC) shall be issued by the authority in favour of the proposed adoption within ten days from the date of receipt of the acceptance of the child by PAPs and letter of approval or permission of the receiving country as per Article 5 and Article 17 of the *Hague Adoption Convention*, wherever applicable; and a copy of NOC shall

38 *Ibid.* See also Juvenile Justice (Care and Protection) Amendment Act, 2015, Chapter – VIII, Ss. 56- 73.

39 *Ibid.*

40 *Ibid.*

41 *Supra* note 37

also be endorsed to all concerned and posted in CARINGS forthwith.[42]

By furnishing an undertaking to SAA, PAPs may take the child in pre-adoption foster care for a temporary period within India after the issuance of NOC by the Authority while the court order is pending. PAPs shall receive final custody of the child from SAA as soon as the passport and visa are issued to the child after issue of adoption order from the competent court.

In cases where PAPs habitually residing abroad and wanting the SAA to represent on their behalf as well, the application shall also be accompanied by a Power of Attorney in favour of the social worker or adoption in-charge of SAA which is processing the case and such Power of Attorney shall authorise a social worker to handle the case on behalf of PAPs.

The Authority shall issue a Conformity Certificate under Article 23 of the *Hague Adoption Convention* in the format provided in Schedule XI within three working days from the date of availability of the adoption order in CARINGS, in case the receiving country of the adopted child is a signatory to the *Hague Adoption Convention*. The Authority shall inform the immigration authorities and the foreign regional registration office or the foreign registration office concerned, as the case may be, about confirmation of the adoption.[43]

To obtain Indian passport for the adopted child, the SAA shall submit the application to the regional passport officer within three working days from the date of receipt of the adoption order which then issue the passport for the adopted child within ten days from the date of receipt of application.

With respect to the birth certificate, SAA shall approach the issuing authority for obtaining birth certificate of the adopted child, with the name of adoptive parents, as parents, and date of birth as recorded in the adoption order within a period of three days of obtaining of the certified copy of the adoption order. The adopted child shall be entitled to receive Overseas Citizen of India card, if found eligible. The adoptive parent(s) shall come to India for taking the adopted child to their country within a period of two months from the date of adoption order.[44]

The concerned authorities shall report the progress of the adopted child for

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42 *Ibid.*
43 *Ibid.*
44 *Ibid.*

two years from the date of arrival of the adopted child in the receiving country by uploading the report as well as the photographs online in CARINGS as provided in Schedule XII. On the basis of the progress report or in course of post-adoption home visits, if an adjustment problem of an adoptee with the adoptive parents comes to the notice of the concerned authorities in the receiving country, necessary counseling shall be arranged for the adoptive parents and for the adoptee, wherever applicable.

If it is found that the adoptee is unable to adjust in the adoptive family or that the continuance of the child in the adoptive family is not in the interest of the child, the concerned authorities shall withdraw the child and provide necessary counseling and arrangement for suitable alternate adoption or foster placement of the child in that country, in consultation with the Indian diplomatic mission and the Authority.

Thus, broadly it is analysed that the process of inter-country adoption in India is regulated totally in consonance with the *Hague Adoption Convention*, 1993, thereby facilitating adoption of Indian children for foreign prospective adoptive parents.[45]

8. Conclusion and Suggestions

David M. Smolin states, "Inter- country adoption is presented as a heart-warming act of good will that benefits both child and adoptive family. The child is characterized as a bereft orphan doomed to a dismal future within a poor country. All the child needs is a chance and a home. The adoptive family's simple act of love in bringing the child to the promised land brings to the adoptive parents a harvest of love from the child while also enriching the nation with a dynamic diversity."[46]

Presently, as far as inter-country adoption between India and Canada are concerned, both the countries are signatories to the *Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoptions*, 1993. The main purpose of the convention is the protection of the best interests of adopted children, standardization of processes between countries and prevention of child trafficking.

Also it is to be noted that with respect to inter-country adoptions, CARA has

45 The Juvenile Justice (Care and Protection) Amendment Act, 2015, Chapter – VIII, Ss. 56- 73.

46 David M., Smolin, "The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals", 35 *Seton Hall Law Review*, 403-493, 2005.

declared officially to accept new adoption applications[47] and various provinces in Canada in particular, British Columbia has seen an increase in visas being granted for Indian relative children coming to Canada. Moreover, India allows relative's adoption for Persons of Indian Origin (POI) and Non Resident Indian (NRI) applicants who are residents of Canada.[48] These changes bring new hope and reduced wait times for eligible adoptive parents.

Thus to conclude in the light of above research findings, it is observed and analysed that in order to protect the child rights concerning inter- country adoption and right to family, bilateral arrangements/ agreements between India and Canada should be entered into so as to regulate and facilitate the process of adoption in the time bound and efficient manner within the safety net of the *Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoptions*, 1993. Also, such arrangements shall ensure proper safeguard measures as well as proficient monitoring mechanisms required to be adopted in the process of Inter-country adoption.

47 As per April 2015- March 2016 statistics, 527 inter-country adoptions happened from India. See *http://www.cara.nic.in/resource/adoption_Stattistics.html.*

48 CARA's Family Adoption Guidelines allow relatives' adoptions if it is considered in the best interest of the child and if the child is within the first degree of relationship between the adoptive and biological parents. Preference is given to children below the age of 6 years; however in exceptional cases, a child older than 6 years of age can be considered for adoption with the child's consent. Also see *http://www.cara.nic.in.*

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