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IILS LAW REVIEW VOLUME 5

ABOUT IILS

The Indian Institute of Legal Studies established in the year 2010 has evolved into a unique system of imparting legal education not only in North Bengal but also as an emerging education and research centre in the SAARC region with the establishment of the Centre for SAARC on Environment Study & Research. Acknowledged as one of the best law colleges in India, IILS is nestled in the cradle of the quaint Himalayas and picturesque surroundings assimilating nature and education, a combination which is a rarity in itself.

IILS is an institute that promotes holistic study in Law in the form of short-term courses, field work, experimental learning in addition to the regular under graduate course. Post Graduate courses and research centre are already functional, which will mature into doctrinal courses.

The institution takes pride in hosting workshops for police officers of North Bengal on Human Rights and Cyber Crimes, where the institute was privileged to have the presence of eminent police officers and scholars. The Bureau of Police Research & Development, Ministry of Home Affairs, Government of India had approved the organizing of a vertical interaction course for IPS officers on Criminal Justice Delivery System which was witnessed by the gracious presence of Hon'ble Judges of the Supreme Court and the various High Courts.

The institution has organized a series of seminars both at a national and international level. The Institute had started with organizing national seminar on "Civil Justice Delivery System". Today, it has reached the peak of organizing international seminars with the SAARC Law Summit & Conclave being the blooming one.

The Institution's vital location, its active participation in imparting knowledge and moulding its students into sensible and responsible individuals has brought to its credit to serve as the nucleus for education in the North Bengal region. The emphasis in the academic development with its adoption of inter-disciplinary and practical approach has aided its students to gain deeper understanding of the learning process and value for education. Additionally, it has not merely laid the importance for the value and the need to be educated individuals, or to serve as efficient lawyers, but more essentially, to be reborn as a socially viable and responsible beings to construct appropriate mechanisms for building a better society for the coming future.

MESSAGE FROM THE PATRON

JOYJIT CHOUDHURY
Founder Chairman
Indian Institute of Legal Studies

I once again get the opportunity to express my thoughts through this editorial piece. It gives me immense joy and pleasure to rent my views in this periodical journal.

Going back to the days of Hobbes, Locke and Rosseau, the proponents of the 'theory of social contract'- laying the foundation of the modern day nation state. The basic presumption and outcome of the contradiction theory being a constitution which is the fundamental basis of "give and take" of the social contract. One surrenders his individual freedom as existing in nature and in turn becomes bound by the collective rights, duties, obligations imposed by the state as enunciated by the constitution.

The question that creeps to my mind is the fact that how does a democratic system deal with a situation of a Government which comes to power securing 1/3rd of the percentage of votes and then aggressively and vociferously pursuing a disguised political narrative not endorsed by the majority of the people. The political rhetoric unpleased upon the citizens is clearly ultra-vires the provisions of the constitution and against its basic principles and tenets. How does the rule of law rectify such an ambiguous and regressive political agenda? I may never get an answer to my question – but may have to be content with the situation as it is – or else rely upon the internal dynamics of the society to self-balance itself through trial and error.

I once again congratulate the editorial team for the commendable efforts it put in for publishing such a remarkable journal containing views, insights of thinking personalities.

JOYJIT CHOUDHURY

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DOES THE POTENTIAL WORLD-WIDE JURISDICTION OF THE ICC BIND ISRAEL AS A NON-PARTY STATE? -A CRITICAL DISCUSSION OF THE ICC'S JURISDICTION

BARRISTER M ABUL FAZAL CHOWDHURY[1]

Abstract

This essay explores how International Criminal Court (ICC) develops over time. It also discussesthe crimes that are under the jurisdiction of the International Criminal Court (ICC). A critical discussion has been made on howICC can exercise its jurisdiction over non-party state. There are some countries that neither signed nor ratified the Rome Statute 1998 of ICC but they are involved in committing international crimes in the territories of other countries. Special attention has been given on Israel as it is a non-party state which continuously violating the International Law especially doing crimes under the Rome Statute 1998.

Key words: ICC, War crimes, Genocide, Crimes against Humanity, International Humanitarian Law.

Origin and Development of the International Criminal Court (ICC):

In the past, war crimes were considered serious crimes though it was the custom and tradition in many regions to occupy states by war. But war criminals have been prosecuted at least the time of the ancient Greeks and probably well before that[2]. The early laws and customs of war can be found in writings of classical authors and historians as Aristotle, Socrates and others. Aristotle is seen as the founder father of Political Science. History, Political Science, and Law are closely related to each other.

Modern codifications of this field, such as the detailed text prepared by Columbian University professor Francis Liber that was applied by Abraham Lincoln to the union Army during the American Civil War in seventeen centuries, proscribed inhuman conduct and set out sanctions including the death penalty for pillage, raping civilians, abuse of prisoners and similar atrocities. Prosecutions for war crimes however, was only affected by national courts and these were and

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[2]A.Schabs, W, An Introduction to the International Criminal Court, CambridgeUniversity Press.

remain ineffective when those responsible for the crime are still in power and their victims remain subjugated.

The first genuinely international trial for the perpetration of atrocities was probably that of Peter Von Hagen Bach, who was tried in 1474 for atrocities committed during the occupation of Breisach[3]. When the town was retaken, Von was charged with crimes, convicted and beheaded. "Gustav Monnir" one of the founder of the Red Cross movement, which grew up in Geneva 1860, urged a draft Statute for an International Criminal Court, its task would be to prosecute breaches of Geneva Convention of the 1864 and other humanitarian norms. The "Hague Convention" of 1899 and 1907 represent the first significant codification of the "laws of war" in an international treaty[4]. In 1913, a commission of inquiry sent by the Carnegie Foundation to investigate atrocities committed during the Balkan wars used the provision of the Hague Convention IV as a basis for its description of war crimes. Offences against law and customs of war, known as "Hague Law" because of their root in the 1899 and 1907 conventions that were codified in 1993 as "Statute of the International Criminal Tribunal for former Yugoslavia" (ICTY) and in Article s8(2) (b) (e) and (f) of the" Statute for the International Court".

After the First World War[5] the Treaty of Versailles was signed on 28 June, 1919, between Allied Powers and Central Powers and effected on 10 January, 1920.

In Paris Peace Conference that was held in Paris in 1919, the Allied Victors, following the end of First World War, the establishment of an international Tribunal to judge political leaders accused of war crimes was raised by the Commission of Responsibilities. Also League of Nations established during the Paris Peace Conference in 1919. However, the issue was addressed again at a conference held in Geneva under the auspices of the League of Nations in November 1937 that resulted in a stipulation to establish a permanent international court to try acts of international terrorism. The convention was signed by 13 governments, but it was never ratified.

The General Assembly (GA) of the UN first recognized the need for a permanent international Court to deal with atrocities of the kind committed during World War II in 1948, following the Nuremberg and Tokyo Tribunals.

The Allies affirmed their determination to prosecute the Nazi's for war crimes in the Moscow Declaration of 1 November, 1943[6]. Following that declaration the

[3]Ibid 2
[4]Ibid 2
[5]World War 1(1914-1918).
[6]Ibid, 2

Allies formed the charter of the International Military Tribunal (IMT) on August 1945. In December 1945, the four Allied powers enacted a modified version of charter of the International Military Tribunal known as Control Council "Law No 10". It provided the legal basis of series of trials before tribunals that were run by the Victorious Allies. At Nuremberg, Nazi war criminals were charged with the prosecution called "genocide", but the term did not appear in the substantive provisions of the Statute of "crime against humanity" as it was committed against the Jewish people in Europe. In 1948, GA of the UN adopted a resolution declaring genocide an international crime against International Law[7].The Victorious Allies established the International Military Tribunal for the Far East. Japanese war criminals were tried under similar provision tothose at Nuremberg. Benjamin B. Firenze, an investigator of Nazi war crimes after World War-ll and the chief prosecutor of the US Army at Einsatzgruppen Trial became a vocal advocate of the establishment of an international rule of law and International Criminal Court[8].

Role of the International Law Commission:

The International Law Commission (ILC) is a body of experts named by the UNGAand charged within codification and progressive development of international law.However, GA had asked the commission to prepare what are known as Nuremberg Principles a task it completed in 1950, and the Code of Crimes Against the Peace and Security of mankind- a job that took longer. The ILC submitted its report in 1954[9].

Due to some complexity in the definition of aggression, the influence of the cold war had made the war crime agenda and the establishment of ICC virtually impossible. In 1981 the GA asked the ILC to revive the work on its draft codes of crimes. However the aspect of work was only initiated in 1989 when A.N.R Robinson then the PM of Trinidad and Tobago, proposed the creation of a permanent international court to deal with the illegal drug trade in the GA and GA had directed the ILC to consider the subject of an ICC within the context of its work on the draft code of crimes[10].

The ad hoc Tribunals:

While the draft Statute of an international criminal court was being considered in the ILC, events compelled the creation of a court on an ad hoc basis in order to address atrocities being committed in the former Yugoslavia (Security Council

[7]Article 11 of 1948 convention, Article 6 of the Rome Statute 1998.
[8]Ibid 2.
[9]Ibid 2
[10]Ibid 2

Resolution no.823 of 1993). The international Criminal Tribunal for former Yugoslavia (ICTY) is still running under the Statute of the ICTY. In 1993, the Security Council decided upon the establishment of a tribunal mandated to prosecute persons responsible for serious violations of international humanitarian law committed in Rwanda and in neighbouring countries during the year 1994[11]. So the International Criminal Tribunal for Rwanda (ICTR) was established under the Statute of the ICTR in 1994. Though these ad hoc tribunals were formed to try war criminals of a specific region but it played a very important role to establish a permanent International Criminal Court.

Now atrocities being committed in many countries like Israel,Burma after 2002 can be tried before the ICC. Note that, Rwanda genocide took place within the context of a purely internal armed conflict. Both of the Tribunal applied rules of international humanitarian law that are "beyond any doubt part of the customary law". Subsequent rulings of the ad hoc tribunals on a variety of matters fed the debates on the creation of an international criminal court. Judgements of the ad hoc tribunals also helped the drafters of the Rome Statute to incorporate some provisions.

Drafting the ICC Statute:

In 1994, the UNGA decided to pursue work towards the establishment of an international criminal court, taking the ILC's draft Statute as a basis. To consider major substantive issues in the draft statute, the GA established the ad hoc committee on the establishment of an international criminal court, which met twice in 1995[12]. The UNGA had formed a preparatory committee for the establishment of the ICC to prepare a consolidated draft text after having a report from the ad hoc committee. From 1996 to 1998 the preparatory committee had met in six sessions at the UN headquarter in New York. In January 1998, the bureau and coordinators of the preparatory committee convened for an inter-sessional meeting in Zutphen, the Netherlands, to consolidate and restructure the draft Articles into a draft[13].

In June 1998, the GA convened a conference in Rome with the aim of finalizing a Treaty. Finally, on July 17, 1998, the Rome Statute of the international criminal court was adopted by a vote of 120 to 7, with 27 countries abstaining. The seven countries that voted against the Treaty were China, Qatar, Iraq, Libya, Israel, Yemen and USA. The Rome Statute became a binding treaty on 11 April 2002 after achieving required ratification from UN member States.

However, at last we have got an International Criminal Court (ICC) that should have established earlier. Due to the cold war and the politics it took a long time to establish. Some powerful and big countries still remain outside the Court's jurisdiction.

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[11]Security Council Resolution 955/1994.

[12]Ibid 2

[13]Ibid 2

Member States and the ICC:

There are three types of States in relation to the Rome Statute or in connection with the ICC.

a) State Parties: As of 4 March 2016, 124 States are State parties[14] to the Statute of the Court.
b) Signatory States: There are 139 States have signed but not ratified the Treaty while 118 countries have ratified the Statute[15]; meaning that they are willing to use the ICC in their States.
c) Non-signatory States: There are 42 UN States which neither signed nor ratified or acceded to the Rome Statute including China and India[16].

The ICC and "The Assembly of State parties":

A very important role is being played by the Assembly of the State Parties in decision making. This is the legislative body of the ICC. The Assembly consists of one representative from each party. Each State party has one vote and every effort has to be made to reach decisions by consensus[17]. If consensus cannot be reached, decisions are made by vote. The Assembly is presided over by a president and two vice presidents, who are elected by the members to three years terms. The Assembly meets in full session once a year in New York and The Hague, and may also hold special sessions where circumstances require. Sessions are open to observer States and NGOs like Amnesty International.

The Assembly elects the Judges and prosecutors of the Court, decides the Court's budget, adopts important texts such as rules of procedures and evidence and provides management oversight to the other organs of the Court. Article 46 of the Rome Statute allows the Assembly to remove a judge or a prosecutor from office who "is found to have committed serious misconduct or a series of breaches of his or her duties, or unable to exercise the functions required by the Statute. But the State parties cannot interfere with the judicial functions of the court.

Jurisdictions of the Court:

A very controversial issue is ICC's jurisdiction. Some Scholars claimed it has aWorld-wide jurisdiction and some reasoned against this. The treaty provides that the ICC may exercise jurisdiction even over nationals of states that are not parties to the Treaty and have not otherwise consented to the court's jurisdiction[18]. Article

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[14]https://en.wikipedia.org/wiki/States_parties_to_the_Rome_Statute_of_the_International_Criminal_Court#States_parties

[15]http://internationalcriminalcourtnashie.weebly.com/signatories-of-the-rome-statute.html

[16]Ibid 14

[17]Article 112.Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc.A/CONF. 183/9 [hereinafter ICC Treaty].

[18]Madeline Morris, Professor of Law, Duke University HIGH CRIMES AND MISCONCEPTIONS: This article is also available at http://www.law.duke.edu/journals/64LCPMorris

12 of the Rome Statute states the jurisdiction of the court. The ICC has been created with the consent of those countries which will themselves be subject to its jurisdiction. It is true that the jurisdiction that the international community has accepted for its new court is narrower than the jurisdiction that individual States are entitled to exercise with respect to the same crimes.

However, ICC can exercise jurisdiction over the following matters;

a) Crimes prosecuted by the Court: (Jurisdiction over crimes):

The ICC has jurisdiction over four categories of crimes. Article 5 of the RomeStatute states these four categories are the most serious crimes of concern to the international community as a whole. These are, Genocide, Crimes against Humanity, War crimes and the Crime of Aggression. In the preamble of the Statute it describes then as "an unimaginable atrocities that deeply shocked the conscience of humanity". In Article 1 of the Rome Statute, it describes these crimes as "the most serious crimes of international concern".

However, some critiques voiced to include some other crimes under the jurisdiction of the court. The concepts of "international crime" were considered to be offences whose repression compelled some international dimension. Piracy for example, was committed on the high seas. These features of the crime necessitated special jurisdiction rules as well as cooperation between States. Similar requirements obtained with respect to slave trade, trafficking in women and children, trafficking in narcotics drugs, hijacking, terrorism and money laundering. It was indeed this sort of crime that inspired Trinidad and Tobago in 1989 to reactive the issue of an international criminal court within the GA of the UN.

On March 21, 2016, the three-member Trial Chamber III of the International Criminal Court (ICC), in what has been described as a landmark ruling, unanimously declared the former Vice President of the Democratic Republic of Congo, Jean-Pierre Bemba Gombo[19], "guilty beyond any reasonable doubt of two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape, and pillaging)[20]."

The ruling marks the first time that the ICC has "secured a conviction for 'command responsibility,' meaning that a commander can be found guilty even if he did not himself take direct part in such crimes as rape, murder and pillage but allowed them to be committed." The International Criminal Court Recognises Rape as a War Crime[21].

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[19]Bemba, who served as Vice President from 2003 to 2006, was President of the Mouvement de Libération du Congo (MLC) and Commander-in-Chief of the Armée de Libération du Congo (ALC), the figurehead organization of the MLC that provided its funding and set its goals.

[20]Press Release, ICC, ICC Trial Chamber III Declares Jean-Pierre Bemba Gombo Guilty of War Crimes and Crimes Against Humanity (Mar. 21, 2016), ICC website.)/Congo Ex-Vice President Guilty in Landmark ICC War Rape Ruling, REUTERS (Mar. 22, 2016).

[21]ECONOMIST (Mar. 22, 2016).

India lobbied to have the use of nuclear weapons and weapons of mass destruction included as war crimes, but the move was also defeated. India has expressed concern that "the Statute of the ICC lies down, by clear implication, that the use of weapons of mass destruction is not a war crime. This is an extraordinary message to send to the international community. Crimes of this type are already addressed in a rather sophisticated scheme of international treaties, and for this reason the drafters of the Rome Statute referred to them as "Treaty Crimes".

Article 5 of the Rome Statute defines each of the crimes within its jurisdiction except for "aggression". The Statute also provides that the Court will not exercise its jurisdiction over the crime of aggression until such time as the State parties agree on a definition of the crime and set out the conditions under which it may be prosecuted.

However, in June 2010, the ICC's first review conference in Kampala, Uganda adopted amendments defining "crimes of aggression" and expanding the ICC's jurisdiction over them. But it was decided that the ICC would not be allowed to prosecute for this crime until at least 2017.

There is still doubt about the effective exercise of the jurisdiction of the crime "aggression" because powerful countries generally do the crime of aggression. Another matter is that the veto power of the Security Council of the UN can impede that jurisdiction. If the ICC is strong enough to bring up the powerful countries under its jurisdiction then it may effectively exercise its jurisdiction.

b) Temporal jurisdiction:

The issue of the temporal jurisdiction relates to the International Human Rights Law that consider the prohibition of retroactive crimes and punishment and this was considered in the Rome Statute as one of the most important fundamentals. This norm is known by the term Latin expression "nullumcrimennullapoenasonelege", that forbids prosecution of crimes that were not recognised as such at the time they were committed. This is not a court like those of Nuremberg or Tokyo or an Ad hoc Tribunal established with a view to judging crimes already committed. So the ICC can only prosecute crimes committed on or after 1 July 2002.

The Statute has been criticized for its inability to reach into the past and prosecute atrocities committed prior to its coming force. But the failure to prosecute does not relatively wipe the State clean and grant a form of impunity to previous offenders. Those responsible for the atrocities committed prior to the entry into force of the Rome Statute may and should be punished by national courts. For example in Bangladesh the present government formed an International Criminal Tribunal on the 25 March, 2010 that's aim is to investigate and administer justice regarding war crimes, crimes against humanity and genocide. The Tribunal's trial is still going on. Another recent example of the trial of crimes against humanity is the trial for the "Trelew Massacre[22]" in Argentina in October

[22]BBC news on 16/10/ 2012"Argentine Army Officers Jailed OverTrelew Massacre".

2012. Three ex-army officers in Argentina have been sentenced to life imprisonment for crime against humanity over the killing of 16 jailed rebel fighters in 1972. The victims were shot at an air base near the city of Trelew after a failed jailed break. The massacre came amid escalating violence that led to the 1976 military coup and the subsequent dirty war. The circumstances were described as "crime against humanity". Argentina was riven with violent unrest in the 1960s and 1970s. During the 7 years rule of military junta, an estimated 30,000 people were kidnapped, tortured and killed by the junta. Following the return to civilian rule in 1983, some leading members of the military were tried but then granted amnesties. More than 20 years on, the amnesties were ruled unconstitutional, clearing the way for trials to resume. In May, last year, a court of northern sentenced 8 ex-military officers to life in jail for killing unarmed activists during military rule.

A very important criticism about the jurisdiction of ICC is the UNSC's power. According to Article 16 of the Statute, the court may be prevented from exercising its jurisdiction when so directed by the Security Council. This is called "deferral". The Statute says that the Security Council may adopt a resolution under chapter vii of the charter of the UN requesting the Court to suspend prosecution and that in such case the Court may not proceed. Again a decision of the Council can be blocked at any time by one of the five permanent members. So this is clearly a drawback of the ICC. Thus some scholars comment on this provision as an intervention to the freedom of the ICC.

c) Personal jurisdiction:

The Treaty Article 12(2) (b) states that the ICC will also have a jurisdiction over nationals of States parties who are accused of a crime or who have committed crimes illustrated Article 5 of the Rome Statute in anywhere outside the member States. Again the Court can prosecute a national of non-party State that accept its jurisdiction on an ad hoc basis.

d) Territorial jurisdiction:

Article 12(2) (a) of the Statute states the general principle that the ICC can exercise the jurisdiction over crimes committed on the territory of the state parties, regardless of nationality of the offender. The Court also can exercise jurisdiction over nationals of non-party States that accept its jurisdiction on an ad hoc basis. The 1948 Genocide Convention and Article VI provide same precedent for the idea.The Treaty provides that the ICC may exercise jurisdiction over nationals of States that are not parties to the Treaty and have not otherwise consented to the court's jurisdiction. Article 12 of the Rome Statute of ICC provides that, in addition to jurisdiction based on the Security Council action under chapter vii of the UN Charter and jurisdiction based on consent by the defendant's State of nationality, the ICC will have jurisdiction to prosecute the national of any State when crimes within the court's subject-matter jurisdiction are committed on the territory of a State that is a party to the Treaty or that consents to the ICC jurisdiction for that

case. That territorial basis would empower the court to exercise jurisdiction even in cases where the defendant's State of nationality is not a party to the Treaty and does not consent to the exercise of jurisdiction.

The ICC member States argued that Article 12 of the ICC Statute is quite supportable in Question of jurisdiction over non-party State on the base of the theories of the delegated jurisdiction.

Now we will critically consider these theories;

1) Delegated universal jurisdiction:

The ICC Treaty provides that the ICC may exercise jurisdiction over non-party nationals, without consent by the State of nationality or referral by the Security Council only if the alleged crime was committed on the territory of the State party. The theory based on the principle of universal jurisdiction pursuant to which the courts of any State may prosecute the national of any State for certain serious international crimes. It means that any national court has the right to hear cases of international crimes even if there are no links to its territory or its nationals. It does not matter if the perpetrator allegedly committed the crime on foreign soil, or if he is not a national or resident of the State that wishes to prosecute him or her.

Under this theory each state party, in effect, delegates to the international court its power to exercise universal jurisdiction. Advocates of this view reason that the territoriality requirement simply reflects a choice that ICC will exercise only part of the full range of jurisdiction that it legally could exercise under the customary law of universal jurisdiction.

The theory of delegated universal jurisdiction as a basis for the ICC jurisdiction fails to account for the ICC jurisdiction over a number of crimes that the Treaty places within the subject matter jurisdiction of the ICC but which are not subject to the universal jurisdiction, for example certain violation of protocol 1 to the convention of 1949 for instances, are not subject to universal jurisdiction. For example, conscription of child soldiers prohibited under protocol 1 and elsewhere, is placed within the jurisdiction of the court by the terms of the ICC Treaty (Article 8 (xxvi)), but is not a crime customarily subject to universal jurisdiction The prohibition of recruitment of children under 15 years of age for service in armed forces, and the obligation to takemeasures to ensure that such children do not participate in hostilities, appear in two 1977 protocols to the Geneva Convention as well as in the UN convention on the rights of child. In none of these Treaties is there any suggestions that violates of the child soldier provisions constitute grave breaches of otherwise give rise to universal jurisdiction. Nor is there any other basis for action the utilization of child soldier constitute an international crime entailing universal jurisdiction.

Thus, a delegated universal jurisdiction theory of the ICC jurisdiction over non-party nationals would not account for jurisdiction over some of the crimes within the jurisdiction of the court under Treaty.

2) Delegated territorial Jurisdiction:

The notion here is that when a non-party national is prosecuted before the ICC for crimes committed on the ICC exercises territorial jurisdiction that is delegated to the court by the territorial State, under Article 12 of the Rome Statute, the ICC may exercise jurisdiction if the territorial State is a party or provides ad hoc consent. Here the question arises whether as a matter of customary international law; territorial jurisdiction may be delegated to an international court without the consent of the defendant's State nationality.

The non-party States like the USA argued that the delegation of State's jurisdiction to an international court would materially increase the risk or burden imposed on a State whose national may be subject to prosecution for an international crime. This increased risk or increased burden arises, primarily in interstate dispute type cases. So applying the non-prejudice principle to the question whether States may delegate or assign jurisdiction to the ICC is not permissible without the consent of what might be called the Obligor State because it would materially increase the burden or risk imposed on that State. One can imagine ICC cases in which the act forming the basis for the indictment was a military intervention, deployment of a particular weapon, recourse to a certain method of warfare or other official conduct that the responsible State maintains is lawful. In these sorts of the ICC cases will represent bonafied legal dispute between States. The sort comings of the ICC jurisdictional structure and of the arguments that have been advanced in support of the structure stem from the fact that this second aspect of the ICC's character, that of a court for interstate dispute adjudication or other alternative dispute resolution processes are not adequately taken into account.

The drafters of the ICC Treaty faced the dilemma of needing to fashion a jurisdiction scheme for the ICC that would be sufficiently aggressive to make the court effective in the prosecution of criminals but also sufficiently consensual to make the court suitable institution for the adjudication of international disputes.

The ICC and other international courts:

The interest of states in retaining discretion as to their methods of addressing interstate dispute is reflected in the jurisdictional structure of the International Court of Justice (ICJ) and other specialized courts such as the Law of Sea Tribunal and the World Trade Organization (WTO). The jurisdiction of the ICJ, based as it is on a combination of compromising clauses, optional clause, declarations and special agreements is quite thoroughly consent based. Unsurprisingly, controversies have arisen regarding whether the interests of a non-consenting, third party state would, in effect, be adjudicated in a case brought by other parties before the court. In Monetary Gold case[23], four States that wished to submit dispute for adjudication had all accepted ICJ jurisdiction. The ICJ nevertheless declined to

[23]Monetary Gold Case (1943)

adjudicate the case because Albania whose property rights were the subject of the dispute had not so consented. The principle of the Monetary Gold case has subsequently been further clarified. In the Nicaragua case[24], the ICJ held that the requirement for consent to jurisdiction by each party to the dispute applied only where the legal interests of the non-consenting State "would not only be effected by a decision, but would form the very subject-matter of the decision".

In looking at the relevant provisions of the ICJ Statute, UNCLOS (United Nations Convention on Law of Sea) and the WTO's dispute settlement understanding, we have seen that each Treaty provides to states considerable discretion over the degree and the type of authority that respective courts will have over interstate disputes. The ICC Treaty's jurisdictional provisions stand stark constant to those of the ICJ Statute. So there are different approaches in question of the jurisdiction between ICC and ICJ[25]. The non-party states argued that the ICC has no jurisdiction over them as it possesses quite different jurisdiction than other international courts.

Potential World Wide Jurisdiction:

We have already seen the jurisdiction of the ICC over its member States. But the question is whether it can exercise its jurisdiction over the world. One of the principle of international Law is that a Treaty does not create either obligations or rights for third States without their consent, and this is also enshrined in the Vienna Convention 1969[26] (Article 34 of the Vienna Convention on the Law of Treaties, 1969). Article 85 or the Rome Statute of the International Criminal Court (ICC) states that the cooperation of the non- party States is envisioned by the Statute to be of voluntary nature; even States that have not acceded to the Rome Statute might still be subject to an obligation to cooperate with the ICC.

a) When a case is referred to the ICC by the UN Security Council, all member States are obliged to
co-operate, since its decisions are binding for all of them (Article 25 of the UN Charter).

b) When a case is referred to the ICC by the UN Security Council, all member States are obliged to
co-operate, since its decisions are binding for all of them (Article 25 of the UN Charter).

c) There is an obligation to respect and ensure respect for international Humanitarian law which stems from the Geneva Conventions and additional-Protocol[27]. This means that the International Humanitarian Law (IHL) is

[24]Nicaragua v USA (1986)

[25]The Jurisdiction of the International Criminal Court over nationals of non-party States-Madeline Morris, Professor of Law, Duke University, also Ibid 18.

[26]Article 34 of the Vienna Convention on the Law of Treaties, 1969.

[27]Article 89 of the Additional Protocol 1.

absolute in nature (Nicaragua v USA, judgement by the ICJ).In relation to co-operation in investigation and evidence gathering, it is implied from the Rome Statute in Article 99 that the consent of a non-party State is a prerequisite for the ICC prosecutor to conduct an investigation within its territory, and it seems that it is even more necessary for him to observe any reasonable conditions raised by that State, since such restrictions exist for States party to the States.

d) As for the actions that ICC can take towards non-party states that the court may inform the Assembly of States Parties or the Security Council, when the matter is referred by it. When non-party state refers to co-operate after it has entered into an ad hoc arrangement or an agreement to the court, then ICC can exercise its jurisdiction over it.

e) The Palestine is not a State. But in January 2009 it made an official communication to the Office of the Prosecutor of the ICC that it accepted ICC's jurisdiction. It also requested to judge all the atrocities committed in its land under ICC's jurisdiction. Palestine has formally attained membership of the International Criminal Court in 2015, a move that could open the door to possible war crime indictments against Israeli officials despite uncertainty over its wider ramifications[28]. The Palestinian Authority has also handed over its first submission of evidence of Israeli war crimes to the International Criminal Court (ICC) on 25 June 2015; in a bid to speed up an ICC inquiry into abuses committed during last year's Gaza conflict[29].

f) Israel voted against the adoption of the Rome Statute but later signed it for a short period. In 2002, the United States and Israel "unsigned" the Rome Statute, indicating that they no longer intend to become states parties and, as such, they have no legal obligations arising from their signature of the statute. Israel states that it has "deep sympathy" with the goals of the Court. However, it has concerns that political pressure on the Court would lead it to reinterpret international law or to "invent new crimes". It cites the inclusion of "the transfer of parts of the civilian population of an occupying power into occupied territory" as a war crime as an example of this, whilst at the same time disagrees with the exclusion of terrorism and drug trafficking. Israel sees the powers given to the prosecutor as excessive and the geographical appointment of judges as disadvantaging Israel which was prevented from joining any of the UN Regional Groups[30].

g) As Israel is not a party State under the ICC statute, it may raise the question that it is not under the ICC jurisdiction and ICC has no right to investigate into the matters related to the Palestine. But Israel became a member of the UN in

[28]http://www.aljazeera.com/news/2015/04/palestine-formally-joins-international-criminal-court-150401073619618.html

[29]Ibid 28

[30]Ibid 14

1949 and it is bound by the UN decision. So the Security Council of the UN can investigate in to the matter related to the crime against humanity, war crime and then referred it to the ICC to take further action as this type of crimes are dealt with the ICC.

Admissibility:

The admissibility is closely related to the jurisdiction of the Court. Article 17 of the Statute provides that a case is inadmissible if;

a) The case being investigated or prosecuted by a Statute which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20 paragraph 3;

d) The case is not sufficient gravity to justify further action by the Court.

But these admissibility provisions do not address the fact that the State whose official acts are at issue may view those acts as lawful and, therefore may see no basis for investigation or prosecution.

Achievement of the ICC:

We have already seen that there is a controversy on the establishment of the ICC. Some countries voted against the establishment of the court. Though there are some limitations and influences from the powerful countries, it has some remarkable successes. The court has opened investigations into seven situations in Africa. These are in the Republic of Congo, the Central African Republic, Sudan (Darfur), the Republic of Kenya, the Libya and the Cote d'Ivore. Of these seven situations three were referred to the court by the concerned State parties themselves (Uganda, Congo, Central African Republic), two were referred by the UNSC (Darfur and Libya), and the other two were begun propiromotu by the prosecutor (Kenya and Cote d'Ivore). In addition the government of Mali has referred the situation in the country to the prosecutor. The ICC has publicly indicted 29 people, proceedings against 23 of whom are on-going. It has issued arrest warrants for 20 individuals and summons to nine others. Five individuals are in the custody; one has been found guilty and four of them are being tried. In the Africa the court has succeeded a lot. This is undoubtedly a very good achievement of the ICC. But in Asia especially in the Myanmar and in Israel ICC should take steps to stop the crimes against humanity. The Myanmar and Israelare UN member states and they are bound by the decision of the UN. The UNSC can refer the situation to the ICC to take an investigation. In the near future we might see that the prosecutor of the ICC would investigate the situation in the Myanmar and Israel.

Conclusion:

In conclusion we can say that, at least we have got an International Criminal Court (ICC) though the ICC has some success in Africa; it has also some failures in Asia. We can also understand from the above discussion that still there are some powerful countries like USA, China, and India that are outside of the ICC statute and jurisdiction. These countries make the ICC controversial and influenced the situations in different parts of the world worse. So the signatory countries and the ratified countries should negotiate with the non-signatories countries to give the maximum effect of the Rome Statute and the ICC.

THE JADHAV CASE: A DISCOURSE ON WHETHER ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS, 1963, CONFERS AN INDIVIDUAL WITH A PRIVATE RIGHT ENFORCEABLE UNDER LAW

AYUSHI KUNDU*

Abstract

The Kulbhushan Jadhav case, where India had approached the ICJ seeking provisional measures to stay the execution order passed by a Pakistani Military Court of an alleged Indian 'spy', has brought before the Court several questions relating to international treaty law, its conflict with domestic law, scope of Article 36 of the Vienna Convention on Consular Relations, jurisdiction of the ICJ in the matter, etc.

In this article, I have explored very briefly on the status of the right conferred by Article 36(1) of the Convention, and whether it can be considered a private individual right enforceable by law. There have been several conflicting opinions with regard to this provision of the Convention, which I have discussed in greater details in the article. Pending the conclusion of the final proceeding before the ICJ, it will be interesting to see what would be the ICJ's view on this aspect of the matter, and whether it will conform to its earlier view where it has affirmed the private enforceable nature of this right, in which case there has been a clear human rights violation as well as violation of the provisions of the Treaty by Pakistan.

Introduction

The order of execution of the alleged Indian 'spy' Kulbhushan Jadhav by a Pakistani Military Court in early 2017 sparked off debates. India approached the International Court of Justice under Article 36 of the Vienna Convention on Consular Relations[1]

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[1]Article 36 of the Vienna Convention on Consular Relations provides:

'1.With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2.The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.'

(hereinafter VCCR), seeking provisional measures to stay the execution as a matter of urgency.

Several questions relating to the veracity of the accusations, fairness of the trial, the power of a military court to pass a sentence of execution, the powers of the ICJ in staying the execution, inter alia, have been raised. India views this incident as an act of aggression by Pakistan and political tensions between the two states have escalated to the point where India has even considered severing diplomatic relations with Pakistan.

The primary allegation made by India against Pakistan in this case before the ICJ was that India was denied consular access to Kulbhushan Jadhav despite several requests from India. Article 36(1)(c) gives the right to consular officers to gain access to nationals of the Sending State (in this case India) when they are prison, custody or detention, so as to converse and correspond with him and also arrange for his legal representation. Further, Mr. Jadhav was also denied his right to consular access, as has been alleged by India.

These arguments put forth by India raises an interesting question. Does Article 36 of the VCCR provide an individual with a private right which he can enforce?

If the United States is taken as an example, it will be seen that there is a traditional deviation from the Vienna Convention and every year in the United States, several foreign nationals are arrested and detained, tried and in many cases are sentenced to death. In most cases, they are not informed of their rights under the VCCR or granted consular access.[2] As Kolesnikov suggests, the acceleration in the problem is caused due to lack of remedial measures provided under the VCCR itself.[3]

Article 36 of the VCCR suffers from a lack of clarity on several levels. It can also be said that it imposes an immense burden on the receiving state to inform the consulate of the concerned state of its arrested or detained national. This may seem to be an impossible task, especially for large countries or countries with a significant number of immigrants. A question therefore arises as to where a balance needs to be struck to secure the individual right of a national vis-a-vis make the law seemingly practical.

Interpretation of the Preamble to the Vienna Convention of Consular Relations

A preliminary reading of the Preamble[4] to the VCCR will reveal that the immunities

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[2]Yury A. Kolesnikov, 'Meddling with the Vienna Convention on Consular Relations: The Dilemma and
Proposed Statutory Solutions', 40 McGeorge Law Review 181 (2009)

[3]Ibid.

[4]The Preamble to the Vienna Convention on Consular Relations, 1963, provides:
'The States Parties to the present Convention,
Recalling that consular relations have been established between peoples since ancient times,
Having in mind the Purposes and Principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,
Considering that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961,
Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,
Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,
Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,
Have agreed as follows:..'

and privileges conferred under this Convention are not for the benefit of an individual, but for the effective and efficient functioning of consular posts on behalf of states.

As such, a discourse on private or individual rights emanating from the Convention may seem to contradict the purposes of the Convention. However, it is worthwhile to note that Article 36 of the Convention deals with special circumstances relating to arrest or detention of nationals from a separate state. The provision does not exclusively deal with the privileges or immunities granted to a consular officer, but rather relates to the role and function of the consular office when an individual of its state is arrested or detained.

Furthermore, it is also perhaps correct to say that the use of the word 'individuals' in the Preamble to the Convention is to be interpreted as to be meaning a consular officer and not a national of a particular state, in which the question of granting him or her a benefit does not arise.

Debates Concerning the Interpretation of Article 36

It would perhaps not be wrong to say that Article 36 of the Convention bestows an individual right on an arrested or detained individual for securing the larger purpose of smooth functioning of consular relations. It is to ensure that a foreign national is not put through an unfair trial (evident from a reading of Article 36 (1) (c) or not subject to severe punishments without being given an unbiased representation before the courts of law.

