IILS LAW REVIEW Vol. 7 Issue 1/2021 ISSN 2320 – 5318

# IILS LAW REVIEW

**INDIAN INSTITUTE OF LEGAL STUDIES**
UG & POST GRADUATE ADVANCED RESEARCH STUDIES IN LAW

Accredited by NAAC
Affiliated to the University of North Bengal
Approved by the University Grants Commission, New Delhi
Recognized by the Bar Council of India, New Delhi


**INDIAN INSTITUTE OF LEGAL STUDIES**
UG & POST GRADUATE ADVANCED RESEARCH STUDIES IN LAW

Accredited by NAAC
Affiliated to the University of North Bengal
Approved by the University Grants Commission, New Delhi
Recognized by the Bar Council of India, New Delhi

Siliguri, P.O. Salbari, Dist. Darjeeling – 734002 (West Bengal), India
Phone: (0353) 2960665, Fax: (0353) 2960668
Iils.siliguri@gmail.com, iils.lawreview.5318@gmail.com
Website: www.iilsindia.com

**IILS LAW REVIEW Vol. 7 Issue 1/2021 ISSN 2320 – 5318**

# IILS LAW REVIEW

**INDIAN INSTITUTE OF LEGAL STUDIES**
**UG & POST GRADUATE ADVANCED RESEARCH STUDIES IN LAW**

**Accredited by NAAC**
**Affiliated to the University of North Bengal**
**Approved by the University Grants Commission, New Delhi**
**Recognized by the Bar Council of India, New Delhi**

**Siliguri, P.O. Salbari, Dist. Darjeeling – 734002 (West Bengal), India**
**Phone: (0353) 2960665, Fax: (0353) 2960668**

Iils.siliguri@gmail.com, iils.lawreview.5318@gmail.com
**Website: www.iilsindia.com**

## EDITORIAL BOARD

## 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, Clinical legal classes 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 from different corners of the country. 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 the Hon'ble Judges of the Supreme Court of India and the various High Courts.

The Institution has been organizing a series of National and International Seminars, Conferences, Symposiums, Workshops and Inter and Intra Moot Court competitions. 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.

Presently, the world is facing health crises due to emergence of a pandemic by COVID-19 virus and physical gatherings have been completely stopped, especially in schools, colleges and universities since past almost 6 months and more. But even during this pandemic, the Indian Institute of Legal Studies was the first of its kind in this region that has undertaken the initiative of conducting online classes for the students of both UG and PG courses and has been conducting them effectively since its very beginning to reach out to the students through online teaching- learning mechanism from the very initial period of lockdown. Also, the college have successfully conducted internal examinations through online mode so that the continuous evaluation of students does not come to a halt.

The Institution's vital location, its active participation in imparting knowledge and molding 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

**SHRI JOYJIT CHOUDHURY**
Founder Chairman
Indian Institute of Legal Studies

This journal, though in its nascent and juvenile stage, has received the rare distinction of being recognized by the UGC. It provides the entire team responsible for its publication, the vivacity and vigor to move forward and present ideas and thoughts to its readers. It has been made possible by the relentless efforts put in by the editorial team which has had the good fortune of having extremely able and imaginative research assistants.

While choosing on the topic, I have decided to jot down a few lines on the unprecedented crisis that the entire human race has been facing due to the COVID -19 Pandemic. The onset of spring this year has been quite different from other years. It had demonstrated signs of pathological anxiety. The COVID -19 Pandemic has diseased humankind and it has been considered as a global health crisis of the modern civilization. This has been the greatest challenge we have encountered since the World Wars and the Great Economic Depression of the 1930s.The present hour weighs heavy with gloom and it is the dire need of the world to generate pragmatic

responses to overcome this epidemic and the most erudite brains all over the globe are tirelessly striving to devise strategies and remedies to combat this crisis.

If we take a look at the history of the Corona virus, it originated sometime in the middle of December in China at a live seafood market and then spread to the Wuhan area. Gradually, it spread to Italy, U.S.A, Europe and other countries of the world. The affected countries have been called to take immediate steps to detect, treat and reduce the further spread of the virus to save lives of the people. Presently COVID-19 is no more confined to China, Italy or U.S.A. It has become a global issue.

The economic impact has had devastating and cascading effect world-wide with closure of business entities, rampant job loss coupled with non -existent economic activities putting the lives and livelihood of a large section of the world 's population in peril. The poor vulnerable daily wage earners and migrant workers are the ones who are worst affected. Concrete measures must be adopted by the governments to provide this section of the population with sustainability incomes or else the world shall witness an increase in the pre-existing inequalities. The Governments must strengthen social protection and livelihood, reorient public finance to augment human capabilities, introduce measures to limit bankruptcies and create new sources of job creation.

In adverse times as this, when our newsfeed is buzzing everyday with dark and gloomy information about lockdown, boycotts, rising death toll, a sense of uncertainty is baffling our minds. We,as responsible citizens of our country must try to hold on our nerves. We must learn not to panic as lots of myths and fake news are being circulated by fraudsters. Domestic abuse, depression, suicidal tendencies are increasing because of the anxiety that is looming large. We must realize that anxiety is contagious and make conscious efforts to combat it.

COVID -19 has had adverse impact on the entire educational system and the entire student fraternity has been affected irrespective of their social backgrounds. The mental health of students has also been impacted upon. An effort has been initiated to normalize education system by the use of technology. About 1.5 billion children around the world have had to stay home and indoors in their efforts to minimize the transmission of the virus. Even though remote learning opportunities have been adopted yet 30 percent of the students -around 463 million worldwide- were deprived access to such a method by remote learning due to depravation and poverty. This

has led to a global education emergency and the repercussions shall be felt for decades to come. Such unequal access to education particularly in rural areas shall lead to skewed human response development which is detrimental to humanity.

Humans have devised and evolved various means to restrict the impact of the virus but itsdevastating effect is visible everywhere-this is the struggle for existence -this is the new normal. People should spread positive messages. This is the time to explore one's hidden talents and work on them. Because of communication gaps, people are becoming more paranoid. Social distancing must be replaced by physical distancing. One should maintain proper hygiene and positive thinking and physical activity can reduce stress and boost immunity. Though a staggering number of people are getting infected, they are recovering also. B.B.C and other institutional research agencies estimate that most of the Corona Virus related information circulating on social media are not reliable. One must stay away from the medical internet jargon that one doesn't understand.

It is heartening to see that in spite of closure of many educational institutions, the editorial team has put in their honest efforts to publish the journal in such antagonizing and unprecedented times. I sincerely laud and appreciate their endeavors in making this happen.

**JOYJIT CHOUDHURY**

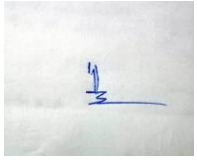
## MESSAGE FROM EDITOR IN CHIEF

Legal scholarship is very vital to the continued relationship of law and society. It sheds light on particular issues, creating dialogue between scholars' lawyers, judges and policy makers, causing us to think more critically. Writing also gives voices to the oppressed, and by speaking out against injustice, we create ripples in the fabric of society. It leads to shifts in legislative policy, making our leaders and entrepreneurs aware of the pulse of the people. The only way for a society is to progress by entertaining contrasting perspectives, each holding the other accountable. My ultimate vision is that of a society where we are free to have different views and one where we constantly challenge ourselves to accept new ideas.

The IILS Law Review from its very inception in 2014 has worked to push the boundaries of academic literature, garnering literature from students, academicians and legal professionals with a vision of providing fora to academicians, professionals and students alike to express their views on various dimensions of the law as it stands and the law, as it ought to be. The IILS Law Review aspires to be at par with foreign law school reviews in terms of quality. Throughout the years, the editorial boards have attempted to maintain the threshold of quality while ensuring the frequency of issues is consistent. The IILS Law Review has sought to sustain and support legal excellence through its continued standards of publication.

I am extremely proud to present the Seventh Volume (Vol. VII, Issue No. 1/2021) of the IILS Law Review. I thank the Hon'ble Chairman of Institute, the Editorial Advisory Board, the authors of the articles and the teachers who were involved in this process. A lot of hard work, intellectual discussions, and free exchange of ideas contributed to this Journal. My hope for the IILS Law Review, is that it should always seek to achieve newer and greater heights and keep the spirit of legal scepticism alive.

Looking forward on Behalf of the Board of Editors,



Prof. Dr. Ganesh Ji Tiwari
**Editor in Chief& Principal**
Indian Institute of Legal Studies

**IILS LAW REVIEW**

**VOLUME 7, ISSUE 1 (2021)**

**TABLE OF CONTENTS**

# SHAREHOLDERS' RIGHT TO VOTE AND PARTICIPATE IN CORPORATE MANAGEMENT: A COMPARATIVE PERSPECTIVE

*-Dr. Gogo George Otuturu*[1]

**Abstract**

*The shareholders are undoubtedly the primary reason a company exists. They contribute their money to the company. They do this in hope of a return on their investment. Having invested their money in the company, they have a right to some control over those who manage their resources. This is possible by their participation in the management of the company through the annual general meeting where they exercise their right to vote and to have a say in the management of the company. This paper examines the extent of the shareholders' right to vote and to participate in the management of the affairs of the company. It adopts a comparative approach. It examines the shareholders' right to vote and to participate in corporate management under American law, German law and Nigerian law. As Nigerian law derives mainly from English law, references will only be made to English law where necessary. The purpose is to point out the limitations on the shareholders' right to vote in Nigeria with a view to making suggestions for reform where necessary. Amongst other things, it suggests that legislation should make it mandatory for shareholders holding more than twenty percent of the total issued capital of a public company should have a representative on the board of directors should.*

**Keywords:** company control, cumulative voting, proxy contest, voting agreement, voting trust

## Introduction

Shareholders are entitled to a number of rights. These rights are either conferred by statute or by the articles. Rights conferred by the articles can be altered in accordance with the provisions of the articles, whereas rights conferred by statute cannot be altered by the board of directors or shareholders in general meeting. These principles were brilliantly restated in the Indian case of *Ohio Insurance Co. v. Nunnemacher*[2] where Justice Perkins said:

> A corporation is a creature existing, not by contract; but, in this country, is created or authorized by statute; and its rights, and even mode of action, may be, and generally are, defined and marked out by statute; and when they are, they cannot be changed, even by the contracts of the corporators.[3]

The right to vote and to participate in corporate management is one of the rights conferred on shareholders by relevant company statutes. The shareholders are, undoubtedly, the primary

[1]LL. B, LL.M, PhD, B.L, CBA, DipEd, ANITD, ACIArb (Nigeria); Solicitor and Advocate of the Supreme Court of Nigeria; Senior Lecturer, Faculty of Law, Niger Delta University, Wilberforce Island, Bayelsa State, Nigeria. E-mail: otuturulaw@gmail.cocm; 08033036092

2 [1860] 15 Ind. 294.

3 Ibid 295.

reason the company exists. They contribute their money to the company. They do this in hope of a return on their investment. As such, they have a right to some control over those who manage their resources. This is possible through the annual general meeting where they exercise their right to vote and to have a say in the management of the company.

This paper examines the extent of the shareholder's right to vote and to have a say in the management of the affairs of the company. The paper adopts a comparative approach. It examines the shareholder's right to vote and to participate in corporate management under American law, German law and Nigerian law. Of course, Nigerian law derives mainly from English law, so references will only be made to English law where necessary. The purpose is to point out the limitations on the shareholder's right to vote in Nigeria with a view to making suggestions for reform where necessary. Amongst other things, it suggests that legislation should make it mandatory for shareholders holding more than twenty percent of the total issued capital of a public company should have a representative on the board of directors should.

**Shareholder's Right to Vote under American Law**

Under the United States Revised Business Corporation Act, each share normally entitles its holder to one vote on matters submitted to a vote, unless the articles provide for more or less than one vote per share.[4] Thus the holder of one share is generally entitled to one vote and the holder of fifty shares is generally entitled to cast fifty votes.

The RMBCA also authorizes the issuance of nonvoting shares.[5] For example, redeemable preference shares generally carry no voting rights. However, even the holder of a nonvoting share is entitled to vote on certain extraordinary transactions, such as amendments to the articles, mergers and consolidations, and dissolution of the corporation.[6]

Because a shareholder is entitled to one vote for each share, the holders of 51 percent of the voting shares will have complete control. To give minority shareholders more power, most states permit corporations to adopt cumulative voting for directors. This system allows a shareholder to multiply the number of his voting shares by the number of directors to be elected.[7] Thus, he may cumulate all these votes and cast them for one candidate or distribute them among several candidates. This procedure allows minority shareholders an opportunity to be represented on the board of directors.[8]

---

4 Revised Model Business Corporation Act 1985 Revision *(*hereinafter simply referred to as RMBCA), s 7.21(a).

5 Ibid, s. 7.21(d).

6 Ibid, s. 11.03.

7 Ibid, s 7.28(b) provides that shareholders do not have a right to cumulate their votes for directors unless the articles of incorporation so provide. In other words, the articles may permit cumulate voting for directors.

8 RW Hamilton, *Cases and Materials on Corporations including Partnerships and Limited Partnerships* (3rdedn, West Publishing Co. 1986) 425-436; GW Brown, EE Byers and MA Lawlor, *Business Law* (7thedn, McMillan/McGraw-Hill Publishing Co. 1989) 529.

Cumulative voting can be illustrated with an example. Assume that Buck Corporation will elect all three of its directors at the next annual shareholders' meeting. Assume also that out of the 100, 000 voting shares of the corporation, the majority shareholders hold 60, 000 shares and the minority shareholders hold 40, 000 shares. The minority shareholders wish to elect at least one director to the board, but the majority shareholders want to elect all the three directors to the board. If cumulative voting is not used, the majority shareholders will be able to vote in all its candidates by a margin of 60, 000 votes to 40,000 votes.

Assuming a cumulative voting system is employed. Each share is given three votes, one for each director to be elected. If a shareholder owns only one share, the shareholder may cast one vote for each of the three candidates, or may instead cumulate his votes by casting all three votes for one candidate. In our example, the minority shareholders will have 120, 000 votes (that is, the 40, 000 shares they own multiplied by the three directors to be elected), all of which they can cast to elect their candidate.

In our example, the majority shareholders have 180, 000 votes. If they cast all the 180, 000 votes for only one of their candidates, they would not have any votes left to elect the other two candidates. Alternatively, they could cast 120, 001 votes for one of their candidates and this would give him one more vote than the minority shareholders' candidate. But then the majority shareholders would have only 59, 999 votes left, which they would cast to elect the third candidate to the board. Thus, the minority shareholders' 120, 000 votes would ensure them a slot on the board.