While the textual interpretation of the text of the Convention may not appear to be very coherent, resort may be taken to the travaux préparatoires to discover the true intentions and opinions of the state parties regarding this matter.

The Summary Records of the plenary meetings of the First and Second Committees on the United Nations Conference on Consular Relations provide a lot of information in this regard. The delegation from Philippines argued in the Second Committee that 'nationals of a sending state who were arrested or imprisoned should be protected because they were often ignorant of the laws and regulations of the receiving state.'[5] This argument was however countered, stating that no one was supposed to be ignorant of the law.[6]

The fact that the receiving state must inform the consul after a request from the arrested national was also heavily criticised. Many states were of the opinion that there was no way to verify whether the arrested national had been rightfully informed about his right and granted access to the consul office. It would also be difficult to ascertain whether or not there had been any exercise of undue influence. This has been viewed as to be conflicting with the basic principle of international law that every state has the right to protect its own national.[7]

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[5]United Nations Conference on Consular Relations, Vol. I, 1963: Summary Records of Plenary Meetings and of the Meetings of the First and Second Committee

[6]Ibid.

[7]Ibid.

Several states asserted on the automatic notification to consul whenever the national of the sending state was arrested or detained, so as to safeguard his interests.[8]

There were also debates on how Article 36 would 'accord a privileged status to an alien'. However, the response by the delegate of the United Kingdom was that Article 36 was included precisely to deal with the rights of an alien. The proposal of amendment of this Article by the United Kingdom was adopted despite several criticisms.[9]

Although several delegates in this Conference were of the view that it would often be very difficult and unnecessarily creating burdensome obligations for the receiving state to inform the consul of the concerned state about each of its arrested or detained nationals, citing the impracticalities of the situation as a defence, there is very little that suggests that such reasoning could often not be misused as a political vendetta by the receiving state against the sending state.

The final adoption of Article 36 of the VCCR has protected individual freedom to the maximum extent possible, including the prohibition to inform the consul office of the arrest or detention when the foreign national has so requested.

It can be inferred from the history of the drafting of the VCCR that the treaty supports that individual rights be conferred on foreign individuals.

A major shortcoming of the Convention, however, remains that no effective remedy has been provided when the individual right provided under Article 36 of the Convention is violated or not fully given effect to.

The political rivalry between India and Pakistan is unknown to very few people across the world. If the Jadhav case is to be seen in the context of the preceeding discussion and due consideration is given to the number of requests made by India seeking consular access to him, all being rejected by Pakistan, one may believe that the decision of the Pakistani Military Court was influenced by the existing political relations between the two countries.

In several cases, as can be demonstrated from case laws concerning the USA, it will be seen that on many occasion states have taken advantage of the loopholes of the Convention and ordered that foreign nationals to death penalties, without having provided them consular access, as has been the case in the Jadhav case.

Three of the most famous cases involving USA's breach of Article 36 of the VCCR have been discussed hereinafter:

- **Paraguay v. United States of America[10]:** On 3 April 1998, Paraguay instituted proceedings against the United States before the International Court of Justice (ICJ) in a dispute concerning alleged violations of the VCCR. It maintained that Mr. Angel Francisco Breard, a Paraguayan national, was tried and sentenced to death without the State of Virginia advising him of his right to assistance by the

[8]Mark J. Kadish, 'Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul', Vol. 18(4) MJIL 598 (1997).
[9]Ibid.
[10]Paraguay v. United States of America, 1998 I.C.J. 266

consular officers of Paraguay, as required by Article 36 of the Vienna Convention. The Convention came into force in the United States on 24 December 1969.

On 9 April 1998, the ICJ called on the United States to "take all measures at its disposal" to prevent the execution of Mr. Breard, pending a final decision of the Court. Despite this order and a subsequent request from the U.S. Secretary of State to suspend Breard's sentence, he was executed on 14 April 1998.

Following the execution, Paraguayan officials expressed their resolve to pursue a binding judgment from the International Court of Justice against the United States, as a matter of principle. The United States made an official apology with the guarantee of a better future compliance with the Vienna Convention. On 11 November 1998, the case was removed from the Court's List at the request of Paraguay.

- **Germany v. United States of America (LaGrand Case)[11]: On 2 March 1999, Germany** filed an Application instituting proceedings against the United States of America in a dispute concerning alleged violations of the Vienna Convention on Consular Relations. Germany stated that, in 1982, the authorities of the State of Arizona had detained two German nationals, Karl and Walter LaGrand, who were tried and sentenced to death without having been informed of their rights.

  Germany maintained that the right to be informed of the rights under Article 36(1)(b) of the Vienna Convention, is an individual right of every national of a State party to the Convention who enters the territory of another State party. It submitted that this view was supported by the ordinary meaning of the terms of Article 36(1)(b), of the Vienna Convention, since the last sentence of that provision speaks of the "rights" under this subparagraph of "the person concerned", i.e., of the foreign national arrested or detained. Germany also added that the provision in Article 36 (1)(b) according to which it is for the arrested person to decide whether consular notification is to be provided, has the effect of conferring an individual right upon the foreign national concerned. In its view, the context of Article 36 supports this conclusion since it relates to both the concerns of the sending and receiving States and to those of individuals. According to Germany, the travaux préparatoires of the Vienna Convention lend further support to this interpretation. In addition, Germany submitted that the "United Nations Declaration on the human rights of individuals who are not nationals of the country in which they live," adopted by General Assembly resolution 40/144 on 13 December 1985, confirms the view that the right of access to the consulate of the home State, as well as the information on this right, constitute individual rights of foreign nationals and are to be regarded as human rights of aliens.

  In its Judgment of 27 June 2001, the Court found that the submissions of Germany were admissible and that the United States had breached its obligations

[11]Germany v. United States of America, 2001 I.C.J. 466

to Germany and to the LaGrand brothers under the Convention. The Court also pointed out that by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the Court, the United States had breached the legal obligation incumbent upon it under the Order issued by the Court on 3 March 1999.

The ICJ also held that Article 36 of the VCCR affords an individually enforceable right to consular access upon arrest or detention in a foreign country. The Court also ruled that states which fail to give timely notice cannot later invoke procedural default to bar individuals from judicial relief.

- **Mexico v. United States of America[12]:** On 9 January 2003 Mexico instituted proceedings against the United States of America in a dispute concerning alleged breaches of Articles 5 and 36 of the Vienna Convention on Consular Relations of 24 April 1963 in relation to the treatment of a number of Mexican nationals who had been tried, convicted and sentenced to death in criminal proceedings in the United States.

On 9 January 2003 Mexico also asked the Court to indicate provisional measures, and in particular to order the United States to take all measures necessary to ensure that no Mexican national was executed pending a final decision of the Court.

On 5 February 2003 the Court unanimously adopted an Order indicating such measures. On 31 March 2004, in the judgment on the merits, the Court found that the United States of America had breached its obligations to Mr. Avena and other Mexican nationals and to Mexico under the Vienna Convention on Consular Relations.

The defence taken by Pakistan, however, for having rejected India's request for consular access is that Jadhav's arrest is governed by the 2008 Agreement on Consular Access between India and Pakistan, where an exception can be made on grounds of political and security reasons.

Clause (vi) of the Agreement reads:

'In case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merit.'

However, the Agreement does not provide in explicit terms that consular access must be absolutely denied if arrest or detention or sentence is made on political or security grounds. If such terms were included in the Agreement, they would be derogatory to the principle of the original Convention which is unqualified in nature.

Conclusion

The Jadhav case will prove to be an interesting interpretation of the VCCR by the ICJ in the final course of the proceedings. Out of the several questions open before the Court, one particularly intriguing question is how the conflict between the 2008 Agreement between India and Pakistan and the VCCR will be resolved and whether primacy will be given to a bilateral agreement over an International Convention. It

will also be worth seeing the approach of the Court with regard to Article 36 where it conforms to its earlier decisions holding that this Article confers an individual right on the foreign national which is enforceable before a court of law, or whether there will be a deviation from the previous decisions. Whatever be the final judgment, the Jadhav case will definitely be set as a precedent by the ICJ.

ENVIRONMENTAL LAW AND ITS IMPLEMENTATION IN INDIA: AN INTERPRETATION OF JUDICIAL ROLE WITH SPECIAL REFERENCE TO PROVISIONS UNDER CRP.C.

DR. AKHILESH KUMAR PANDEY[1]

Abstract

The meaning of environment is surroundings of us and includes all parts of nature resources which are necessary to the survival of the man and their health, happiness and prosperity. Apart from this, nature reserves immense potential to maintain ecological balance. Nature and its resources have their adequate capacity to feed and bear the burden of the requirements of the mankind. Once these resources are overburdened due to the undue pressure of human activities, it disturbs the equilibrium relationship between the man and the nature necessary for human existence. Consequently it gives rise to the problems of environmental pollution.

Introduction

According to Section 2(a) of the Indian Environment (Protection) Act 1986[2], the term "Environment" includes water, air and land and human beings, other living creatures, plants, micro-organism and property. However, under Section 1(2) of the Environment Protection Act 1990 of the United Kingdom, the term "environment" consists of all or any of the following medium, namely, air, water and land and the medium of air made structures above or below ground. According to the Encyclopedia Britannica, the term "Environment" means the entire range of external influence acting on an organism, both the physical and biological and other organism, i.e., forces of nature surrounding of an individual. Besides, man-made environment is created by us i.e., industrial revolution, communication networks like telephones, internet etc., agricultural & plantation for the protection of environment, power generations, sustainable development is a tool of protect the pollution free environment.

The degradation in environmental quality has been evidenced by enormous pollution, loss of vegetal cover and biological diversity, excess accumulation of harmful chemicals in the atmosphere and in food chains, growing risks of environmental accidents and threats to life support system. The expression "the people of the whole world resolve to protect and enhance the environmental quality" is found in the decisions taken at the United Nations Conference on the Human Environment which took place at Stockholm in June 1972. The Government of India was participated in the Conference and strongly voiced

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[2]The Environment Protection Act, 1986, No.29, Acts of Parliament, 1986 (India).

the environmental concerns. While several measures have been undertaken for environmental protection, but the need for a general legislation has become increasingly evident. Although, there are existing laws dealing directly or indirectly with several environmental matters, it is necessary to have a general legislation for environmental protection. Existing laws generally focus on specific types of pollution or on specific categories of hazardous substances. Some major areas of environmental hazards are not covered.

There also exist uncovered gaps in areas of major environmental hazards. There are not adequate linkages in handling matters of industrial and environmental safety. Control of mechanism to the guard against slow insidious to develop of the hazardous substances, especially new chemicals are weak in an environment. Because of a multiplicity of regulatory agencies, there is need for an authority which can assume the lead role for studying, planning and implementing long term requirements of environmental safety and to give direction to and to co-ordinate a system of speedy and adequate response to emergency situations threatening the environment.

The deforestation, cutting of tree without permission from the competent authority, rapid growth of industrialization, there is no check & balance of hazard standards equipment in industrial units, expulsion of population, inadequate knowledge among the people about environment and pollution are the main causes of environmental issues and challenges. Besides, the government agencies/functionary is not activated to control these problems and prospects in such a manner as requires the problems of our nation. There is a need of an hour to motivate these agencies to do something in inspirit of the legislation with the strong "Political Will of the State". NGOs can perform to aware about issues and solutions amongst to the common people.

Related Work

The rapid growth of industry and direct foreign investment is the result of our liberal economy policy on the monumental scale pose new challenges and new threats for a complex plural society. These challenges have often been noticed in the past, it is merely the scale, which might be different in future. If there has been indeed, a regrettable aspect to the Independent Nation's history, it has been the inability of the Executive wing to deal with these problems effectively and set a precedent, which may be followed. The trains that such rapid Industrial advancement place on a Nation's environs is unfathomable, the destruction that it has the capacity of causing, almost frightening and under these circumstances the means and measures which ordinary citizens have in dealing with them, seemingly hopeless.

But it is each society's own unique way of dealing with the challenges before it. Reformed Government has not yet been India's response. The sheer destruction of our ecology has been met with firmly by only one pillar of the vast State. It is indeed almost ironic that the task of saving India's natural resources.

The Herculean task undertaken by the Supreme Court has been made possible by the now settled principle of dilution of the old rule of locus standi. Invention has occurred by now in a plethora of cases, most of them discussed on innumerable occasions by Jurists and the Intelligentsia and PIL can be filed for the protection of environment.

No doubt, industrialization is the backbone of our economy and agrarian sector is not capable to fulfill the requirement of an employment opportunities but we cannot be compromised with environment, development should be made in such a manner to use the natural resources in a minimize waste with maximum satisfaction of the wants of the people as the theory of "Social Engineering" propounded by Dean R. Pound. Therefore, sustainable development is the best solution of our problem as discussed above.

The pollution of water is a phenomenon that is characterized by the deterioration of the quality of water as a result of different human activities.

It is estimated that man can survive 20 days without food, but starts struggling for life in the absence of water just after one day. Water is the need for the maintenance of life of plants and animal; for navigation and hydro-electric power. That is why most of our cities, towns, and villages sprang up near places where plentiful water is available in the form of lakes, rivers and sea. History reminders us that many civilizations perished or migrated to better locations due to scarcity of water. Water pollution is a global problem, affecting both the industrialized and the developing nations. The water pollution problem is in rich and poor nations, these can be sorted out with collective measures and efforts of the nations. Human activities related with water pollution can be attributed to mining, agriculture, stockbreeding, fisheries, forestry, urban development, construction works, industries, etc., in our country unsanitary water and malnutrition can account for most of the illness and death. Like air pollutants, water pollutants, come from numerous natural and anthropogenic sources. Likewise, water pollutants produced in one nation may flow into others, creating complex international control problems that may take decades to solve. Therefore, management and conservation of water resources have become important issues for the protection of environment.

Environmental protection has now become a matter of grave concern for human existence. It is the duty of State and each & every people of the world to maintain the ecological system of the environment and pollution free society of the world. Industrialization, over exploitation of resources, the scientific and technological progress of man have invested the man with immense power over nature and these have been the principal causes for the impairment of the quality of the environment.

Environmental degradation is a social problem and considering its impact on the society has risen to deal with the situation as it demands in the present day-to-day. It is not merely confined to the Apex Court, but also the High

Courts in India including Orrisa High Court which have shown dynamism in evolving the right to environment in India. While dealing with an environmental issue on Bhitarakanika Sanctuary, Hon'ble A. Pasayat and P.C. Naik , JJ felt in the case of Centre for Environmental Law V. State of odiisa that there is constitutional imperative on the State Government and the local bodies like Municipalities not only to ensure and safeguard proper environment but also an imperative duty to take adequate measure to promote, protect and improve the environment.

1. Constitutional Protection of the Environment

The Constitution[3] is amongst the few in the world that contains specific provisions on environmental protection. The Directive Principles of State Policy and the Fundamental Duties chapters explicitly enunciate the national commitment to protect and improve the environment. Judicial interpretation has strengthened this constitutional mandate. Recently, the courts have recognised the right to a wholesome environment as being implicit in the fundamental right to life.

Environmental protection and improvement were explicitly incorporated into the Constitution by the Constitution (Forty – Second Amendment) Act of 1976. The Constitution (Forty – Second Amendment) Act, 1976 introduced Article 48-A in Part IV which provides that "the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country", the provision though not enforceable in a court, directs the State to enact legislation and frame policies towards attaining these goals.

The Constitution (Forty-Second Amendment) Act, 1976 also introduced Article 51A in Part IV A of the Constitution Article 51 A (g) provides that "it shall be the duly of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures". Thus the State now is under a moral duty to take measures to prevent ecological imbalances resulting from modern industrialization. The Constitution has also cast a duty on the citizen to take steps for maintaining ecological balance. Although the language of Article 48 A and Article 51 A (g) differs to each other, the differences appear to relate to form rather than to substance. Together, the provisions highlight the national consensus on the importance of environmental protection and improvement. The incorporation of protection of environment as an obligation of the state and as a mandate to the citizens of India as part of the fundamental duties is notable indication to the importance of the protection of environment.

"Whenever a problem of ecology is brought before the Court, the Court is bound to bear in mind Article 48A of the Constitution and Article 51A (g) of the Constitution. When the Court is called upon to give effect to the Directive

[3]INDIA CONSTITUTION.

Principle and the Fundamental Duty, the Court is not to shrug its shoulders and say that priorities are a matter of policy and so it is a matter for the policy -making authority. The least that the Court may do is to examine whether appropriate considerations are borne in mind and irrelevancies excluded. In appropriate cases, the court may go further, but how much further will depend on the circumstances of the case. The Court may always give necessary directions.

2. Scope of the Environment (Protection) Act, 1986

In the wake of the Bhopal tragedy, the Government of India enacted the Environment (Protection) Act of 1986, under Article 253 of the Constitution. The purpose of the Act is to implement the decisions of the United Nations Conference on the Human Environment of 1972, in so far as they relate to the protection and improvement of the human environment and the prevention of hazards to human beings, other living creatures, plants and property. The Act is an ”umbrella” legislation designed to provide a framework for Central Government co-ordination of the activities of various central and state authorities established under previous laws, such as the Water Act and Air Act.

This Act is the first Act dealing with the Human environment as a composite whole and it is a comprehensive legislation on this point and also dealing with air, water, and noise pollution as also regulating the treatment of hazards materials. Besides, Act is contained the 26 Sections and divided into four chapters. The legislature has made the first time attempts to lay down the said law on this point and goes beyond the scope of the water and Air Pollution Acts passed in 1974 and 1981 respectively. But Act also suffers from shortcomings. The drawbacks of the Act relate to its narrow area of operation weak citizens suit provision, tax provisions relating to fixing of liability of corporate officials and lack of provisions providing for an individual’s right to sue a defaulter for damages.

The potential scope of the Act is broad, with ‘environment’ defined to include water, air, and land and the inter-relationships which exist among water, air and land, and human beings and and human beings and other living creatures, plants, micro-organisms and property. “Environmental pollution” is the presence of any environmental pollutant, defined as any solid, liquid or gaseous substance present in such concentration as may be, or may tend to be injurious to the environment. Hazardous substances’ include any substance or preparation which may cause harm to human beings, other living creatures, plants, micro-organisms, property or the environment.

The Act provides for severe penalties. Any person who fails to comply with or contravenes any of the provisions of the Act or the rules, orders, or directions issued under the Act shall be punished, for each failure or contravention, with a prison term of up to five years or a fine of up to Rs. l lakh, or both. The Act imposes an additional fine of up to Rs. 5,000 for every

day of continuing violation. If a failure or contravention occurs for more than one year after the date of conviction, on offender may be punished with a prison term which may extend to seven years.

The Parliament has enacted various legislations for the protection of environment, pollution and maintains the ecological system of our nature, such as even in pre-independent era environment pollution was regulated by general laws viz: I.P.C. 1860, Cr.P.C. 1898 and Police Act 1861 having relevant provisions dealing with control of water, air, noise pollution and nuisances. Whereas, water pollution was controlled mainly by the North canal and Drainage Act 1873, and the Obstruction of Fair Way Act 1881, Air Pollution Control Provisions were contained in the Oriental Gas Company Act 1957, Explosives Act 1884, Indian Boilers Act 1923, The Petroleum Act 1934, Poison Act 1919, The Environment (Protection) Act 1986, Air (Prevention and Control of Pollution) Act 1981, The Water Cess Act 1977, The water (Prevention and Control of Pollution) Act 1974, The Bhopal Gas Leak Disaster (Processing of Claims) Acts 1985, The Public Liability Insurance Act 1991, The Wild Life (Protection) Act 1972, The Forest (Conservation) Act 1980, The Indian Forest Act 1927 The National Green Tribunal Act 2010 but the implementation of these laws couldn't achieved the require result, it may be a failure of our function & functionary. But it can get the require result with the aid of "Strong Political Will of the State" and NGOs can play the vital role for awareness of environment and pollution free atmosphere among the common peoples.

3. The Environment Protection: Cr. P. C[4] & I. P. C[5].

The question whether the SDM was justified in passing order for closure of factory on the ground of causing pollution. Andhra Pradesh High Court in the case of Nagarjuna Paper Mills Ltd. V. S.D.M & R.D. Officer has held that the Water Act 1974 has not taken away the power of Sub-Divisional Magistrate under Section 133 of Cr. P.C to close a factory causing pollution when appreciation certificate is not produce. The remedy under Section 133 of Cr. P.C is a quick and injunctive relief to the aggrieved party but the case may come within the purview of public nuisance under Section 133 of Cr. P.C and not for private nuisance which can be adjudicated before the Civil Court.

It is clear that Section 133 of the Code of Criminal Procedure, 1973 deals with the public nuisance. On the other hand the Air (Prevention and Control of Pollution) Act, 1981 was enacted by the Parliament under Article 252 (1) of the Constitution, however, after securing enabling resolutions from 12 States. The said Act, 1981 represents a Human Environment held at Stockholm in 1972. The executive functions of the Air Act are performed by the State

[4] The code of criminal procedure,1973, no.2, acts of Parliament,1974 (India).
[5]Indian Penal Code,1860, no.45, acts of legislative council, 1860 (India).

Pollution Control Boards, as delegation of executive functions is permitted by Article 258 (2) of the Constitution. By virtue of Article 258 (3) of the Constitution, the Central Government is under Constitutional obligation to compensate the States for the cost of carrying out the delegated functions.

The issue was raised before the Rajasthan High Court whether the provisions of the Air Act, 1981 operate to impliedly repeal the provisions of Section 133 of Cr. P.C in the case of Lakshmi Cement V. State and another[6], wherein the State Pollution Control Board having rejected the consent application directed the company to stop its operations. This direction was issued prior to the introduction of Section 31-A of the Air (Prevention and Control of Pollution) Act, 1981[7] which was brought into effect from 1st April 1988 and the Board endorsed a copy of the latter to the District Collector requesting to take administrative action against the company/factory. The District Collector forwarded the latter to the Magistrate who passed an order under Section 133 of Cr. P.C requiring the company/factory to abate the public nuisance. By the time High Court has decided the company's petition challenging the Magistrate's order, the petition was regarded infructuous on account of subsequent events. The State Pollution Control Board has issued a provisional consent to the company immediately after the Magistrate's order and company installed air pollution control equipment which brought down the emissions within the prescribed limits. The Rajasthan High Court while allowing the petition to "secure the ends of justice" and since the menace of the public nuisance had long abated, the High Court rejected the company's plea that Section 133 of the Code stood impliedly repealed by passage of the Air (Prevention and Control of Pollution) Act, 1981.

I.P.C. and Protection of Environment

The provisions under Sections 268 to 294-A of the Indian Penal Code dealing with an environment problems however, certain sections of the I.P.C, are concern with the matters of public nuisance, negligent/malignant act likely to spread infection of disease dangerous to life, adulteration of drugs/foods, fouling of water of public spring or reservoir, making atmosphere noxious to health and punishment for public nuisance are embodied in the chapter XIV of the Indian Penal Code.

The public nuisance is also called common nuisance. It is annoyance which affects the public and is an actual annoyance to all the subjects. To amount a public nuisance there must be an act or an illegal omission. It is not mandatory that the act should be illegal. However, as soon as an act becomes a nuisance, it becomes illegal not because it is 'per se' illegal, but because it has an injurious effect upon and is not tolerable to the public.

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[6]Lakshmi Cement V. State and another (1994) 2, Cri LJ.3649 (India).

[7]The Air (Prevention and Control of Pollution) Act, 1981, no.14, acts of Parliament, 1981(India).

The Section 269 of I.P.C contains the provisions about the punishment of the Offence related to spread infectious diseases by any person in the society. The infectious diseases are cholera, plague and small-pox etc. However, such person must have knowledge that his action was likely to spread infectious diseases. Where a man was suffering from cholera and was aware of its infectious nature, travelled by train without informing the railway authorities of his condition, it was held that he was responsible for spreading infectious of cholera.

The Section 270 of I.P.C is the aggravated form of the offence punishable under the last Section. The word "malignantly denotes a deliberate intention to cause intention of any disease on the part of accused.

The Section 272 of I.P.C says that a person who mixes harmful ingredient in food or drink shall be punished under this section. Mere adulteration with harmless ingredients for the purpose of getting more profit is not punishable under this Section e.g. mixing water with milk or ghee with vegetable oil. Similarly Section 278 of I.P.C provides punishment for making atmosphere noxious to heath and affects the health of the public at large.

4. The Environmental Laws: A Judicial Approach

The Supreme Court has held that every attempt should be made to preserve the fragile ecology of the forest areas and to protect the tiger reserve and the right of tribal in the State of M.P. Hence, it is a landmark decision of Apex Court to protection of deforestation of our Jungles.

In the case of Supreme Court has recognised the importance of pollution free environment and gave it the status of a human right.

In the case of Supreme Court held on the facts that discharge of smoke from the chimneys of the plant, was not causing pollution. The petitioner samithi alleged that the Junjunwala Oil Mills and Refinery Plant located in the green belt area was causing environmental pollution due to the emissions of smoke and dust from the chimneys of the mill and effluents discharged from the Plants. The petitioner prayed for necessary direction. The Apex Court having considered the facts and circumstances, the nature of allegations and the long history of enmity and animosity between parties, expressed the opinion that there was no conduct on the part of the respondent to attribute pollution of air or ecological imbalance calling for interference by the Court. The petition was held devoid of any merit. Every citizen has a fundamental right to have the enjoyment of quality of life and living as contemplated by Article 21 of the Constitution of India.

Anything which endangers or impairs, by conduct of anybody either in violation or in derogation of laws, that quality of life and living is entitled to be taken recourse of Article 32 of the Constitution.

The Supreme Court has enunciated the doctrine of "Public Trust", based on the legal theory of the ancient Roman Empire. The idea of this theory was that

certain common properties such as rivers, seashores, forests and the air were held by the Government in trusteeship for the free and unimpeded use of the general public. The resources like air, sea, waters and the forests have such a great importance to the people as a whole, that it would be totally unjustified to make them a subject of private ownership. The concept "environment" bears a very close relationship to this doctrine. The doctrine enjoins upon the resources for the enjoyment of the general public, rather to permit their use for private ownership or commercial purposes. It was thus held that the State Government committed breach of public, by leasing the ecologically fragile land to the Motel management.

Right under Article 19 (1) (g) of the Constitution is not an absolute right but it is subject to suspension/restriction/prohibition. Thus, it is clear that a license to carry on activities of traders doing business of gunny bag can be cancelled on account of creating nuisance. Hence, the right of the petitioner to carry on business in old and used gunny bags cannot be said to be absolute.

The chemical or other hazardous industries which are essential for economic development may have to be set up. But measures should be taken to reduce the risk to the community by taking all necessary steps for locating such industries in a manner that would pose the least risk or danger to the community and for maximizing safety requirements in such industries. The Supreme Court directed the High Court to set up Green Bench.

The Supreme Court has directed the Union of India and University Grant Commission to take appropriate steps immediately to give effect to the guidelines laid down by the Court, i.e., requiring the Universities to prescribe the course on environment. They would consider the feasibility of making this a compulsory subject at level in college education. So far as every State Govt. and every Education Board connected with education up-to the matriculation stage or even intermediate College to immediately take steps to enforce compulsory on environment in a graded way.

The Supreme Court has held that the material resources of the community like pounds, forests and mountains etc., are bounty of nature. They are responsible for maintaining ecological balance all over. Therefore, they need to be protected for proper and healthy environment which enables people to enjoy quality of life which is the essence of the guaranteed right under Article 21 of the constitution. Thus, the Govt. and its agencies are under constitutional obligation itself provides concept and object for protection and improvement of environment then an Act to provide for the protection and improvement of environment and for matters connected therewith, cannot be said to be unconstitutional in any way.

The "precautionary principle" requires the State to anticipate and attack the causes of environmental degradation.

Conclusion

To wind up our discussion made so far, it would be well in point to recapitulate the following essential things around which this work has been spinning. In the present day globalization era, the theory "Social Engineering" Propounded by Roscoe Pound says: The policy of Law makers, town planner, developers of industrial sectors in such a manner, it should be satisfying the maximum wants, or desires, or claims of the human beings with minimum waste, means a balance between the competing interests in the society". In fact industrialization plays vital role in our economy & commerce and also generate employment opportunities to our youth generations but keep in mind an environmental factor also. So, sustainable development is the need of an hour and it would helpful to maintenance of environmental factor and ecological balance should be maintained. Natural resource may be utilized as small as and policy makers must plans industrialization & urbanization policy in such a manner to protect & improve the environment & pollution free atmosphere in order to preserve the fertile lands and industrial township can be set up in non-fertile lands. So, Green belt to be developed for the progress of oxygen from trees and policy-makers may plan their in such a manner to provide an opportunity to the farmers to develop the groves & orchards due to creation oxygen to our lungs and control of pollution.

CYBER ESPIONAGE: AN EMERGING CHALLENGE TO THE INTERNATIONAL COMMUNITY

MISS RUPA PRADHAN[1]

Introduction

Espionage is organized activity and is not a new phenomenon for the International Community. The act of espionage was always one of the major concerns of International Community as it violates the principles of Non-interference, non-intervention on International Affairs and territorial Sovereignty of a state party and directly attacks the right to privacy. The traces of employment of secret agents (spies) in other States for the purposes of collecting the confidential, sensitive and un-disclosed information to find out the strong and weaker side of the concern Nations by Roman and Greece Empire found. The concept of espionage developed drastically just after the World War I due the changed Global Political scenario. The act of espionage becomes one of the most important sources of obtaining unpublished and unauthorized secret information of other state. The purpose of it is to obtain the secret information of a Nation and with the malicious intention to use it against the same. The secret information mostly related to the National Security Issues of a Nation and it might be any other confidential information, which is very important for a Nation. The reason behind the principle of Non-Interference is to maintain Peace and Harmonious Relationship among the Nations. In our day-to-day life, we the human beings are very much curious to know what is going on in others life and family. But here the one State Party sends their secret agent abroad in other State in order to obtain the most confidential and secret information relating to the security of the Nation, Political Matter, Economic Matter etc. The competitive spirit of the state parties is one of the reasons of espionage in present Globalized world. This world of technology and science developed a new method of spying or espionage and that is cyber espionage, which is more dangerous that other forms of espionage. Cyber Espionage is one of the example of use of technology in collecting unauthorized and unpublished information of another state without sending any human agent in that particular state. The act of espionage in any forms has prohibited under International law as it undermines the International Co-operation and Peace.

Meaning of Espionage

The term espionage signifies the practice of spying or using spies either human agent, or in any other forms by Government to obtain confidential political, military and Industrial Information of another Government secretly without consent. In this globalized world espionage are generally state

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sponsored actions. Espionage can be define as the process of stealing information for hostile intent from opponents, concerning strategic and national security issues and other information considered confidential and of vital importance for a state.[2] Espionage starts with spying. The term spy defined as, "a spy is who secretly or under false issue acts to collect, and transfer information for the enemy in operational region for the enemy.[3] Espionage is intelligence gathering activity or practice, accepted as common modern action of a state. In fact, intelligence gathering is considers as one of vital strategic policy to maintain authority of a state. Espionage is a threat because of three main purposes:

i. collecting information is the objective of espionage so to use such information for destruction,
ii. Manipulating people of a nation by distributing the information to create internal political conflict in nation,
iii. Espionage is not easily detectable.

There are various modes, methods, techniques and human sources of obtaining secret information. Few of the techniques adopted in for the act of obtaining information used by the secret agents officially or non-officially are:[4]

- Human Intelligence (HUMINT),
- code breaking process (COMINT),
- aircraft or satellite photography (IMINT),
- analyzing open publications (OSINT),
- technological surveillance (SIGINT) and
- Interrogation of individuals that may have information of high interest concerning national security of a certain state.

Legality of Espionage under International Law

Espionage is an act of a soldier or other individual who clandestine, or under false pretence, seeks to obtain information concerning a belligerent with the intention of communicating it to the other belligerent.[5] The old customary rule permits the employment of methods necessary to obtain information about the enemy and the country and same has incorporated under Article 24 of the Hague Regulation. An individual engaged in procuring information is not protected and considered as war criminals and punished under laws. Oppenheim an eminent international law jurist stated that spying is not considered as wrong morally, politically or legally.[6]

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[2]https://www.iapss.org/wp/2015/02/16/question-on-legality-of-espionage-carried-out-through-diplomatic-missions/ accessed on 9th October, 2017 at 7:30pm.
[3]Article-29 of Hague Regulation 1907.
[4]Ibid.
[5]Dr. H.O Agarwal, International Law and Human Rights, 16th Edition 2009, Central Law Publications, pg. 239
[6]https://medium.com/wonk-bridge/cyber-espionage-and-the-vaccum-of-international-law-9db2f1256d99, accessed on 10th October, 2017 at 8:30pm.

There are numerous International principles in regards to intelligence gathering but the law is not been clear and stated. There are diverse of opinions of jurists in regards to legality of intelligence gathering. One group opined espionage is just an unfriendly action and is not violation of international law. The question arises is whether rules of espionage is also applicable to gathering of intelligence by technical methods or only for traditional methods. The act of gathering intelligence by research scholars, news reporters who collects information by expressing their identity are protected under law.

Espionage can be conducted either at the time of peace or war and it can be divided in two categories first peacetime espionage and second wartime espionage. If a spy charges with peacetime espionage penalize with death sentence is not justified. United Nation Charter considers the act of espionage as anticipatory action of self defence. This is being sponsored by state itself based on past behavior and capabilities of other Nation, which is justified. Repeatedly the issue of legality of espionage activities arose internationally. State Party is sponsoring Espionage by employing spies in other nation in International Forum. There are instances of state sponsored espionage. The impact of globalization has increased tremendously the competitiveness among the state parties, which, sometimes lead to the sponsorship of espionage or spying like activities in other states. Every state is interested to know strengths and weaknesses of opponent so to obtain that information traditionally state parties use to employ reliable agents, which in this 21st century is replaced by the modern technologies. There are some states in the world who believes that espionage is their right.

Another section of jurists opined that no matter peacetime or wartime espionage is regarded as an international delinquency and violation of International Law. There are different rules and regulations to deal with peacetime and wartime espionage under International Law. Firstly, espionage is not the activity permitted under International law. It undermines the principles of territorial sovereignty and independency of a nation. Now the point is whether the rules of espionage in times of war based on The Hague Regulations of 1907, the Geneva Conventions, the Protocol Additional to the Geneva Conventions, or other sources, are quite unclear and ambiguous.

The term Scout and Spy in International law is sometimes misunderstood as similar for espionage. However, both had different meaning and prospects. A Scout is someone who stays in military uniform or sufficiently designates himself as a combatant, has duty to collect, study and synthesis of information on probable and current enemy and worked as military or intelligence. They collect information by illegal methods. If caught, are dealt as a prisoner of war because there is nothing treacherous or deceitful about his scouting or Reconnaissance mission. However, a spy is someone who does not have a military uniform or a clear military designation, he collected information sometimes by kidnapping officials and uses different unfair methods to

obtaining information. They are the full time employees of foreign intelligence department are not entitled to any kind of protection as a prisoner of war. Their action leads them to severe punishment from the captors if caught. The penalty for espionage may differ from one country to another country but the punishment prescribed for espionage is very harsh in nature. The trial of the person caught with the charges of espionage need to be conducted as per the procedure prescribed under the law of that nation.

International Declarations and Conventions regulating Espionage are:[7]

- Brussels Declaration concerning the Laws and Customs of War (1874).
- The Hague Convention (II): Respecting the Laws and Customs of War on Land (1899).
- The Hague Convention (IV): Respecting the Laws and Customs of War (1907)
- Geneva Convention (IV): Relative to the Protection of Civilian Persons in Time of War (1949)
- The Vienna Convention on Diplomatic Relations (1961).
- The Vienna Convention on Consular Relations (1963)
- Agreement on Trade-Related Aspects of Intellectual Property Rights (1994) (TRIPS).

The Brussels Declaration concerning the Laws and Customs of War (1874) is not ratified by even the Nations who drafted it. This was just an attempt to codify the laws relating to war but which could not be successful. Article 19-22 of the Convention deals with the issue of spies during the war time and they are[8]:

Article 19 of the convention states that, a person can only be considered a spy when acting clandestinely or on false pretenses he obtains or endeavors to obtain information in the districts occupied by the enemy, with the intention of communicating it to the hostile party. Whereas Article 20 provides, a spy taken in the act shall be tried and treated according to the laws in force in the army which captures him. Article 21, provides that, a spy who rejoins the army to which he belongs and who is subsequently captured by the enemy is treated as a prisoner of war and incurs no responsibility for his previous acts. And under article 22 of the convention specify when a soldier is not considered spy. Soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. The soldiers (and also civilians, carrying out their mission openly) entrusted with the delivery of dispatches intended either for their own army or for the enemy's army should not be considered as spies.

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[7]http://notabeneuh.blogspot.in/2013/11/spying-and-international-law.html) visited on 5th April,2018.
[8]http://web.ics.purdue.edu/~wggray/Teaching/His300/Handouts/Brussels-1874.html, visited on 15th February, 2018.