Cumulative voting applies only to the election of directors. In some states, cumulative voting is required by statute and cannot be refused in any election or eliminated in the articles. In other states, it is permissive, meaning that cumulative voting can be eliminated in the articles. Under the RMBCA cumulative voting is permissive.[9] Whether it is permissive or mandatory, cumulative voting for directors is controversial. On the one hand, proponents of cumulative voting claim that it is necessary to assure a minority voice in corporate management. On the other hand, opponents claim that minority representation means dissent in the boardroom.[10]

Majority shareholders have in many instances succeeded in curtailing or eliminating cumulative voting through a number of devices. In states where the right to vote cumulatively is permissive rather than mandatory, the charters of certain corporations have been amended to replace cumulative voting with straight voting. Cumulative voting may also be circumvented by

9 RMBCA, s. 7.28.

10 TW Dunfee and others, *Modern Business Law and the Regulatory Environment* (3rdedn, McGraw-Hill 1996) 778.

removing minority-elected directors without cause. A third method employed to prevent effective use of cumulative voting is that of reducing the number of directors.[11]

A further related device for diluting the effect of cumulative voting is the staggered election of directors, because the fewer the number of directors to be elected, the greater the number of shares that will be necessary to assure representation.[12] As an illustration, assume that in our earlier example, the three directors were elected for staggered 3-year terms and only one director comes up for election each year. That will neutralize the effect of cumulative voting. In any given year, the majority shareholders would have 60, 000 votes (60, 000 shares times one director to be elected) and the minority shareholders would have 40, 000 votes. With only one slot to be filled each year, the majority candidate would win each year by a margin of 60, 000 votes to 40, 000 votes.

Under the RMBCA, staggered elections are allowed to a limited extent. It permits boards consisting of nine or more directors to be divided into two or three classes, with each class being elected to a staggered 3-year term.[13] However, in states where cumulative voting is mandatory, the staggered election of directors is often prohibited.[14]

A shareholder may vote either in person or by proxy. A proxy is an authorization to exercise voting rights which is given by a shareholder to another person (who may also himself be referred to as a "proxy").[15] A proxy creates a special type of principal-agency relationship and therefore is subject to the rules of agency law as modified by special state statutes or by federal securities regulations. Under the RMBCA, a proxy must be in writing. A telegram or cablegram is sufficient. Some states require that the proxy be filed with the corporation before or at the shareholders' meeting. A few states allow oral proxy.[16]

As a proxy creates an agency relationship, every appointment of a proxy is revocable. One way a shareholder may revoke a proxy is by attending and voting at the relevant meeting. However, a proxy is not revocable if it is coupled with an interest, meaning that some consideration has been received by the shareholder such as an option to purchase the share. Even when proxies are irrevocable, statutes generally limit their duration. The RMBCA limits the validity of a proxy to eleven months unless it is otherwise provided in the proxy.[17]

---

11 *Humphreys v Winous Co.* 165 Ohio St. 45, 133 N.E. 2d 780 (1956).
12 Dunfee (n 9) 778.
13 RMBCA, s. 8.06.
14 Dunfee (n. 9) 779.
15 MA Pickering, "Shareholders' Voting Rights and Company Control" [1965] 81 LQR 248, 261.
16 Dunfee (n. 9) 779.
17 RMBCA, s 7.22.

Because cumulative voting may be circumvented and because proxies may be revoked, other devices for pooling votes for control of the corporation are frequently used. They include voting agreement and voting trust. A voting agreement is a contract entered into by several shareholders who mutually promise to vote their shares together in a specified manner. In some states[18] and under the RMBCA, such agreements are enforceable.[19] Such agreements are known variously as shareholder agreements, voting agreements or pooling agreements and have been held to be valid and enforceable.[20]

A voting trust is an agreement among shareholders to transfer their voting rights to a trustee, who is permitted to vote the shares in a block at the shareholders' meeting according to the terms of the trust instrument. Under the RMBCA, a voting trust agreement must be in writing, which must specify the terms and conditions of the voting trust, and a copy of it must be deposited with the corporation. The shareholders must transfer their shares to the trustee and receive in return trust certificates, sometimes called certificates of beneficial ownership.[21]

A voting trust is not the same thing as a proxy. A proxy has neither legal title to the shares not possession of the certificates, whereas a voting trustee has both.[22] As a proxy creates a special agency relationship, it is revocable unless it is coupled with an interest. On the other hand, a voting trust, once created, cannot be revoked until the specified period has run its course. Under the RMBCA, a voting trust cannot exceed ten years but it may be extended for an additional ten years.[23]

The minority shareholder's voting power increases as the proxies accumulate. This has brought about what has come to be known as proxy contests between the minority shareholders and the majority shareholders.[24] This has necessitated the regulation of proxy solicitation[25] in order to protect shareholders from misleading and concealed information in the solicitation of proxies.[26]

**Shareholder's Right to Vote under German Law**

Under German law, in principle, each share confers the right to vote at shareholders' meeting.[27] The articles may create shares without voting rights only in the case of preference shares. The

18 See, for example, California Corporation Code, s 708.
19 RMBCA, s. 7.31.
20 *Ringling Bros-Barnum & Barley Combines Shows v Ringling* 29 Del.Ch. 610, 53 A.2d 441 (1947).
21 Dunfee (n 9) 779.
22 KW Clarkson and others, *West's Business Law* (5thedn, West Publishing Co. 1992) 787.
23 RMBCA, s 7.30.
24 Brown (n 2) 529.
25 Securities and Exchange Act 1934, s 14.
26 Dunfee (n 9) 779.
27 Aktiengesetz of 1965 (German Stock Corporation Law) (hereinafter simply referred to as*AktG*) s 12(1).

articles may, however, limit the voting power of any shareholder to a specified number of shares.[28]

Contracts between shareholders to vote in a certain way are valid. However, contrary to the American rule, contracts of this kind cannot be specifically enforced. The party injured by a breach of such contract is relegated to a claim for damages.[29]

Generally, shares with multiple voting rights are prohibited. Such shares may be issued only with governmental permission, and only to the extent necessary to safeguard vital interests of the general economy.[30] The public authority responsible for granting multiple voting rights is the government of the state in which the corporation has its domicile.

Voting rights can be exercised in person or by proxy. The proxy must be in writing and signed by the shareholder concerned.[31] The most important proxy holders in shareholders' meetings are banks. Most of the shareholders in German corporations leave their representation at the meeting to the banks with which their shares are deposited. It is thus customary for a shareholder to give his bank every year a written power of attorney authorizing the bank to represent him at the shareholders' meeting of any corporation which is represented in his portfolio.[32]

Proxies are revocable at any time and may not be granted for a longer period than fifteen months.[33] However, renewals are permitted and are usually granted as a matter of course. Even with a power of attorney, a bank is not automatically entitled to vote the shares of its principal. It must first submit to the customer a specific proposal as to the way it intends to exercise the voting right and then ask him for specific instructions as to the items on the agenda. The customer's instructions must be followed. If the customer fails to give instructions, the bank may vote his shares according to the proposal submitted.[34]

**Shareholder's Right to Vote under Nigerian Law**

Under the Companies and allied Mattes Act 2020, the right to vote by a shareholder is one of the important incidents of share ownership and the articles, apart from conferring the right to vote, may also stipulate the manner and extent of its exercise. As the directors invariably hold a strong

28 Ibid, s. 134(1).
29 EC Steefel& B. von Falkenhausen, "The New German Stock Corporation Law" [1967] 52 *Cornell Law Quarterly* 518, 541-542.
30 AktG, s. 12(2).
31 Ibid, s. 134(3).
32 DF Vagts, "Reforming the Modern Corporation: Perspectives from the German" [1966] *Harv. L. Rev*. 23, 53-58.
33 AktG, s. 135(2).
34 Ibid, s. 128(2).

position of *de facto* control within the company, the shareholder's right to vote is often seen as the source of corporate control.[35]

The shareholders participate in management of the company through the annual general meeting where they exercise their right to vote and to have a say in the management of the company. The Companies and Allied Matters Act 2020 reserves certain powers of control over the company to the shareholders in general meeting. For example, decisions of the board of directors on mergers and acquisition,[36] declaration of dividends,[37] capitalization of profits and reserves[38] and voluntary winding up[39] are subject to approval by the shareholders in general meeting. The shareholders also have the power to elect the directors of the company[40] and to remove or refuse to re-elect directors[41] with whose performance they are not satisfied.[42]