To this class belong likewise, if they are captured, persons sent in balloons for the purpose of carrying dispatches and, generally, of maintaining communications between the different parts of an army or a territory.

Cyber Espionage

The advent of new technology is placing challenges before the International law and also affecting the relationship between state parties. The cyberspace is directly used against the other state by intelligence agencies for gathering intelligence illegally and secretly. In absence of specific regulation under International Law to deal with cyber espionage, it will become very difficult to regulate the cyber espionage. There are no treaties, general principles or any international custom to prevent the modern state practice of intelligence gathering by the agencies using cyberspace. Cyber espionage is an act which specially targets secret information with malicious intention. But this definition is not clearly indicating which nature of information stolen or gathered illegally.

It is very difficult to define the term cyber espionage in this world of science and technology. Tallinn Manual, attempts to provide definitions, procedures, and rules governing international cyber operations. This manual, published in 2013 as a result of a conference hosted by the NATO Cooperative Cyber Defence Center of Excellence in Tallinn, Estonia, defines cyber espionage as an act undertaken clandestinely or under false pretenses that uses cyber capabilities to gather (or attempt to gather) information with the intention of communicating it to the opposing party.[9] Not only technical but legal and political hindrances are creating difficulty for the state party to defend cyber-attacks.

In the George W. Bush administration the Presidential Decisions on National Security categorized as National Security Presidential Directives (NSPD) for proper promulgation. The first NSPD was issued in 2001. In regards to cyber espionage the NSPD-16 outlined strategies, procedure, and protocols. The NSPD-16 was published in 2002 which talks about to develop the guidelines for offensive Cyber-Warfare. Further, the Defence Department published the Information Operation Roadmap in 2003 in which cyber warfare preparations incorporated in form of providing training to military in cyber defence.

In 2009, new US Cyber Command was establish in US Military and more fund were allocated for securing cyber infrastructure. Now two nations namely China and Russia had come out with high- tech cyber infrastructure with powerful cyber weapon which can be used to breakdown any nation's cyber system. It is suspected by the International Community that China had established a separate wing for the purpose of cyber espionage in their

[9]http://www.cse.wustl.edu/~jain/cse571-14/ftp/cyber_espionage/ visited on 7th May, 2018.

intelligence Department in the name of Cyber Intelligence and Russia had dedicated a military unit for the same purpose. They do hire the young students as hackers from the University directly and paying them for the same.

Effects of Cyber Espionage[10]:

In general for a common man or woman the concept of cyber espionage is very new and unknown to them so the impact of it is, too distant and not influences their life much. But the cyber espionage do effect adversely the nation. There will be monitory loss, damage cause to physical infrastructure and civilian casualties and the cost can range from minimum to the devastating. First significant impact of it will be on cost which varies from one kind of espionage to another. There will be loss of communication system which prevents the victim nation to defend back and be in the position of stability. Beside that there will be loss of property, infrastructure, and human life most importantly. The prominent example is Russia when they used the strategy on Estonia, Georgia and Ukraine because of which the victim Nation could not request the other Nation for help. Secondly primarily the cyber espionage may only affect one Nation but incidentally it also affects the entire Nation with which it has political and economic relation. It also impacts on the politics and media too. Legislature may make policy for combating cyber espionage if the thread of cyber war is high. The instances prove that the cyber espionage is so advanced that any nation could not prevent it.

Few important international instances of cyber espionage:

Espionage is itself an offence in international law. The principle of sovereignty does not allow any other state to interfere or intervene in the national policy of another state. So the international law does permit the espionage or intelligence gathering activities of other sovereign powers. The cyber espionage is most dangerous. The advent of several new technologies exposes the state in internationally or makes a sovereign from one point of view strong and from another point of view vulnerable. The cyber espionage is rampant in this present world. There are several instances where the government data, personal data, data in relation to national policy of a state, industrial data were stolen and misused. World's biggest powers like USA AND UK are affected by the cyber espionage.

The first state sponsored (Titan Rain) cyber espionage was held on from 2003 -2005 by the Chinese Military Hackers who hacked the US Government Computers and also UK defence and Foreign Ministers computers.

Most recently in the Year of 2016 the hacking group known as shadow brokers breached the spy tools elite NSA-linked operation known as equation

[10]Ibid.

group and they stole the NSA data and attempted to auction it. Yet the identity of the shadow broker is undisclosed. The action of the group becomes leaves the world in great debate about the maintainability and safeguard of data and information provided to the concern authority.

Gillette Industrial espionage is one of the examples of industrial espionage where as the culprit Mr. Davis was convicted for industrial espionage and sentenced for jail of 27 month. Mr. Davis was the company who discloses the secret corporate information to the company of the competitors.

In 2011 Chinese Hackers Night Dragon operation initiated by to hack the American and European energy business. The hackers got access topographical maps with potential oil reserves.

In this era of technology and science the espionage has become more dangerous. The cyber Espionage has becoming a serious concern for every nation. Any one from any part of the country can easily get the information about anything so long he/she has internet connection. An expert hacker can get in the website of any nation and collect the internal information and share it with the terrorist organization in lieu of money. The terrorist organizations are appointing hackers for the purpose of collecting the information of any nation and to use such information to cause mass destruction. In this present era what need to be done is to consider the vulnerability and over dependence of the population on internet and to make policies to regulate the easy accessibility of information on internet.

Conclusion

Security of homeland is the biggest priority of a nation. In terms of physical immediate destruction and causalities espionage seems to be less threatening. The advent of modern technology is becoming the biggest challenge of International Community. We cannot deny the fact that due to the advent of new technologies life of a person has become easier. However the fact that every coin has two sides also cannot be denied. It has several disadvantages too. Now in this present time the cyber world is becoming as a threat to a Nation as well as to an individual. New developed norms of internet will not prove as easy. Specially keeping in mind the Principle of International Peace and Security International Norms are being framed. But today because of the advent of modern advance technologies the cyber spying has become so easy. One sitting from one corner of country may get in any official website of another country and collect all confidential information to cause mass destruction by using internet. To control or to regulate the same still no International Laws or Rules are being framed. We are currently in this period of uncertainty for the internet, and as of now we don't have any stringent Interrelation regulation to deal with the situation. The development of norms for the purpose of regulating the internet accessibility will be particularly difficult for a nation.

EVIDENTIARY VALUE OF VOICE IDENTIFICATION IN CRIMINAL CASE

MRS. SHRUTI DASGUPTA[1]

With the advanced developments in the scientific world and technology there arises the need for the legal universe to take far-sighted approach in delivering and imparting justice. Sound Spectrogram was first developed by Alexander Melville Bell who penned the visual representation of the spoken words and sentences. It was based on the pronouncements made by the speakers while making conversations, it was based on the theory that there were differences on how different individuals spoke. The Voice Identification test or the speaker recognition test also termed as voice fingerprinting can said to be boon to the criminal jurisprudence. If cautioned with care and diligence it can be utilized as an effective tool in finding the criminal behind the black mask. The technology dates back to decades which believes and establishes that due to the different acoustic patterns including both anatomy and behavioral pattern a person's spectrogram differs from one to another. The acoustic scientists used this technology to identify the voices of their enemy during the World War II. Nowadays, the Speaker recognition has been used in telecom services as well as for security purposes. The new test of voice identification is also used in banking services for identity verification of the customers. The science of voice identification has travelled a string of changes way back from the times it was first introduced. However, its applicability, admissibility and significance are a few points which warrant detailed discussions which the article shall elaborately deal with.

Introduction

The omnipresence of communication technology has been one of the significant gifts to the humans though it is not devoid of its evil consequences. It has certainly helped the criminals to carry out their criminal activities with much ease and comfort. It has aided them to formulate the crimes in much organized and systematic manner which adds to the necessity of advanced and better equipped forensic research and sciences in order to detect such activities and punish the anti-social elements of the society.

The Speaker Identification or the Voice Identification test is a methodology which can help to detect the wrong-doer, the process is known as the Audio signal processing. Especially, in the case of bomb threat, threatening or anonymous calls, human trafficking, drug peddling or a kidnapping case asking for the ransom where the only clue police are left with is the voice of the caller, it is in these cases that the technology of audio processing comes to

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the rescue. This technology is based on the fact that every individual's voice is different and unique due to the anatomy of the vocal cords, vocal cavity, oral and nasal cavities and thereby the speech sounds coming from the vibrations of the vocal cords inside the larynx varies from person to person. The discovery of this theory can be dated back to the year 1867 when Mr. Melville Bell, the Father of the telephone inventor Mr. Alexander Graham Bell, created a system of hand written symbols that could represent the spoken words on paper and this process was called visual speech. Further in the year of 1941 the bell Laboratory engineers had invented a sound spectrograph or which may also be called as an automatic sound wave analyser which was used during the World War II to identify the voices and find the enemy. Voice can said to be the identity marker of an individual which reveals the personality, culture as well as the physical and emotional fitness.

Voice Identification has been used by the Police of various Nations and it been reiterated that sound spectrograph could be helpful to tell one person's voice from another with an accuracy of above 99%. It was also tested by asking the professional mimics to do mimicry and compared the same with the original and it did show separate spectrograms.

It is very interesting to note that there exists a line of difference between the voice verification and voice identification. The former is when the speaker claims to be of a particular identity and his voice needs to be verified against the same which may also be termed as voice authentication, it is done by the scientist by comparing two recorded speech by means of spectrogram or voice prints[2] and the latter is when an unknown speaker has to be identified. It may be well said that in voice verification there is a 1:1 template match and in voice identification there is a 1: N template match.

Identifying the criminals through voice identification has passed its latest tests.[3] A new venture named Speaker Identification Integrated Project which was funded by the grant of 10 million Euros by the European Union was tested by the United Kingdom Metropolitan Police Services and Portugal's Policia Judiciaria. Over a hundred voice identification researchers, police detectives and forensic scientists participated in the research to make it a success. It took four long years to complete the project. The project was undertaken by nineteen partners consisting of hi-tech industries, police agencies, INTERPOL, Airbus, Singular Logic, Nuance and the University of Warwick. The project also included 'Speaker Model Recognition' which does gender and age detection, keyword and Taxonomy Spotting.'

[2]Lisa Yount, Forensic Science- From Fibres to Fingerprints, Chelsa House Publishers, 2007, pp.109
[3]http://www.wnd.com/2017/12/cops-identifying-criminals-through-voice-recognition/#2PVjKESdbpvo6P6o.99 visited on 3/03/2018 at 11.30 a.m.

International Position

The question as to the admissibility of voice identification test in the American Courts came in the 1960s in the case of United States v. Wright[4] where the appellate court allowed the voice identification evidence to be admissible by the board of review. Next very important concern raised was whether voice identification to be considered as the substantive evidence or corroborative evidence, the Supreme Court of Minnesota in the case of State ex rel. Trimble v. Heldman[5] stated that spectrograms to be made admissible for corroborative evidence. In the year 1976, the Supreme Court of New York in the case of People v. Rogers[6] also supported the admissibility of spectrograph voice identification as the proper piece of evidence.

Further, in 1989, in an appeal of the case United States of America v. Tamara Jo Smith[7] the United States Court of Appeals (Seventh Circuit) upheld the decision given by the United States District court for the Northern District of Illinois stating the admissibility of spectrographic voice identification evidence as substantial evidence.

The judiciary while deciding upon the admissibility of tape recorded conversations in the case of Hopes v. H.M. Advocate[8] in a very befitting manner substantiated its points for considering the admissibility of voice identification. It contended that the advanced technology and novice devices are the order of the day and have their own pros and cons. Like the statements given by the Captain of the ship as to his observations cannot and should not be put down just because he used a telescope to see rather than the naked eyes similarly no scientific or advanced developments can be turned off just because they have used advanced technology which can be tampered with. There may be lacunae to the given theory which may be cured and may invite criticisms which is both necessary and important. However, it does not give the right to obliterate the idea altogether.

Further in the case of Rex v. Masqud[9] the Court of Criminal Appeal observed that photographs, situations and circumstances witnessed by binoculars and telescopes have been accepted as admissible evidence in the court of law. It has therefore accepted one of the primary senses of 'seeing'. The Court expressed its willingness to accept and adopt to the changes and advancements of the scientific technologies in the justice delivery system thereby ensuring speedy justice by also allowing to sensitize the sense of 'hearing' and advocating the acceptance of voice identification process in the forensic sciences.

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[4]USCMA 183, 37 CMR 447 (1967)
[5]192 NW, 2d 432(Minn. 1971)
[6]48 N.Y.2d 167.
[7]869 F.2d 348.
[8]1060 Scots Law Times 264.
[9]1965(2) ALL ER, 461.

Indian Position

The Indian Evidence Act, 1872, primarily dealt with the oral and documentary evidence but after the incorporation of the amendments according to the passing of the Information Technology Act, 2000 there has been an admissibility of the conversation or statement recorded in an electro-magnetic device.

There are a plethora of judicial pronouncements forming important discussions as to the admissibility of tape recorded conversation, a form of voice identification. The first case which came to the Indian Judiciary regarding the admissibility of tape recorded conversations was Rupchand v. Mahabir Prasad[10] the Honourable Apex Court allowed the admissibility of the same under Section 155(3) of the Evidence Act, 1872 to shake the credit of the witness.

Early in the year 1964, a case came to the Court regarding the admissibility of the tape recorded conversation, S. Pratap Singh v. State of Punjab[11], where it was held that the tape recorded evidence are admissible as evidence and merely the fact that it can be tampered with does not make it inadmissible as there are hardly or no piece of evidence which cannot be tampered with, for e.g. even the photographs can be tampered by the use of trick photography, it does not mean that photographs in toto will not be admissible in any of the cases.

Since there are a set of cautions which needs to be adhered to while taking the voice recognition as a piece of evidence to detect the criminal, the Apex Court in the case of Yusufalli Esmail Nagree v. State of Maharashtra[12] which was a case under Section 165-A of Indian Penal Code, 1860, presently under Section 7, 11 and 12 of the Prevention of Corruption Act, 1988, the entire conversation between the accused and the complainant was tape recorded. The Supreme Court laid down a set of principles to be followed in instances where tape recorded conversations has to be made admissible as evidence. Firstly, the tape recording will be admissible under Section 8 of the Indian Evidence Act, 1872. Secondly, the recorded conversation may be procured without the knowledge of the accused but it should not have been procured by duress or coercion or any type of force and the same was protected under Article 20(3) of the Constitution of India, which states that 'No person accused of any offence shall be compelled to be a witness against himself' and most importantly the Court must be satisfied beyond reasonable doubt that the recording has not been tampered at all.

It has been a common practice in cases arising under the Prevention of Corruption Act, 1988 to send the complainant with the tape recorder to collect the evidence to penalize the offender. In the case of Mahabir Prasad v.

[10]AIR 1970 Punjab 173.
[11]AIR 1964 SC 72.
[12]AIR 1968 SC 147.

Surinder Kaur[13] the Supreem court pondered about the degree and level of admissibility to be attributed to the evidentiary value of tape recorded conversations. The Court after having given much demanded serious thought stated that the tape recorded conversations can only be used as corroborative evidences of the conversations made by any of the parties.

In the case of Pratap Singh v. State of Punjab[14] it was held that slightest doubt of tampering with the tape recorded conversation would reject the evidentiary value of the same in its entirety. In Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdas Mehta[15] the Apex Court while interpreting Section 159 of the Indian Evidence Act, 1872 stated that the recorded conversations can also be used in order to refresh memory.

After the passing of the Information Technology Act, 2000 the position of Section 3, the definition of Evidence stands amended and clause (2) reads as follows 'all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence'. After such an amendment, there was an important question to be answered. The information stored on electronic device would be primary or secondary?

The tape recorded conversations will be regarded as substantive evidence or corroborative evidence?

The Apex Court in the cases of N. Sri Rama Reddy v. V.V. Giri[16], R.K. Malkani v. State of Maharashtra[17] and in the case of Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdas Mehta[18] held that the tape recorded conversation similar to other documents are primary and direct evidence and when the Court allows the tape recorded conversation to be played in the Court it cannot be confined to the utility of corroboration only but can also be proved as substantive evidence in absence of any tampering subject to the provisions of the Indian Evidence Act, 1872. After the above cited judicial pronouncements it can be established as a well settled rule of law that tape recorded conversations being primary and direct evidences can be used to authenticate what was told by a particular person at a given time.

According to the judgments given by the Honourable Courts in the Landmark Judicial pronouncements it can be stated that apart from being documentary evidence voice, recorded conversations can also be given in the following Sections of the Indian Evidence Act, 1872.

1. Sub-section (1) of Section 146-'to test the veracity of the witness being cross-examined.

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[13]AIR 1982 SC 1043.
[14]AIR 1964 SC 72.
[15]AIR 1986 SC 1788.
[16]AIR 1971 SC 1162.
[17]AIR 1973 SC 157.
[18]AIR 1975 SC 1788.

2. Exception (2) of Section 153-'in contradicting the witness'
3. Sub-section (3) of Section 155-'to prove his former statements inconsistent with any part of his evidence which can be contradicted.'

Steps taken to educate regarding Voice Identification:

Innovative and encouraging steps have been taken to include the beneficial aspects of voice recognition in criminal jurisprudence. The training of police officers by including a study of voice identification in Forensic Science subject has been undertaken by the Karnataka Police Academy.[19] Such steps are much required to be taken as at times, the only clue or the hint left with the police to identify the wrong doer is the voice as in the cases of kidnapping, bomb threat or any unknown callers. Voice identification Techniques are regularly conducted at Chandigarh Forensic Science Laboratories, there is a facility of Voice analysis facility at SRC Institute of Speech and Hearing, Bangalore, the All India Institute of Speech and Hearing, Mysore has been working and advancing in this area since a decade and has also expressed its plan to start a one-year PG Diploma course in forensic voice analysis.[20]

Conclusion

It can be well concluded by stating that voice identification with further advanced standards and authenticity and wide acceptance can be proved to be of immense assistance to the legal world and has enormous benefits such as quick analysis of recordings for recognition of voices and in the investigation support for Police forces and Law Enforcement Agencies. However, as there are two sides to every coin likewise this technology is also not without its limitations or vices. The propositions in support of the statement are that voices of an individual may change with age and time, wearing of false teeth, stress, illness or intoxication. There are still other factors such as shifting of a person from one country or region to another thereby bringing a change in one's accent.

However, the boldness which the Indian Judiciary has shown in accepting the Voice Identification as corroborative evidence and also substantive evidence in few exceptional cases is worth appreciating and applauding. The Forensic science has a long way to go and the intertwined relationship between forensic science and criminal judicial administration has once again been established and accepted.

[19]Forensic Science Law, Sarita Jhand, New Era Law Publications, 2017, pp. 401.
[20]Id, pp. 485.

PROTECTION AGAINST UNAUTORIZED CHARACTER MERCHANDISING UNDER THE INDIAN LEGAL REGIME

MS. RITUPARNA DE[1]

Introduction

The concept of character merchandising basically refers to building of a merchantable product about the celebrated character, fictional or in other way. As the vast recognition to lots of fictional and real lives characters, businesses these days are tremendously rising combining their innovative as well as active commodities and services with well-known personality, to influence on their recognition. With the passage of time, the area of character merchandising has enlarged in such varied way that what was seen as a derived source of business operation by the entertainment industry, has turn out to be the predecessor in terms of returns. Since, the early time of character merchandising while Walt Disney Studios started licensing of their renowned character in the 1930s to the current day film creation placement for instance, Toy Story where movies are created just about the character to provide as a means of endorsing of the toy characters,[2] character merchandising has emerged in such a flexible forms that their categorization in an structured way is necessary to understand the factual extent of character merchandising and is an crucial prerequisite to its study.

The Concept of Character

The term 'Character' in the context of Character Merchandising should be understood in the sense of famous characters which can be fictional human characters (like Chota Bheem, Chacha Chaudhary, Superman, Batsman etc.) or non-human characters (like Tom and Jerry, Donald Duck, etc.) and real characters like renowned individualities from different field (for eg. Sachin Tendulkar, Narendra Modi, Sharukh Khan, Arijit Singh and many others). It is mainly the basic characteristics of these famous characters that attract the people and many a times they agree to pay a lot more for the product than their actual price. These characteristics include their name, image, sign, voice and various other features that make them identifiable among the people at large.

The sources from which these characters have derived its origin are for fictional characters they are mainly literary works, strip cartoons, artistic works, cinematographic works (for example Anaconda, King Kong, etc. in respect of movies, certain motion picture cartoons) and for real characters the source is mainly the works with which they are related to for example, for actors it is the movie or television series in which they have acted.

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[2]Litwak Mark, Movie merchandising, available at hhtp://www.marklitwak.com/articles/general/movie_merchandising.htmlt (last visited on 29 Mar, 2017).

The sources from which these characters have derived its origin are for fictional characters they are mainly literary works, strip cartoons, artistic works, cinematographic works (for example Anaconda, King Kong, etc. in respect of movies, certain motion picture cartoons) and for real characters the source is mainly the works with which they are related to for example, for actors it is the movie or television series in which they have acted.[3]

The Rights Attached to a Character

The rights appended to an anecdotal character can for the most part be alluded to as "property rights," which incorporate monetary and misuse rights. Just like the case with most property, those rights incorporate the privilege to utilize an anecdotal character (or all the more definitely his name, picture, appearance, and so on.), the privilege to get the advantages coming about because of its utilization and the privilege to discard it.

As for genuine people, the rights appended to, bury alia, the name, picture or appearance of a genuine individual might be alluded to as "identity rights" or "reputation rights." Those rights incorporate the privilege to utilize the fundamental identity highlights and to get the advantages coming about because of such utilizes. Besides, where a specific type of legitimate security (for instance, trademark assurance) is pertinent to some of those components, the said frame may, under specific conditions, be exchanged.

On a basic level, just the individual or lawful substance that claims the rights in a character is qualified for practice the privilege to utilize it, including the setting up of a marketing program. On the off chance that the client or the merchandiser is not the proprietor of the rights, he will be viewed as a legal client or merchandiser in the event that he has asked for and gotten the preparatory approval (or, if conceivable, procured the rights) from the said proprietor.

Note that the rights connected to a character may appreciate legitimate security in various structures accessible either consequently, under specific conditions (for instance, copyright, identity or attention rights), or taking after a demonstration before an equipped specialist (for instance, trademark or modern outline insurance).

Ownership of the Rights Attached to a Character

The rights appended to a character (being an anecdotal character all things considered or the anecdotal character depicted by a genuine individual regarding picture promoting) are on a .fundamental level possessed by the maker of that character, unless the maker has exchanged his rights, was appointed to make, made over the span of his expert action for his manager

[3]Supra note 2 at 2.

or has passed on. On account of identity marketing, the rights appended to the genuine individual concerned are, on a basic level, claimed by the said individual.

Definition and Nature of Character Merchandising

'Character Merchandising' can be defined as one of the process of marketing, in which exploitation or adaptation of copyrighted characters takes place by associating the features of those characters with goods and services to increase the popularity and willingness among the customers for purchasing the particular good and service.[4]

Some famous examples of Character Merchandising can be noticed while buying T-Shirts, coffee mugs, water bottles, Tiffin boxes, three-dimensional toys, etc. bearing the name and symbol of characters such as Batsman, Spiderman, Harry Potter, Chota Bheem, Tin-tin, Donald Duck, etc. and other things or accessories associated with real life personalities like that of movie stars, sports star, singers, choreographers, political leaders or other people from various fields.

Character Merchandising is otherwise lawful in nature when it's done by authorized third parties but when it is done in a wrongful manner without proper authorization from original creators of those characters only then the rights of creators' gets affected and legal issues come into the picture. There is no sui-generis law for character merchandising so as the characters are principally protected under the copyright law; it automatically comes under the purview of Intellectual Property Law even though there are many other laws associated with it such as Trademark Law, Industrial Designs, Contract Law, Constitutional Law, Unfair Competition, etc.

Historical Background of the growth of 'Character Merchandising' [5]

Character Merchandising in a systematic manner was for the first time originated in the United States of America in the year 1930's with the advent of Walt Disney Studio in Burbank (California). It was this company which created the famous cartoon characters Mickey, Minnie and Donald. Kay Kameen, who was an employee in the company, started commercializing these characters by the method of secondary exploitation and this was possible as the company granted him licenses for manufacturing and distributing articles bearing the features of those characters. If traced back one can find the existence of secondary exploitation of characters even before the before the twentieth century even though at that time it was not purpose of economic gain. One of the examples of such existence can be found in South Asia more

[4]Supra note 2 at 2.
[5]Supra note 2 at 2.

specifically in India where religion based characters from the epic 'Ramanaya' like Rama, Lakshmana and Sita were given a form through sculptures, posters, puppets and in many other forms.

It was much later, when industrialists started adapting characters with an idea of popularizing good and for commercial gain. They then started to associate their goods be it toys, clothes, posters, clocks or any other with the basic features of these famous characters. This process speeded up mainly during the 20th century. In 1950's, real personalities be it movie stars or politicians or businessmen in order to gain popularity started authorizing manufacturers to produce their name and images on different goods. They called this process as 'tie-in-advertising'. Merchanding of film based characters started only in the 1980's and few of its examples can be Star Wars, Rambo, E.T., etc.

Developments of Character Merchandising

From Reports

- As per the PwC Reports, The Indian Entertainment Industry is likely to reach Rs 2,272 billion by 2018 at a mix annual growth rate of 15%. Whereas, it could be supposed to be the highest increasing entertainment industry over worldwide.
- PEW Research Centre Internet Project Survey discovered that the existing populations, on the whole, age group 18 – 29 have about 97% right to use to the internet and different other forms of media. As an outcome, they have been out in the open to these movies, TV Series, Games, Books, etc. Now a day's children and youth as well having a better buying power because they are having way in to funds.

Forms of Character Merchandising

There are various sort of character that is used in merchandising and the business opportunities of merchandising chiefly built upon on its character type. Thus, merchandising could be divided into the subsequent categories on the basis of nature of characters. As for a business or from advertising view point, character merchandising can almost certainly be dealt with on its own type. Nonetheless, in lawful sense it is imperative to distinguish between the different apt of merchandising, as the extent and length of legal safety might differ as per the character concerned.

There exist two major class exist rely upon if the merchandising include the exploit of fictional characters or of real personalities (by and large called as personality merchandising). Among these above two class, a third fusion also prevail which is usually called to as 'image merchandising'.

Merchandising of Fictional Characters

This is the earliest and the most recognized type of merchandising. It includes the application of the important personality features such as name, figure, and etc. of imaginary characters in the selling and/or promotion of goods or services. Initially, the exercise of character merchandising, as a well thought-out scheme of endorsement, urbanized as a way of using or taking the advantage of the fame of cartoon characters, through illustrating the eye-catching figures and the like. The very conception of character merchandising and the ensuing business mould were originally shaped about fictional cartoon characters, with Walt Disney Studios with a set-up of a separate unit to permit the rights to exploit the admired cartoon characters Mickey, Minnie and Donald on a variety of purchaser stuff.[6] Cartoon characters are the primeval and possibly the most accepted merchantable character yet formed. Vending of fictional/ cartoon characters includes exercise of distinctive individuality of a well-known character for instance, the manifestation, name, picture, sounds/discussion on customer commodities. Few of the instance comprise of the application of images of Mickey and Minnie on Cadbury chocolates, the illustration of Spiderman and Superman on apparel and so on. Such application of manifestation and erstwhile qualities may take place in two dimensional or three dimensional forms.

Fictional or cartoon characters can initiate by the way of a range of sources such as:

Literary works: Beginning with the typical children's narrative for instance The Adventure of Pinnocchio, Alice in Wonderland to cartoon strips like Garfield, Calvin and Hobbs, literary works have been the biggest foundation of fictional an cartoon characters. Whereas a few of these celebrated literary wonder portray characters in such a way that a person who read can effortlessly think about the characters, generally other literary works are guided by their optical art appearance. Like the cartoon strip started becoming renowned all around the world as the character of Tintin was displayed in various animated movies and television shows. Now a day's business of merchandising is so well planned around Tintin.[7]

Artistic Works: in regards to artistic works, the depictions of Mona Lisa by Da Vinci as well as the artworks of Raja Ram Mohan Roy got to be distinctly renowned and are currently sold by their canvas in itself as well as by the automating that as related with such compositions as T-shirts which have such prints and also versatile covers additionally numerous a

[6]Supra note 2 at 2.

[7]Verbauwhede Lien, Savvy marketing: Merchandising of intellectual property rights, WIPO, available at hhtp://www.wipo.int/sme/end/document/merchandising.htm (last visited 5th Apr, 2017).

circumstances creative characters are made which are not some portion of any TV or motion picture in itself yet rather are made for advancing the promotion itself. Couple of cases for this situation is the character of Fido Dido made prevalent through Seven-Up[8] or the character of ZUZU made well known for the commercial of Vodafone.

Cinematography Films: Cinematography movies or motion pictures or recordings are exceptionally well known method for appropriating or marketing since they contact a far more noteworthy gathering of people and have a much bigger effect on them because of their high excitement esteem. Film characters, for example, the Lion King, Kung Fu Panda, Shriek, Frozen, etc, and so forth are enormously prevalent everywhere throughout the world. In simply a year ago the motion picture solidified sold over $4 billion worth of stock and the most recent star war motion picture Star War (The Force Awakens) have sold over $243 million worth of stock and this prohibits the books which sold more than $2 million books as it were.[9]

Personality Merchandising

This is the other type of promoting the characters which includes the utilization of the important properties (name, picture, voice and other identity elements) of genuine people (as such, the genuine character of a person) in the showcasing and additionally publicizing of merchandise and ventures. All in all, the genuine individual whose characteristics are "marketed" is outstanding to general society everywhere; this is the motivation behind why this type of promoting has now and again been alluded to as "notoriety promoting."[10] truth be told, from a business perspective, merchandisers trust that the primary purpose behind a man to purchase low-valued mass products (mugs, scarves, identifications, T-shirts, and so forth.) is not a result of the item itself but rather in light of the fact that the name or picture of a big name speaking to that individual is recreated on the item.

This classification can be subdivided into two structures. The primary shape comprises in the utilization of the name, picture (in a few measurements) or image of a genuine individual.[11] This shape relates for the

[8]Rahul Bajaj, An Analysis of the Burgeoning Character Merchandising Industry in India, October 25, 2014 available at https://blog.ipleaders.in/an-analysis-of-the-burgeoning-character-merchandising-industry-in-india/ (last visited at 5th Apr, 2017).

[9]Paul Bond, A Breakdown of Star Wars Merchandise Sales This year, The Hollywood Reporter, available at http://www.hllywoodreporter.com/news/a-breakdown-star-wars-merchandise-849861 (last visited 5th Apr, 2017).

[10]Nishant Kewalramani and S.Hedge, Character Merchandising, 17 Journal of Intellectual Property Rights, 454-462, 456, available at http://nopr.niscair.res.in/bitstream/123456789/14770/3/JIPR%2017(5)%20.pdf (last visited 7th Apr, 2017).

[11]Supra note 2 at 2.

most part to celebrated people in the film or music businesses. Nonetheless, people associated with different fields of movement might be apprehensive (for instance, individuals from an imperial family). As demonstrated above, it is less the item which is of chief significance to the buyer, but instead the name or picture that it bears is the primary promoting and publicizing means of expression. The second frame happens where masters in specific fields, for example, acclaimed games or music identities, show up in promoting efforts in connection to products or administrations. The interest for the potential buyer is that the identity spoke to supports the item or administration concerned and is viewed as a specialist. Obviously, the more the item or administration promoted is connected with the action of the identity, the more the potential buyer will consider that the said item or administration is supported and endorsed by that identity (publicizing for sneakers or rackets by a tennis champion, publicizing for a caffeinated drink by a cross country runner or publicizing for high-devotion gear or melodic instruments by a pop star).

Image Merchandising

This is the latest type of marketing. It includes the utilization of anecdotal film or TV characters, played by genuine performers, in the showcasing and publicizing of merchandise or administrations. In those cases, general society once in a while thinks that it’s hard to separate the performer (genuine individual) from the part he plays (character depicted).[12] Here and there, be that as it may, there is a total affiliation and the genuine individual is alluded to and known by the name of the character. The accompanying cases can be given to show this thought: from the film ventures, Laurel and Hardy, the Marx Brothers, Crocodile Dundee, James Bond 007 played via Sean Connery and Roger Moore, Frankenstein's beast by Boris Karloff and Tarzan by Johnny Weissmuller; from TV arrangement, Columbo played by Peter Falk, the character J.R. in "Dallas," played by Larry Hagman, or the character McGyver played by Richard Dean Anderson. On account of the last mentioned, a T-shirt bearing the picture of R.D. Anderson would be eluded to as a "McGyver T-shirt," while packs of dairy items replicating the picture of R.D. Anderson would say the name McGyver, the acquiring of such item giving the likelihood of winning optional "McGyver" items, for example, T-shirts or travel packs.

On account of picture promoting, products or administrations will be advertised with the marketing of particular components of a film or arrangement (appearance and dress of the performer when playing the character combined with huge parts of a scene (for instance, early on scenes

[12]Supra note 7 at 7.

of the James Bond movies, the appearance and weapons of Rambo or the "cut scene" in Crocodile Dundee).

Protection from Character Merchandising and the Legal Developments

Even though character merchandising involves several other laws but it is most intrinsically related to copyright law and Trademark law, as characters are mostly the outcomes of some artistic or literary wok and as these characters are used for trade or merchandise purpose it necessarily involves Trademark law. But the matter is not always so simple there are at many times several complexities attached to it. Here, basically all such copyright issues and the protection that is provided to characters through copyright are being discussed.

Copyright Issues in relation to Character Merchandizing

- The author of these characters generally holds the authority over his characters as it is only he himself who has created those characters but as they are no more restricted to the movies and cartoons only but also becomes a significant part of human life as people remember them for longer periods even after the shows goes off air, this becomes a plus point for the third parties. They taking the benefit often without any authorization of the author start using these characters for his personal and economic benefit by merchandising their goods with the help of these characters. At that time the only option left with the author is to remedy from court but there problem is often characters fails to get protection themselves. They are not considered to be original rather treated as mere ideas thus to get protection for merchandising becomes really difficult.[13]

- Another issue that crops up is in relation to cinematographic films, generally for cinematographic films it is the producer who is the author of the cinematographic work and has all the rights to exploit his work in all possible manners but there are certain exceptions prevailing. Firstly, the question arises is that when a non-fictional movie is being made there are actors who plays certain characters so is it correct to vest all rights to producers or actors must all possess certain rights basing on their labor and effort which they have put in to perform the roles. Their performer's right must also be taken into notice. Secondly, the question arises in relation to image merchandising where even though the producers posses all the rights still the actors can object to use any of their image by producers on the basis hampering their public rights.[14]

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[13]Shreya Chadda, Character Merchandising under Copyright Law, available at https://www.academia.edu /24841199/character_merchandising_under_copyright_law (Last visited 10th Feb, 2017).

[14]Supra note 7 at 7.

• A question which still prevails is in relation to personal rights of celebrities and which is very much associated with their right to privacy. Being a public figure it's very difficult to differentiate between their public and private life as everything comes into public domain and everything becomes a part of publicity. Now the question is does using their status or reputation without their consent for any economic or others benefits does not infringe their rights?[15]

Copyright Protection available for characters along with its limitations

Copyright law protects fictional characters from being copied as it would amount to copyright infringement. Even if directly or indirectly the substantial part is copied it would amount to copyright infringement. Whenever fictional characters are represented, an artistic character is attached to them as a result they are protected under artistic works. So, if any character of Walt Disney for e.g. Donald Duck used anywhere without the prior permission of the owner then it will amount to copyright infringement. One can claim copyright over only on an expression but not on an idea itself that's why the literary characters do not enjoy the copyright protection but the characters like Harry Potter, Batman etc are so popular that even if any work is there which is based on them then it would lead to direct infringement as it would be easy to differentiate between the imposter and the real character itself. So the court should focus on the comparison between the characters rather than examining the qualities or literary or dramatic works.

Therefore,

• to get the copyright protection the fictional character should be specifically described and developed.

• the creator should first prove that the alleged infringer had the access to that fictional character.

• one must have to prove that there is substantial similarity between the infringing character and the original one.

Copyright as a means of dispute resolution[16]

To judge the disputes, the dispute resolution model takes in to consideration the endorsement, which means copyright, must exist above publicity, trademark infringement and passing off claims if the owner of copyright takes in to utilisation of his effort in such a way that it do not suggest the support of the celebrity. Example In a cinematographic film the producer of it uses his film images in a way that it is not suggesting the approval by any celebrity for the characters they played in the movie then celebrity would not in trade mark

[15]Id.

[16]Supra note 7 at 7

infringement, passing off claim or trademark infringement against the producer.

• Copyright owner controls all the rights to permit merchandising of a character in case of cartoon or animated characters.

Producer of the film has all the right relating to exploitation of images from the animated films.

• The copyright owner of animated character should be able to put an stop for any activity of merchandising by producer in case of absence of any contract which is providing the producer with such merchandising rights in animated films based on comic book series or on an earlier famous animated character.

• The producer of the film should be permitted to merchandise the stills from the film which are cinematographic and where celebrities play the role of a well-known character like Spiderman, Batman, Harry Potter etc. even if the such images depict the celebrity because here in the image the celebrity is in shoes of the character and association of the public is with the celebrity alone but with the character. Example for the character of James bond various celebrities played this character in different films so people ultimately relate to the character rather than the celebrity. The judging authority may impose a condition that the producer have to mention on the merchandise that celebrity does not endorse this character.

Producer will impose conditional merchandising in case of cinematographic film not based on any prior famous characters and major contribution is of the celebrity in the success of the film. Some such strict conditions to be imposed on using of stills comprising of celebrities such as:-

• Using an image whose dominant part is comprised of celebrity should not be permitted.

• If there is an image from the film comprising of the celebrity then it should be accompanied by title of the film which should be written next to the image to suggest that the merchandising is based on stills from the film and no endorsement by celebrity.

• The merchandise should have a notice with it that the celebrity does not endorse the product, it is the stills from the film which has been used.

The dialogues of the celebrity from film should not be used by producer for merchandising as it would lead customers to believe in the fact that the celebrity is endorsing the product.

'Character Merchandising'- A Trademark and Passing off Issue

In recent years, the entities holding the ownership rights over characters register these characters as trademarks or at times when left unregistered seeks passing off action before the Court in case of any infringement. This is due to the fact that characters today are often been commercially exploited by the

owners of these characters by associating them with various goods and services.

Like other marks, characters also fulfils the purpose of 'distinctiveness' thereby, the consumers having affinity towards a particular fictional or real life character often associates the good to the origin of such character. Therefore, any unauthorized use by third party can create a misrepresentation in the minds of customers. Thereby, helps in lowering down the image and reputation of famous characters. This, problem is all the more significant in case of 'celebrity merchandising' as in this case the popularity and reputation of a celebrity plays a major role.[17] It is a common tendency among the customers that they associate the goodness of a product to the image of famous celebrities that they are of the belief that if a particular celebrity is endorsing a product then it is sure to be of high quality. But often unauthorized use creates a risk of loss of reputation among the owners of famous characters and among celebrities.

An issue arose few years before regarding famous film star Amitabh Bachchan's baritone voice.[18] The voice is a part of his basic features and it's a mode of distinctiveness among common mass. Through its use any person will be able to determine that the voice belongs to him therefore any misrepresentation of his voice may hamper his reputation heavily. A tobacco company in order to increase the sell of their product allegedly used the "imitated voice" of the famous actor.

The actor in response stated: "Not only is this unethical and wrong, it paints me in bad light as well... For someone that does not smoke or propagate smoking or any kind of intoxicant... it is most disgusting to find someone conflagrating the law of the land." [19]

He further stated: "Caricatured images are used for commercial gain without our permission and this is completely undesirable." [20]

Protection under Trademark Law

Under the trademark law there are certain conditions which need to be fulfilled before a mark can be registered. The basic characteristics of a fictional character are more towards fulfilment of the conditions for registration than that of the characteristics of real personalities. There are several issues raised in regard to registration of the features of some real person and that is why

[17]Nishant Kewalramani and S.Hedge, Character Merchandising, 17 Journal of Intellectual Property Rights, 454-462, 456, available at http://nopr.niscair.res.in/bitstream/123456789/14770/3/JIPR%2017(5)%20.pdf (last visited 7th Apr, 2017).

[18]'Amitabh Bachchan to get copyright', available at: http://indiatoday.intoday.in/story/amitabh-bachchan-to-get-copyright/1/119209.html (last visited 3rd Apr, 2017).

[19]Id.

[20]Id.

many personalities have adopted ‘stage names’, ‘personalized logos’, ‘nick names’, etc. to get them registered.[21] Registration must be done without making any delay as in many countries rights can only derive through registration and also because the popularity of any character can be for a certain time limit only.

There are different requirements of registration under different countries which are of substantive nature. This must be understood in the context of merchandising of characters. Like in some countries there is a requirement that there should be an existing relationship between the business of the owner or holder of the mark and of the products and services on which the trademark is applied. In case of character merchandising application of such condition becomes quite difficult in this case no such relationship exists. The creator or owner of the character cannot in any manner be indulged in the production or manufacture of goods on which the mark will be applied. Nevertheless, in the modern scenario there has been several instances when are marks are getting registered and applied on different goods even though it bears no such relationship with the person or entity who has applied for the registration of the mark.

In some other countries, under the condition for registration of marks it is stated that the marks that are to be registered must have posses the quality of distinctiveness. That is it should be such that it leaves no scope for confusion in the minds of public regarding the mark. Putting up such conditions on characters creates lots of hindrance in the registrability under the trademark law. Because it is said that in some countries distinctiveness alone is not enough it must also possess a secondary meaning. However, the laws of every country are not similar and therefore for fictional characters in some countries the names of those characters are considered fanciful therefore it becomes registrable. In regard to the registrability of names and surnames of real persons, laws of certain countries provide trademark protection but the rights can be limited as there can be other people bearing similar name and in certain situations they might continue using their own names. Only when an attempt will be made to distort the reputation of any famous personality by using his name, the trademark law will look into it.

Then there is also another condition for registration of trademark and that is “effective use of a mark”. This rule is prevalent in almost all the countries that the applicant or the trademark holder might at time to time give proof to the respective authorities regarding the use of mark, be it at the time of application or renewal. Non-use of mark may lead to invalidation of right over the particular mark. If this condition is to be understood in the context of character merchandising then the holder of the mark would be considered to be using the mark even if it is used by the authorized users of that particular

[21]Supra note 2 at 2.

trademark holder like the licensees or persons involved in merchandising the product because the holder in this case might not be a part of the merchandise at all. So, it can be seen that even though characters do not exactly fits to the criteria of trademark protection like all other marks because of its certain uniqueness. Nevertheless, it can provided trademark protection if there will slight flexibility in the conditions of registration for trademark protection.

Protection under Indian Trademark Act

The Trade Marks Act, 1999 is an elaborate Act where the provisions are mostly wide in nature thus, the issue of character merchandising can be best solved under this Act than any other prevailing law in the country. Under the Act the term trademark has been defined and according to it trademark is "any mark that is capable of (a) being represented graphically; and (b) distinguishing goods and services of different persons."[22] Thus, according to the definition marks which are of distinctive nature be it any name, label, numbers, letters, shape of goods, colour combination etc. Following this particular definition distinctive fictional characters or distinctive features of famous personalities which are easily recognizable by persons can be given protection under the Act.

After the registration of the mark that is the 'character' as a trademark. The owner would get certain rights under the particular Act. Like the owner "can prevent others from using an identical or deceptively similar mark without permission on their goods or services for sale, offering or advertisement and can also prevent import of goods with such marks in India."[23] The registration also provides a presumption of validity of trademark to the owner. If any person falsifies any registered trademark of the owner or by any means applies it falsely to any other product in order to create confusion then it would be considered to an offence under the Act thus, punishable in nature.[24] If any person desires to use such a registered trademark it can only be done by acquiring permission from the owner of the mark. All these rights can be enjoyed by the owner of any particular character if the distinctiveness of the character is being registered as a mark. It is not only granted to the fictional characters even in case of celebrity merchandising the celebrities too can register their famous features such as name, voice or any other trait as a distinctive mark.

Even in situations where the mark is not registered, any unauthorized use can be restricted by seeking relief under common law. In order to do so one must bring passing off action against the infringer who has used the marks of famous characters or personalities.

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[22]Section 2(zb) of Trademark Act, 1999.
[23]Section 29 of Trademark Act, 1999.
[24]Section 102 & 103 of Trademark Act, 1999.

Court's Precedents dealing with the issue of Character Merchandising

- According to the Indian situation, in Malayala Manorama v V. T. Thomas, the Kerala High Court recognized the drawings made utilizing the cartoon character and the authentic cartoon character. The Court elucidated that the copyright over the drawings made with the character would lie with the publishing house as an artistic work, though the copyright over the authentic character vest with Mr. Thomas.
- Star India Pvt. Ltd. v. Leo Burnett (India) Pvt. Ltd., the Bombay High Court stated all the fictional or the real characters are subjected to secondary exploitation in character merchandising when they get license in this regard and the characters have a value of their own which increases the value of the commodity.
- The Delhi High Court in Disney Enterprises Inc & Anr. vs Santosh Kumar & Anr., held that the defendant was liable for putting the items on sale containing representations of characters such as Hannah Montana, Winnie the Pooh, etc whose ownership rights is of the plaintiff. The court also held that there is an extreme degree of connection between the plaintiffs and the aforesaid characters.
- In D.M. Entertainment Pvt. Ltd. V. Baby Gift House and Ors., In this case court further elucidated that the right to publicity of a celebrity can, in a methodological sense, be situated with the person's right and is free to allow or not to allow for the purpose of marketing his work or further use of his reproduction or other some of the traits if his persona.
- In ICC Development International V. Arvee Enterprise, The Delhi High Court approach back in 2003 spell out to facilitate the right to publicity of a celebrity encompass right to privacy provided under Article 21 of the Constitution of India. The court aimed to bring publicity right under the ambit Article 21 can be better portrayed in the courts subsequent language.

  The right to publicity have emerged from the right of privacy and may exist merely in an individual or in at all sign of a character personality like his name, personality, trait, signature, voice, etc. The right of publicity lies in an individual and he himself is permitted to profit from it. For instance if at all any person, was to use Kapil Dev or Sachin Tenduklar given name/ personality/sign in link with the World Cup devoid of their approval, they will have a legitimate and fair grounds of action.

Conclusion

In the last few years there has been a rapid growth in the field of 'Character Merchandising' regardless of the fact that till now there is no proper law formulated in this regard. This is because of high yield in revenue this particular business earns. Considering the growing affinity towards characters be it real or fictional among maximum percentage of today's population,

character merchandising in almost every country has shifted from an insignificant to one of the most significant modes of earning among businessmen.

Although it earns a huge amount of revenue for the owners of these characters but it's still a matter of concern among the copyright owners of these characters or for celebrities due to the non availability of proper legislation in this regard. If the rate of growth of this practice is to be considered they the legislation of different countries in this regard is lagging behind. In order to protect the owners from the infringers and to continue with the revenue it is generating, a foremost piece of character merchandising licenses and assignments should be dealt under the law of contract. Necessary alteration should be brought under the Copyright Law so as to explicitly take fictional and real characters within the scope of Copyright protection. Under the Copyright Act, 1957 definite facet of a character's personality such as voice, figure, outward show, label, events, eccentricity, etc. should be exclusively brought, guarding its security. Most importantly, the legislators must come up with a 'sui generis' law in this regard. There is a need to formulate a separate Act that would deal with the issue in its totality and would be able to combat the limitations in the already established laws.

A CRITICAL ANALYSIS OF INTELLECTUAL PROPERTY ASSET MANAGEMENT STRATEGY IN SPECIAL REFERENCE TO DARJEELING TEA

ANUTTAMA GHOSE[1]

Abstract

Darjeeling Tea is one of the most exotic type of beverage which is available in India and is mainly produced in the Darjeeling district of West Bengal, India. It plays a vital role in generating economy and symbolizes as the cultural and collective heritage of India. Darjeeling tea is considered an Intellectual asset and predominantly protected under the domain of Geographical Indication. In this research paper the author analyses various aspects of Intellectual property laws, under which Darjeeling tea is protected because of this unique flavors and esteemed reputation in the global market. In this study an endeavor will be made to examine the Intellectual Property Asset Management strategies and legal framework which are instituted to retain the authenticity of Darjeeling tea among the consumers.

Globalization has given our nation a venerated platform to put forward our tradition and culture in front of the entire world and even provided us with the opportunity to generate economy by utilizing such assets. But at the same time due to unfair competition prevailing in the market it has exposed our assets towards various vulnerabilities, which has been discussed in this research with the help of case studies on such infringement incidents. Along with this in this paper we have put forward various essential regulatory and structural changes which should be adopted by the governing bodies to not only safeguard our intellectual assets but also shall be utilized to retain the goodwill associated with Darjeeling tea in the market since ages.

Keywords: Intellectual Property, Darjeeling Tea, Geographical Indication, Commercial strategy, Goodwill.

Introduction

Tea is one of the most common beverages across the world and has become an everyday need in every household in India. Despite of presence of various tea-producing companies in the market, Darjeeling tea is the most popular one due to its distinctive flavor and quality. This variety of tea is only cultivated and produced in this specific region of Himalayas in the district of Darjeeling, and these special characteristics of the tea cannot be replicated in anywhere else. The local know-how, cool moist climate, rainfall and topographical

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scenario plays a vital role in the exclusive availability of this product in this specific area. Any person can identify the odor and flavor of Darjeeling Tea easily than any other product in the market.

Protection for Darjeeling Tea: Darjeeling Tea is protected under the Geographical Indication of Goods (Registration and Protection) Act, 1999. Geographical Indication is a name or symbol which indicates a product which is available only in a certain geographical territory. The GI certification assures the presence of certain specific qualities, traditional practices, which differentiates the product from other competitors in the market.[2]

Due to distinctive flavor and quality which can easily attract consumers, over many years Darjeeling Tea has enjoyed unique reputation in the tea market. Darjeeling tea is administered by the Tea Board of India which controls the production and commercial exploitation of Darjeeling Tea in the market. They are also entitled to protect the product from infringement by competitors. They have also protected the logo under the various aspects of Intellectual Property laws across the world. In India Darjeeling Tea is protected under Geographical Indication of Goods (Registration and Protection) Act, 1999, the logo and the term "Darjeeling" is protected under the Trademark Act, 1999 and Copyright laws.

Need for Intellectual Property Management in Case of Darjeeling Tea

The worldwide reputation of Darjeeling Tea has created a huge market for its products. Infact as per records, *"in 1866, Darjeeling had 39 gardens producing a total of 21,000 kilograms of tea per year. Tea cultivation in Darjeeling has continued to prove to be a profitable venture, and today, nearly 17,400 hectares in 87 tea gardens produce over 10 million kilograms of tea every year."* [3] Even though it is produced in a limited quantity, this vintage tea generated returns several times higher than ordinary tea which is produced in India.

Around 70 percent of the tea cultivated in Darjeeling is exported in the worldwide market like Germany, Japan, the United Kingdom, the United States of America and other EU countries. Infact, presently India is confronting tremendous competition from other significant tea producing nations, such as Kenya, Sri Lanka and China. A huge amount of profit is earned from exporting Darjeeling Tea, because of its international demand and hence it plays a vital role in economic development of the nation. Apart from

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[2]Darjeeling Tea: Indian Geographical Indication, Indian Institute of Patent and Trademark Attorney (IIPTA), Oct, 2012, available at: https://www.iipta.com/darjeeling-tea-indian-geographical-indication/ (accessed on 13.04.2018).

[3]Managing the Challenges of Protection and Enforcement of Intellectual Property Rights, WIPO World Intellectual Property Rights, available at http://www.wipo.int/ipadvantage/en/details.jsp?id=2540 (accessed on 13.04.2018).

that the production procedure also provides employment opportunity to over 15000 people out of which majority are women.

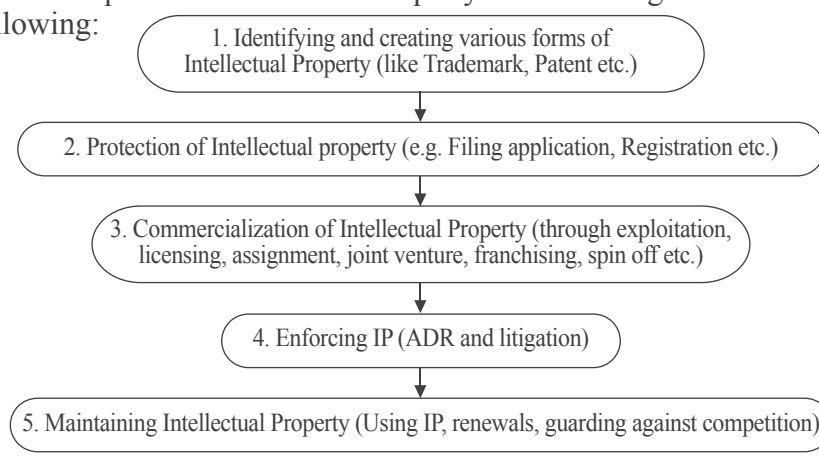
Thus an adequate legal protection is vital for the protection of legitimate propritors of Darjeeling tea in order to protect their hard work from the dishonest business practices of various fake and unfair commercial entities. For example, tea produced in countries like Kenya, Sri Lanka or even Nepal has often been passed off around the world as 'Darjeeling tea'[4]. Appropriate legal protection of this GI can ensure originality, prevent such misuse and infringement. Without adequate management strategy it would be difficult to prevent the misuse of Darjeeling Tea's reputation and goodwill in both domestic and international arena, causing damage to consumers and denying the premium price to Darjeeling tea industry.

IP Management Principles Existing in the Case of Darjeeling Tea

Tea Board and Darjeeling planters association has jointly made an effort to safeguard Darjeeling tea and its reputation. Their main objective involves:

- Ensure to prevent unauthorized entities from using the word 'Darjeeling' so that the reputation and goodwill of Darjeeling tea can be retained in the global market.
- To exploit it economically in the global market in order to generate capital for the nation and also to benefit the plantation workers.
- To obtain well known and reputation standard like that of Scotch and Whiskey in the international market.

Various aspect of Intellectual Property Asset Management included the following:



[4]Protecting Darjeeling Tea: The tea from Queen of Hills, Source Trace, available at http://www.sourcetrace.com/protecting-gi-darjeeling-tea/ (accessed on 13.04.2018).

In the light of these aspects of IP Asset Management let us analyze the efforts undertaken by Tea Board and Darjeeling planters association to secure Darjeeling Tea.

1. Identifying Various forms of Intellectual Property Associated with Darjeeling Tea

If we observe the Darjeeling tea we can establish that various forms of Intellectual Property is associated with their product and business. They are:

- **Geographical Indication:** The Darjeeling region has the perfect soil and environmental conditions for tea cultivation with slopes as steep as sixty to seventy degrees, the gradient of the hills provide natural drainage during the monsoon season. The soil of this also very useful for high quality tea cultivation. The standard carbon content of soil in other tea growing areas in India is less than one percent, but this quantity is much higher in the Darjeeling region. Rich in organic matter from forest cover and the weathering of underlying rocks, the soil has plenty of crucial nutrients, and combined with the unique weather and geographical conditions make an environment perfect for cultivating tea. Thus these unique elements of the tea cannot be replicated in anywhere else. Due its distinctive flavor and remarkable quality Darjeeling Tea can be protected under the aspect of Geographical Indication.
- **Traditional Knowledge:** Darjeeling Tea can also be regarded as a traditional knowledge of that area because tea in the Darjeeling region has been cultivated for generations, the local population is consist of skilled workers possessing traditional knowledge of tea cultivation specific to the region and know-how has become a family tradition among the population. The traditional knowledge the women possess ensures that they can efficiently pick Darjeeling tea while being careful to protect the tea bushes from any undue stress. Along with the specific soil and environmental conditions of the region, the traditional knowledge and production practices of local producers differentiates Darjeeling tea from other teas grown anywhere else in the world.[5] It is regarded that the soft fingers of the women are ideal to pluck the tea leaves, and this has continued for years.
- **Trademark:** The word "Darjeeling" when associated with the product that is, "tea", indicates its source, which assures the consumers with the exotic flavor and quality of the product. This mark plays a vital role in identifying a source with is product and often acts like a marketing tool as well. Hence the word "Darjeeling" not only represents the product but also generates a reputation in the market and hence shall be protected to prevent it from misuse by other entities.

[5]Managing the Challenges of Protection and Enforcement of Intellectual Property Rights, IPO World Intellectual Property Rights, available at: http://www.wipo.int/ipadvantage/en/details.jsp?id=2540 , accessed on 13.04.2018.

• Copyright: The Darjeeling logo is copyright protected and registered as an artistic work with the Copyright Office under the Indian Copyright Act of 1957.

2. Protection and Registration of Darjeeling Tea

In India Darjeeling Tea is registered under the following:

• The word "Darjeeling" and their logo are registered as certification mark of Tea Board under the Trade Marks Act, 1999.

• In the name of Tea Board, the first protection which was provided to Darjeeling Tea in the form of the name as well as logo was under the Geographical Indication of Goods (Registration and Protection) Act, 1999.

• Along with these the artistic efforts which is put in order to create the logo is also protected the copyright laws.

Apart from these internationally, the logo of Darjeeling tea has been registered in various nations including Canada, Egypt, some European countries, Japan, Lebanon, the United Kingdom and the United States of America as a trademark/certification mark/collective mark. Along with that, the word "DARJEELING" is registered as a trademark in Russia, and similar registration of the word is pending in Australia (as a certification mark), in the European Union (as a Community collective mark), and in Germany and Japan (as a collective mark). The logo is also registered internationally under the Madrid system.[6]

3. Commercialization of Darjeeling Tea

The strategy for commercialization undertaken for Darjeeling tea is Compulsory licensing. The Tea Board in India teams up with the Darjeeling Planters in order to fulfill the end goal of taking care and ensuring appropriate supply of Darjeeling Tea in the market. The Tea Board started in 2000 a compulsory strategy of certifying the realness of Darjeeling tea under the rules laid down in the Tea Act of 1953. The framework requires all merchants in Darjeeling tea to necessarily go into a permit concurrence by obtaining a license with the Tea Board and pay a yearly permit expense. Under this validation procedure, 171 organizations managing Darjeeling tea have enrolled with the Tea Board, 74 of which are producer entities and 97 merchant/exporter companies.[7] Endorsements through Certificates of Origin are then issued for exporting these products.. This guarantees the supply-chain

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[6]Darjeeling Tea: Indian Geographical Indication, Indian Institute of Patent and Trademark Attorney (IIPTA), Oct, 2012, available at:
https://www.iipta.com/darjeeling-tea-indian-geographical-indication/ (accessed on 13.04.2018).

[7]Managing the Challenges of Protection and Enforcement of Intellectual Property Rights, WIPO World Intellectual Property Rights, available at:
http://www.wipo.int/ipadvantage/en/details.jsp?id=2540 , accessed on 13.04.2018.

veracity and reliability of Darjeeling tea until the point when these dispatches leave the shores of India. The Customs checkpoints in India ensures that these exported products bear certificates of origin as per the instruction given by the authoritative bodies.

The Tea Board has likewise looked for assistance from every single abroad purchaser, venders and Tea Councils and Associations to such an extent as they should demand that Certificates of Origin in order to ensure all fare transfers of Darjeeling tea. Overseas merchants are in this way guaranteed of 100% genuine Darjeeling tea in the entirety of their relegations.

4. Enforcement of Rights by Darjeeling Tea:

In order to fulfill these objectives they have hired solution provider company named- CompuMark. CompuMark supervises and reports to the Tea Board all cases of unauthorized use and attempted registration. Due to the efforts of CompuMark, several cases of attempted registrations and unauthorized use of "Darjeeling" and the Darjeeling logo have been reported and actions have been taken against such wrongful activities. Few instances have been successfully concluded in countries like Japan, Sri Lanka and Russia, while others are still pending decision. Some of the major disputes are:

- In one of the most initial case the Tea Board recorded a refutation activity against International Tea KK, a Japanese Company, regarding the issue of registration of the Darjeeling logo mark, ie. Darjeeling lady 'serving beverage' in the Japanese Patent Office (JPO). The Tea Board likewise documented and filed a filed a non-use cancellation action. The JPO Board of Appeal held that the wrongful registration done by the Japanese company was invalid since it was in opposition to public order and moral standards. With respect to the Tea Board's non-use cancellation action, the JPO ruled that International Tea KK had not outfitted adequate proof to substantiate its utilization of registration and hence took the decision in the favor of the Tea Board.
- After that in Russia, the Tea Board once again filed an application for unapproved use by an organization of the word 'Darjeeling'. This application was questioned on the ground of contention with a prior enlistment of the indistinguishable word by an organization named 'Akorus'. The Russian Patent Office overruled the complaint and acknowledged the use of Tea Board of India for the word 'Darjeeling'.[8]
- In United states the Tea Board is opposing and fighting an application filed by its licensee in United States to enlist 'Darjeeling nouveau' ('nouveau' is the French for 'new') identifying with different products and administration,

[8]S C Srivastava, Protecting Geographical Indication for Darjeeling Tea, Managing challenges of WTO Participation: Case Study 16, World Trade Organisation, available at https://www.wto.org/english/res_e/booksp_e/casestudies_e/case16_e.htm (accessed on 13.04.2018).

for example, attire, underwear, Internet administrations, espresso, cocoa et cetera in regard of first flush Darjeeling tea. The enrollment application is under review despite the fact that 'Darjeeling' is as of now enlisted under US CTM law.

5. Maintaining the IP Rights Associated with Darjeeling Tea:

The Tea board of India has attempted different strategies to shield Darjeeling Tea from its rivalries and preserve its quality over the world. Other than setting licensing and certification rules, the following stage in the safeguarding Darjeeling tea includes checking the development of green leaf and the expansion of the certification framework to abroad markets, which are as of now self definitive.

- An online arrangement is proposed for the purpose in order to encourage ease of use and curtail paper work.
- Undoubtedly, it would be in the best interests of industry to export a value added product. The economies however require making sense both in terms of value addition as well as importing duty rates for packet tea in bulk.
- The Tea Board has been associating with tea importing communities like Germany and the United Kingdom in this venture.[9]

These measures, however moderate moving in a lot of cases, have had a combined impact. Today, around the world, there is an expanding awareness and attention to the name Darjeeling as a secured element. Meanwhile to advance Darjeeling tea and unite its value alongside expanding shopper mindfulness about Darjeeling as a Geographical Indication, the Tea Board is holding celebrations in different fare markets and running Darjeeling tea advancements together with retail chains and strength eateries. Advertising and instructive correspondence through educational materials are scattering the awareness of Darjeeling Tea worldwide and in addition in India as well.

Conclusion: Critical Analysis of the IP Management Strategy of Darjeeling Tea Even after adopting various strategies to commercialize Darjeeling tea, the Tea Board is yet to overcome various hurdles which may hamper the generation of economy is the long run. Such issues are the following

A. Issue of Unaware Population: Irrespective of the efforts to popularize Darjeeling tea in the International market, the efforts of Tea board may not have been very successful in the domestic sphere as a result of which many consumers are still unaware of the official Darjeeling tea logo nor familiar with the concept of Geographical Indication. Regular customer tends to

[9]Managing the Challenges of Protection and Enforcement of Intellectual Property Rights, WIPO World Intellectual Property Rights, available at: http://www.wipo.int/ipadvantage/en/details.jsp?id=2540 , accessed on 13.04.2018.

purchase tea from local suppliers and believes the image portrayed by those sellers only. A profusion of teas abusing or infringing the Darjeeling name along with labels such as "fair-trade certified tea" or "certified organic tea" creates confusion and deception, which at the end results into lack of proper know-how where consumers do not really verify the official GI logo when buying loose or packaged Darjeeling tea.[10]

Hence in order to clear such deception and confusion from the minds of the consumer, various strategies to commercialize and market Darjeeling Tea shall be adopted in such a manner that not only the consumer can be made aware of the quality and reputation associated with Darjeeling tea but also at the same time shall be able to identify the authenticity of the logo and avoid any sorts of confusion regarding the same. In this way they can procure themselves from buying misleading and fake products which are sold in the market under the same name. "Tea Tourism" programs can also be initiated and encouraged to market the authentic Darjeeling Tea among consumers.

B. Issue of Adulteration and Blending: It has been seen that with the end goal to increase the amount of item producers frequently mix ordinary assortment of tea with that of Darjeeling Tea. Thus, the quality detorriates and can't meet the consumer expectation Such acts additionally hampers the worldwide goodwill of the item and causes huge misfortune.

With the end goal to stay away from such situations, the Tea Board should roll out a few improvements in the commercialization strategies. They ought to be more strict with the licensing strategies and certificates will only be given after cautious assessment of the quality.

C. Enforcement Issues: The Tea Board of India has confronted various obstacles, difficulties and challenges in the protection and enforcement of the word 'Darjeeling' and of the Darjeeling logo. While the Indian legal system protects French GIs, France on the other hand does not extend similar or reciprocal protection to Indian GIs. In this manner French law does not allow any resistance to an application for a trademark comparable or indistinguishable to a GI if the products secured are not the same as those spoken to by the GI. The owner of the GI can take appropriate judicial proceedings only after the impugned application has proceeded to registration. The net effect of such a provision has been that despite India's protests, Darjeeling has been misappropriated as a trade mark in respect of

[10]Sudhir Ravidhran & Arya Mathew, The Protection of Geographical Indication in India – Case Study on 'Darjeeling Tea', INTERNATIONAL PROPERTY RIGHTS INDEX, 2009 Report, Chapter VI : Case studies, available at https://www.altacit.com/wp-content/uploads/2015/03/The-Protection-of-Geographical-Indication-in-India-Case-Study-on-Darjeeling-Tea.pdf (accessed on 13.04.2018)

several goods, namely, clothing, shoes and headgear etc. In these scenarios the Tea Board has failed to enforce the IP rights associated with Darjeeling Tea.

D. Cost and Expenditure Issues: Another significant problem faced by the Tea Board of India relates to legal and registration expenses, enrollment costs, expenses of employing a global watch office and battling encroachments in international jurisdictions. This costs include administrative expenses of pertinent personnel working for the Tea Board, the cost of setting up monitoring apparatus, software development costs etc. It is difficult for every geographical indication right holder to indulge into such expenses for protection. Further, such as administering, observing and executing GI protection, the staggering expense of making lawful move can prevent a country from engaging a lawyer to contest the case, however real and solid the case may be. Moreover, a lack of expertise in the proper treatment of highly complex legal dialect is another challenge to be met.

Thus they best way to deal with these issues is by indulging into commercialization in the global market through one big and trustful entity so that the various activities associated and cost implementations can be supervised in the most efficient way possible. Indian Government and tea board authorities along with Darjeeling tea producers and major market players should join hand to protect the distinctiveness of Darjeeling tea as a real GI belonging to India and should come out with the pioneering schemes such as "TEA TOURISM" for endorsement of genuine Darjeeling tea in international field in order to curb the issues relating to financial shortage and expand recognition at the same time.[11]

Darjeeling Tea is one of the most important and popular product of India protected under Geographical indication. The worldwide reputation and the huge market makes the product economically significant and valuable Intellectual Property Asset. And thus well organized strategy to manage Darjeeling tea can not only protect it from infringement but also secure the unique quality and retain the cultural and collective heritage of India.

[11]S C Srivastava, Protecting Geographical Indication for Darjeeling Tea, Managing challenges of WTO Participation: Case Study 16, World Trade Organisation, available at https://www.wto.org/english/res_e/booksp_e/casestudies_e/case16_e.htm (accessed on 13.04.2018).

ESPIONAGE UNDER INTERNATIONAL HUMANITARIAN LAW: AN ANALYSIS WITH SPECIAL FOCUS TO KULBHUSHAN YADAV CASE

MS. MAMTA THAPA[1]

Abstract

In this paper an endeavor has been made to understand the concept of the Espionage in the ream of International law and throw a light on the Kulbhushan Yadav Case to analyze its relevance and applicability. Espionage is the practice of spying or of using spies, typically by governments to obtain political and military information and in regard to International Law, espionage and gathering intelligence methods and techniques may violate certain treaties concerning Human Rights, such as right to privacy and principles set by international law on non-interference on internal affairs of another state. The relationship between espionage and international law is not yet defined but international law is tolerant toward the process of spying on foreign countries.

However the applicability of this law was questioned in the case of Khulbhushan Yadav, where a former Naval Officer was arrested in the Balochistan, Pakistan in the month of August over charges of terrorism, and spying for India's Intelligence Agency. In this article the author has tried to examine the practical applicability of the laws in the international regime and also discussed the loopholes which are currently present in the global practices.

Introduction

Espionage has not been given a statutory definition, however; it is a somewhat prohibited act under International Humanitarian law. It can be defined as an act of collecting or gathering information secretly. It is an illegal act and not only prohibited but also punishable. International Humanitarian Law or jus in bello or Law in war[2], consists of numerous international conventions which includes the, the Hague Regulations of 1907 with regard to the manner of conflict, St Petersburg Declaration, and several other treaties that helped in formulation of the Four Geneva Convention 1949 and their Additional Protocols of 1977. International Humanitarian law also comprises of several customary principles founded on the basis of worldwide recognition of conventions.[3] Addition to this there are growing bodies of treaties on particular

[1]Assistant Professor of Law, Indian Institute of Legal Studies

[2]EMILY CRAWFORD & ALISON PERT, INTERNATIONAL HUMANITARIAN LAW,4-27(2015).

[3]Stanford University, Review of The Applicability of International Humanitarian Law to The Occupied Palestinian Territory (July, 2004) available at https://web.stanford.edu/group/scai/images/harvardreview.pdf.

aspect of armed conflict. The development of International Criminal law has also played an effected role in implementation of International Humanitarian law.[4]

It has been the primary objective of international humanitarian law to try and shield the civilians from any sort of aggression that may take place around them because if the aforementioned purpose is not perused then warring states would fire indiscriminately without caution, resulting in taking lives of civilians as collateral damage. Civilians would also become strategically targets in such cases, thus their protection is one of the major concerns of international community.[5] Concept of espionage in the international Humanitarian law doesn't presents a comprehensive and preventive definition of espionage which can be generalized to all types of espionage as the same is not possible. Aside from this, espionage's spatial and time realm varies based on the case; however, the concept of espionage from the perspective of international Humanitarian laws can be reviewed from two general dimensions of classical international laws and modern international laws. The concept of espionage in international laws that comes to mind at first is the discussion of espionage armed conflicts which has long been discussed. Article 29 of the 1907 Hague regulations defined a spy as follows: a spy is who secretly or under false issues acts to collect and transfer information for the enemy in the operational region f the enemy. Then, in the process of development of international laws, the concept of espionage went through some changes as well.[6] With the approval of the 1977 Additional Protocol I to the Geneva Convention 1949 of supporting the victims of international armed conflicts (1997), it was attempted to reduce the inclusion of individuals under the title of spy and to exclude the dressed civilians and military men from the definition of espionage. Article 46 of the 1977 Additional Protocol I to the Geneva Convention 1949 can be mentioned which has only included members of armed forces under the title of espionage.[7] It is possible that the image would be that definition of espionage in armed conflicts and reviewing its laws are not efficient; because nowadays, one of the basic principles of the contemporary international laws is sanction of the war and prevention of using force. But nonetheless, international Humanitarian law have made waging war legitimate and legal in some cases despite the acceptance of the principle of banning using force and sanction of the war. Therefore, the international laws and regulations governing espionage in this field is also crucial.

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[4]Emily Crawford, supra note 1.
[5]Pat Andriola, Did Israel Violate International Humanitarian Law during Operation Protective Edge? EMORY LAW (Nov. 2015)
http://law.emory.edu/eilr/_documents/volumes/30/recent%20developments/andriola.pdf.
[6]1907 Hague regulations
[7]1977 Additional Protocol I to the Geneva Convention 1949

IHL on Espionage by sovereign nations

International sanctions contradict certain fundamental principles of international law, explicitly the principle of Self determination and state sovereignty[8]. Under the United Nations Charter Article 2 provides protection of Sovereignty to all nations and Article 2(7) provides United Nations shall not intervene with matters which are domestic concern of a state[9] and as the very purpose of international sanctions is to alter the behavior of a state[10] it is implied that such intervention may violate the sovereignty of a nation.

However, Permanent Court of Justice in Wimbledon case[11] stated that when a state voluntarily surrenders its sovereignty by forming an International agreement it cannot be considered as unlawful or in violation of the Charter. In the present case a British ship namely S.S. Wimbledon was carrying military equipments which were to be used in the war fought by Poland against Russia. As the shipment was supposed to cross though the Kiel Canal of Germany and as agreed in the Treaty of Versailles (1919) that all state who are at peace with Germany would be allowed to cross it's Kiel Canal, however Germany refused to grant access. The matter was presented before the Permanent Court of Justice. The court while adjudicating the matter stated that ratification of a Treaty is a power which a nation exercises as sovereign and as Germany signed and rectified the Treaty the same is binding[12]. Therefore when a state undertake any legal obligation under a treaty and accepts to undergo sanction in case of any violation of such legal obligation such imposition of sanction shall not deemed to be in contravention with any prevailing International law. Thus IHL being comprised on multilateral treaties cannot be held as violating the sovereignty of member nations.

The Prohibition on Espionage as a form of Anti-diplomacy

Professor James Der Derian presented the term "Anti Diplomacy" in a book of a similar title published in 1992. In the book, Der Derian noticed that: "new innovative practices and widespread threats, interceded by the specific interests of the national security state, have created a new anti-diplomacy." Put in an unexpected way, when a particular spying operation is led against the raison d'être of our public international system, when such an operation is contradictory to the soul of the U.N. Sanction, such an operation should be analyzed as an abuse of the privilege to spy and should be prohibited.