In the English case of *Shaw & Sons (Salford) Ltd v Shaw*[43] where Greer LJ succinctly stated the power of the shareholders to control the exercise of director's powers thus:

> The only way in which the general body of shareholders can control the exercise of the powers vested by the articles in the directors is by altering the articles, or if the opportunity arises under the articles, by refusing to re-elect the directors whose action they disapprove.[44]

Although the shareholders have the power to alter the articles, they cannot exercise this power retroactively. In other words, no alteration of the articles shall invalidate any prior act of the board of directors which would have been valid if the articles had not been altered.[45] Thus, the shareholders in general meeting cannot alter the articles so as to invalidate what was valid at the time it was done.[46] Also the power of the shareholders to remove a director is without prejudice to the director's right to sue for damages.[47]

---

35 ME Asomugha, *Company Law in Nigeria under the Companies and Allied Matters Act* (Tema Micro Publishers Ltd 1994) 101.
36 Investment and Securities Act 2007, s 121(5).
37 Companies and Allied Matters Act 2020 (hereinafter simply referred to as CAMA), s 426.
38 Ibid, s 420.
39 Ibid, s 620.
40 Ibid, s 273.
41 Ibid, s 288.
42 KB Omidire, 'The Rights and Responsibilities of Shareholders at the Annual General Meeting' [1999] 1 *Modus International Law and Business Quarterly* 18, 19.
43 [1935] 2 KB 113.
44 Ibid 164 (Greer LJ).
45 CAMA, s 87(6).
46 JO Orojo, *Company Law and Practice in Nigeria* (5thedn, LexisNexis 2008) 99-101.
47 *Southern Foundries Ltd v Shirlaw*[1970] AC 701.

At any general meeting, a resolution put to the vote shall be decided on a show of hands, unless a poll is demanded. On a showofhands, each member entitled to vote has one vote only irrespective of the number of shares he holds in the company. On a poll, however, every member is entitled to one vote in respect of each share and he need not use all his votes or cast all the votes he uses in the same way.[48] In *Carruth v. I.C.I Ltd*[49] Lord Maugham said, "The shareholder's vote is a right of property, and *primafacie* may be exercised by a shareholder as he thinks fit in his own interest."[50]

In some specified circumstances, preference shares may carry more than one vote per share. For example, the articles may provide that preference shares shall carry the rights to attend general meetings and on a poll at the meetings to more than one vote per share in the following circumstances:

(a) where there is a resolution during such period as the preferential dividend or any part of its remains in arrears and unpaid; or
(b) where there is a resolution which varies the rights attached to preference shares; or
(c) where there is a resolution to appoint or remove an auditor of the company; or
(d) where there is a resolution for the winding up of the company or during the winding up of the company.[51]

There are four categories of persons who have the right to demand a poll. The first is the chairman where he is a shareholder or a proxy. The second is any three members present in person or by proxy. The third is any member or members present in person or by proxy and representing not less than one-tenth of the total voting rights of all the members having the right to vote at the meeting. The fourth is any member or members holding shares on which an aggregate sum has been paid up equal one-tenth of the total sum paid up on all the shares conferring the right to vote at the meeting.[52]

The right to demand a poll is inalienable and any provision in the articles excluding this right shall be void. However, there are two exceptional cases where the right to demand a poll may be excluded. Firstly, it may be excluded on any question relating to the election of the chairman of the meeting. Secondly, it may be excluded on any question relating to the adjournment of the meeting. In addition, the Act excludes the right to demand a poll on the election of members of the Audit Committee, which is peculiar to only public companies.[53]

48 Ibid, s 224.
49 [1937] AC 707
50 Ibid 765.
51 CAMA, s. 168.
52 Ibid, s. 248.
53 Ibid, s. 249.

Any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person as his proxy to attend and vote instead of him. A proxy need not be a member of the company. A person appointed a proxy shall have the same right as the member to speak at the meeting.[54]The instrument appointing a proxy must be in writing under the hand of the appointer or his attorney duly authorized in writing. If the appointer is a company, then the instrument must be under seal or under the hand of the officer or attorney duly authorized.[55]

The Act requires that the instrument appointing a proxy and the power of attorney or other authority, if any, shall be deposited at the registered office or head office of the company not less than 48 hours before the time for holding the meeting at which the person named in the instrument proposes to vote. In the case of a poll, the instrument must be deposited at the registered office or head office of the company not less than 24 hours before the time appointed for taking of the poll. In default, any instrument of proxy shall be treated as void.[56]

Finally, the Act requires every notice of meeting of a company having a share capital to contain a statement that a member having the right to attend and vote at the meeting is entitled to appoint a proxy to attend and vote instead of him and that a proxy need not be a member. If default is made in complying with this requirement, every officer of the company who is in default shall be guilty of an offence and liable to a fine.[57]

## Conclusion and Suggestions for Reform

Under the Companies and Allied Matters Act 2020, the shareholders' right to vote and have a say in the management of the affairs of the company is limited to participation at the annual general meeting[58] and enforcement of their rights against the company by way of exception to the majority rule.[59] There are no voting devices to ensure the representation of minority shareholders on the board of directors. Even the remedies available to shareholders under the Act are circumscribed by procedural obstacles and financial burdens which are difficult for minority shareholders to surmount.[60]

The shareholders' right to vote and to have a say in the management of the affairs of the company should be strengthened and protected by legislation. This could be achieved by introducing cumulative voting for the purpose of electing directors. This will give minority shareholders the opportunity to elect their representative to the board of directors. The venue of shareholders' meeting should be accessible and affordable in terms of distance and cost. This

54 Ibid, s. 254(1).
55 Ibid, s. 254(6).
56 Ibid, s. 254(7).
57 Ibid, s. 242(4).
58 Ibid, s 107.
59 Ibid, s 341.
60 Ibid, s 346.

will make it possible for minority shareholders to attend and exercise their right to vote. For this purpose, it should be made mandatory for all shareholders' meetings to be held at the registered office of the company instead of the common practice of holding shareholders' meetings at Abuja or Lagos, which are inaccessible to most of the minority shareholders in terms of distance and cost.

Finally, the recommendation of the joint committee of the Securities and Exchange Commission and the Corporate Affairs Commission that shareholders holding more than 20% of the total issued capital of a public company should have a representative on the board of directors[61] should be given statutory backing.

[61] SEC and CAC, *Code of Best Practices on Corporate Governance* (Securities and Exchange Commission and Corporate Affairs Commission 2003) 20.

# CONTEMPT OF COURT AND FREEDOM OF SPEECH: THE UNBALANCED WHEELS OF A DEMOCRATIC CART

*-Mr. Shashank Nande[1] and Mr. Rajiv Ranjan[2]*

## Abstract

*The Indian democracy runs as per the Indian Constitution. The Indian Constitution under Article 19(1)(a) of it provides 'freedom of speech and expression'. This right has greater significance as it allows the flow of the ideas and thoughts which is pivotal for the functioning of Indian democracy. It helps in making the government know about their responsibilities. However, this right is not absolute and can be restricted under certain grounds. Contempt of court being one of those grounds. The independence and integrity of Indian judiciary is also actor significant factor which the constitution guarantees but at times, both the principles conflict and again it becomes the responsibility of the judiciary only to resolve the conflict and strike a harmonious balance where ideas and thoughts can flow without making any contempt. The Supreme Court of India being the apex court of the country has attempted to bring the harmony but at times it becomes a matter of controversy as well. This paper in brief deals with the how significant the right of free speech and expression is and how the courts have tried striking a balance between the two, especially the criminal contempt.*

## Introduction

> "*Justice is not a Cloistered virtue, she must be allowed to suffer the scrutiny and respectful even through outspoken comments of ordinary men"*
>
> - Lord James Atkin.
>
> (Ambard v Attorney-General for Trinidad and Tobago [1936] AC 322 at 335)