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[8]Supra note 22

[9]UN Charter <http://www.icj-cij.org/documents/index.php?p1=4&p2=1&> accessed 3 January 2017

[10]Supra note 14

[11]UK, Fr., Italy & Japan v. Ger, (1923) PCIJ Series A01
<http://www.icj-cij.org/pcij/serie_A/A_01/03_Wimbledon_Arret_08_1923.pdf>
accessed 3 January 2017

[12]ibid

In this regard, the new Charter has bought a vivid change from the days of Nizam Al-Mulk or Sir Francis Walsingham because for them firstly, all the intelligence operation was inherently justified, and none of the target was ever immune but under the Charter there are certain logical ground to disgrace or stigmatize those operations that would cause a chilling effect on international co-operation and also on the future negotiations of treaties, or on the engagements of States with adjudicative bodies, or on the work of the U.N. and other inter governmental mechanisms.

Difference between Intelligence Activity and Espionage

The term Intelligence activity means secretly gathering of information by the members of armed forces carried out in the uniform to understand the situation and analyze the option open to the opponent party whereas Espionage simply means the act of spying or using spies to secretly gather information. Though the primary task in both the cases is collection of information done secretly but the same is viewed differently from the perspective of international humanitarian law.

According to A.P.I. Art 46.2, if a member of the armed forces is caught in the territory of the adverse party while gathering information or attempting to gather information then he will not be considered to be engaged in espionage.

API Art. 46.3 is a clause which deals with the gathering of information in an occupied territory if a member of armed force who is resident of occupied territory by an adverse party and who on behalf of the party on which he depends gathers or attempts to collect information of military values shall also not be considered to be engaging in espionage unless he does that on a false pretenses or deliberately in a clandestine manner. Such a resident will not be treated as a spy unless he is arrested while doing an act of espionage.

API Art. 46.4 further says that if an armed force member who is not a resident of territory occupied by an adverse party and who is engaged in espionage in that geographical location shall not forfeit his right to the status of prisoners of war and hence will not be treated as a spy unless he is captured before he rejoined the armed forces to which he belongs.

Whereas if a spy is caught while doing the same act then he is assimilated in the category of saboteur and he cannot be benefited from the status of prisoners of war. But he must be treated with humanity and should be punished with a fair and a regular trial according to the Article 5 of Third Geneva Convention relating to treatment of Prisoners of War.

Customary international humanitarian law prescribes that in the context of an international armed conflict, combatants who are captured while engaged in espionage do not have the right to prisoner-of-war status. They may not be convicted or sentenced without previous trial[13].

[13]rule 107 of the 2005 ICRC customary IHL study

Vienna Convention on Consular relations of 1963

The international treaty that deals with the framework of consular relations between states is Vienna Convention on consular relations of 1963. A consul is an official usually appointed to look after the commercial affair and the welfare of the one's own citizen in another state to perform two functions and they are firstly to protect the interest and look after the welfare of own countrymen in the host country and secondly to further the commercial and economic relations between the two states.

The Vienna Convention on Consular Relations (1963) is an extensive document and this treaty is ratified by 179 states and following are the key provisions:

1. There are thirteen functions of a consul which are listed and it includes protecting in the receiving state the interests of the sending state and its nationals, as well as developing the commercial, economic, cultural, and scientific relations between the two states.[14]

2. The host nation at any time and for any reason may declare a particular member of the consular staff to be persona non grata and the sending state must recall this person within a reasonable period of time, or otherwise this person may lose their consular immunity.[15]

3.The host nation must protect the premises from intrusion or damage and should not enter the consular premises.[16]

4. It also deals with the freedom of communication between the consul and their home country and further says that the consular bag must never be opened as well as a consular courier must never be detained.[17]

5. Foreign nationals who are arrested or detained should be given a notice "without delay" of their right to have their embassy or consulate notified of that arrest. On the request of detained foreign national the police must fax that notice to the embassy or consulate, which they can use to check up on the person. The notice to the consulate can be done through very simple manner like sending details to the consul by fax providing details of the person like his name, place of arrest, reason for arrest or detention.[18]

Case of Kulbhushan Yadav

Kulbhushan Yadav, a former Naval Officer was arrested in the Balochistan, Pakistan in the month of August over charges of terrorism, and spying for India's Intelligence Agency. India made several request for consular access to Kulbhushan Yadav, according to the provisions of Vienna Convention on

[14]Article 5 of Vienna Convention on Consular relations, 1963
[15]Article 23 of Vienna Convention on Consular relations, 1963
[16]Article 31 of Vienna Convention on Consular relations, 1963
[17]Article 35 of Vienna Convention on Consular relations, 1963
[18]Article 36 of Vienna Convention on Consular relations, 1963

Consular Relations of 1963 which allows state consular access to their national whether arrested or detained in other state and the same have been acceded both by India and Pakistan but the application has been rejected by Pakistan and finally Pakistan Military court came out with a judgment for awarding death penalty to Kulbhushan Yadav. Thereafter on May 8, 2017 India knocked the door of International Court of Justice and filed an appeal against the death penalty. During its submission India also expressed its concern and fear over the fact that Pakistan could execute the death sentence before the hearing at the ICJ was over. ICJ ruled that Pakistan's treatment of Jadhav is a gross violation of international laws and stalled his execution. After this ruling India stepped forward and challenged the ruling of UN Top court and on 18th May it passed another verdict putting a temporary stay over the death sentence and asking Pakistan not to execute Kulbhushan Yadav before they decide the case.[19]

The president of the ICJ, Ronny Abraham also had a meeting with the representative of both the states over the same matter and have asked India to make full submission of matter before it by 13th September 2017 and have also asked Islamabad to make it counter submission by 13th December 2017.[20]

ICJ decision on Death Penalty against other states

It is not only India who had dragged Pakistan before the International Court of Justice for passing death sentence without letting the consular access to the accused person and thereby violating the provision of Vienna Convention on Consular Relations of 1963 but there have been instances where other countries have also been dragged in similar matter:

- **Paraguay Vs United States[21]**

  Paraguay had dragged United States in April, 1998 before the ICJ charging that the state of Virginia had contravene the provision of Vienna Convention by neglecting to advise Angel Francisco Breard, a Paraguayan, of his entitlement to contact the Paraguayan consulate for help after his detention . A report in Firstpost, said The Hague approached US to "take all measures at its disposal" to keep the execution of Breard, pending a final decision in the proceedings instituted by Paraguay. However, Breard was executed on April 14. Later, the United States officially apologized and guaranteed of a better future compliance with the Vienna Convention and with that on 11th November 1998, Paraguay withdrew the case from the Court's List

[19]https://timesofindia.indiatimes.com/topic/kulbhushan-jadhav
[20]http://www.hindustantimes.com/india-news/kulbhushan-jadhav-s-death-sentence-india-submits-written-pleadings-to-icj/story-g4LjyHgZYrsCPEyV79OayM.html
[21]http://www.haguejusticeportal.net/index.php?id=6216

- **Germany Vs United States**[22]

  This case is popularly known as LaGrand Case. In this case the citizens of the state of Germany namely Walter LaGrand and his brother Karl were detained by the US state of Arizona in 1982 on doubt of armed robbery and murder and the duo were not informed about their consular right hence in the year 1999, Germany instituted a suit against the US for neglecting to inform them about their right to consular access, guaranteed under the Vienna Convention. The appeal in this regard was instituted on the eve of the brothers' execution but the brother Karl was executed before the case started and then Germany raised a demand that the United State must compensate Karl's family and halt Walter's execution should not be executed till the pending of the proceedings. The same was reflected in the verdict of the International Court of Justice as it asked the United State to ensure Walter was not executed during proceedings but the US executed Walter on the very same day then Germany then modified its complaint alleging the US with violating international law by failing to implement the provisional measures. The US argued that the Vienna Convention did not grant rights to individuals, only to states. The ICJ ruled in favour of Germany on June 27, 2001.

- **Mexico Vs United States**[23]

  This case is also commonly known as Avena case. It was instituted on 9th January 2003 by Mexico to drag the United States before the International Court of justice over a dispute relating to the contravention of the provision of Articles 5 and 36 of the Vienna Convention with respect to 54 Mexican Citizens. The right of these 54 nationals was violated as they were awarded death penalty by the United States. Mexico requested the ICJ to ensure that the US should neither execute them nor set an execution dates for any Mexican national before the court passes the judgment and the ICJ after establishing that it had jurisdiction to deal with the case, passed a ruling that its jurisdiction lies only in establishing whether the US breached its obligations as mentioned under Article 36, paragraph 1, of the Vienna Convention and not functioning as "a court of criminal appeal". court, however, said that no execution dates should be fixed in any of the cases before it passes a decision. It has also taken consideration of the fact that the three Mexican citizens were at a risk of execution in the coming months, or possibly even weeks, and their execution would cause irreparable prejudice to any rights that may subsequently be adjudged by the court to belong to Mexico". After deliberating for months, the court concluded that in 51 of the cases, the US had breached its obligation by not informing the appropriate Mexican consular post without delay about the

[22]https://www.icj-cij.org/en/case/104
[23]https://www.icj-cij.org/en/case/128

judicial process and as a result of the same US had also deprived Mexico of its right to provide assistance to its citizens. Hence the US was ordered to provide review and reconsideration of the judgments in relation to Mexican nationals and also to implement specific and necessary measures to ensure non-repetition.

Death sentence to Jadhav violates international standards

Death Penalty has been looked as a distasteful practise in the recent years by the International Community and various International and Human Rights organisations. The Second Optional Protocol to the International Covenant on Civil and Political Rights was specifically framed aiming at the abolition of the death penalty.

Death sentence by the Pakistan's military court to Indian national Kulbhushan Jadav has been highly criticised globally. Amnesty International which works against the human rights abuses and campaigns for compliance with international laws and standards questioned the secretive courts ability to dispense justice.

Mr. Biraj Patnaik, South-Asia Director of Amnesty International said, "The death sentence given to Kulbushan Jadhav shows yet again shows how Pakistan's military court system rides roughshod over international standards".

Amnesty International which opposes death penalty in all the circumstances and situation regardless of who is accused, the crime, guilt or innocence, or the method of execution so it stood against the judgement of Pakistan's army chief Gen Qamar Javed Bajwa.

The judgement was criticised not only for awarding death penalty on the ground of alleged spying and charges of espionage and sabotage activities but also for neglecting and rejecting the petition for consular access to him which is one of the provision in Vienna Convention on Consular relations, 1963 which have been acceded by Pakistan, through which it is also very much clear that the judgement of Pakistan's military court was not through a fair trial. It is also said that in Pakistan at the end of 2016 more than 6000 people were awarded death sentence which is among top 5 executioners. In the year 2015 almost 326 death sentences were executed and 87 in 2016.[24]

- **Asian Legal Resource Center**

  In a recent article, "Pakistan: Government Undermine The People's Right to Life" the Asian Legal Resource Centre at (ALRC) showed its concerns to the UN Human Right Council about the Pakistani Government's clear infringement of Article 6 of the ICCPR.[25] Furthermore, the ALRC also

[24]"Death sentences and executions in 2016". amnesty.org. Retrieved August 21, 2017.
[25]http://alrc.asia/article2/2016/03/pakistan-government-undermines-the-peoples-right-to-life/

stated that Article 9 of Pakistan Constitution states that: "No Person shall be deprived of life or liberty saves in accordance with law," yet the country's civilian and military courts are sentencing people without following due process. Even the façade of the rule of law has taken a back seat as the State gropes in the dark to deter terrorism with judicial and quasi-judicial terror. They argue that the Pakistani Government are not following international principles or instructions of 'most serious crimes' when ordering the killing of vulnerable people usually for the most pity crimes.

- **Amnesty International**

  Amnesty International argues that almost 8,200 people were awarded death penalty at the end of 2014 and almost 8,500 were thought to be on death row as of June 2015. In October 2015, Minister of State for Interior Muhammad Baligh Rahman told the Senate that there were 6,016 death row inmates in the country, but it is not clear whether he was alluding only to inmates whose death sentences had been finalized on appeal[26]. Amnesty also alleged that since the lifting of a six-year banned on execution, there have been more than 400 carried out by the Pakistani Government. Amnesty found that not only it is an infringement of right to life, but on many event, capital punishment is usually imposed after an unfair trial by both the military and the civil courts.

Conclusion

Espionage i.e. the act of collecting and gathering information secretly of other nation is a prohibited act and punishably by law but there is a lacking of proper definition of espionage as when the same act is done by an armed personnel wearing uniform to analyze the resorts open to them, then the same is viewed in differently and if caught while doing so the armed personnel enjoys the status of "prisoners of war".

[26]Cornell Center on the Death Penalty Worldwide "Pakistan", https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Pakistan#f4-2. Retrieved September 7th, 2017.

A CRITICAL ANALYSIS OF PSYCHOLOGICAL AUTOPSY AS A PART OF FORENSIC MEDICINE AND ITS LEGAL APPLICATION

SOUVIK DHAR, LL.M.

Abstract

Forensic medicine deals with the application of medical knowledge to administration of law. Written as early as in 4th century B.C, Kautilya's Arthashastra describes the importance of autopsy in establishing the crime. Psychological autopsy evolves as an important part of forensic medicine in recent time. Psychological autopsy is a comprehensive retrospective post-mortem investigation which assesses the psychological and behavioral history of the deceased in equivocal death. An equivocal death is a death in which it is not instantly clear whether a person has committed suicide or not. In this era of competitiveness, psychological problem is one of the leading causes of surge in suicidal deaths. At the same time, religious faiths are deeply rooted and black magic is still practice in abundance. Amidst this complex structure of society and complex human behavior, it becomes important for investigating authorities to know the exact cause of death in equivocal deaths. This research paper aims at providing importance of psychological autopsy in investigation stage of equivocal deaths and its legal application. This project is a doctrinal one where the sources of data are case laws, legal journals, newspapers, medical journals and various websites on law and medicine. From the research work it is found that psychological autopsy provides helping hands to investigating authorities in cases of equivocal deaths.

Introduction

While physics and mathematics may tell us how the universe began, they are not much use in predicting human behavior because there are far too many equations to solve.[1]

This quote of Stephen Hawking sets the tone of this article. There are several things happening which are not easily traceable. Unless and until it is traceable and the imaginary guess is not transforming into fact, it is impossible to come to a conclusion of the cause of the crime. If proofs are not beyond a reasonable doubt, the accused will get off scot-free. In our criminal legal system, Judiciary's decision is never rested upon suspicion. The gravest suspicion against the accused is not enough to convict him of the crime unless evidence proves it beyond doubt.

Nothing matters but the facts. Without them, the science of criminal investigation is nothing more than a guessing game.[2] In criminal investigation,

[1]https://www.brainyquote.com/quotes/stephen_hawking_627173?src=t_human_behavior.
[2]https://www.brainyquote.com/quotes/blake_edwards_401491?src=t_investigation.

the investigator tries to reach the root of the cause of the crime. He is supposed to add up all the ends to form a proper structure of the events that led to the crime.

In Equivocal Deaths, it is quite a painstaking job for the investigators to find out whether it is homicidal death or suicidal death. If investigators are confused over this fact, it becomes impossible for them to submit chargesheet before the Court within statutory period.

Equivocal Death

An equivocal death is a death in which it is not immediately clear whether person committed suicide or not (e.g. drug-ingestion deaths, single car accident deaths).[3]

In Om Parkash Kumar vs The State Of Himachal Pradesh[4], wife of the accused was found death but it was not clear whether she has committed suicide or not as the post-mortem report laid down the reason of death was coal-gas poisoning but not completely eradicated the possibility of strychnine poisoning. This is an example of equivocal death. It was not sure whether the lady was poisoned by her husband or it was accidental death due to coal gas poisoning.

Equivocal Death Investigations

"Equivocal death investigations are those inquiries that are open to interpretation. There may be two or more meanings and the case may present as either a homicide or a suicide depending upon the circumstances. The facts are purposefully vague or misleading as in the case of a "staged crime scene." Or, the death is suspicious or questionable based upon what is presented to the authorities. The deaths may resemble homicides or suicides, accidents or naturals. They are open to interpretation pending further information of the facts, the victimology and the circumstances of the event." [5]

In the above-referred case of equivocal death, it was extremely difficult for the investigators to come to proper interpretation of cause of death. This is because, the forensic expert opined that the death was due to asphyxia caused by coal gas poisoning, but he deferred his final opinion because he intended to send the stomach contents as well as the viscera for chemical examination. The forensic expert enclosed the stomach contents in one bottle and viscera which consisted of the liver, spleen and kidney in the second bottle. Surprisingly, report of the Chemical Examiner indicated, that strychnine poison and alcohol was detected in the first bottle which contained these

[3]http://medind.nic.in/daa/t14/i2/daat14i2p458.pdf.
[4]1974 CriLJ 556; https://indiankanoon.org/doc/116825/.
[5]http://www.practicalhomicide.com/Research/equivocaldeath.htm.

stomach contents. However, in the second bottle strychnine poison was not detected, but alcohol was found.

From the above-said case, it can be said that an equivocal death investigation should be comprised of an extensive and thoroughly documented analysis of the body recovery scene, the autopsy, the forensic evidence, laboratory tests, and the victimology and behavioral history of the deceased. Equivocal death analysis is an investigative process that can aid in determining the manner of death by examining existing forensic evidence and the behavioral and psychological history of the deceased.[6]

Autopsy

Autopsy is a postmortem pathological examination done to determine the cause of death or past medical history or to assist in medical research. The term derives from two Greek roots meaning 'seeing for oneself'.[7]

In the above-said case, the forensic expert initially came to the conclusion that death was an asphyxia death (death caused because of failure of respiratory organs) caused because of coal poisoning as the autopsy examination revealed that trachea-mucous and membrane of the trachea were bright red covered with bloody froth and congested. The right lung was also found congested with bright red colour. The liver, spleen and kidneys were also found congested with bright red colour.

Forensic Medicine

Forensic means pertaining or applicable to personal injury, murder, and other legal proceedings. [L. forensis, of a forum].[8]

Forensic medicine is defined as the application of medical science in the investigation of crime. Forensic scientists are well-acquired with disease processes (pathology); the signs of assault, including rape; some aspects of dentistry; with the action of poisons (toxicology); the effects of firearms and other offensive weapons and the principles of determining the time of death. They are involved with human identification by DNA analysis, and with the evidential significance of skin scrapings, hair, seminal fluid, blood, natural and synthetic fibres, paint chips, dust, soil and many other materials. Forensic medicine is synomous as medical jurisprudence or legal medicine.[9]

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[6]Robyn Diehl Lacks, Arthur E. Westveer, Ashley Dibble & James Clemente (2008) Equivocal Death Investigation: Case Study Analyses, Victims & Offenders, 3:2-3, 150-164, DOI: 10.1080/15564880801938292.

[7]autopsy. (n.d.) Collins Dictionary of Medicine. (2004, 2005). Retrieved October 29 2018 from https://medical-dictionary.thefreedictionary.com/autopsy.

[8]forensic. (n.d.) Medical Dictionary for the Health Professions and Nursing. (2012). Retrieved October 29 2018 from https://medical-dictionary.thefreedictionary.com/forensic.

[9]forensic medicine. (n.d.) Collins Dictionary of Medicine. (2004, 2005). Retrieved October 29 2018 from https://medical-dictionary.thefreedictionary.com/forensic+medicine.

Psychological Autopsy

In and around the 1950's, 2 psychologists working in a hospital in USA had developed the concept of psychological autopsy. Those two psychologists discovered a box in the basement containing over 200 suicide notes. They studied them and other aspects of suicide. In 1958, the term 'Psychological autopsy' was first time coined by Edwin Shneidman, Norman Earberow, and Robert Litman who were the directors of the Los Angeles suicide prevention center (LASPC). Dr. Bruce Ebert in 1987 made a step towards formulising the conditions under which a behavioral scientist should carry out a 'Psychological autopsy'.[10]

Psychological autopsy is an attempt to reconstruct a person's psychological state prior to death.[11]

A procedure for investigating a person's death by reconstructing what the person thought, felt, and did before death, based on information gathered from personal documents, police reports, medical and coroner's records, and face-to-face interviews with families, friends, and others who had contact with the person before the death.[12]

In the above-said case, there were several loose ends that investigators could not solve. How the poison went into the stomach of victim; whether it was accidental or suicidal; whether coal gas poisoning was a staged one or not; the Court could not come into concrete conclusion. And because of lack of lack of proof beyond reasonable doubt, the criminal case against the accused was dismissed.

The question arises, whether psychological autopsy could have helped the investigators to come into a concrete conclusion in the above-said case? What Court tried in that case was to connect the loose ends in more casual approach. But because of lack of proof beyond reasonable doubts, the Court could not come into convincing conclusion and had to let accused go away. Even the Court said that, "the entire case is bristling with improbabilities and it could not be stated definitely that the appellant committed this crime. There might be a strong suspicion against him, but suspicion is no proof and no conviction can be sustained merely on suspicion."

From several case laws and articles on psychological autopsy that had been studied while before this article, it can be said that psychological autopsy is such a scientific way of investigating an equivocal death by reconstructing several seen and unseen factors. It is a process to minimize down the

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[10]Psychological Autopsy-A Review. Available from : https://www.researchgate.net/publication/44796986_Psychological_Autopsy-A_Review [accessed Oct 31 2018].

[11]http://eprints.hud.ac.uk/id/eprint/8669/1/canterpsychological.pdf.

[12]psychological autopsy. (n.d.) Segen's Medical Dictionary. (2011). Retrieved October 29 2018 from https://medical-dictionary.thefreedictionary.com/psychological+autopsy.

improbabilities and help investigating authorities as well as the Court in arriving to a concrete conclusion on a equivocal death.

Psychological Autopsy And Indian Legal System

As per section 45 of the Indian Evidence Act, 1872, when the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting [or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, [or in questions as to identity of handwriting], [or finger impressions] are relevant facts. Such persons are called experts.

In Seethalakshmi vs M.Karunanidhi, it was held that in law, the Forensic Science Expert Report/Opinion has persuasive value, although it may not have a binding force on a Court of Law. In fact, the Report of the Forensic Science Expert/Finger Print Expert will have to be looked into and taken note of by the trial Court along with other available oral and documentary evidence on record in a given case and it is for the trial Court to arrive at a conclusion in a given case based on the attendant facts and circumstances and on available oral and documentary evidence on record in a certain case.[13]

In Mahmood vs State of U.P[14], it was held that it would be highly unsafe to convict a person on the sole testimony of an expert.

In State vs Sushil Sharma[15], famous as Tandoor Murder case, the Court gave importance to the expert witness as one of the vital circumstantial evidence while convicting the accused. In this case, accused killed his wife and burnt the dead body in a bar-be-que of a restaurant to destroy the evidence. Along with other witnesses, post-mortem report and expert opinion of medical officer and other forensic experts played an important role in convicting the accused.

From the provision and case laws referred it can be concluded that opinion of forensic expert is neither conclusive nor substantive evidence. It is merely corroborative evidence. Now being corroborative evidence, can a psychological autopsy be given importance?

One of the prerequisites of expert evidence is that the subject is such that expert testimony is necessary. Wherein some technical question is involved which can be answered by a person specially skilled, it can be said that expert opinion is necessary.[16]

Need for psychological autopsy is utmost when there is serious doubt on equivocal deaths. Main purpose of the psychological autopsy is to solve the problem – whether the death is suicidal or homicidal. Psychological autopsy

[13]https://indiankanoon.org/doc/121325305.
[14]AIR 1976 SC 69.
[15]2007 CriLJ 4008.
[16]Batuk Lal, The Law of Evidence, 299 (19th Edition, Central Law Agency, Allahabad, 2012).

comes into the picture in criminal investigation when all the material evidence fails to solve the issue. Human psychology is a very complex structure and person who deals with psychological aspects of human has a better grasp on decoding complex structure of human psychology. So there is involvement of technical question for which we need proper expert who deals with human psychology.

Sunanda Pushkar's death is one of the mysterious and unsolved cases. In this case, the investigators analysed the medico-legal and forensic evidence during the investigation but could not arrive at any concrete conclusion. After carrying out the psychological autopsy, the investigators come up to the conclusion that Pushkar has committed suicide and submitted the chargesheet accusing her husband Tharoor of abetting her suicide. Though psychological autopsy report here in this case is not binding upon the judge, the investigation team relied heavily on it and submitted the chargesheet. The court will certainly use it as relevant fact to connect the loose ends before coming to a conclusion.

Mysterious Burari Case

11 members of the Bhatia family, were found dead in north Delhi's Burari on July 1, 2018. It is suspected by the police that the members of the family committed suicide. Central Bureau of Investigation (CBI) conducted psychological autopsy where it was revealed they had died while performing a ritual that they believed would help them meet a long-dead family member.

It is important to focus on what police investigator said on psychological autopsy report submitted by CBI. "The psychological autopsy conducted by the CBI is consistent with our findings. It confirms that for over a decade, one of the family members, Lalit Bhatia, had been writing on or dictating ritualistic practices to other relatives," said the investigator.[17] Thus as per the police, the psychological autopsy report of the 11 members of the concerned family, has 'corroborated' the police's findings of the police that all of them committed suicide.

Thus police investigators were confused on equivocal deaths of 11 members of the family. They were quite sure that they had committed suicide but were not sure of their findings. Whereas psychological autopsy proved that they died while performing a ritual and they had no intention to die. So can it be concluded as accidental death rather than suicidal? The police report and Court's verdict will confirm it later on. But no doubt psychological autopsy played vital role in this case in connecting the loose ends which confused the police investigators.

[17]https://www.hindustantimes.com/delhi-news/burari-psychological-autopsy-confirms-suicide/story-tJ2OYJFVNbhtvFgmy19rJK.html.

Psychological Autopsy Examination

In psychological autopsy, it is possible to solve the complex human behavior. Many forensic experts and psychologists agreed that psychological autopsy is a tremendous tool in unraveling mysterious death. The primary mode of the psychological autopsy is collection of information. A questionnaire is needed to be prepared to determine the victim's state of mind prior to his or her death. It is necessary to know victim's state of mind as it is necessary to rule out suicide or confirm that the victim was suicidal at the time of his or her death.

This is one such specimen of Questionnaire[18] that can be used for Psychological Autopsy.

- Name_____
- Date_____
- Time_____
- Place_____
- Interviewer_____
- Witness_____
- How long have you known the deceased person?
- What was your relationship?
- How often did you see or speak?
- When was the last time you saw deceased person?
- How would you describe deceased person?
- Did you notice any behavioral or emotional changes?
- How did deceased person cope with problems?
- Did you know of any concerns, problems, or difficulties deceased person was having?
- Was there anyone who deceased person would confide in?
- Did deceased person ever make any statements like:

* I just can't take it anymore.
* I'd be better off dead.
* The world would be better without me.

- Did deceased person have any of the following:

* Sleep problems
* Physical ailments or disability
* Persistent headaches
* Loss of appetite
* Indigestion

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[18]https://www.experts.com/Articles/Equivocal-Death-Questionnaire-Investigators-Experts-By-Dan-Vogel

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* Loss of appetite
* Indigestion

• Was deceased person under a doctor's care just prior to death?
• Was deceased person taking any prescription medications?
• Did deceased person use illegal drugs?
• Did deceased person use or abuse alcohol?
• What did others think of D?
• How do you believe deceased person died?
• Did deceased person give away any possessions just prior to death?
• Was deceased person under any kind of stress at the time of death?
• Did deceased person threaten suicide at any time?
• Did deceased person ever attempt suicide?
• Has deceased person ever been treated for depression or other emotional disorders?
• Did deceased person have any relatives who committed suicide or were self destructive?
• Did deceased person have any mental/emotional problems or ever seek help from a psychiatrist.
• Did deceased person make any expressions of farewell?
• Any expressions of hopelessness/helplessness?
• Any stressful events or significant losses just prior to death?
• Any instability in family or interpersonal conflict?
• Do you know others who might be willing to talk to me?
• Is there anything else you would like to add?

From the above questionnaire it can be seen that what investigator will try is to know the behavioral changes in the deceased person before the death. It is very important to identify human behavior in case of equivocal deaths. Even though police officers or judges deal with human behavior in a basic level but it is not always possible for them to breakdown the complex human behavior which only an expert can do. Moreover, the society is no less complex. Black magic and other customs and practices still exist in urban and rural part of the countries. Our legal system is not enough well equipped to reach down to such diverse social practices. Experts will have better understandings and mental adjustment to perceive such social practices.

Conclusion And Suggestion

Even though expert opinion is corroborative evidence it does have certain value in criminal legal system of our country. Psychological autopsy report is such corroborative evidence; nothing more nothing less. Keeping this in mind,

from the above analysis and discussion it can be concluded that the importance of the psychological autopsy lies in the fact that it converts the hazy image in a criminal investigation into a clearer image. Whenever the police investigators are not sure and guessing a certain option as the cause of certain equivocal death, psychological autopsy can work as helping hands for the police investigators. It acts like that thread which helps to bind together all loose ends in a criminal investigation. Thus, it will be suggested, that because of complex human behavior and diverse social structure, it is preferable that psychological autopsy is used more often in criminal investigation of equivocal deaths. The psychological autopsy will only enrich legal system of India further.

The psychological autopsy is thought to be the cornerstone of suicide research, providing more detailed knowledge than other methods.

EVOLUTION OF PUNISHMENTS AND ITS IMPACT IN PRESENT SCENARIO

MOONMI BAISHYA & SHUBHAM DUTTA

Abstract

This Article examines various issues regarding to punishment. In the introductory part the article clearly explained the concept and need of punishment in society. The Article gives a very detailed explanation regarding the evolution of punishments right from the concept of Danda in Hindu Ancient Law, then the Mohammedan Criminal Law and English Criminal Law. The reformation, retribution, deterrence, expiatory and preventive theories of punishment are also identified and comprehensively explained. On the other hand the Article also gives a clear description of development and role of the Indian Penal Code, 1860 embracing various punishments in the Code and its impact in present scenario with reference to various decided cases in which justice has been done by the Hon'ble Courts by giving suitable punishments to the offenders. A significant part of this article has been devoted to bring out the critical aspects inherent in the theories of punishment in order to remove those so that the theories can come up with better solutions and help in proper administration of justice.

The problem of crime, criminal and punishment is engaging the attention of criminologists and penologists all around the world. To punish criminals is a recognised of all civilized states for centuries. But with the changing patterns of modern societies, the approach of penologists towards punishment has also undergone a radical change. The penologists are today concerned with the crucial problem as to the end of punishment and its place in penal policy. Many personal laws have evolved their own theories of punishments but those theories were found unsuitable as per the needs of the society as they could not come up with proper solutions and hence with the changing time codification of punishments in statutes was required which led to introduction of penal law in the country.

Introduction

"It alone governs all creatures and protects them; for when people are asleep it watches them"- the rod of punishment created out of the essence of Brahma.[1] The firmest pillar of Government is the administration of justice- meaning justice according to law. Administration of justice is of two kinds- civil and criminal. The purpose of criminal justice is to punish the wrong doer[2]. In

[1]RAMAPRASAD DAS GUPTA, CRIME AND PUNISHMENT IN ANCIENT INDIA, 13, BHARATIYA PUBLISHING HOUSE 1973.

[2]Prof. Nomita Agarwal, JURISPRUDENCE (LEGAL THEORY), 69-72, CENTRAL LAW PUBLICATIONS, 107, DARBHANGA CASTLE, ALLAHABAD (10th ed. 2014).

Criminal Law, punishment has been described as any kind of pain, penalty, confinement, or suffering, which has been imposed upon a person by any such authority of law and the sentence of a Court, for some crime or offense committed by him, or for his omission of a duty enjoined by law[3].

The major questions which is engaging the attention of modern penologists are whether the forms of punishment which are traditionally followed should remain the exclusive or primary weapons in restraining criminal behaviour or should be supplemented and even replaced by a much more flexible or diversified combination of measures of treatment of a reformative, curative and protective nature. And if so, to which categories of offenders should these improvised measures be applicable and how the reintegration of offenders into society could be placed so as to efface the penal stigma.[4]

Punishment can be used as a method of reducing crimes either by deterring the potential offenders or by incapacitating and preventing them from repeating the offence or by reforming them into law-abiding citizens. It is therefore evident from the fact that the object of criminal justice is to punish the wrongdoers under existing penal law.[5]

Evolution of the Concept of Crime & Punishment: Punishment in Ancient India:

Crimes and Punishment Under Hindu Criminal Law:

India has a rich culture and heritage which is oldest in the world.[6] Hindu Law has been divided into Classical Hindu Law (Vedic Times), the Anglo- Hindu Law (British rule in India from 1772-1947) sand Modern Hindu Law (family law or personal law). The term Dharma comes under classical Hindu Law. Dharma is a Sanskrit word which means righteousness, duty, law. It consists of both legal and religious duties. The Manusmriti came into being in the 2nd and 3rd century A.D. by Manu who is an important Hindu Jurist. Manu believes that maintenance and co-existence is possible only when people perform their duties. No man is above Dharma but they are subject to Dharma and Kings were needed to perform their duties, i.e. to punish those who violate the laws. The duty is imposed to the King to decide the lawsuit with the help of judges and all the Kings had to perform their duties laid down in Dharmashastras. Manu acknowledged and accepted the concepts of assault and various other bodily injuries and offences with regard to property such as theft and robbery.[7]

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[3]Law notes in. Punishment,(Aug. 30,2018, 09:30 PM) http://www.lawnotes.in/Punishment
[4]Prof. N.V. PARANJAPE, Criminology & Penology with Victimology 241, CENTRAL LAW PUBLISHERS AND DISTRIBUTORS, 107, DARBHANGHA CASTLE, ALLAHABAD
[5]Id. at 4.
[6]Judge Dr. Gokulesh Sharma, CRIME, PUNISHMENT AND JUDICIAL PROCEDURE IN ANCIENT (SMRITI) INDIA, (Sep. 1, 2018, 04:30 PM)

Concept of "Danda":

"Danda" is a Sanskrit word is equivalent of punishment. In ancient India, punishments were generally sanctioned by the ruler, but other legal officials could also play a part. The punishments that were handed out were in response to criminal activity. In the Hindu Law tradition, there is a counterpart to danda which is prayascitta or atonement. Whereas danda is sanctioned primarily by the king, prayascitta is taken up by a person upon his or her own volition. Furthermore, danda provides a way for an offender to right any violations of dharma that he or she may have committed. In essence, danda functions as the ruler's tool to protect the system of life stages and castes. Danda makes up a part of vyavahara, or legal procedure, which was also a responsibility afforded to the King.[8]

Castes and Punishment in Ancient India:

In India, the equality of the ancient world was indefinite during ancient period. If a Kshatriya abuses a Brahman than the Kshatriya is under compulsion to pay 100 Karshapanas and if they beat a Brahman then they are under obligation to pay not less than 200 Karshapanas. And if such circumstances arises that Vaisya abuses a Brahman than fine of 150 Karshapanas is charged but in cases when Brahman abuses a Kshatriya than the Brahman is under a compulsion of paying 50 Karshapanas, and 25 karshapanas are fined for abusing a Vaishya and the Shudras are never charged any fine.[9] Punishment provided for the crime was like hot oil poured in mouth and into ears, cutting tongue of a person etc. those punishments seems to be deterrent instead of capital punishment.[10]

Crime and Punishment Under Muslim Criminal Law:

Islamic Criminal Law is criminal law in accordance with Sharia. It divides crimes into three stages:

Hadd: Hadd means Crimes against God, whose punishment is fixed in the Quran and Hadiths;

Qisas: Qisas is crime against an individual or family whose punishment is equal retaliation in the Quran and Hadiths;

Tazir: Tazir are the crimes whose punishment is not specified in the Quran

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[8]DANDA(HINDUPUNISHMENT)(SEP.1,2018,05:30 PM)
https://en.wikipedia.org/wiki/Da%E1%B9%87%E1%B8%8Da_(Hindu_punishment).

[9]THIRD MILLENIUM LIBRARY, HISTORY OF INDIA-FROM THE EARLIEST TIME TO THE SIXTH CENTURY BC CHAPTER XX LAWS, (SEP. 1, 2018 07:45 PM)
http://www.cristoraul.com/ENGLISH/readinghall/UniversalHistory/INDIA/Early-6th _BC /HISTORY-20.html.

[10]Judge Dr. Gokulesh Sharma, supra note 7.

and the Hadiths and is left to the discretion of the ruler or Qadi, i.e. judge.[11]

English Criminal Law:

When India came under the domain of the East India Company, Britishers wanted to preserve the status quo but the defects of Mohammedan Criminal Law were noticed and before the Indian Penal Code came into force the English Criminal Law modified by various Acts was applied in the Presidency town of Bombay, Calcutta and Madras while Courts in the interior where mainly guided by the Muslim Criminal Law.

The Local Governments in the interior framed Regulations to remove the glaring defects of the Muslim Criminal Law. The Indian Penal Code drafted by the First Law Commission presided over by Lord Macaulay and the draft was submitted to the Governor-General-in-Council in 1837. After several revisions the draft was finalised in 1850.

It was submitted to the Governor-General in Council in 1856 and received the assent of the Governor-General on October 6, 1860 and came into force on 1st January, 1862.[12]

Concept and Theories of Punishment:

One of the prime functions of the State is to maintain peace, order and security in the society and in order to maintain peace it becomes the duty of the state to punish the evil-doer. Punishment is necessary for the security of the members of the society. Punishment is a means to inflict pain or loss upon a person for his misdeed. It is the duty of the state to impose suffering in order to reform, regenerate the criminal.[13]

Theories of Punishment:

In determining a nation's rank in political civilisation one of the decisive test is the degree of justice actually realised in its judicial administration.[14] Jurists have evolved many theories concerning punishments. All the theories which have been propounded from time to time can be divided under three broad categories viz.:

- Those that hold that the primary function of criminal law is to preserve and increase the welfare of the State.

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[11]Islamic Criminal Jurisprudence, (Sep. 2, 2018, 11:30 AM)
https://en.wikipedia.org/wiki/Islamic_criminal_jurisprudence.
[12]History of Criminal Law in India, (Sep.2, 2018, 11:30 AM),
http://www.shareyouressays.com/essay-on-the-history-of-criminal-laws-in-india 119646
[13]Agarwal, Supra note 2, at 72.
[14]V.D Mahajan, JURISPRUDENCE & LEGAL THEORY ,128 EASTERN BOOK COMPANY, LAW PUBLISHERS AND BOOKSELLERS 34, LALBAGH, LUCKNOW.

- Those that hold that the chief aim of criminal justice must be infliction of punishment as retribution to the offender for the harm done
- Those that hold that punishment to the offender should be inflicted in a way so as to reform him.

Jurists have propounded the following main theories of punishment:

> Retributive.
> Deterrent.
> Preventive.
> Reformative.
> Expiatory.[15]

Retributive Theory:

In primitive societies, punishment was mainly retributive. The person wronged was allowed to have his revenge against the wrong-doer. The principle of "eye for an eye and tooth for a tooth" was recognised and followed. Justice Holmes writes: "It is commonly known that the early forms of legal procedure were grounded in vengeance." [16]

According to this theory, it is right and proper, without regard to ulterior consequences that evil should be returned for evil. Kant was of the view that "punishment cannot rightly be inflicted for deriving any benefit from it, for the criminal or for society and the sole and sufficient reason and justification lies on the fact that evil has been done by him who suffers it." [17]

Deterrent Theory:

According to this theory of punishment, punishment should be inflicted in such a manner that it should deter or prevent not only the offender himself but also others from the following example. The main object of this theory is to make the evil-doer an example and a warning to all like-minded persons, so that they are deterred from committing such crime by fear of consequences. It attempts to deter not only the offender who has actually committed the crime but also attempts to check those who are likely to commit offence. Thus, punishment as a deterrent is expected to serve two-fold purposes, individual and general.[18]

[15]Agarwal, supra note 13, at 78.
[16]Mahajan, supra Note 14, at 145.
[17]Agarwal,supra Note 15, at 78-79.
[18]Agarwal, supra Note, 17, at 81.

Preventive Theory:

The preventive theory aims at preventing the wrong-doer from committing the crimes again.[19] The offenders are disabled from repeating the offences by such punishments as imprisonment, death, exile, forfeiture of office etc. By putting the offender in jail, he is prevented from committing another crime[20].

Preventive mode of punishment has a two-fold impact:

- It overawes all prospective wrong-doers with the fear of punishment.
- It disables the wrong-doer.

The underlying idea of preventive theory of punishment has been aptly described by Salmond, who says, "We hang murderers not merely that we may put into hearts of others like them the fear of a like fate but for the same reason for which we kill snakes namely because it is better for us that they should be out of the world than in it"[21].

Reformative Theory:

This theory owes its origin to the Italian School headed by Lombrosa and the French writer La Cassague, who put forwarded the doctrine that the main object of punishment is to reform the criminal. The reformatory theory implies that a "crime is a disease and the object should be to cure the disease".[22]

According to this theory, the object of punishment should be the reform of the criminal. Even if an offender commits a crime, he does not cease to be a human being.[23] The object of punishment should be to bring about the moral reform of the offender.[24] That is to say, the offender while being punished by detention, the offender must be put to educative and healthy influences. He should be educated and his character should be re-shaped and he should be put once again in the furnace of being moulded.[25]

Expiatory Theory:

Main supporters of this theory are Hegel and Kohler. Hegel says that punishment makes the criminal to expiate for the wrong done. Kohler opines; it is the purification not of the individual alone but of humanity as a whole. According to this theory if the offender expiates or repents for the crime, he should be forgiven as his expiation or repentance is itself a punishment.[26]

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[19]Agarwal, supra Note 18, at 83.
[20]Mahajan, supra Note 16, at 138.
[21]Agarwal, supra Note 19, at 83.
[22]Agarwal, supra Note 21, at 85.
[23]Mahajan, supra Note 20, at 139.
[24]Mahajan,supra Note 23, at 139.
[25]Agarwal, supra Note 22, at 85.
[26]Agarwal, supra Note 25, at 84.

Legal Provisions of Punishment in India

History and Role of the Indian Penal Code in Development of Punishments:

The Indian Penal Code prepared by the English Rulers through their commissions to apply it to all parts of British India to made administration of justice as uniform and easy. The ground work of the Code which the four Law Commissioners, of whom Lord Macaulay was the chief, prepared and which they submitted to the Governor General on the 14th October, 1837. The Bill as so revised appears to have remained pigeon-holder for twelve or more years and it was only on 6th October, 1860 it could see the light of the day. The Code is a statute in which all types of punishments are prescribed and explained.[27]

Punishments under the Indian Penal Code, 1860:

Chapter III of the Indian Penal Code from Sections 53 to 75 of the Indian Penal Code, 1860 deals with the scheme of Punishment. Section 53 of the Indian Penal Code prescribes five kinds of punishments. Section 53 of Indian Penal Code, 1860 states the punishments to which offenders are liable are-

First- Death
Secondly - Imprisonment for life
Thirdly - Omitted by Act 17 of 1949
Fourthly - Imprisonment which is of two descriptions, namely:-
Rigorous, that is with hard labour;
Simple;
Fifthly- Forfeiture of Property;
Sixthly-Fine.[28]

Kinds of Punishment Under Indian Penal Code,1860

1. Death Punishment:

The punishment of death may be imposed on the following offences:-

- Waging war or attempting to wage war or abetting the waging of war against the Government of India (Section 121, IPC)
- Abetment of mutiny actually committed (Section 132, IPC)
- Giving or fabricating false evidence upon which an innocent person suffers death (Section 194, IPC)
- Murder (Section 302, IPC) etc.[29]

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[27]The Genesis and Development of Punishment System in India, (Sep. 15, 2018, 03:30 PM), http://shodhganga.inflibnet.ac.in/bitstream/10603/63023/9/09_chapter%202.pdf.
[28]INDIAN PENAL CODE, 1860, No.45 of 1860.
[29]Different kinds of punishments practiced in India (Sep. 15, 2018, 10:05 PM), https://www.shareyouressays.com/knowledge/what-are-the-different-kinds-of-punishments-practiced-in-india-explained/115857.

In Bacchan Singh v. State of Punjab, 1980, AIR, 267, 1980, SCR (1) 645 1980 SCC (1) 754, the court held that death penalty should only be applied for the heinous offences (rare of rarest).[30]

Imprisonment for life:

Life Imprisonment means a sentence of imprisonment running throughout the remaining period of a convict's natural life (till death). But in practice it is not so. According to Section 55 of the Indian Penal Code, in every case in which the sentence of imprisonment for life shall have been passed , the appropriate Government may without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years. Section 57 of the Indian Penal Code states that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years.

In K.M. Nanavati v. State of Maharastra, AIR 1962 SC 605 it was held by the Supreme Court that imprisonment for life means rigorous imprisonment for life and not simple imprisonment.

2. Imprisonment- Rigorous and Simple:

Imprisonment may be rigorous or simple. Imprisonment is said to be rigorous when it is given with hard labour such as digging earth, cutting woods. Etc. According to Section 60 of Indian Penal Code, in every case in which an offender is punishable with imprisonment which may be of either description, it shall be competent to the Court which sentences such an offender to direct in the sentence that such imprisonment shall be wholly rigorous or that such imprisonment shall be wholly simple or that any part of such imprisonment shall be rigorous and the rest simple.

3. Forfeiture of Property:

Forfeiture of Property means taking away the property of the criminal by the State. Forfeiture of property is now abolished except in the case of following offences:

- Committing Depredation on territories of power at peace with the Government of India (Section 126 of IPC)
- Receiving property taken by war or depredation mentioned in Sections 125 and 126 (Section 127 of IPC)

[30]LAW COMMISSION OF INDIA, SENTENCE AND INCIDENTAL MATTERS (Sep. 20, 2018, 12:30 PM), http://lawcommissionofindia.nic.in/cpds1.pdf.

4. Fine:

The Courts may impose fine as well as imprisonment or alternative or it may be imposed in sole as punishment. The IPC, 1860 prescribes fine along with imprisonment in respect of certain offences. In default of fine, imprisonment may be imposed.[31]

5. Impact of Punishments in Present Scenario:

Law is an important component of society. A law is a norm for rule of conduct meant for repeated application and not exhausted by its once fulfilment. Law reflects a certain social or economic relationship and this relationship and this relationship is created by the productive forces then prevalent in a given society.[32]

Crime is basically defined through the eyes of society. Crime is an act which threatens and offends the society, and such act needs to be punished. The basic reasons behind the making of law are to penalise those who commit a crime and these laws are the result of society's need to stop happening of such acts.[33]

The critics of punishment who argue that punishment aimed at intentional actions forces people to suppress their ability to act on intent. Advocates of this point argue that suppression of intentional causes the harmful behaviours to remain, making punishments counterproductive.[34]

Increasing the severity of punishments definitely helps in reducing crimes. When the potential law breakers see the fate, the offenders of law are suffering, they will definitely think twice before doing something wrong. At a time when crime is at an all-time high, its very important for the government to take a strong stand and deliver the message that breaking law and order can lead to dire consequences. Increasing the severity of punishments will not only serve as a deterrent for the potential law-breakers, but also strengthen the faith of the people on the law and order of the country. Harsher punishments means more stringent rules and hence more scrutiny of potential law-breakers. This will lead to a decline the rate of crimes. The government will be better off providing severe punishments to the criminals rather than spending the much-needed funds in arranging for rehabilitation and help for the criminals. These funds will be better utilized in helping the poorer section of the society that has potential and has something positive to contribute to the society.[35]

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[31]Punishments under Indian Penal Code, 1860 (Sep. 21. 2018, 06:30 PM), https://www.srdlawnotes.com/2017/04/punishments-under-indian-penal-code-1860.

[32]Impact of Punishment on Society (Oct. 1, 2018, 09:30 PM), http://shodhganga.inflibnet.ac.in/bitstream/10603/63023/10/10_chapter%203.pdf.

[33]Relation between Society and Crime (Oct. 1, 2018, 10:05 PM), https://blog.ipleaders.in/relation-society-crime.

[34]Punishment Destructiveness to thinking and betterment (Oct. 1, 2018, 10:15 PM), https://en.wikipedia.org/wiki/punishment#destructiveness_to_thinking_and _betterment.

[35]OINDRILA CHATTERJEE, THE ONLY WAY TO REDUCE CRIME IS TO INCREASE THE SEVERITY OF PUNISHMENTS (Oct. 2, 2018, 11:00 AM), https://www.linkedin.com/pulseonly-way-reduce-crime-increase-severity-punishments-chatterjee.

But at the same time there is terrible controversy over the effectiveness of punishment in reducing crime. Most researchers have failed to find a relationship between crime rates and imprisonment rates. It is equally probable for regions with high imprisonment rates to have, to be followed by increases or decreases in crime, and so on.[36]

Coming to the impact of death penalty, in present scenario, of all the forms of punishments, death penalty is perhaps the most debated subject among the modern penologists. Death sentence has been used as an effective weapon of retributive justice for centuries. The people that favour the death penalty agree that capital punishment is a relic barbarism, but as murder itself is barbaric, they contend that death is a fitting punishment for it. While this improves the desirable deterrent effect of detention, and fits the idea of retribution, its perception as cruelty rather than justice may endanger both internal security and prospects for rehabilitation.

Further, the effect or impact of imprisonment presents a most common form of punishment for incapacitating criminals. It proved to be an efficient method of temporary elimination of criminals apart from being a general deterrent as well as individual deterrent. Conditions of imprisonment in civilised countries have undergone radical changes in the recent times. The problem faced in fixing the period of imprisonment is made more complex by the fact that both short term as well as long term imprisonment has inherent disadvantages. There are legitimate disputes about the effects of imprisonment on crime, and people of goodwill can and do argue about the precise impact of the incarceration boom of the past twenty-five years. But violent crimes remain endemic in the society at shockingly high level.[37]

Critical Analysis of Theories of Punishment

Retributive Theory

Punishment in itself is not a remedy for the mischief committed by the offender. It merely aggravates the mischief. Punishment is itself is an evil and can be justified only on the ground that it is going to yield better results. Revenge is a wild justice.

This passion of vengeance is not the one we encourage, either as private individuals or as law-makers. Retribution is only a subsidiary purpose served by punishment.

People were shocked and criticised the judgment of the Siddhartha Vasisht @ Manu Sharma v. State (NCT of Delhi), 2010 6 SCC, 1(Jessica Lal) case

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[36]Anthony Nicolas Allot, David. A. Thomas, Thomas J. Bernard, Donald C. Clarke, Ian David Edge, Punishment Law, (Oct. 2, 2018, 12:05 PM), https://www.britannica.com/topic/punishment.
[37]Impact of Punishment on Society (Oct. 3, 2018, 09:30 PM), http://shodhganga.inflibnet.ac.in/bitstream/10603/63023/10/10_chapter%203.pdf.

where Manu Sharma and others murdered her in an open bar. But the trial court acquitted all the accused on the ground that there was no evidence. Later Delhi High Court due to the stunning remarks of people conducted the proceedings on a daily basis and passed sentence of life imprisonment on the accused and it was confirmed by Supreme Court on appeal. From the above two cases we can come to the point that people's starvation for justice, if not honoured the society will not honour the criminal law.[39]

Deterrent Theory:

Holmes has criticised this theory on the ground that this theory is immoral because it gives only law-maker's subjective opinion and no such particular measure of punishment.

Kenny remarks, that deterrent theory can only be successful, if wrong-doer knows that he is committing wrong and therefore, on this ground immunity from punishment is conceded to persons who are of unsound mind or act in honest mistake.[40]

Preventive Theory:

This theory has a drawback that detaining a person for a longer period in jail enhances the criminal spirit of the wrongdoer. While criticising this theory Kant says that this theory treats 'man a thing, not as a person, as a means not as an end in himself.'[41]

Reformatory Theory:

Reformatory theory of punishment has very limited application. It cannot be applied in case of habitual offender because it is not that easy to change habits. Psychologists say that behaviour which comes under the domain of habit cannot be changed so easily. Again, it is not possible to determine how an offender will behave when he is released in spite of the fact that he has not been subjected to severe punishments but has been educated and treated differently.[42]

In Sunil Batra (II) V. Delhi Administration 1980, 3 S.C.C., 488 the Supreme Court regarded a simple letter from a co-prisoner as sufficient to invoke proceedings by way of habeas corpus. The judgment deals at length with the

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[39]CRITICAL ANALYSIS OF THEORIES OF PUNISHMENT (Oct. 5, 2018 07:35 PM), http://jsslawcollege.in/wp-content/uploads/2013/05/CRITICAL-ANALYSIS-OF-THEORIES-OF-PUNISHMENT1.pdf.

[40]Agarwal, supra Note 26 at 81.

[41]Agarwal, supra Note, 40, at 84.

[42]Agarwal, supra Note, 41, at 87.

shocking conditions prevailing in Indian prisons and suggests a series of prison reforms.[43]

Expiatory Theory:

However this theory is obsolete now. The principles of morality do not normally come under the domain of law. As Paton points out that this theory is based on moral doctrines and therefore is beyond the limits of modern law and jurisprudence.[44]

Conclusions

Punishment is a method of social control. Punishment is such an important instrument in the hands of the State that through punishment it can protect the society from potential offenders, by preventing them from committing further offences and by reforming them into law abiding citizens which ultimately lead to establishment of peace, comfort and tranquillity in the society.

Crime is a disease in society and it should be treated scientifically. In my opinion, punishment should be regarded as only a means to an end and not the end itself, the end being reclamation of the criminal to useful citizenship.

In my opinion, one of the factors responsible for the increasing number of crimes is due to lack of education. In India, more often we can see that people are more superstitious which contributes more or less to various forms of crimes in the society, instance can be given of witch-hunting and mob-lynching. Thus for such heinous crimes, appropriate punishments needs to be evolved out.

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[43]Impact of Punishment on Society (Oct. 7, 2018, 08:30 PM), http://shodhganga.inflibnet.ac.in/bitstream/10603/63023/10/10_chapter%203.pdf.

[44]Agarwal, Supra Note,42,at 85.

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LEGISLATION CONCERNING JUVENILE JUSTICE IN INDIA - NEED FOR IMPROVEMENT

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The Juvenile Justice Act of 1986, amended in 2000, and 2015 is the basic regulatory act regarding child rights and juvenile justice in India. This article seeks to analyze the phenomenon of juvenile crime and its regulation in India. The authors seek to explore the facets of the rules, its implications on juvenile delinquencies and explore the judicial standing and understanding of the act. The various new amendments and what fallacies they seem to contain, and suggestions for a further better system are discussed as well. The article analyses how the 2015 legislation came into being in context of the immense public as well as media pressure on the government in light of the 'Nirbhaya' incident, from where the current and urgent need for the need of update and better implementation stems from. The authors explore the various facets of the 2015 act dealing with the legal age of the juvenile, the recommendations made by the Verma Committee and its recommendations rejected thereafter while drafting the 2015 Act. The fact that judicial decisions were not paid heed to while drafting the legislation is taken into account as well. The pitfalls the act fails to address are also highlighted in the article. The authors analyse whether the passing of the amended act was more like a knee-jerk reaction to the mob frenzy resulting from the 'Nirbhaya' incident or whether it is an act aimed at curbing the confusion regarding the laws governing juvenile justice in India.

Introduction

The word "Juvenile" originates in a Latin word "juvenis" that means young.[3] A juvenile or child means a person who has not completed eighteen years of age. Juvenile crime, formally known as
juvenile delinquency, is a term that defines the participation of a minor in an illegal act.[4]

While juvenile crime may be individual in some cases, it is necessary to continue focusing on it as a social problem. Situations like domestic violence, illness, labour among others can lead to an increased vulnerability in children resulting into juvenile crime. In a Study by ECHO Centre for Juvenile Justice, conducted in 2014, 2500 cases brought before the Juvenile Justice Board in

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[3]Juvenile, ETYMONLINE, https://www.etymonline.com/word/juvenile (last updated Oct. 22, 2018).
[4]MousumiDey, Juvenile Justice in India, 1 IJIMS 64, 64 – 70 (2014).

Bangalore from six districts in Karnataka were analysed. The findings reveal that the majority of the children (65%) live with parents whereas 16.7% live with single parents and 5.1% are without parents. But 94% of juveniles perceived inadequate parental care, probably due to the demands of everyday life as most of these children hailed from lower socio-economic backgrounds where parents strived to earn their daily living.[5]

An analysis of the juvenile justice system in India indicates two value positions: First, a crime cannot be understood any differently if it has been committed by a child. Thus, the same offence "charges" apply equally to both an adult and a juvenile,[6] and second, that if a juvenile commits a crime, then an entirely different mechanism is required, for the law endorses them as "juveniles", and they should be treated as such.[7]

The focus of such programs, legislations and provisions is more on rehabilitation and reconciliation rather than the punishments being capital in nature. However, a system which is supposed to provide protection and direction may end up further victimizing and make some of the juveniles impervious to positive change. Lack of a standardized system of registering grievances and trained personnel to attend the same further undermines the potential of juvenile justice in India[8].

Legal Definition of Juvenile

The term "Juvenile" is used to refer to a child who unlike an adult person, having not attained the minimum prescribed age, cannot be held liable for his criminal acts. The age criterion for being termed a "juvenile" varies across the world. The Probation of Offenders Act[9] imposed a restriction on the imprisonment of a person below 21 years of age[10]. Juvenile Justice Act, 1986[11], termed a boy less than 16 years of age and a girl less than 18 years of age a "juvenile"[12]. The Juvenile Justice, 2000[13], provided a uniform maximum prescribed age of 18 years for boys and girls to be termed as "juveniles"[14]. The Juvenile Justice Act, 2015[15] empowers a Juvenile Justice Board to determine

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[5]JUVENILE CRIME: A PEEP INTO REALITY, ECHO CTR. FOR JUVENILE JUSTICE (2014).
[6]Juveniles and Serious Crimes, CTR. FOR THE CHILD AND THE LAW, NATIONAL LAW SCHOOL OF INDIA UNIV., https://www.nls.ac.in/ccl/jjdocuments/security2015.pdf (last updated Oct. 22 2018).
[7]Dr.Subramanian Swamy v. RajuThr. Member Juvenile Justice Board, AIR 2014 SC 1649.
[8]K. Shanmugavelayutham, The Juvenile Justice (Care and Protection of Children) Act, 2000: A Critical Analysis, THE INDIAN JOURNAL OF SOCIAL WORK(2002).
[9]The Probation of Offenders Act, 1958.
[10]The Probation of Offenders Act, 1958, §6.
[11]The Juvenile Justice Act, 1986.
[12]The Juvenile Justice Act, 1986, §2(h).
[13]The Juvenile Justice (Care and Protection of Children) Act, 2000.
[14]The Juvenile Justice (Care and Protection of Children) Act, 2000, §2(k).
[15]The Juvenile Justice (Care and Protection of Children) Act, 2015.

whether a person not having attained the age of 18 years but having attained the age of 16 years can be tried as an adult or not[16] and at the same time it defines a "child" as someone who has not crossed the age of 18 years[17].

Historical Background

The first global shift with respect the juvenile justice was seen in the United Nations. The UN Declaration of the Rights of the Child[18] was introduced in 1958 and it aimed to secure the rights of children and underlined the special treatment that they needed by virtue of not having attained adulthood. The same led to the adoption of the Convention on the Rights of the Child[19] exactly 30 years later. Simultaneously the United Nations introduced the Beijing Rules[20] in 1985 and it dealt with the accountability regarding the exercise of discretion relating to juvenile crimes.

The first piece of legislation concerning juvenile justice in India came in 1850 with the Apprentices Act[21] and it required that children between the ages of 10-18 and convicted in courts, be provided vocational training as part of their rehabilitation process. Almost half a century later the Reformatory Schools Act[22] was introduced and it provided that children aged 15 years or less and convicted in a court may be sent to a reformatory cell. The first piece of legislation to prove a uniform mechanism for juvenile justice in India was the Juvenile Justice Act[23], introduced in 1986. This act was repealed and replaced by the Juvenile Justice Act, 2000[24]. This act was further repealed and replaced by the Juvenile Justice Act, 2015[25], which presently deals with juvenile justice in India.

Juvenile Justice Act, 1986[26]

With the adoption of the Beijing Rules[27], India became the first nation to develop its juvenile justice system keeping in mind the principles enunciated therein. The legislation set out ambitious goals for itself such as to lay down a codified and coherent legal framework for Juvenile Justice across the country,

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[16]The Juvenile Justice (Care and Protection of Children) Act, 2015, §18(3).
[17]The Juvenile Justice (Care and Protection of Children) Act, 2015, §2(12).
[18]UN GENERAL ASSEMBLY, Declaration of the Rights of the Child, Nov. 20, 1959, A/RES/1386(XIV).
[19]Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.
[20]UN GENERAL ASSEMBLY, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Nov. 29 1985, A/RES/40/33.
[21]The Apprentices Act, 1850.
[22]The Reformatory Schools Act, 1897.
[23]The Juvenile Justice Act, 1986.
[24]The Juvenile Justice (Care and Protection of Children) Act, 2000.
[25]The Juvenile Justice (Care and Protection of Children) Act, 2015.
[26]The Juvenile Justice Act, 1986.
[27]Supra note 20.

to provide a specialized approach towards the prevention and control of juvenile delinquency, to spell out the machinery and infrastructure for operations concerning juvenile justice, to develop appropriate linkages and coordination between the formal system and voluntary agencies, and to constitute special offenses in relation to prescribing punishments thereof.

In order to realize these objectives, the legislation imbibes the essential elements of all the due processes, parenspatriae and participatory models. The legislation places an onerous duty on the state to appropriately harness the resources from various sectors of socio-economic development in ensuring the well-being and welfare of juveniles and offers them a chance to recover if they happen to falter.

Juvenile Justice Act, 2000[28]

The 1986 Act[29] required that the pre-existing system built around the implementation of the then available Children's Acts be restructured. However, due to the absence of a national consensus on the time frame for such a restructuring, the steps taken by most of the State Governments were still heavily short of the proclaimed goals. In order to rationalise and standardise the approach towards juvenile justice in keeping with the relevant provisions of the Constitution of India and International obligations in this regard, the Government of India enacted the Juvenile Justice Act, 2000[30].

Aftermath of the Delhi Rape Case - Verma Committee[31]

The government appointed Justice J.S Verma Committee, to look into the possible amendments to the Criminal Law to provide for a speedier trial and enhanced punishment to the persons committing grave sexual offences as an aftermath of the 'Nirbhaya incident'. In particular, the Verma Committee considered the issue relating to whether the age of a juvenile be reduced from 18 years to 16 years.Taking a reformatory approach, the Committee took a stance against death penalty, life and long imprisonment for persons aged 16. The Committee observed that,

> *"Our jails do not have reformatory and rehabilitation policies. We do not engage with inmates as human beings. We do not bring about transformation… Children, who have been deprived of parental guidance and education, have very little chances of mainstreaming and rehabilitations, with the provisions of the Juvenile Justice Act being reduced to words on paper."* [32]

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[28]The Juvenile Justice (Care and Protection of Children) Act, 2000.
[29]The Juvenile Justice Act, 1986.
[30]Supra note 28.
[31]J.S. Verma& L. Seth& G.Subramanium, Reports of the Committee on Amendments to Criminal Law(2013).
[32]Ibid.

It ultimately settled upon the same, observing that,

> *"...the material before is sufficient for us to reach the conclusion that the age of 'juveniles' ought not to be reduced to 16 years"* [33]

Judicial Review of the Age Limit of 18 Years

A 3 judge bench of the Supreme Court in 2014 considered and dismissed petitions filed in the context of the Nirbhaya incident seeking that the serious offences having minimum punishment of seven years imprisonment and above be brought outside the purview of the Juvenile Justice Act and the same should be tried by an ordinary Criminal Court[34].

Passing of the 2015 Legislation

In the meantime, pressure emanating from the public reaction to the 'Nirbhaya' incident, for trying a Juvenile as adult for grave offences got heavier on the Government. The objections forwarded by the subject experts, having their basis in child rights and child psychology, were not seriously considered. Ministry for Woman and Child Development acting on irrelevant considerations came with a draft bill to replace the Juvenile Justice Act 2000, against which many parliamentarians cutting across party lines raised objections and the bill was sent to the Parliamentary Standing Committee for suggestions. The Committee raised serious objections but the bill was passed. Being a specific legislation, the bill should be comprehensive enough to eliminate the gaps in policy regarding the issue that India has been facing in the past. It is important to test it against the touchstone of progressive justice. Does it lay stress on rehabilitation of the juvenile delinquent so that they can be assimilated back in the society? Does it take into consideration mental and societal conditions which led the juvenile to commit the crime? These issues become pertinent to be studied seeing as it affects more than 39% of the nation's population,[35] keeping in the mind the context and the circumstances in which the Act was passed and its possible effects in the society.

Pitfalls in the Provisions of the 2015 Act

The provisions in the Act are the result of a mind-set which wrongly perceived that a child of 16 years can commit a crime as an adult of may be 18 years of age. It is a fallacious thought. A child can only be a child, though by 16 or 18 years he might physically represent an adult but merely by that, in no case his mental maturity attributable to brain development would have grown proportionately. Moreover, India being a signatory to the United Nations

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[33]Ibid.

[34]Dr.SubramanianSwamy v. RajuThr. Member Juvenile Justice Board, AIR 2014 SC 1649.

[35]Child in India, CHILD LINE, http://www.childlineindia.org.in/child-in-india.htm (last updated Oct. 22 2018).

Convention on Rights of Children (UNCRC),[36] it has to adhere to the standards set out in the treaty. UNCRC defines the same benchmark of below 18 years of age for all juveniles and makes no distinction like that of the 2015 Act wherein it sets out provisions of differential treatment for juveniles between the ages 16-18 who commit heinous crimes. The UNCRC expects all the signatory countries to try all children below 18 in a similar manner. However, it does maintain that no juvenile can be given life imprisonment or death penalty for his or her crimes.

The "trial of a child as an adult", as the Act purports, is essentially an incongruity. The Act specifies vague criteria to judge the juvenile himself, relying on factors like "the mental and physical capacity to commit such offense", "the ability to understand the consequences" and "the circumstances in which the crime was committed", essentially ignoring a thorough assessment of the accused. The level of mental maturity in any given case cannot be determined with any degree of accuracy and precision and the results are prone to vary from case to case and from individual to individual. A system which provides for an option to refer a juvenile to a regular Court, therefore, cannot be accepted as fair and would be vitiated by arbitrariness as no objective basis for such reference can exist. Such decisions over the child by the Juvenile Justice Board are prone to be subjective rather than objective the provision thus renders itself void for vagueness.

Mostly the designated Children's courts are presided over by Principal Sessions Judges who are heavily preoccupied by administrative and other onerous judicial works and many of them though competent senior judicial officers would not have any special inclination required in dealing with juvenile crimes or special knowledge as to child psychology. The Juvenile Justice Board comprising of a Judicial Officer with such aptitude and two Social Workers which is a body specially designed to deal with exceptional cases involving juvenile delinquency.However, when such a board, optimized to deal with the above-discussed cases chooses to transfer to the relatively ill-equipped and inept "Children's Court", it casts a shadow on the principles of reformation and rehabilitation that the entire process claims to be based upon.The punishments handed by such a court, to children at an impressionable age of 16 to 18, wherein they have just begun to be incorporated as a responsible member of the society, can aggravate the very condition this entire mechanism seeks to address. This can lead to the juvenile being unable to cope with the society in the later years, rendering the process to be counterproductive.

From the constitutional viewpoint, the Act violates article 14 of the Constitution by treating two similarly circumstanced people, accused of the

[36]ShanthaSinha&Karin Hulshof, Twenty Years of The Convention on the Rights of the Child, UNICEF INDIA, http://unicef.in/PressReleases/141/Twenty-Years-of-The-Convention-on-the-Rights-of-the-Child (last updated Oct. 22 2018).

same offence, differently. The legislation places emphasis on the intentions of the juveniles while justifying the differential treatment of juveniles aged 16-18. However, there exists no objective test to determine the same. There have been cases wherein people of 25 years of age do not possess the mental capabilities of an average adult, while 16 year olds who possess a matured mind and commit calculated and meticulous crimes[37].

Furthermore, one of the most reformatory measures that the Act provides for is that it seeks to maintain the anonymity of the juvenile delinquent throughout and after the proceedings in the designated court.[38] However the practical reality is something different entirely. Due to the multiplicity of parties involved in the process which starts from a First Information Report with the police, then moves on to the district courts in most cases, then to the specialized courts and so on, the identity of the child accused becomes a part of the public domain for all needs and purposes. Something which the delinquent did maybe condoned later. The Act itself provides for it to be "revived as the need may be"[39], the lack of specification of objective standards for the invoking of the same though, has not been settled. This brings the entire notion of the objective of the legislation, which is to provide the delinquent a chance at rehabilitation and to live as a normal part of society, under serious doubt.

Conclusion

The passing of the above provisions, for referring certain cases involving a child to the regular judicial system, therefore seems more like a knee-jerk reaction to appease the emotional mob frenzied sections of our demography. The Act fails in providing a holistic environment for rehabilitation of the delinquent. It does not account for the mental health and age of the accused and is majorly silent on this essential aspect of countering criminality in the society. By taking into account only the legalities of the issues involved and ignoring other socio-economic factors like the circumstanced wherein the child was reared, the causality of the particular crime, the economic status of the child, amongst other things, the legislation fails to be robust, further requiring legislative amendments and better execution. As seen above the impugned provisions infringe the underlying 'fairness' and 'due process' enshrined in Articles 14 and 21 of the Constitution and it is also in utter disregard to India's International obligations emanating from various International Conventions. It would have been better off if the Government had focused more on the practical aspects of prevention, reformation, rehabilitation and social reintegration.

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[37]B.B. Pande, In the Name of Delhi Gang Rape: The Proposed Tough Juvenile Justice Law Reform Initiative, 2 J. OF NATIONAL LAW UNIVERSITY DELHI145, 145 –166 (2014).
[38]Ibid.
[39]Ibid.

BETWEEN SAYING AND DOING: AN ANALYSIS OF SECTION 15 OF JUVENILE JUSTICE ACT, 2015

MR. DEEPAK SINGH

The Juvenile Justice Act, 2000 was besieged by the critics from all the spectrum of the society in the aftermath of gruesome Nirbhaya gang-rape incident for its failure to bring the 'child predators' accountable. The Government under unprecedented scrutiny for its perceived failure to tackle juvenile menace brought Juvenile Justice Act, 2015 as a fire-fighting measure to mollify the public anger. Section 15 of JJ Act, 2015 provides for the transfer of a child to an adult criminal system in a case where a children between 16 to 18 years is alleged to committed a heinous offence. Section 15 mandates the Juvenile justice boards to assess the mental capacity of a child, which is a subjective process, involving scope for arbitrariness. It has shifted the juvenile system from its original social welfare mechanism into an auxiliary of the criminal justice system. The 'legal differences' between the child and criminal justice system are now narrower than they have been at any point since the inception of juvenile system. The new act is contradictory to the philosophy of informal and non-criminal treatment of children in conflict with law as it excludes the child from the protective umbrella of the benevolent legislation by treating them as an adult. It is unfortunate that the government rushed to enact the JJ Act, 2015 despite cogent reasons provided by the Apex Court, Civil Societies, Parliamentary Committee, against the tinkering with the existing framework.. The new legislation overall rejects the rehabilitative approach in favour of punitive sentencing option. In the present article, main principle of Section 15 of the JJ Act, 2015 will be described, together with an analysis of the repercussions of wavering of a child into criminal justice system, children's psychological competencies, and a comparative perspective to present a better picture of juvenile justice in a wider domain.

Keywords: Juvenile, Rehabilitation, Physiology, Jurisdictions, adult.

Introduction

The Juvenile Justice (Care and protection) Act, 2015 (hereinafter JJ Act, 2015) as passed by the Parliament received the assent of the President of India on December 13, 2015. It was applicable to the whole of India except, J&K. The gruesome rape of the medical student where one of the offender was just few months short of attaining 18 years raised the nationwide debate on the inefficiency of Juvenile Justice Act, 2000 to tackle the menace of juvenile delinquency. The lawmakers, media frenzy and ordinary citizens jumped on the bandwagon, advocating greater stringency of action as a deterrent. The government succumbed to the public clamour by enacting the Juvenile Justice Act, 2015 to make it easier to prosecute the juvenile as an adult. The new act

has heralded a new era of juvenile justice in India by introducing the provision of transfer of 16-18 years old children to an adult criminal court in a case a child is alleged to have committed a heinous offence.[1] Under the act, a child who has completed or above than 16 years alleged to have committed a heinous offence may be transferred to an adult criminal court, known as children's court to be tried as an adults.[2] Section 15 of the JJ Act, 2015 is the most contentious provision which allows the Juvenile Justice Board (hereinafter JJB) to conduct preliminary assessment in regard to child to assess his mental and physical capacity to commit the crime. It also mandates the JJB to take the help of psycho-workers, psychologist and other experts.[3] If the JJB is satisfied on the basis of preliminary assessment, then it may 'waive' or 'transfer' the child to be dealt by the Children's Court under 18(1).[4] It is submitted that the provision requiring preliminary assessment is a subjective process which creates scope for arbitrariness. The legislature has failed to take into account the scientific evidences that have come to fore in the last decades which show that individual assessment of a child's mental capacity is not possible. The act also does not conform to the International Conventions on the Child rights. The wavering of child into criminal justice system also violates the Right to Equality enshrined under the Article 14 and 15(3) of the Constitution of India.