Indian democracy stands on the wheels of free speech and expression. It the most cherished rights enjoyed by the citizens of the country. The Indian Constitution guarantees these rights to the citizens of this country. Free speech allows the flow of ideas which is very pivotal for the functioning of the democracy as it allows people to come down to a reasoned and informed decision. The government chosen in India is based on the consent of the citizens of India is also an illustration of freedom of speech and expression. This expression empowers the citizens to even criticize the functioning of the state which includes judiciary as well. Close look to Article 19(a) of Indian Constitution very expressly bestows the power to express one's opinion but this

[1] Assistant Professor at School of Law, Amity University, Raipur. He can reached at shashanknande@nls.ac.in
[2]Ph.D Scholar, NUALS Kochi. He can be reached at rajivranjan1021@gmail.com.

right is not absolute, it is subject to many reasonable restrictions. Some restrictions that may be put on the right to freedom of speech & expression are the interest of the sovereignty, integrity and security of India, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement of offence.[3] Contempt of Court is included under the restriction part which shows a citizen's right of free speech and expression will not work as a shield when someone by his words or conduct dilutes or lowers down the authority of judges or the court or obstructs in the administration of justice. Independence of Judiciary just like Part III is also a basic feature of Indian Constitution[4] and in order to safeguard the same, the text[5] has provided Article 129 and 215 of Indian Constitution which makes the Supreme Court and High Courts of the state 'a court of record' and also provide power to proceed on contempt. Freedom of speech and expression under Article 19(1)(a) of Indian Constitution allows the citizens to criticize the functioning of Indian judiciary. However, the Indian courts have also been empowered to punish if somebody attempts to lower down the dignity of the courts or makes an attempt to interfere with the administration of the justice. These two principles are very essential for the functioning of Indian democracy.

The law of contempt in India is governed by Contempt of Courts Act, 1971. This power is being given to courts for the administration of justice and upholding the supremacy of law in the country. Contempt of Courts Act, 1971 mentions two types of 'Contempt' i.e. Civil and Criminal.[6] Civil contempt refers to 'willful disobedience' to any judgement or decree or order of a court whereas 'Criminal Contempt' signifies an act (whether by words or conduct or through publication) which scandalizes or tends to scandalize or lowers the authority of any court. Criminal contempt also includes an act which prejudices, or interferes or tends to interfere or obstructs the administration of justice. Criminal Contempt had always been the subject matter of debate. The primary reason for that is the tussle between two significant part of Indian Constitution i.e. 'Freedom of Speech and Expression and Independence of Judiciary'. The power of the Indian courts to punish for contempt often encroaches upon the right of free speech. There seems a thin line difference between criticizing the judiciary and lowering the authority of the Court which in brief is being dealt in this paper with emphasis given on the recent developments in this area.

## Freedom of Speech and Expression under Indian Constitution

The Indian Constitution provides its citizens 'Right to Freedom'.[7] It is the most cherished rights enjoyed by all as it provides right to speak, assemble and reside. Without these rights, there is no meaning and significance of democracy. Out of all the rights, freedom of speech and expression is one of the most cherished rights. It allows people to put forth their opinions and give

[3]Article 19(2) of the Constitution of India, 1950.
[4]*Kesavananda Bharati Sripadagalvaru&Ors. v. State of Kerala &Anr,* AIR 1973 SC 1461.
[5] The Constitution of India, 1950.
[6]Contempt of Courts Act, 1971
[7]Article 19 of the Constitution of India, 1950.

suggestions and sometimes even to criticize the authorities. It is the backbone of political freedom of the nation. Imagining a democratic nation without the freedom of speech and expression is nothing more than a nightmare. The Indian constitution is the fundamental law of the land, and the touchstone upon which the validity of all other statutes is measured.[8] This section of the paper deals with how the courts of the country have safeguarded the interest of the common citizens against the speech restrictive laws of the state.

Freedom of Speech and expression has different dimensions. This freedom includes the right to propagate your thoughts and ideas through different channels. This right even provides liberty to criticize the government and even the State has the duty to protect and safeguard this right of the citizens. The Apex Court has even raised a question in *S. Rangarajan v. P. Jagjivan Ram*[9]"what good is the protection of freedom of expression if the State does not take care to protect it?"

Freedom of Speech and Expression under the Indian Constitution is the primary source of free discussion of the issues and challenges of the country.

The freedom of speech and expression includes right to acquire information and to disseminate it.[10] In addition, it also makes the government accountable to the democracy. The Supreme Court has also observed that:

"*The faith of a citizen is that political wisdom and virtue will sustain themselves in the free market of ideas so long as the channels of communication are left open. The faith in the popular government rests on the old dictum 'let the people have the truth and the freedom to discuss it and all will go well.*[11]*"*

Though, the Indian Constitution does not recognize right to press expressly unlike USA's Constitution[12] but the Indian courts have recognized the same and held that right to 'right to press' is included under Article 19(1)(a). The press is one of the significant sources through which the government reaches out to people and also the grievances of the people are also being brought before the government agencies. Press or media in India has been said to be the fourth pillar of Indian democracy.[13] The Preamble of Indian Constitution has guaranteed and intended to secure to all citizens liberty of thought, expression and belief. In order to establish the same, the Apex Court of the country in *Ramesh Thappar v. State of Madras*[14] has clearly limited the power of the executive by stating that there could not be any other means to restrict the power of free speech and expression other than those provided in clause 2 of article 19.

---

[8] Article 13 of Indian Constitution empowers the Court to declare any law unconstitutional if that violates Part III of Indian Constitution

[9]1989 SCR (2) 204

[10] The DMK Party vs The State of Tamil Nadu on 20 December, 2005. The Court also observed that: "Freedom of speech and expression is necessary for self-expression, which is an important means of free conscience and self-fulfillment. It enables the people to contribute to debates of social and moral issues. It is the best way to have a truest model of anything, since, it is only through it that the widest possible range of ideas can circulate."

[11] Bennett Coleman & co. vs. Union of India, AIR 1973 SC 106 at p.129, Para 79

[12] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

[13]Court On Its Own Motion vs State, 146 (2008) DLT 429

[14]1957 SCR 930

Freedom of Speech and expression has always been so fundamental for any democracy that even International conventions and treaties have also mentioned about it. Article 19 of UDHR[15] declares "everyone has the right to freedom of, opinion and expression, this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[16]

Apart from UDHR, other covenants have also attempted to priorities this right as Article 19 of ICCPR[17] states "everyone shall have the right to hold opinions without interference."

In addition to this, European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 also states that everyone has the right to freedom of expression.[18]

## Significance of Independent Judicial System and Contempt of Court

The judiciary is considered as a last hope when a citizen fails to get justice anywhere. The Supreme Court is the paragon of the Indian judiciary. An attack on the Supreme Court does not only have the effect of tending an ordinary litigant of losing the confidence in the Supreme Court but also may tend to lose the confidence in the mind of other judges in the country in its highest court. Indian Judiciary is one of the major pillars on which the democracy of India stands. The trust, faith and confidence on the judiciary by the citizen are *sine qua non* for the existence of 'Rule of Law' and 'Dominance of legal Spirit'. For safeguarding the fundamental rights of the citizens of this country, approaching the Apex Court of this country has also been made a fundamental right which even cannot be suspended during emergency as well. In addition to this, under Article 226 of Indian Constitution, any violation of fundamental as well as legal rights can also be redressed by the High Courts of the State.

In the present democratic system, judges do not work for the benefit of the ruler, and they gained the most esteemed position in the eyes of law. In a way, the judges certainly get their position from the individuals, and so it follows that at some level, they should stay answerable to them. The instant change in the political and social scenario has given the judges an essential function: to remain totally independent and unbiased in the administration of equity for all. In this manner, it seems absurd that the context of contempt law lies in the way that it must secure the authority of the courts in the eyes of individuals. It should be established that in a democratic system, the courts determine their definitive authority from the people, and a law gagging contradiction and analysis from the individuals makes no sense. It is well established that Rule of Law is a basic feature of the Constitution, and the Rule of Law is inherent in the Constitution in the sense of its supremacy.[19] It entails *inter alia* the right to obtain judicial redress through administration of justice, which is the function of the Courts, and is imperative for the functioning of a civilized society. Justice should be administer in a virtuous manner because judiciary is a Guardian of

[15] Universal Declaration of Human Rights, 1948
[16] Article 19 of the Universal Declaration of Human Rights, 1948 as cited in Human Rights.: A Source Book (1996)
[17] International Covenant on Civil and Political Rights, 1966
[18] Article 10 of European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.
[19] KesavanandaBharatiSripadagalvaru&Ors. v. State of Kerala &Anr., AIR 1973 SC 1461

Rule of Law and it is entrusted with the extra ordinary power to punish misconduct which aims at undermining its authority either inside or outside the court.[20] The Main cause of Contempt Jurisdiction it to confirm the independence and dignity of the judiciary, so that it will help the judges to decide cases without any fear and favor.

The Law of Contempt in the present time has become subject of debate, especially criminal contempt as it on one hand upholds the supremacy of law and on the other it restricts our fundamental right under Article 19(1)(a) of Indian Constitution. Next chapter of the paper in brief deals with the present system of law of contempt in India.

## Law Regarding Contempt of Court in India and Freedom of Speech and Expression

Indian legal system is highly inspired by common law principles. Contempt of court is no exception to this. It is described as the Proteus of the Legal world.[21]According to *Black's Law Dictionary* Contempt of court means- "Any act which is calculated to embarrass, hinder, or obstruct court in administration of justice, or which is calculated to lessen its authority or its dignity, committed by a person who does any act in willful contravention of its authority or dignity, or tending to impede or frustrate the administration of justice, or by one who, being under the court's authority as a party to a proceeding therein, willfully disobeys its lawful orders or fails to comply with an undertaking which he has given."[22]

Indian, being a democracy values freedom of speech and expression immensely. However, another factor which is to be considered it the independence and integrity of Indian judicial system along with the confidence of people in the administration of justice. It thus makes the job tougher to strike fine balance between the two. The freedom which allows to express your opinions and thoughts also restrict us not to commit contempt. The primary reason for the same is to preserve the authority of the courts and there should not be any obstruction in the administration of the justice.

The Apex court has made an attempt to maintain a fine balance between the two in plethora of cases. This part of the chapter will briefly deals with the same.

The Supreme Court of India in *M.V.Jayarajan vs High Court of Kerala &Anr*[23] has observed that:

"*petitioner has the right of freedom of speech of expression, this postulates a temperate and reasoned criticism and not a vitriolic, slanderous or abusive one; this right of free speech certainly does not extend to inciting the public directly or insidiously to disobey Court orders."*

[20]In Re : Vinay Chandra Mishra, AIR 1995 SC 2348

[21]Joseph Moskovitz, Contempt of Injunctions, Civil and Criminal, Columbia Law Review, Vol. 43, No. 6 (Sep., 1943), pp. 780-824 (45 pages),Published By: Columbia Law Review Association, Inc. (The word 'proteus' means a sea god which is capable of changing shape at will.)

[22]*Black's Law Dictionary,* 11th Edition.

[23] Criminal Appeal No. 2009 by 2011

The Court also observed that statement made by the Petitioner i.e. "*if those judges have any self-respect, they should resign and quit their offices" is* something which is highly vitriolic and should not get the shadow of free speech and expression.

It is indeed noteworthy that in India, freedom of speech and expression is not an absolute right which a citizen enjoys rather it is subject to many restrictions. Contempt of Court being one of them. No words or action of person should be allowed if that lowers the authority of the court in India. Right to express is subject to different provisions of Indian Constitution.[24]

As mentioned above that Criminal Contempt directly hampers upon another fundamental right i.e. right to speech and expression. Right to fair criticism comes under Article 19(1)(a) of Indian Constitution. So, what would be fair criticism and how it is not a contempt is still a gray area needs to be adjudicated and what is fair criticism and what is not is also being decided by Constitutional Courts only. Considering this being a century old law but even till now, no fine balance has been brought between these two aspects. Under Article 19(2) of Indian Constitution, freedom of speech and expression can be restricted on the ground of Contempt of Court and that has given the Indian courts herculean task to decide what comes under free speech and what is contempt. There have been times, when the decision of the Supreme or High Courts have become subject of criticism. The recent Prashant Bhushan Case is also one of the decisions of the Supreme Court which has not been taken as it was, considering most of the people including the members of the Bar remarked it to be wrong as whatever Prashant Bhushan did was just exercising his fundamental right under article 19 (1) (a) of Indian Constitution. This part of the paper deals with the long journey covered by the Indian Courts while striking a balance between two non-comprisable principles which at a time can be a 'right' and an 'offence' at another.

The very first attempt made by the Apex Court of India to strike a balance between contempt and freedom of speech and expression was done in Brahma *Prakash Sharma v. State of Uttar Pradesh*[25]. This case revolved around the resolution passed by members of Executive Committee of District Bar Association at Muzaffarnagar in Uttar Pradesh. The resolution dealt with the conduct and incompetency of the two judicial officers both of whom functioned At Muzaffarnagar. The relevant part of the resolution says " Whereas the members of the Association have had ample opportunity of forming an opinion of the judicial work of Sri Kanhaiya Lal, Judicial Magistrate, and Shri Lalta Prasad, Revenue Officer, It is now their considered opinion that the two officers are thoroughly incompetent in law, do not inspire confidence in their judicial work, are given to stating wrong facts when passing orders and are overbearing and discourteous to the litigant public and the lawyers alike.."

This resolution sparked the controversy that whether the resolution passed by the Executive Committee by bar is contempt of Court or not. Against the order of the High Court of Allahabad, this matter reached up to the Supreme Court of India. Allegations of scandalizing the court were levelled against the members of the Bar. The Supreme Court while deciding the case has held that "*"in the first place, the reflection on the conduct or character of a judge in reference to the*

[24] Articles 19(2), 129 and 215 of the Constitution of India.
[25] 1954 SCR 1169

*discharge of his judicial duties, would not be contempt if such reflection is made in the exercise of the right of fair and reasonable criticism which every citizen possesses in respect of public acts done in the seat of justice.*"

These words of the Supreme Court are sufficient to differentiate what is contempt and what is not. Fair and reasonable criticism of courts is even allowed considering the fact that courts are also doing public acts.

The Supreme Court in *Perspective Publications (P) Ltd. v/s State of Maharashtra*[26]while deciding the case has attempted to sum up the law relating to criminal contempt in India and had given following points-

- Laws relating to contempt which includes scandalizing the Court has not gone obsolete.
- The summary jurisdiction by way of contempt must be exercised with great care and caution and only when its exercise is necessary for the proper administration of law and justice.
- It is open to anyone to express fair, reasonable and legitimate criticism of any act or conduct of a Judge in his judicial capacity or even to make a proper and fair comment on any decision given by him because "justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men".
- A distinction must be made between a mere libel or defamation of a Judge and what amounts to a contempt of the court. The test in each case would be whether the impugned publication is a mere defamatory attack on the Judge or whether it is calculated to interfere with the due course of justice or the proper administration of law by this Court. It is only in the latter case that it will be punishable as Contempt.
- The test will be whether the wrong is done to the Judge personally or it is done to the public. The Hon'ble Court further held that the publication of a disparaging statement will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the Judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice or if it is likely to cause embarrassment in the mind of the Judge himself in the discharge of his judicial duties.[27]

The attempt of the Court has summed up every aspect of criminal contempt of courts in India. Wrong committed against a judge personally or it is done to public are two different aspect and both cannot be treated equally. One may be case of defamation and other is a case of Contempt has been clarified by the Supreme court.