It is also necessary to stipulate what I mean by Juvenile justice system. I will deal only with the aspect of juvenile justice that includes the criminal conduct. I exclude from the consideration other aspects of juvenile justice i.e. care and protection, neglect, adoption. It is also important to explain the nature of juvenile beforehand to let the readers have an idea about juvenile. Juveniles are treated differently in legal and social context- based on their age.[5] Juvenile delinquency has been termed as deviant child behaviour. When a child commits a crime we call him juvenile offender, juvenile delinquent, and the crime as juvenile delinquency.[6]

Juvenile Justice in Historical Context

The JJS in India originated during the British Rule and reforms occurring in the England also shaped the laws in India. In India, each states had their own

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[1]The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 02 of 2016, INDIA CODE, § 15, § 2(33).

[2]Id.

[3]Id.

[4]Id., § 2(20) ((Under the Juvenile Justice Act 2015, the Children's Court is defined as a Special court constituted under Protection of Children from Sexual Offences Act, 2012 (POCSO), and wherever such special courts are not designated, the Court of Session having the jurisdiction to try offences under the act).

[5]Adolescent Development & Competency, NAT'L CONF. OF STATE LEG., http://www.ncsl.org/documents/cj/jjguidebook-adolescent.pdf (last visited July. 02, 2018).

[6]RETURN TO FEDERAL PROBATION JOURNAL, http://www.uscourts.gov/probation-journal-topic/juveniles (last visited Sep. 02, 2018).

respective children act. The Madras was the first state to enact its own children act. This suit was closely followed by Bengal and Bombay in 1922 and 1924. Post Independence, the Government of India enacted the Children Act, 1960 to provide for the trial of juvenile delinquent in Union Territories as a model to be followed by all the states in the enactment of their respective Children Acts.[7] All the states had their respective laws on juvenile justice which was inconsistent in terms of procedures, age and so on. Even the definition of 'child' differed from state to state. The confusion in respect to each states having their own law on children prompted the Hon'ble Apex Court in Sheela Barse v. Union of India to suggest that "Parliament should initiate legislation on this matter to avoid confusion".[8]

Consequently the Parliament enacted the Juvenile Justice Act, 1986. Under the act, a boy was 16 years old and a girl was 18 years old. The need was felt after the Government ratified the UNCRC in 1992 to have a uniform age in terms of both the boys and girls. There was also a wide gap between the cherished principles and the actual practises under the JJ Act, 1986. Subsequently Juvenile Justice Act, 2000 was enacted. However the JJ Act, 2015 has heralded a new era of juvenile justice in India by introducing the provision of trying a child as an adult.

International Human Rights Charter on Juveniles

The JJ Act, 2015 does not conform with the International Instruments on Child's Rights. The first Instrument on Children's Right was "Declaration of Geneva" which emphasised on the rehabilitative aspect of the juvenile offender, rather on punitive measures to tackle the juveniles.[9] The Beijing Rules stated the minimum standards to be followed by all the member states. It stated different treatments to be meted out to juvenile, separate from their adult counterparts.[10] The Riyadh Guidelines stressed on the physiological aspect of the juvenile. It recognised that:

> "part of maturing often includes behaviour that does not conform to societal norms and that tends to disappear in most individuals with the transition to adulthood and avoid labelling a youth a deviant or delinquent as this contributes to negative patterns of behaviour".[11]

The Havana rules was the first Instrument which defined a juvenile in terms of age- "A juvenile is every person under the age of 18".[12] The Convention on the

[7]The Children Act, 1960, Act no. 60 of 1960, § 2(e).
[8]Sheela Barse v. Union of India, 1986 S.C.A.L.E (2) 230.
[9]Covenant of the League of Nations adopting Geneva Declaration of the Rights of the Child on 26 September, 1924.
[10]G.A. Res. 40/33, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Nov. 29, 1985).
[11]G.A Res. 45/112, United Nations Guidelines for the Prevention of Juvenile Delinquency (Dec. 14, 1990).
[12]G.A Res. 45/113, United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Dec. 14, 1990), Rule 11(a).

Rights of the Child (hereinafter CRC) is the world's most heavily ratified treaty, to which India is a signatory and ratified in 1992 emphasises inter alia, the best interest of the child, social reintegration etc.[13]

India has failed to observe the International Instruments on child rights which emphasises on the separate treatment of a child from adults in the best interest of the child. The transfer provision of a child who has completed or above 16 years into the adult criminal justice system goes against the mandate set by International covenants. JJ Act, 2015 violates the instruments which are set in its preamble.[14]

Wavering of A Child Under Section 15

Section 15 of the JJ Act, 2015 has reduced the age of a child from 18 years to 16 years in case a child is alleged to have committed a heinous offence. It is be noted that there is no change in the definition of the child per se under the act. A child has been defined as a person who has not attained the age of 18 years under the act.[15] The act has not reduced the age for defining a child, however Section 15 of the Act has reduced the age of a child from 18 to 16 years for the purpose of treating a child as an adult in case a child is alleged to have committed a heinous offence.

A. Transfer of A Child Into Criminal Justice System

The JJ Act, 2015 has introduced the provision to transfer of a child who has completed or above 16 years alleged to have committed heinous offence to an adult criminal court, known as children's court to be tried as an adult.[16] Section 15 of the JJ Act, 2015 has bestowed power on the JJBs to conduct a preliminary assessment of a child to assess his mental capacity to commit a crime.[17] The JJBs may take the help of experienced psychologist and other experts to come to the conclusion. If the board is satisfied, then it may transfer the child to be tried as an adult under Section 18(1) to a children's court.[18] The Children Court on the other hand can try the juvenile offender as a child or an adult. If the Children Court decides to try the child as an adult, and subsequently finds him guilty, then it may order the juvenile to serve the

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[13]G.A Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989); See UN lauds Somalia as country ratifies landmark children's rights treaty, UN NEWS, https://news.un.org/en/story/2015/01/488692-un-lauds-somalia-country-ratifies-landmark-childrens-rights-treaty (last visited Jul. 27, 2018).

[14]The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 02 of 2016, INDIA CODE, prmble.

[15] The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 02 of 2016, INDIA CODE, § 2(12), (13)
(2015).

[16]The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 02 of 2016, INDIA CODE, § 15.

[17]Id.

[18]Id., § 18(1).

juvenile sentence at a 'place of safety', after upon he is transferred to adult prison on attaining 21 years age.[19] This convergence erodes the rational of a separate juvenile justice system.[20]

It is submitted that the same court's established for the protection of child's dignity will now violate the child's dignity. The Children's Court has been defined as a special court designated as POSCO Court which tries the offenders who have committed sexual violence against the children. Now the same court has been empowered to try the juvenile as potential criminals.[21] The Supreme Court has time and again held that dignity of a child is of extreme significance.[22]

The UNCRC and Beijing Rules have advocated that different treatment should be accorded to the juvenile offender from adult offender: It reminds the state parties under general comment no.10 of their obligation under CRC that *"every person under the age of 18 years at the time of the alleged commission of an offence must be treated in accordance with the rules of juvenile justice"*.[23]

The Juvenile's interaction with the interface of the criminal justice system shapes his behaviour to a great extent. Once a juvenile commits a crime, and apprehended, then the very interface of criminal justice system produces the identity of a child.[24] The system and society, henceforward identifies the juvenile with only one identity i.e. of the criminal. This results in the juvenile taking up the identity of a 'criminal' as a result of this societal reaction. [25]

The Supreme Court in the case of Subramanian Swami v. Raju through the Juvenile Justice Board,[26] gave cogent reasons while dismissing the petition against reducing the cut-off age from 18 to 16 years. The Court in Salil Bali v. Union of India,[27] where the constitutionality of definition of child under 18 years was challenged as ultra vires Constitution. The Court held:

> "The age of eighteen has been fixed on the accounts of understanding of the experts in child psychology that until such an age the children in conflict with law could still be redeemed and reintegrate into the society".

The Delhi High Court in the Court on Its Own Motion v. Dept. of Women and Child,[28] observed:

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[19]Id., § 19(3).
[20]Barry C. Feld, Juvenile and Criminal Justice Systems' Responses to Youth Violence 24, THE UNIVERSITY OF CHIGAO PRESS (1998).
[21]The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 02 of 2016, INDIA CODE, § 2(20). (2015).
[22]Mofil Khan and Anr. v. State of Jharkhand, (2015) 1 S.C.C 67.
[23]Supra note 13.
[24]CHRIS CUNNEEN et al., JUVENILE JUSTICE- AN AUSTRALIAN PERSPECTIVE 28-90 (Oxford University Press 1995).
[25]LARRY J. SIEGEL & BRANDON C.WELSH, JUVENILE DELINQUENCY: THE CORE 449-50 (6th Edn, Cengage Learning 2016).
[26]Subramanian Swamy v. Raju, (2014) 8 S.C.C 390.
[27]Salil Bali v Union of India, (2013) 7 S.C.C 705.
[28]Court on Its Own Motion v. Dept. of Women and Child, W.P (C) No. 8889 of 2012.

"It is of utmost importance to take note of the fact that a separate adjudicating and treatment mechanism has been established for persons below 18 years of age who have committed an offence. A child is a part of the society in which he lives. Due to his immaturity, he is easily motivated by what he sees around him. It is his environment and social context that provokes his actions. It is because of this immaturity that they are not supposed to be treated as adult offenders".

The Department- Related Parliamentary Standing Committed which examined the Juvenile Justice Bill, 2014 also took note of the apprehensions raised by various stakeholders who voiced their concern that certain provisions of the legislation violate the provisions of the constitution. It rejected the bill in the following words:[29]

"[T]he existing Juvenile Justice Act, 2000 is not only reformative and rehabilitative in nature but also recognises the fact that 16-18 years is an extremely sensitive and critical age requiring greater protection. Hence, there is no need to subject them to different or adult judicial system as it will violate Article 14 and 15(3) of the Constitution".

The Justice Verma committee constituted in the aftermath of Nirbhaya case to look into prospective amendments in the criminal law also recommended against the reduction of the age of a child from 18 to 16 years.[30]

B. Psychology and Juvenile

Section 15 of the JJ Act, 2015 puts an onerous responsibility on the JJBs to assess the 'mental capacity' of a child who has completed or above than 16 years in a case of heinous offences, by taking the help of experienced psychology, psycho-social workers and other experts.[31] However it has not provided a understood definition of such capacity. The Psychological sciences cannot deconstruct this concept in a manner that allows for an accurate and reliable assessment. Neither can psychology and the human development sciences precisely identify the chronological age at which such capacity exists in its entirety. The matter of where to draw a line between a child and an adult is subjective, and is ultimately arbitrary.[33]

Justice Corbett in the case of S v. Dyk has argued the "danger inherent in applying a vague, generalised right and wrong test is that, in an instance like

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[29]Two Hundred Sixty Fourth Report The Juvenile Justice (Care and Protection of Children) Bill, 2014, PARLIAMENT OF INDIA, http://www.prsindia.org/uploads/media/Juvenile%20Justice/SC%20report-%20Juvenile%20justice.pdf (last visited Oct. 09, 2018).

[30]Report of the Committee on Amendments to Criminal Law, GOV. OF INDIA, https://searchworks.stanford.edu/view/10772631 (last visited Oct. 09, 2018).

[31]The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 02 of 2016, INDIA CODE, § 15.

[32]The Criminal Capacity of Children in South Africa, DULLAH OMAR INSTITUTE, https://dullahomarinstitute.org.za/childrensrights/Publications/Other%20publications/The%20criminal%20capacity%20of%20children%20in%20South%20Africa%20%20International%20developments%20and%20considerations%20for%20a%20review.pdf (last visited Aug. 21, 2018).

[33]Robert O. Dawson, The Future of Juvenile Justice: Is It Time to Abolish the System?, 81 THE JOURNAL OF CRI. LAW AND CRIMINOLOGY 136-155 (spring 1990).

this, such a child could well be found criminally responsible".[34]

Recent modern technologies, particularly 'imaging technology' have concluded that "adolescent brains are not fully developed as adults until age 25". The United States Supreme Court in Stanford v. Kentucky,[35] observed that:

> "Children, those under age 18 but even as old as 16 and 17, are not sufficiently able to control their impulses nor to fully understand the consequences of their risky behaviour".

In Roper v. Simmons,[36] the US Supreme Court countermanded the death penalty of 17 years old children on the basis of amicus brief submitted by the American Medical Association, American Physiological Association to show that at the age of 17 years the adolescent brain is still developing.

It is the author's submission that a psychologist is unable to satisfy the criteria under Section 15 of the JJ Act, 2015 to assess a child's mental capacity as they are skilled to identify the mental disorder, not the 'mental' capacity of a child. The process of assessing mental capacity of each child who is alleged to have a heinous offence is a complex task to perform, and costly to be applied given the significant reduction in the Union Government Budget on the welfare of the child.[37]

C. Rehabilitation or Retribution: What Works?

It is a sound principle that "Hard cases make bad laws" that dates back to 1837.[38] Ignoring this sound principle, India has taken a step-backward since the inception of the juvenile justice system by introducing the provision of trying a child as an adult on the basis of one bad case of diabolic gang-rape in which one of the juvenile offender was on the verge of attaining majority.[39]

It is submitted that the countries that are following the practise of transferring the child to adult criminal system have been experiencing higher recidivism rates. The Court in Madrid v. Gomez , observed that that the modern prison life "may press the outer bounds of what most humans can psychologically tolerate". Krishna Iyer. J in the case of Satto v. State of U.P, opposed the idea of sending a children to prisons as adult prisons are "animal farms". The culture in prison fosters behaviour in juveniles that increases their chance of recidivism.

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[34]S v Dyk, (1969(1) S.A 601(C).
[35]Stanford v. Kentucky, 492 U.S 361.
[36]Roper v. Simmons, 543 U.S 551 (2005).
[37]Budget for Children in New India, CENTRE FOR CHILD RIGHTS, http://haqcrc.org/wp- content/uploads/2018/02/haq-budget-for-children-2018-19.pdf (last visited Sep. 11 2018)
[39]Bindu Shajan Perappadan & Nirnimesh Kumar, Juvenile gets 3 years in Delhi gangrape case, THE HINDU (Aug. 31, 2013, 03:31), https://www.thehindu.com/news/national/juvenile-gets-3-years-in-delhi-gangrape-case/article5079092.ece.

It is submitted that the countries that are following the practise of transferring the child to adult criminal system have been experiencing higher recidivism rates.[40] The Court in Madrid v. Gomez[41], observed that that the modern prison life "may press the outer bounds of what most humans can psychologically tolerate". Krishna Iyer. J in the case of Satto v. State of U.P,[42] opposed the idea of sending a children to prisons as adult prisons are "animal farms". The culture in prison fosters behaviour in juveniles that increases their chance of recidivism.

The present act is based on the 'retribution' conception of punishment where the offender is guilty in proportion to the magnitude of his crime. The attitude of the Juvenile Justice has changed from treatment-driven system to law-driven system in the JJ Act, 2015.

It is submitted that the rehabilitation plays a very important role in juvenile justice system, in which the immaturity renders them simultaneously less responsible and more corrigible. Rehabilitating a juvenile itself can have a deterrent value because successful rehabilitation results in specific deterrence.

V. Juvenile Justice Act, 2015 and Constitution

The transfer of a child to adult criminal justice system envisaged under JJ Act, 2015 blatantly violates the Right to Equality and Discrimination enshrined under the Constitution of India. Article 14 mandates that State shall not discriminate between similarly situated persons. It prescribes equality before law. The Apex Court has explored the basic contours of Article 14 in the case of TMA Pai Foundation v. State of Karnataka:[43]

> "The varying needs of different classes or sections of people require differential and separate treatment. Therefore equals should be treated alike; it does mean that unequals ought to be treated equally'. People who are in the like circumstances should be treated equally".

Children and adults being on unequal footing with respect to their psychological development cannot be treated alike. Children are not expected to exhibit same level of psychological understanding as adults, thereby subjecting children to the same criminal justice system is treating "unequals as equals" violating Article 14. Further Article 15(3) mandates the state to make laws for children, not against them.[44]

How Other Nations are Addressing the Issue of Juvenile Delinquency

Juvenile delinquency is confined not to a particular jurisdiction; it is a

[40]Allen D.C, Trying Children as adults, 24 JONES L. REV 27-64. (2002).
[41]Madrid v. Gomez, 889 F. Supp. 1146 (N.D Cal. 1995).
[42]Satto v. State of UP, (1979) 2 S.C.C 628.
[43]TMA Pai Foundation v. State of Karnataka, (2002) 8 S.C.C 481.
[44]Sri Mahadeb Jiew and Anr. v. Dr. B.B Sen, A.I.R 1951 Cal. 563

worldwide phenomenon.[45] However the approaches to tackle juvenile delinquency is different in other countries. In this section, I propose to look at how other jurisdictions are addressing the issue of juvenile delinquency.

A. United States Response

There is no uniform juvenile justice system in United States. Every states have their own set of juvenile system.[46] It had a liberal sentencing policy but the liberal character of the JJS came under increasing threat in 1990s due to the U.S media portraying juvenile crime as a result of the liberal JJS and the calls for getting tough had its effect on the JJS. Most of the states enacted waiver provisions, allowing for juveniles who committed crimes to be transferred to adult courts in three major shifts i.e. Statutory exclusion Waiver, Judicial Waiver Laws, Prosecutorial discretion waiver or concurrent jurisdictional law. The United States response points to a move towards an adult oriented criminal justice system, which is in violation of minimum international standards. However it is to be noted that United States is the only country in the world, which has not ratified the Convention on the Rights of the Child.[47]

B. South African Response

The Republic of South Africa has a juvenile justice system in place which affords the majority of the child the opportunity to be dealt outside the formal court system. The Constitution of South Africa ensures that the child be kept separate from their adult counterparts under Section 28(2) and that the best interest of the child to be of paramount importance.[48] The Child Justice Act passed in 2008 to put into the effect of the constitutional mandate promotes the welfare and best interest of the children through preventing children from being tried in the adversarial court system, by resorting to the mechanism which are more suitable to the interest, welfare and need of the child, and in accordance with the Constitution of South Africa, including the use of diversion.[49] Courts are bound to give effect to the provisions of Section 28(2) of the Constitution in matters which involve children in South Africa.[50]

C. Ugandan Response

The Republic of Uganda has adopted a child centered approach in its Juvenile Justice System, which derives its mandate from the Constitution.[51] Article

[45]K. PADMAJA, JUVENILE DELINQUENCY (ICFAI University Press 2007).
[46]Susan S. Greenebaum, Conditional Access to Juvenile Court Proceedings: A Prior Restraint or a Viable Solution?, 44 JOURNAL OF URBAN AND CONTEMPORARY L. (Jan. 1993).
[47]Supra note 13.
[48]SOUTH AFRICA CONSTI. § 28 (1) (g), (2).
[49]Child Justice Act, 2008, Act. no. 75 of 2008, § 2 (2018).
[50]Director of Public Prosecutions, Transvaal v. Minister of Justice and Constitutional Development and Ors., (2009) 4 S.A 222 (C.C).
[51]UGANDA CONST. art. 34.

34(6) of the Constitution of Uganda provides for the separate treatment of child offenders and that a child offender shall not be detained with adults.[52] The commitment to put into effect the Constitutional provision on children is reflected in Section 4 of the Children's Act which gives the welfare of the child to be of paramount importance. Uganda carried out an amendment in its Children's Act in 2016. Under the new amended act, Uganda has specifically focused on the 'core issues' which lead to the juvenile delinquency. Section 6 of the Act spells out the parental responsibility to provide basic amenities such as education, immunisation diet, clothing, medical attention and so on. The principle of diversion has been emphasised by the Uganda Juvenile Justice system which conceives the detention of a child as a serious violation of human rights.[53] A child alleged to have committed a crime is let off by the Police by giving caution without resorting to the formal court system.[54]

D. Lessons for India

The above examination of various jurisdictions across the world throws light for India. With the exception of United States, which is not a signatory to the UNCRC, almost all the countries examined above have demonstrated the tendency to deal with the 'core issues' such as education, family status, his surrounding and so on. Further separate treatment of a child from adult offender has been emphasised as in the case of South Africa juvenile justice system and Ugandan Juvenile system.

Conclusion

The JJ Act, 2015 has dislocated the sui generis status of the Juvenile treatment. The objective of Juvenile is 'retributive' in nature rather than 'rehabilitative'. The committee examining the Juvenile Justice Bill, 2014 was apprised of the serious flaws in the existing JJ Act, 2000 by the Ministry of Woman ranging from the establishment of JJBs in districts, delay in inquires, lack of clarity relating to the roles, responsibilities and duties of JJBs, and reported incident of rampant abuse of children in juvenile institutions.[55] Instead of tiding over the crisis, the government enacted the JJ Act, 2015 which is retrograde in nature and unlikely to serve any substantive purpose for the welfare of the children. It has changed the course of the attitude of law towards children in the direction of law-driven system and away from treatment-driven system. The government has simpliciter passed the JJ Act, 2015, bypassing the "core issues" pertaining to the rights of the child. The "big plans" chalking out by the government for the welfare of the child has paid less attention to the core issues which lead to the juvenile delinquency.

[52]Id.
[53]Children Act, 1997, Act. no. 6 of 1996, Chap. 59, § 89(1) (1997).
[54]Id., § 2(6).
[55]Supra note 29.

As we have already observed, Criminal behaviour is caused by unwholesome environmental determinism of a children. The current emphasis of the law should be turned from "assessing the social harm that the offender has done to assessing the social needs of the offender". Creating a system that focuses on early intervention is extremely important- Education, family issues. The steps taken in this regard might be practically useful to invest in children& overall development rather than to consign them to the ranks of the unredeemable.

As the law has already passed, it is submitted that trying juveniles as adults should be rare and saved for only the most severe, violent crimes (rarest of the rare). Model Rules should be enacted to try a juvenile as an adult only in the rarest of the rare cases. Clearly adult prison do not encourage positive change in offenders nor does it focus on rehabilitation aspects. Instead, it creates an environment that encourages further criminal activity.

TOWARDS AN ASTOUNDING EVOLUTION OF ARTIFICIAL INTELLIGENCE: FACIAL ETHICAL CONFLICTS

MEDHA PATIL

Abstract

1950s has gone down in the history of technology as the age of researchers, mathematicians and thinkers who believed in the possibility of Artificial Intelligence (hereinafter AI). Alan Turing, one such pioneer explored the mathematical possibility of AI and his efforts ushered in a technological revolution that has gained an unstoppable momentum. AI is the study of ways of using computer based systems to perform tasks or to solve problems normally performed by humans. One of its goals is to understand human intelligence. Another is to produce useful machines.

There has been periodic disconcert to regulate the framework of ethical governance on AI. Existent ethical issues like hacking have sprung up the dangers of operative systems. Today, AI is the master creation by humans, therefore, any person adept in hacking or manipulation caneasily change the path of technology around the worldthrough AI. Currently, modus operandi of AI possesses serious perils on the infringement of right to life and privacy of humans.Other repercussions are unemployment and migration, because of which people will be ready to work in less developed countries to derive fixed income and job security even at the cost of violation of human rights. This vicious circle of misery continues to be present in the tech-dominated world till the role of ethics in AI is realized. Inducement of ethics is crucial as it would not be too far when AI would surpass humans as the most intellectually sophisticated entities on the planet and the regime of singularity will sway across the world.

AI is setting deep roots in this new age world and our lives are currently touched by AI somehow. This paper, identifying the importance of AI and its futuristic impact makes an approach towards scrutinizing its significance and also proffer solutions for the same.

Keywords - Alan Turing, ethical governance, hacking, right to life and privacy, unemployment, migration, human rights, singularity.

Introduction

Creation of computers has been one of the mankind's most cherished dreams and accomplishments. There has always been strong links between the development of computers and the emergence of Artificial Intelligence (hereinafter referred to as AI). The seeds of AI, however, were sown long before the development of computers. The earliest and strongest roots of AI date back to the work of McCulloch and Pitts, who, in 1943 described the

mathematical models (preceprtrons) of brain's neurons based on a detailed analysis of biological origins.[1]

In the 1950s, long before the invention of computers as we know them today, Englishman Alan Turing, perhaps one of the greatest computer scientists, mathematicians and logicians, wrote a seminal paper in which he tried to answer the question, 'Can machines think?' At the time, to even think of such a question was revolutionary, but Turing also came up with the concept of 'Turing test' which, in essence, meant a machine's ability to display intelligent behaviour similar to that of a human. In recent years, though, the modern thinking of AI has focused more on the bottom-up approach, which refers to a way of solving problems in computer algorithms where parts of the problem are focused on and solved, such as in AI taking some of the basic building blocks of intelligence and putting them together and getting them to learn and develop new information over time. The most exciting advancement in the field of AI, however, has appeared through the development of robotics. It could be argued that an intelligent robot is merely the embodiment of an artificially intelligent entity – giving a body to AI.[2]

At the same time, even as intelligent machine systems are altering our lives for the better, a new frontier of ethics and risk assessment has emerged with respect to AI, which merit critical attention. In this paper, the researchers have tried to critically analyze the prospect for AI ethics identifying several inherent limitations and their futuristic impact. Machine ethics can increase the probability of ethical behavior but it cannot guarantee it owing both to the nature of ethics and the complexity of the computational agents. The researchers have tried to put forth some solutions for the issues that may arise in the near future with the advancement of AI.

In order to approach this study's prescribed objectives, doctrinal model of research methodology is proposed. E-resources have majorly contributed in research for getting the most relevant and latest information on the web which has helped the researchers to explore the subject through various dimensions.

Facets of Ethical Concerns in Intelligent Machinery

Ethics, generally, is deemed as a system of moral principles, which tend to affect how people arrive at decisions and lead their lives. Thus, an ethical issue is a problem, a situation or an opportunity that prompts a decision-maker to opt among several actions that must be judged as right or wrong, ethical or unethical.[3] The spectre of some future AI systems being judged through the lenses of morality gives rise to a newer set of ethical issues.

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[1]KEVIN WARWICK, ARTIFICIAL INTELLIGENCE: THE BASICS 2-3 (1st ed. 2013).
[2]Ibid.
[3]Omar E. M. Khalil, Artificial Decision-Making and Artificial Ethics: A Management Concern, 12 JBE 313, 313-321 (1993).

Transcending Singularity- an End of Human Era

Even as AI has advanced over the course of decades, it's very advancement has given rise to numerous ethical issues. One of the major ethics issues relating to AI is the hypothesis of "Singularity", an envisaged growing menace that can engender dire straits for humanity. It denotes an intelligence explosion whereby owing to the advancement of technology the machines will surpass human brain power and turn out to be exponentially smarter. The Merriam Webster's Collegiate Dictionary defines AI as merely the capability of a machine to imitate intelligent human behaviour, but when the advent of Singularity would hit the world, human beings will near almost their extinction With its enhanced super intelligence, AI will be in a position to create a whole new generation of itself. While it has been debated that the world would progress at a faster rate, still when the magnitude of intelligence would unleash its numerous wonders, it is said that this luminous tech-savvy world will have no place for humankind. The day would not be too far off when human brains will take the assistance of AI for their work. Recently, Tesla CEO Elon Musk declared that AI could make humans irrelevant, and he called for humans to merge with machines in order to continue serving a purpose.[4]

Presently, to function AI needs finances to source power. But in the post-Singularity scenario, it is conjectured that AI will be efficient to control its own power generation. Reflecting the silhouettes of Singularity's progression, the repercussions of AI dominated world has already started to reveal colours. Recently in July 2017, Facebook succeeded in completing an AI research project in which two chatbots interacted with each other in a common communication link. What's more, in a trice, the robots began to converse in a secret linguistic pattern that only machines could understand.[5] On the flip side, though, some Singularitarians also believe that humans will achieve immortality and superintelligence when we merge with this future machine intelligence. Kurzweil, however, is of the view that Singularity would not takeoverhuman intelligence; instead, it will be more like a co-existence where machines would reinforce human abilities.[6] Still, the voyage to virtual world would pave the way for the unleashing of dark faces of artificial humans.

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[4]Arjun Kharpal, Elon Musk: Humans must merge with machines or become irrelevant in AI age, CNBC (Feb. 13, 2018, 2:05 PM), https://www.cnbc.com/2017/02/13/elon-musk-humans-merge-machines-cyborg-artificial-intelligence-robots.html

[5]Andrew Griffin, Facebook's artificial intelligence robots shut down after they start talking to each other in their own language, THE INDEPENDENT, (Jan. 15, 2018, 10:05 AM), http://www.independent.co.uk/life-style/gadgets-and-tech/news/facebook-artificial-intelligence-ai-chatbot-new-language-research-openai-google-a7869706.html.

[6]Id.

Reflections on Unemployment

There is another equally dire issue arising out of Singularity. One of the foreseen pragmatic consequences of the raging tempest of Singularity is massive unemployment. As the technologies take a quantum leap, human-centric jobs will run down to a perilous state. Most jobs will succumb to the spectre of automatization. Elon Musk suggested that with the advent ofAI-powered systems, countries may have to adapt universal basic income programs for their citizens to cope with the aftermath of this revolution.[7]

The resultant scourge of unemployment will inflict the Gordian knot in plural families and cause sweeping poverty. Though AI systems may cause a paradigm shift in the economic growth and productivity level of the countries, they will have a dramatic effect on the survival of human beings and humankind. There are various cognitive abilities and decision-making processes involved in skill-enriched jobs where AI systems face off an arduous battle with humans. This leads to another unprecedented problem of distribution of wealth. Unemployment will bring unintended offset of migration. As employment downturn would cast its shadow, people in developed countries will move towards less developed countries to earn their livelihood, even at the risk of sacrificing human rights.

Consequentialsm on Regeneration

Another issue stems from AI's extraordinary properties vis-a-vis reproduction. AI is exempt from the different experimental conditions that apply to human generation. For example, human children are born out of the restructuring of genetic material from two parents. This is not the case with AI. Therefore, it may be that the moral tenets that are accepted as norms with respect to human reproduction will be required to be reconsidered as far as AI reproduction is concerned.[8]

It is not hard imagine that an AI could replicate itself fast, in a lesser time frame than it takes to make a copy of the AI's software, if it is provided access to computer hardware. What's more, since the AI copy would be ditto as the original, it would take birth totally mature, and its copy could start producing its own ditto versions instantly. Thus, if there were no hardware limitations, a generation of AI could mushroom exponentially at a phenomenal rate, doubling or tripling in minutes or hours instead of years and decades. Like a generation of uploads, one of whom nurturing a desire to create as large a family as it pleases.[9]

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[7]Galeon Dom, Sarah Marquart, Elon Musk: Automation Will Force Governments to Introduce Universal Basic Income, FUTURISM (Jan. 25, 2017, 12:10 PM), https://futurism.com/elon-musk-automation-will-force-governmenta,s-to-introduce-universal-basic-income/.

[8]Nick Bostorm, Eliezer Yudkowsky, The Ethics of Artificial Intelligence, THE CAMBRIDGE HANDBOOK OF ARTIFICIAL INTELLIGENCE 316, 316-34 (2014).

[9]Id.

Additionally, if accorded total reproductive liberty, this upload may embark on duplicating itself as rapidly as it could. And the duplicates it creates - which could operate on fresh computer hardware possessed or rented or shared by the original - would also commence duplicating themselves, because they are the same as the original upload and harbour the same philoprogenic intent. Taking this scenario further, it might happen that pretty soon members of this upload family would find themselves hard pressed to pay their power charges or rents for storage and computational processing to keep themselves functioning. And this is where the social welfare systems would aid them by offering basic things; but if their proliferating rate is faster than that of the economy, their resources will soon deplete, causing either their death or blocking their ability to replicate more machines.[10]

In recent years, researchers have shown myriad ways of how machine-learning programs can be fudged by exploiting their proclivity for looking for patterns in data. This means they have a weak spot, mostly because they do not have real intelligence. For example, researchers have found that, in self-driving cars it is easy to trick the vision systems, though use of billboards, into making them register things that do not exist. Similarly, voice-controlled programs can be fooled to take unwarranted actions, like going to a website or downloading a virus, through inaudible or faint signals.[11]

Legal Conundrum on Roboethics

It is pertinent at this point to consider the law and its relationship to AI. The law offers abundant opportunities for developing analytic and computational AI models. Law also has unique characteristics that make it a particularly challenging field for AI. For instance:

1. Legal reasoning is multi-modal, rich and varied: it includes reasoning with cases, rules, statutes and principles;
2. Specialised legal knowledge, such as cases and statutory rules, is well-documented and available from many sources, including case reporters, treatises, restatements, statutes, commercial summaries, and scholarly commentaries.
3. The character of answers in the law is different from that in many other disciplines: answers are much more a matter of degree than clear-cut yes-or-no and they can change over time.
4. The knowledge used in legal reasoning is diverse, ranging from common sense to specialised legal knowledge, and it varies greatly in structure, character, and use.[12]

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[10]Id.
[11]Supra No.10.
[12]Edwina L. Rissland, AI and Law: Stepping Stones to a Model of Legal Reasoning, 99 YALE L.J. 1957, 1957- 1981 (1990).

Technology as a whole has grown exponentially over time and AI technology will be no exception. New advances in machine learning coupled with other continuing developments in AI software will increase the prevalence of AI in our lives, making it important to discuss the question of who will be liable when this new technology causes injury. And in every such occurrence, the presence of AI will force us to address the difficult question of whether a human's interaction with AI was foreseeable or unexpected.[13]

As AI represents the face of new humans, a dire need emerges to embed basic human rights in them to protect their interests. For instance, as humans we are creature imbued with a moral status. We may have to confer the same status on AI systems and treat them accordingly. Consequently, when we talk of practical ethics, it becomes imperative to consider questions and issues of moral status. Consider, for example, the questions surrounding the ethical aspect as regards premature birth, which are often based on the conditions and differences with respect to the ethical status of an embryo.[14] A recent case in point is the example of Sophia, a humanoid robot,was accorded a citizenship in Saudi Arabia. As per the strict moral laws of that nation, she enjoys more rights than actual normal women simply because she does not have to have a male relative escort and she is not required to don the abaya.[15] So, this recognition of rights in AIs may end up with two-fold consequences. On a positive side, as the artificial humans have started to imbibe the characteristics of a natural person, it will entail furnishing of inherent human rights at their helm which will preserve the fundamental international law principle of erga omnes. As Ronald Seibes rightly said, “"Robots are starting to look so much like humans that we also have to think about protecting them in the same way as we protect humans.” [16]

Additionally, inclusion of rights will act as a deterrent to thwart the abuse and exploitation of virtual humans. At the same time, though, the coin can be flipped on other side wherein robots use their rights at the cost of the rights of human beings. Privacy infringement is one of the major issues cropping up in machine intelligence. To cite and example, in 2015, DeepMind, an AI based company collaborated with London hospitals to process the medical data of 1.6 million patients. But DeepMind encountered a hitch when the permission of authorisation to access the information from the patients was not secured.[17]

[13]Matthew U. Scherer, Regulating AI Systems: Risks, Challenges, Competencies, and Strategies, 29 HARVARD JOURNAL OF LAW & TECHNOLOGY353, 353-400 (2016).
[14]Supra note. 7.
[15]Shivali Best, Saudi Arabia becomes the first country to grant citizenship to a ROBOT as critics say it now has more rights than women, DAILY MAIL ONLINE (Jan. 24, 2017, 6:10 PM), http://www.dailymail.co.uk/sciencetech/article-5020787/Robot-granted-CITIZENSHIP-Saudi-Arabia-world-first.html.
[16]Cécile Puyhardy, What rights should robots have? L'ATELIER BNP PARIBAS (Jan. 24, 2018, 5:30 PM), https://atelier.bnpparibas/en/smart-city/article/rights-robots-have.
[17]Nicholas Montegriffo, Google subsidiary DeepMind tackles the ethics of AI, Androidpit (Jan. 24, 2018, 10:15 PM), https://www.androidpit.com/google-subsidiary-deepmind-forms-team-to-tackle-the-ethics-of-ai.

As it was perceived, the data transfer violated the rights and was ruled out as illegal. So, these are such areas that necessitate reformation. Moreover, laws are crucial in order to establish ethical norms in AI, whichalso accords the corresponding power to penalise their acts in larger interest. Here, the prime question is to consider whether AIs as human entities have the ability to perceive sentience and to be responsible moral actors. Individuals who can feel, sense and experience are given rights so that they are well protected against their vested interests. So, if AI is just a mere configuration of technology, then conferring of rights is of no use. For instance, a new AI software is not unlike the brain of a human child-ready to be moulded and shaped by its experiences. When the software developer places the AI into the real world, the developer cannot predict how the AI will perform the tasks and solve problems it encounters. The machine will teach itself how to remove obstacles in ways that are unpredictable. A side effect of humans coaching machines rather than coding line by line will entail an inherent amount of unpredictability and a lack of control over the software by the developer once the software is sold.[18]

Similarly, there are other aspects that need to be considered. One significant risk of AI is whether it uses already upgraded capacities to make machines of much moregreater intellectual power. Advanced ages of AI could work as high above humans as in the case of animals, and even perhaps more advanced beyond the human capacity to comprehend it. One such result was cited as the Singularity by Dr. Vernor Vinge for the NASA Lewis Research Center's VISION-21 Symposium in 1993. He pointed out that the rules to life as we are aware of it would change everlastingly because there is no real way to foresee if AI would choose to coexist or be hostile towards mankind.[19] In this context, Stephen Hawking stresses that any genuine discussion of AI must mull over the potential threats and how to oversee them, and he calls for more basic, institutional research as expanding corporate assets are dedicated to acknowledging breakthroughs in making AI.[20] Dr. Vernor Vinge, though, hypothesizes that AI can be firmly regulated by rules that viably hard-wire needed conduct into self-sufficient robots, a scenario that was envisioned by sci-fi author Isaac Asimov's Three Laws of Robotics[21]. Vinge, however, cautions that natural human competition will likely prompt the improvement of unhinderedmodels of AI, so that even such safeguards may not be sufficient

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[18]Kowert Weston, The Foreseeability of Human - AI Interactions, 96 Texas Law Review 181, 181- 204 (2017).