[26]1969 SCR (2) 779
[27]1969 SCR (2) 779

Another significant judgement of the Supreme Court where the Apex Court has re-clarified its stance on contempt was *Rustom Cowasjee Cooper v/s Union of India*[28]. The court while deciding held that "*there is no doubt that the Court like any other institution does not enjoy immunity from fair criticism"...." while fair and temperate criticism of this Court or any other Court even if strong, may not be actionable, attributing improper motives, or tending to bring Judges or courts into hatred and contempt or obstructing directly or indirectly with the functioning of courts is serious contempt of which notice must and will be taken*".

The Indian judiciary is not a non-immune institution. Right to fair criticism is even applicable to them but that should not be in any way be bringing the judges or courts into hatred is one fact which is needed to be considered while deciding any action of a person is contempt or not.

## Law Commission 274 Report of Law on Contempt

The Law Commission of India in its 274th report to the Ministry of Law and Justice B.S. Chauhan has recommended that it isn't important to make any alteration, to the Contempt of Court Act, 1971, after a reference from the Government kept uniquely to Section 2(c) of the Act 1971. In the report named "Review Of Contempt Of Court Act 1971 (Limited To Section 2 Of The Act)", the commission to arrive at the conclusion, has considered — Articles 129 and 215 of the Constitution, expressing that as for the intensity of scorn under the Constitution, the said Articles vest the Superior Courts with capacity to Punish for their contempt, and henceforth, the Supreme Court and High Courts are authorized to investigate and penalize the contemnor even without any enactment laying out their procedural power. Further, furthermore, Article 142(2) of the Constitution likewise empowers Supreme Court to investigate and punish for its contempt. Subsequently, the Commission expressed that the proposal to take out the arrangement identifying with 'criminal contempt' inter alia 'contempt of courts' will have no effect on authority of Constitutional Courts to penalize for contempt, as these commands are autonomous of statutory arrangements.[29]

The commission observed High number of contempt cases: The Commission saw that there were a large number of civil (96,993) and criminal (583) criminal cases pending in different High Courts and the Supreme Court. The Commission notice that the large number of cases legitimize the proceeding with significance of the Act. It exhibits that amending the meaning of contempt may reduce the general effect of the law and decline the regard that individuals have for courts and their power and working.

[28] (1970) 2 SCC 298

[29]Auroshree, Law Commission's Review on amendment to "Contempt of Court Act": Whether necessary https://www.scconline.com/blog/post/2018/05/01/law-commissions-review-on-amendment-to-contempt-of-court-act-whether necessary/#:~:text=The%20Law%20Commission%20of%20India,c)%20of%20the%20Act%201971.(accessed on 24-08-2020)

International comparison: Corresponding to the offense of 'scandalizing the Court', the Commission noticed that the United Kingdom had put an end the offense in its contempt laws. In any case, it noticed that there were two variances in conditions in India and the United Kingdom, which justified a continuation of the offense in India. To start with, India keeps on having a high number of criminal contempt cases, while the last offense of Scandalizing the Court in the UK was in 1931. Second, the offense of Scandalizing the Court keeps on being culpable in UK under different laws. The Commission saw that annulling the offense in India would leave an authoritative gap.[30]

Sufficient Protection: The Commission noticed that there are a few protections incorporated with the Act to ensure against its abuse. For example, the Act contains provisions which set down cases that don't add up to contempt and situations where contempt isn't punishable. These positioning endorse that the courts won't indict all instances of contempt. The Commission additionally noticed that the Act had withstood judicial scrutiny, and along these lines, there was no motivation to alter it.[31]

## Conclusion

The Indian Constitution has given an extraordinary power to the constitutional courts of this nation. The Supreme Court is a defender of the fundamental rights of the citizens, as likewise is enriched with an obligation to keep safe the other pillar of democratic system for example the Executive and the Legislature, inside the constitutional limits. In the event that an attack is made to shake the confidence that the public at large everywhere has in the foundation of legal executive, such an attack must be managed firmly. Most likely, that it might be better as a rule for the judiciary to receive a generously altruistic point of view in any event, when it is made out of bona fide worry for development. In any case, when there shows up some plan and design which have the inclination of harming the confidence in our legal framework and dampen the Judges of the most elevated court by making malicious attack, those keen on keeping up exclusive requirements of fearless impartial and unbending justice will have to stand strongly. If the provisions are so narrowed in scope, there will be a reduction in impact. Such a change in the law of contempt could potentially reduce the regard for or fear of the courts and their authority and functioning; and, there is a chance that this may lead to an undesired increase in the instances of deliberate denial and blasphemy of the courts.

[30]Review of the Contempt of Courts Act, 1971, https://www.prsindia.org/report-summaries/review-contempt-courts-act-1971 (accessed on 24-08-2020)
[31]*Ibid.*

# AN ANALYSIS OF THE RIGHT TO HEALTH IN INDIA

*Chaitali Wadhwa*[1]

## Abstract

*There is no one definition of the right to health that could be applied uniformly across all nations, societies and circumstances. For clarity, we may turn to the preamble and Constitution of the World Health Organization. Despite the ambiguity, the right to health is now recognized as a basic human right in international law. It has also found its way in national legislations in India. Though it is not expressly mentioned in the Indian Constitution, it is implied under the fundamental right to health. The paper highlights the status of the right to health as a Constitutional right, and its growth through precedents. Part I of the paper introduces the concept of the right to health as provided in International Law. The author distinguishes standard of health, to the right to health. The author also gives reference to the guiding principles which form the framework of this right. In parts II and III, the author draws the attention of the readers to the constitutional and legislative provisions, along with landmark judgments. Through these segments of the paper, the author will provide the reader with a better understanding of the legal position in India on the right to health. Finally, while understanding that lack of implementation is the main reason for the denial of this right, in part IV, the author proposes general and specific measures to address the issue. These include suggestions for the workplace, those for children and suggestions applicable in a restrictive family environment. The author also sheds light on the traditional and orthodox practices which have adverse effects on the health of a woman. Part V is the conclusion.*

**Key phrases –** Right to Health, Constitution, fundamental right, human right, the highest attainable standard of health

## Introduction

Till a few decades ago, there were no discussions on the importance of health. This trend has drastically witnessed a change at conferences at the national and international level. Good health is considered a primary aspect of human survival. Human beings, situated at the centre of concerns for sustainable development, are entitled to a healthy and productive life in harmony with nature.[2] Health is an essential matter for individuals as well as nations.

The concept of the right to health is a broad one, and it envelopes a variety of definitions which have been given by various conventions and authors. Each country and each region have differing needs and circumstances, giving birth to divergent definitions. The very nature of the right, with its inherent *"progressive-realization principle"*, dooms any attempt to develop the right uniformly. The most widely accepted definition, though, is the one given by the World

[1]Research Associate, Faculty of Law, Manav Rachna University, Faridabad, Haryana-121004; chaitaliwadhwa@gmail.com; 601-Agni, DRDO Residential Complex, Timarpur, Delhi-10054

[2]*Report of the International Conference on Population and Development*, U.N. Doc. A/CONF.171/13 (1994)

Health Organization (hereinafter the WHO). The Preamble of the WHO Constitution defines health as:

> "*A state of complete physical, mental and social well-being and not merely the absence of disease or infirmity*."[3]

This definition is indicative that health is a dynamic state of well-being. Quality health is an essential requirement for every person.[4] A health claim is not synonymous with a demand to cure incurable diseases. Neither is it a claim to alter unalterable physical attributes or to reverse the ageing process.[5] The right to health includes a healthy mind, body and also provisions of adequate healthcare. A healthy body and mind are essential for a person to realise his true potential and to be able to contribute to the growth of society.