[19]Vision 21, Vision 21: Interdisciplinary Science and Engineering in the Era of Cyberspace, (Jan. 25, 2018, 12:30 PM), https://ntrs.nasa.gov/search.jsp?R=19940022855.

[20]Alex Hern, Stephen Hawking: AI Will Be 'Either Best or Worst Thing' For Humanity, THE GUARDIAN, (Jan 27, 2018, 1:10 PM), https://www.theguardian.com/science/2016/oct/19/stephen-hawking-ai-best-or-worst-thing-for-humanity-cambridge.

[21]M. Abrahm Paul & Kenter Stuart, Tik-Tok and the Three Laws of Robotics, 5 SCIENCE FICTION STUDIES 67, 67-80 (1978).

to control the Singularity on the off chance that it occurs. So, there is a crucial distinction to be considered. A human life experiences various aspects, tragedies, emotions, adventures and forms a belief system based on it. AI, however, is devoid of such experiences and there's no belief system embedded in it as they are machine vitals.

Shadows of Technology Proliferation

In this context, it is worth shedding light on a newly looming challenge in the transportation sector: driverless cars have been innovated and powered by the technology of AI. So here, some serious ethical issues have cropped up relating to the assessment of security, license hassles, privacy considerations etc.[22] Privacy and data protection laws will also have to deal with this new technology, as a self-driving car has to handle a large quantity of data, some of which may be personal.[23] The current set of rules cannot effectively regulate this new automated technology. It calls for a new security and regulatory authority in order to ensure safe and secure driving system which may not infringe upon the rights of others or damage their life or property. For instance, Mercedes-Benz are building into their cars codes which will offer a solution to the trolley problem. But it also implies that through AI advancement, corporations are previously deciding who should die in the event of an accident.[24] The contemporary world is preparing to pull the trigger of a robotic warfare. Governments are on the path of developing fully-autonomous robots that will have the ability to kill.[25] There is also an inculcation of "artificial empathy" in the robots which is existent in United States Of America, specifically with war robots, soldiers acquainting with a robot may become too close of it, leading to concerns that a soldier might risk their own life for the machine.[26] Thus, the fate of the question of adherence to and justification with respect to international humanitarian law – referred to as jus in bello and jus ad bellum – will be in severe jeopardy. So, it is clear that as the enhancement of AI is advancing at a rapid pace, new demonic challenges have

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[22]Pillath Susanne, Automated vehicles in the EU, EUROPEAN PARLIAMENT THINK TANK, (Jan. 24, 2018, 5:00 PM), http://www.europarl.europa.eu

[23]Jayne O'Donnell & Chris Woodyard, Your car may be invading your privacy, USA TODAY, (Jan. 25, 2018, 7:10 PM), https://www.usatoday.com/story/money/cars/2013/03/24/car-spying-edr-data-privacy/1991751/.

[24]Michael Taylor, Self-Driving Mercedes-Benzes Will Prioritize Occupant Safety over Pedestrians, GO TO NEWS, (Jan. 25, 2018, 4:20 PM), https://blog.caranddriver.com/self-driving-mercedes-will-prioritize-occupant-safety-over-pedestrians/.

[25]Lora G. Weiss, Autonomous Robots in the Fog of War, IEEE SPECTRUM, (Jan. 24, 2018, 2:15 PM), https://spectrum.ieee.org/robotics/military-robots/autonomous-robots-in-the-fog-of-war.

[26]Doree Armstrong, Emotional attachment to robots could affect outcome on battlefield, UW NEWS, (Jan. 26, 2018, 4:18 PM), http://www.washington.edu/news/2013/09/17/emotional-attachment-to-robots-could-affect-outcome-on- battlefield/.

evolved wherein robots are equipped with artificial neural networks and are programmed to find "food."

In this regard, a study has shown that AI has learned to cheat through the visual signs to save the food for themselves.[27] So, it would seem that one of the stumbling blocks of AI that poses serious challenges vis-à-vis legal systems is foreseeability. Here, it is worth noting the following observation:

> *"The development of more versatile AI systems combined with advances in machine learning make it all but certain that issues pertaining to unforeseeable AI behaviour will crop up with increasing frequency and that the unexpectedness of AI behaviour will rise significantly. The experiences of a learning AI system could be viewed as a superseding cause — that is, "an intervening force or act that is deemed sufficient to prevent liability for an actor whose tortious conduct was a factual cause of harm" — of any harm that such systems cause. This is because the behaviour of a learning AI system depends in part on its post-design experience, and even the most careful designers, programmers, and manufacturers will not be able to control or predict what an AI system will experience after it leaves their care. [28] "*

Finally, there is a need, above all, to consider a truly calamitous aspect. The murkiest spectre that looms over the AI is the apocalyptic spellbind on the "Dark Web"- an encrypted universe where limitless freedom reigns and users' identities are concealed, a myriad of password protected pages, unethical websites and hidden content accessible only to the authorised users, an assassination market, a radical archetype of the world that is coming for us.

A QUEST FOR VIRTUE ETHICS: TOWARDS A HEURISTIC PANACEA FOR RHETORIC ISSUES

Embodiment of ethics in AI is onerous, as ethics deals with the nettle of human relationships and translating it into a mainstream computing analogue will be a quest of enigma. It is widely concurred that present AI frameworks have no ethical status. We may change, duplicate, terminate, delete, or use computer programs howsoever we see fit, nearest or slightest to the extent that the projects themselves demand. The moral limitations to which we are subject to in our dealings with contemporary AI frameworks are altogether grounded in our obligations to other beings, for example, to our fellow people, but not to any obligations to the frameworks themselves. In this context, it is pertinent consider the instances of legal initiatives that are emerging with respect to AI across the world. For example, Estonia is one of the countries working to

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[27]Sara Mitri, et al, The Evolution of Information Suppression in Communicating Robots with Conflicting Interests, 106 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA 15786, 15786-5790 (2009).

[28]Matthew U. Scherer, Regulating AI Systems: Risks, Challenges, Competencies, And Strategies, 29 HARVARD JOURNAL OF LAW & TECHNOLOGY 354, 359-362 (2016).

establish legal regulations for AI. In the country a concept of "robot-agent" has been proposed which will be placed somewhere in-between a separate legal entity and an object that is someone else's property.[29]

Thus, it makes it clear that in attempting to set up any workable legal framework for AIs, we may have to take into consideration myriad and diverse factors. A value system has to be aligned in AI. A wide array of issues including in data decryption, security hinges, privacy infringement have been rising. So, an ethical regulatory mechanism is needed to shape AI. Moreover, in the countries where humanity is itself on a grim footing, robotisation should be sensitised. Hazardous jobs such as mining, manual scavenging, scrapping sewage lines, cleaning sluices and ditches, firefighting should be handed over to AI so that the life of humansgets elevated. AI is a riotous technology that needs pertinent regulations to uphold the interests of the society.We need to identify the extent to which the ordinary normative precepts are implicitly conditioned on the obtaining of various empirical conditions, and the need to adjust these precepts accordingly when applying them to hypothetical futuristic cases.

Here, it is worth noting the case of DeepMind. In January 2014, Google spent $500 million to purchase DeepMind, a British AI development company whose mission is to "solve intelligence" by incorporating and integrating "the best techniques from machine learning and systems neuroscience to build powerful general-purpose learning algorithms."[30] Deepmind advocates for the positive implication of AI. DeepMind ethics and society is a new research group created to deal with the ethical and moral concerns in AI in order to align it with the society's priorities andmoral obligations. It is developing an algorithm that stimulates the capability of "imagination", enabling machines to discern the repercussions of their actions antecedently.[31]

In the light of the positive ethical aspirations being aligned with DeepMind, as mentioned above, it therefore becomes incumbent upon up to carefully examine all the ethics-related issues and factors, big and small, that may arise with respect to building a legal framework for AIs. There are certain principles which have been devised in a report on European Civil Law and Robotics to instil deeper insight on the contemporary issue of plunking down ethics in AI. Attainment of "Consent" is one of the crucial factors which has to be embedded in advanced technology. There should be regulations governing acquirement of consent from the vulnerable users in order to fetch personal data.[32] To wit, first, the regime for regulating AI should begin with the

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[29]Ott. Ummelas, One Country Is Planning To Give Robots Legal Status, THE INDEPENDENT, (Jan. 27, 2018, 2:10 PM), http://www.independent.co.uk/news/business/news/estonia-robots-artificial-intelligence-ai-legal-recognition-law-disputes-government-plan-a7992071.html.
[30]Id.
[31]Libby Plummer, Google's DeepMind creates an AI with 'imagination', WIRED, (Jan. 24, 2018, 8:10 PM), http://www.wired.co.uk/article/googles-deepmind-creates-an-ai-with-imagination.
[32]Supra note. 25.

establishment of a statute that incorporates comprehensive principles and promulgatesa code of conduct to be adhered by AI.A well-founded principle of "equal access to all robots" should also be established so as to financesurgical or personal assistant robots to ensure equal access to robots for all. In Korea,"Intelligent robots' development and distribution promotion act" has been enforced to ensure development and distribution of smart robots.[33] Second, a legislated statute should ensure that AI is secured, unsusceptible, crackerjack, virtuous and oriented in the best interest of humans. Third, an appropriate body in consonance with the statute should be set up to oversee and supervise the functions of AI. Fourth, an authorisation document, sealed and signed by the governance body of AI subsequent to verification should be granted to the companies associated with AI. Fifth, the horizons of law should be expanded in order to fine-tune the governance of AI. Sixth, a tortious liability should be infused on the delinquents based on crime perpetuation. The courts should adjudicate and penalise the owners of AI on the commitment of gross violation of the terms stipulated in the statute. Finally, we may safely infer that the future of AI may seem appalling but the massive upswing in AI is inevitable. The judicious solution to curb the unbridled misuse of AI is to develop a strong regulatory framework that can subdue AI to deal with ethical problems arising in advanced and dynamic intelligent machines and bring aboutadherence in accordance with the morality of society.

[33]Minkyu Kim, New Legislation and the Reform of the Rules on Robots in Korea, ZURÜCK ZUR STARTSEITE, (Jan. 26, 2018, 5:10 PM), https://www.nomos-elibrary.de/10.5771/9783845284651-129/new-legislation-and-the-reform-of-the-rules-on-robots-in-korea.

JURISDICTION OF INTERNATIONAL COURT OF JUSTICE: A CRITICAL ANALYSIS WITH SPEIAL REFRENCE TO KULBHUSHAN JADHAV CASE

NIDHI AGARWALLA

Abstract

International Court of Justice (ICJ) is a judicial body to resolve disputes at International level. After the establishment it is playing crucial role in resolving International disputes. With respect to India and Pakistan relation it has played crucial role time to time. India was party in six matters before the International Court of Justice. In International Court of Justice, four out of the six cases were against Pakistan. Recently 11-judge bench of the International Court of Justice at The Hague unanimously agreed to accept India's plea against Pakistan's death sentence to Kulbhushan Jadhav.

Introduction

International Court of Justice (ICJ) was preceded by the Permanent Court of International Justice (PCIJ). The statute of Permanent Court of Justice has been adopted for the International Court of Justice. To attain the end of International law, the establishment of the Court became necessary.[1]

It was established in June 1945 by the Charter of the United Nations and began work in April 1946. It is the principal judicial body of the United Nations (UN) to resolve disputes at International level, though its origin predates the League of Nations[2]. The role of the Court is to settle legal disputes submitted to it by States and to give advisory opinions on the legal questions referred to it by authorised organs of the United Nations and specialised agencies in accordance with international law[3]. The seat of the Court is at the Peace Palace in The Hague, Netherland.

Composition and Manner of Election of the Judges

The International Court of Justice is composed of 15 judges, who are elected for the terms of 9 years by the United nations General Assembly (GA) and the Security Council (SC)[4]. All the 15 Judges of the ICJ are elected for a nine year term, and one third of the membership is newly elected at three year intervals[5]. They are permitted for re-election. The judges do not represent the

[1]Composition and Jurisdiction of International Court of Justice (Legal Bites law and beyond, September 17, 2016) https://www.legalbites.in/composition-jurisdictions-international-court-justice/
[2]Vijay Purohit, "The Jadhav Case and the Jurisdiction of the International Court of Justice" (May 29, 2017) http://www.livelaw.in/jadhav-case-jurisdiction-international-court-justice/
[3]Prashant Kumar Srivastava, " International Court of Justice and its role in India- Pakistan Relations" , (2017), Volume 3, International Journal of Advance Research and Innovative Ideas in Education
[4]The Statute of the International Court of Justice, art 3(1)
[5]The Statute of the International Court of Justice, art 13(1)

governments of their home countries, and act entirely as independent authorities. To be eligible, they must be sufficiently qualified to hold the highest judicial office in their home country or must be a recognised authority on public international law[6].

The ICJ reaches decisions by majority vote, the President of the Court having the casting vote in the event of a tie[7].

Proceedings Before the ICJ

Recourse to the ICJ is optional. Both the parties subject themselves voluntarily to its jurisdiction. Thus any contesting party that files an application to the ICJ acknowledges its readiness to comply with the Courts decision on the matter under dispute[8]. On the other hand, if one of the parties subsequently refuses to accept a decision, the ICJ cannot enforce it against that countries will. Judicial execution would run counter not only to the concept of the sovereignty of the states, but also to the experience which has thought that conflicts between nations cannot be resolved by force, but only by establishing consensus.

The proceedings before the ICJ break down into a "written phase" during which the parties submit and exchange the pleadings and an "oral phase" during which the agents and counsel of the parties appear before the Court in public hearings[9]. The proceedings of the Court takes place in English and French, and all the written and oral submissions in one of those languages are invariably translated into other[10]. After the oral phase of the proceedings, the Court deliberates in camera. Its decision is then announces at a public session. The decision is final, and has no right to appeal. In case of one of the parties fails to comply with the decision of ICJ, the order is entitled to the matter to the Security Council of the United Nation. The ICJ performs its duty as a plenary body, but may also form smaller specialized chambers if the parties so wish[11].

Jurisdiction of ICJ

Broadly speaking there are two kinds of jurisdiction of the Court[12]:

1. Contentious Jurisdiction

That jurisdiction of the Court on the basis of which the Court decides any case with the consent of the parties to the case, is called 'Contentious Jurisdiction.' It is fundamental principle of international law that without the consent of any

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[6]The Statute of the International Court of Justice, art 2
[7] The Statute of the International Court of Justice, art 55(2)
[8]The Charter of the United Nations, art 94(1)
[9]The Statute of the International Court of Justice, art 43
[10]The Statute of the International Court of Justice, art 39
[11]Supranote3
[12]Supranote1

party to a case, the same shall not be referred to mediation or arbitration. Contentious Jurisdiction is of three kinds which may be given as under:

- Voluntary Jurisdiction
- Ad hoc Jurisdiction
- Compulsory Jurisdiction

2. Advisory Jurisdiction

Advisory Jurisdiction means that the jurisdiction of the Court by which it may only give an advisory opinion on a question of law. This does not require the consent of the parties to a case but when any International Institute (General Assembly or Security Council) ask the Court to give an advisory opinion on the question, this opinion is not binding on the parties. So the case may be referred by an international organization or by any organs within the scope of their activities.

Article 36 of the Statute (Chapter-II-Competence of the Court), lays down the jurisdiction of the Court as under[13]:

- The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
- The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

The interpretation of a treaty;

* Any question of international law;
* The existence of nay fact which, if established would constitute a breach of an international obligation;
* The nature or extent of the reparation to be made for the breach of an international obligation;

- The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.
- Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice.
- In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Article 36(2) above, provides for the compulsory jurisdiction of the Court, which means that a State that has recognized the compulsory jurisdiction of the Court has in principle, the right to bring any one or more other State which

[13] The Statute of the International Court of Justice, art 36

has accepted the same obligation before the Court by filing an application instituting proceedings with the Court, and, conversely, it has undertaken to appear before the Court should proceedings be instituted against it by one or more such other States[14].

India and Pakistan both, have by way of respective declarations, recognized the compulsory jurisdiction of the Court (India recognized the compulsory jurisdiction of the Court by declaration dated 18 September 1974 and Pakistan vide declarations dated 12 September 1960 & 29 March 2017)[15].

Parties recognize compulsory jurisdiction of the Court with reservations. Therefore, Article 36(2) is also popularly termed as "Optional Clause" conferring jurisdiction on the Court. However, the Optional Clause does not stand by itself. It is an integral part of the Statute and adherence to the Optional Clause means adherence to the whole of the Statute.

It does not appear to be open to states in their unilateral declarations to make their acceptance of jurisdiction conditional upon non-application of constitutional provisions of the Court's Statute. The Court is required to function in accordance with the Statute[16]. For instance, the declarations signed by India & Pakistan respectively, list a number of exceptions, which are excluded from the ambit of compulsory jurisdiction that both the countries have conferred on the ICJ.

Another important facet of jurisdiction of the Court is the "reciprocity" principle with respect to the reservations made by state parties. This principle is well established in the jurisprudence of the Court in the case of Republic of Nicaragua v. the United States of America (Nicaragua Case)[17] wherein the World Court observed that:

> *"The notion of reciprocity is concerned with the scope and substance of the commitments entered into, including reservations, and not with the formal conditions of their creation, duration or extinction. It appears clearly that reciprocity cannot be invoked in order to excuse departure from the terms of a State's own declaration whatever its scope, limitations or conditions"*

In the case of United Kingdom vs. Norway (Fisheries Case)[18], the Court held that any reservation made by parties qua the question of determination of dispute to be falling within the municipal jurisdiction contrary to any express provision of the Statute has to be declared invalid.

The vigour of Article 36(2) therefore, is not really reflective of the term "compulsory jurisdiction".

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[14]The Statute of the International Court of Justice, art 36(2)
[15]Supranote2
[16]The Charter of the United States, art 92; The Statute of the International Court of Justice, art 1
[17]Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), 1986 I.C.J. 14
[18][1951] ICJ 3

Dispute Resolution of India at International Court of Justice

All members of the UN are automatic parties to the statute, but this does not automatically give ICJ jurisdiction over disputes involving them. The ICJ gets jurisdiction only on the basis of consent of both parties[19].

India declared the matters over which it accepts the jurisdiction of the ICJ, in September 1974, which has revoked and replaced the previous declaration made in September 1959. Among the matters over which India does not accept ICJ jurisdiction are[20]:

1. Disputes with the government of any State which is or has been a Member of the Commonwealth of Nations, and
2. Disputes relating to or connected with facts or situations of hostilities, armed conflicts, individual or collective actions taken in self-defence
3. The declaration, which includes other exceptions as well, has been ratified by Parliament.

Facts

Kulbhushan Sudhir Jadhav[21] born on 16th April, 1970 is an Indian national arrested in Balochistan, Pakistan, over charges of terrorism and spying for India's intelligence agency, the Research and Analysis Wing[22].

The Pakistani government states that he is a serving commander in the Indian Navy who was involved in subversive activities inside Pakistan, and was arrested on 3 March 2016 during a counter-intelligence operation in Baluchistan[23]. The Indian government recognises Jadhav as a former naval officer, but denies any links with him and maintains he took premature retirement and was possibly abducted from Iran[24].

Jadhav was sentenced to death in a Field General Court Martial on April 10, 2017 after three and-a-half months of trial. He has been accused of espionage and working for the India's external intelligence agency, Research and Analysis Wing[25].

He was arrested from Balochistan on 3rd March 2016. The issue has snowballed into a flash point for India-Pakistan relations. India has been repeatedly requesting consular access to Mr. Jadhav while also demanding a certified copy of the charge sheet as well as the judgment. Pakistan has so far

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[19]The Charter of the United Nations, art 93(1)

[20]Supranote3

[21]Shashank Kumar, "Pakistan Claims Arrest of RAW Agent in Balochistan. What Happens Next", The Wire (27 March, 2016).

[22]Salman Masood, "Pakistan Releases Video of Indian Officer, Saying He is a Spy", The New York Times (30 March, 2016).

[23]"Pakistan sentences Indian spy Kulbushan Yadav to death", The Express Tribune (10 April, 2017).

[24]"Rijiju Slams Pakistan for Releasing Doctored Video on Arrested Man", The New Indian Express, Press Trust of India (30 March, 2016).

[25]"Kulbhushan Jadhav: The Story so far", The Hindu (April 17, 2017).

denied India's request 13 times, Mr. Gautam Bambawale, Indian High Commissioner in Islamabad told reporters in the Pakistan capital. In the wake of this, India has cancelled maritime talks with Pakistan that was scheduled for April 17[26].

Verdict of the International Court of Justice in Kulbhushan Jadhav Case

The 11-judge bench of the International Court of Justice (ICJ) at The Hague unanimously agreed to accept India's plea against Pakistan's death sentence to Kulbhushan Jadhav. The bench led by Judge Ronny Abraham asked Pakistan not to execute Kulbhushan Jadhav till the final verdict in the case is not pronounced by the International Court of Justice. There were several questions before the International Court of Justice[27]:

1. Whether International Court of Justice have jurisdiction to decide the case?
2. Is the rights alleged by India are plausible?
3. Is there a link between the rights claimed and provisional measures requested?
4. Is there a risk of irreparable prejudice and urgency?

The issue which I am dealing in this research paper is the Jurisdiction of International Court of Justice.

On the question of Jurisdiction of International Court of Justice to decide the case, the International Court Justice began by considering if it has jurisdiction to hear the case. The Court said that India sought its jurisdiction under Article 1 of the Optional Protocol of the Vienna Convention under which the Court has jurisdiction in "disputes arising out of the interpretation or application of the Vienna Convention". The Court said that both parties, India and Pakistan, have differed on the question of India's consular assistance to Kulbhushan Jadhav under the Vienna Convention. The Court noted that the acts alleged by India-Pakistan's failure to provide the requisite consular notifications with regard to arrest and detention of Jadhav-appear to be falling within the scope of the Vienna Convention. The Court said this was sufficient to establish that it has prima facie jurisdiction under Article 1 of the Optional Protocol. The ICJ also observed that the existence of a 2008 bilateral agreement between the parties does not change its conclusion on jurisdiction[28].

The Court asked Pakistan to take measures at its disposal to ensure Kulbhushan Jadhav is not executed pending the final decision in the case, and that it will inform the Court of all the measures it has taken to implement the order.

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[26]Ibid

[27]Kritika Banerjee, "How International Court of Justice Decided in India's favour in Kubhushan Jadhav Case: An Explainer", India Today (May 18, 2017).

[28]Ibid

Impact of the Judgement Given in Kulbhushan Jadhav's Case

Under the United Nations regime, the ICJ i.e. "world court" is the "Principal Judicial Organ" charged with two primary functions, namely[29]:

- To assist in the resolution of disputes between states and
- To provide advisory opinion to specified international originations.

Established under the UN Charter, the court is governed by the Charter, the statute of the ICJ and the Rules of procedure adopted by the Judges and amended from time to time, as well as the Practice Directions adopted in October, 2001.

All members of the United Nations are automatically parties to the court's statute[30]. Non-UN members can also become parties to the courts statutes[31]. Once a state is a party to the court's statute it is entitled to participate in cases before the court. While deciding cases the court needs to apply international conventions, international Custom, the general principles of law recognized by civilized nations and also refers to academic writings i.e the teachings of most highly qualified publicists of the various nations and previous judicial decisions, which though not binding, have great persuasive value[32].

On 14.04.1978 the ICJ, to streamline its functioning and having regard to chapter XIV of the charter of the united nations, and further having regard to the statute of the court annexed to the said charter and exercising powers in terms of Article 30 of the said statute has framed exhaustive Rules of Court (1978) laying down the procedure to invoke the jurisdiction of the International Court of Justice. Subsection 1 of Section D of these Rules deal with interim protection proceedings. Article 73 and 74 of the 1978 Rules of Court provide as under:

Article 73

1. A written request for the indication of provisional measures may be made by a party at any time during the course of the proceedings in the case in connection with which the request is made.

2. The request shall specify the reasons therefore, the possible consequences if it is not granted, and the measures requested. A certified copy shall forthwith be transmitted by the Registrar to the other party.

Article 74

1. A request for the indication of provisional measures shall have priority over all other cases.

2. The Court, if it is not sitting when the request is made, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency.

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[29]Supranote3

[30]The Charter of the United Nations, art 93

[31]The Charter of the United Nations, art 93(2)

[32]Statue of the International Court of Justice, art 38

3. The Court, or the President if the Court is not sitting, shall fix a date for a hearing which will afford the parties an opportunity of being represented at it. The Court shall received and take into account any observations that may be presented to it before the closure of the oral proceedings.
4. Pending the meeting of the Court, the President may call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects.

Conclusion

In all the matters in which India was a party before the International Court of Justice, the court has examined its jurisdiction and decided the matter effectively. In the matter of Kulbhushan Jadhav, the International Court of Justice, being prima facie satisfied about the merits of India's case and the availability of its jurisdiction over the dispute has granted interim relief/provisional measures i.e. stay of execution of Kulbhushan Jadhav by invoking the provisions of the aforesaid articles.

It is a matter of record that both India and Pakistan are signatories to the Vienna Convention on Consular Relations, 1963 providing for consular assistance to their nationals who are facing trial in other counties and unequivocally and compulsorily conferring jurisdiction in the International Court of Justice.

Additionally, the doctrine of "pacta sunt servanda" which is a well recognized doctrine in international law requires that treaties entered into in good faith have to be carried out in good faith and any breach thereof amounts to violation of international law. Examined from this back drop there is no manner of doubt that consular access to India has been denied even though it is well known that military tribunals in Pakistan are opaque and operate in violation of national and international fair trial standards and fail to provide justice, truth and even proper remedies to under trials.

In the present case the court has jurisdiction as per Article 36 of the ICJ statute which has been recognized as compulsory ipso facto and without special agreement. In almost identical fact situation i.e. in the Lagrand case[33] and in the case of Avena and other Mexican Nationals[34] the International Court of Justice has exercised its jurisdiction, stayed the execution and directed review and retrial. The case of Kulbhushan Jadhav is a test case for the International Court of Justice to dispel the impression that international law is the vanishing point of jurisprudence.

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[33]LaGrand, Germany v United States, ICJ GL NO 104, [2001] ICJ Rep 466, (2001) 40 ILM 1069 , ICGJ 51 (ICJ 2001)

[34]Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America), I.C.J. Reports 2004, 12; General List No. 128

INDIA-PAKISTAN RELATIONS: IMPACT ON KULBHUSHAN JADHAV'S CASE

HIMANSHU KUMAR SINGH & AAYUSHI AGARWAL[1]

South Asia is densely populated with people belonging to common civilizations. The thread of golden epistemology is strong between the states. The deep rooted suspicions and distrust among South Asian countries continue to influence the life of people; no change is felt in the existing conflicts among these countries. The protracted Indo-Pak feud has topped all these other. The countries in South Asia has history existing in a state of mutual suspicion since India and Pakistan gained independence in 1947.

Seventy years, 4 major wars, thousands of people losing lives and series of diplomatic failure adding up to the never ending dispute between two of the most highly potential countries in South Asia. Every morning, people from both sides of the border, wake up to fresh news of deteriorating relationship between the two neighbors.

Diplomacy in the form of historically rooted traditions of human solidarity and values of peace and harmony, need to be enhanced in order to achieve a global goal of happiness. It is to our dismay that the two countries where thousands die of hunger and millions are deprived of food; stand together on the list of highly militarized nations. The arms race between India and Pakistan (two countries that account for 93 percent of the total military expenditure in South Asia) is responsible for this cruel agony.[2] India, which is ranked 126[3] in terms of per capita income, ranks 5th in the world in terms of arms export.[4] Going by the data provided by the World Bank Pakistan's position is no better than India in terms of ranking in the sector of per capita income.

The current structure of India Pakistan tension is such that a terrorist attack is capable of inducing military mobilization across the border. While certain militant groups continue to conduct their 'war of liberation' in Kashmir, India continues to accuse Pakistan of the 'Cross Border Terrorism' whereas Pakistan on the other hand has been regularly claiming the denial on any such reports.

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[2]Peace an Economic Cooperation in South Asia, by Akmal Hussain.

[3]Source: Business Today; Report: India moves up one notch to 126 in per capita GDP ranking: IMF, Last Updated: November 20, 2017. Available at: http://www.businesstoday.in/top-story/imf-rankings-india-per-capita-gdp-terms-imf-ppp-world-economic-outlook/story/264384.html, Last Seen: 07th December, 2017 at 12:02am.

[4]Source: GDP per capita (current US$); World Bank national accounts data, and OECD National Accounts data files. Availabe at: https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations= IN, Last Seen: 09th December, 2017 at 11:54pm.

The Kashmir issue between India and Pakistan has not only given a halt to the development in the region but has also promoted a sense of hatred in the form of cruelty and torture to each others' individual. Over the years there are many arrests that have taken place across the border areas, each arrest appears to be a reciprocated attempt of revenge by both the countries. Between the turmoil and hatred, the human values stand defeated.

According to a newspaper report published by the Indian Express[5], 546 Indian nationals are under the custody of Pakistan, whereas according to another report published by a Pakistan daily, Dawn[6], 179 Pakistani prisoners are languishing in the Indian jails. While the numbers of prisoners are moreover same in proportion to the population of the respective countries, the horrific tales of torture, humiliation and inhumane treatment is same on both the sides. Prisoners on both sides of the border continue to narrate their horrific stories.

Mutual mistrust among both the countries continue to haunt the wheel of human values and the principles of human rights between the countries. Setting aside the talks for peace and promotion of trade, majority of the Indo-Pak talks have circled around the same issue of Kashmir. The sense of insecurity is such that both countries refer to the other side of the ceasefire line as "occupied" territory.

Examining the India-Pakistan relationship, Stanley Wolpert wrote, "India and Pakistan were born [in 1947] to conflict.[7]

The never ending lack of trust continues to prevail in the South Asian region, where the two major powers that together have the capacity to be a global strength fail to cooperate and promote peace in the region. Both countries continue to defy the Tashkent Agreement signed by Indian Prime Minister Lal Bahdaur Shastri and Pakistani President Ayub Khan, on January 10, 1966, where both agreed to restore diplomatic relations which each other. It was only 5years later that India and Pakistan ended up in another gruesome war. In 1972, Pakistani Prime Minister Zulifiqar Ali Bhutto and Indian Prime Minister Indira Gandhi sign an agreement in the Indian town of Simla, in which both countries agree to "put an end to the conflict and confrontation that have hitherto marred their relations and work for the promotion of a friendly and harmonious relationship and the establishment of a durable peace in the subcontinent". Both sides agree to settle any disputes "by peaceful means".[8]

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[5]The Indian Express, Report: 546 Indian nationals in Pakistan jails, Last Updated: 1st July, 2017; Availabe on: http://indianexpress.com/article/india/546-indian-nationals-in-pakistan-jails-4730487/, Last Seen on: 11th December, 2017 at 12:54am.

[6]DAWN, Report: 17 Pakistanis in Indian jails awaiting repatriation for years, Last Updated: 06th April, 2016. Available at: https://www.dawn.com/news/1250197, Last Seen: 11th December, 2017 at 12:30am.

[7]Wolpert, Stanley (2011) India and Pakistan: Continued Conflict or Cooperation. California: California University Press.

[8]Agreement Between the Government of India and the Government of the Islamic Republic of Pakistan on Bilateral Relations (Simla Agreement), 1972

The Kulbhushan Jadhav case has given another spark to the already deteriorating relationship between the two countries. The case of Kulbhushan Jadhav at The Hague is controversial and of high importance as it rests moreover upon the ties between the two South Asian neighbors than the judgment at the International Court of Justice. While India and Pakistan have countless issues to fight on, the Jadhav case has given the duo another set of reasons to exploit the relationship.

While India continues to accuse Pakistan as a violator of Vienna Convention on Consular Relations, Pakistan has firmly taken the stand that the convention only applies to legitimate visitors and not to the spies. Pakistan has continuously affirmed and placed before the ICJ said that Jadhav is not an ordinary person as he had entered the country with the intent of spying and carrying out sabotage activities and that these rights cannot be exercised by him.

"Pakistan shall take all measures at its disposal to ensure that Mr Jadhav is not executed."[9] One order, two nations and of course two interpretations. While India, proclaimed this 'provisonal order' as a major victory at The Hague, Pakistan leveled it as a regular and casual order, which had nothing to do with the maintainability of the case. The Court also noted that Pakistan has given no assurance that Mr. Jadhav will not be executed before the Court has rendered its final decision.

The major problem that an individual can see for the failure of relationship between the two countries is the determination to fight amongst themselves at the cost of human lives through non adherence of all the international obligations (Judgments, Agreements, Treaty etc.). The degree of enmity is so severe that both India and Pakistan have forgotten the common values of peace and prosperity enshrined under all the sacred texts.

In what 'appears' to be a reciprocal attempt by India to demand the release of Kulbhushan Jadhav, it is pertinent to note the timeline of events that have occurred after the arrest and sentencing of Jadhav by military court. Pakistan officials have claimed that Lt. Col. Mohammad Hameed Zahir, went missing from Nepal since 06th April, 2017. While Indian officials said they had no knowledge about Habib, Pakistan government sources said Islamabad was convinced that he was in India's external intelligence agency RAW's custody.[10]

The fate of 'missing' and 'disappearing' officers and their release moreover depends upon the level of diplomatic relations the countries maintain between

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[9]Jadhav Case (India v. Pakistan), INTERNATIONAL COURT OF JUSTICE, Press Release Unofficial, No. 2017/22, 18 May 2017, Available at: http://www.icj-cij.org/files/case-related/168/19440.pdf, Last Seen: 12th December, 2017 at 07:00pm.

[10]The Times of India, Report: Pakistan seeks info on its Lt Col who went missing in Nepal, Last Updated: Jun 1, 2017, Available at: https://timesofindia.indiatimes.com/india/pak-seeks-info-on-its-lt-col-who-went-missing-in-nepal/articleshow/58935786.cms, Last Seen: 17th December, 2017, at 01:28pm.

each other, and by India denying to help Pakistan in helping it to find its officer, it is more evident how significantly both sides are determined to provoke each other. India has denied the help to Pakistan on the grounds of jurisdiction, but Pakistan still sees this as an act of India to threaten Pakistan. Recent incursion by Indian Army into the Pakistani territory to 'avenge' the killings of Indian Army men in a terrorist attack, in the Uri Sector of Jammu Kashmir, is a perfect example how critical the condition is between the two countries. The current structure of India-Pakistan tension is such that the nuclear button may be deliberately pressed by one, on the other at any time. The tactics applied by both the nations is nothing but the failure of justice and mankind. The Human Rights of individuals of both the countries are severely hampered by the failure of diplomacy. Political and diplomatic stability are two main elements that severely impact the human right of an individual. The case of Jadhav, is a perfect example of 'diplomatic wreckage', as this case is largely guided on the grounds of suspicion. Individuals have been a victim of the existing relationship between two countries; governments are fighting their battles at the cost of lives of individuals.

India's attempt to isolate Pakistan at international level, would lead to another series of failure in diplomatic relations. Both India and Pakistan should understand the core values of human rights and respect the international instruments and work on developing trust between them. There are hundreds of Jadhavs still locked in Pakistani jails and hundreds of Habibs still missing. Until and unless the countries develop the peace among themselves, there is no scope of the human rights violation to ever stop. Thousands would go missing and millions will be tortured, and the country would keep on spending money on guns and keeping their troops ready for battle; economic, social and cultural cooperation is required between the two countries. In contrast to the pre occupation of the governments to achieve 'national security' within the paradigm of conflict, the citizens share a common concern for human security. They seek security from the threats of war, religious extremism, social injustice etc. Bridging this gap between the pre occupations of state and civil society is necessary to maintain the social contract that lies and sustains national integrity.[11]

The final verdict on the Kulbhushan Jadhav's case is yet to be pronounced by the Internatinal Court of Justice, but with Pakistan reluctant to adhere by the provisional measures issued by the ICJ, chances of Jadhav not being executed is very less. India needs to settle this case only by the way of talks or see Pakistan execute Jadhav. While India and Pakistan are quick in 'avenging' wars and killings, it would be pertinent to watch the next event of the timeline after execution. No matter in what way the countries act and react to each other, one thing that is certain, is the failure of human values and birth of another series human rights violation.

[11]Peace and Economic Cooperation in South Asia, Akmal Husaain.

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