The right to health includes both positive as well as negative aspects. The positive aspect imposes a duty on a state to intervene or to act, to the extent of its available resources, to prevent, reduce, or address severe threats to the health of individuals or the population. Examples of the negative components include the duty of states to refrain from barring access to health-related information and the duty of states not to take health-harming actions.

Instead of the right to health, the phrase *"highest attainable standard of health"* is preferred by scholars and academicians as it recognises the importance of contributing factors. The concept of the highest attainable standard of health considers the individual's biological as well as socio-economic pre-conditions.[6] Court systems and the right to a fair trial and are directly linked to health systems and the right to the highest attainable standard of health. Over the last few years, national and international organisations, human rights mechanisms and courts have begun to explore what the right to the highest attainable standard of health means and how it can be put into practice.

To provide clarity, the Committee on Economic, Social and Cultural Rights laid down a guiding framework on the right to health. The guidelines include a set of general principles which provide the four qualitative elements termed as *"AAAQ"*.

**a. Availability**

States should provide adequate facilities and healthcare in all geographical areas and to all communities. These facilities include infrastructure, consultants, health personnel, unexpired drugs and scientifically approved medical equipment in sufficient quantities, and immunisation

[3] Preamble to the Constitution of WHO, *signed on* July 22, 1946, 14 U.N.T.S. 185
[4]Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) [*hereinafter* UDHR]
[5] Virginia A. Leary, *The Right to Health in International Human Rights Law*, 1 HEALTH AND HUMAN RIGHTS 25 (1994)
[6] International Covenant on Economic, Social and Cultural Rights, *entered into force* Dec. 16, 1966, 993 U.N.T.S. 3 (*hereinafter* ICESCR)

programmes against major infectious diseases. Availability also comprises preventive public health strategies and information as regards safe drinking water and adequate sanitation facilities. It covers within its ambit promotional activities, such as awareness-raising campaigns against HIV/AIDS.

Human rights treaty monitoring bodies have also repeatedly recommended that States should make family planning services, including contraception, widely available. In furtherance of this, States should also ensure in schools the provision of sexual and reproductive health education, including the use of contraceptive methods. Failure to ensure access to a lawful abortion for teenage girls amounts to a violation of their rights to privacy, non-discrimination and protection against inhuman and degrading treatment.[7]

**b. Accessibility**

Accessibility comprises non-discrimination, particularly for the marginalised and disadvantaged sections of the population, in law and fact. Facilities and care should be physically accessible, as well as economically accessible. Persons of all genders, race, caste, class and religion are entitled to quality health care, on an equitable basis.

The element of accessibility is often sub-categorised into six components. The first component is non-discrimination, the second, third and fourth are accessibility – physical, economic (also known as *affordability*) and information accessibility. Component number five is acceptability, and the final component is quality. These components are overlapping, and it is challenging to have water-tight definitions or boundaries for them. Accessibility involves the allocation of resources, which is a two-stage process. At the first stage, the State allocates resources from the whole state budget to health. At the second stage, the State further distributes these allocations to satisfy different demands within the health system.[8]

**c. Acceptability**

The categories of persons that are most prone to diseases are ethnic minorities, indigenous populations, older persons, women and children, and persons with disabilities. The healthcare facilities should be respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and lifecycle requirements. Providers of health care should take into consideration factors such as culture, gender and age when providing facilities and treatment. They should treat the patient with dignity and respect while maintaining the confidentiality of data. Culturally acceptable treatments are sensitive towards minorities and communities. Treatments should also take into account the traditional healing practices and indigenous plants and herbs used to cure diseases.

[7]*KNLH v Peru*, Human Right Commission, Communication No 1153/2003, UN Doc CCPR/C/85/1153/2003 (22 November 2005)

[8]ShenganQiu and Gillian Macnaughtan, *Mechanisms Of Accountability For The Realization Of The Right To Health In China*, HEALTH AND HUMAN RIGHTS JOURNAL (2017)

### d. Quality

The healthcare provided to members of society must scientific and medically appropriate and of good quality. Provisions of expensive machinery to a health centre may not be scientifically and medically appropriate where human and technical resources are scarce, as in many less developed countries. The State should provide these services based on the principle of equity. Such equitable provisions would ensure that there should not be a disproportionate burden on the poorer households compared to the members of the society belonging to the upper class. Both public and private healthcare treatment should be affordable to people.

In addition to the above four mentioned guiding principles, there has been an addition of two more components, now making the framework of *"AAAQ-AP"* structure.

### e. Accountability

Accountability is a key component among the ones mentioned above. Accountability is a crucial aspect of ensuring that States meet their obligations under international and domestic legislation. There are many types of accountability mechanisms, including judicial, quasi-judicial, administrative, political, and social mechanisms.[9] The narrower understanding of accountability is 'blame and punishment'. On the other hand, the broader, more accurate meaning is a process to determine what is working (so it can be repeated) and what is not (so it can be adjusted).[10] Accountability mechanisms ensure participation by the Government, groups, and individuals.

### f. Participation

The public should have a representation in the policy-making exercises that deal with health and health-related services. States should encourage political participation through a democratic system of elections, and also by providing for public enquiries regarding planned health sector reform. The element of participation has been discussed in detail in Part IV under the sub-heading of 'good governance'. For the sake of brevity, it has not been repeated here.

## Constitutional and Legislative Provisions in India

India being a welfare state, has to ensure the creation and sustenance of conditions congenial to good health.[11]

### a. Constitutional Provisions

The Constitution of India is the supreme law of the land and the soul of the nation.[12] Though the right to health has not expressly been laid down under Part III of the Constitution, it is now

[9] H. POTTS, ACCOUNTABILITY AND THE RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH 17 (Colchester, UK: University of Essex Human Rights Centre, 2008)
[10] P. Hunt, *Report of The Special Rapporteur On The Rights To Health*, UN Doc. A/HRC/4/28. (2007) ¶ 46
[11] Vincent Panikurlangara v. Union of India, AIR 1987 SC 990
[12] P. R. GUPTA, SOUL OF THE NATION – CONSTITUTION OF INDIA, 1 (1st ed., 2016)

impliedly a fundamental right. Through evolutions in the law, the definition of life under Article 21 of the Constitution has expanded and envelopes under it several other rights, including the right to health. The apex court has explicitly held the right to health to be an integral factor of a meaningful right to life.[13]

The Supreme Court through its judgments has widened the scope of Article 21. The right to medical care is recognized under Article 21 read with Articles 39(e), 41 and 43.[14]The Apex Court held that the in a welfare state it was the primary duty of the Government to provide welfare to its people. Provision of adequate medical facilities is an obligation that the Government must perform[15]. The Court held that government hospitals run by the State are duty-bound to extend medical assistance for preserving human life It is the obligation of the persons in charge of health to preserve the life of individuals whether they are innocent, or criminals liable to punishment[16]. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in the violation of his right to life.

Protection of the right to health is a sacred obligation upon the State. Though Part III does not expressly provide the right to health, the Constitution makers by bringing it under Part IV have imposed an obligation on the State to improve the conditions of healthcare for the people. The State has to safeguard and promote public health by advancing public hygiene and ensuring the prevention of the spread of diseases. Hygiene can be achieved through adequate sanitation facilities, pest and vermin control, and by ensuring widespread efficient and free medical services throughout the country with particular emphasis on the remote and backward areas.[17]

Article 47[18] puts a duty on the State to raise the level of nutrition, the standard of living, and to improve public health. This duty also embodies the obligation of the State to protect poverty-stricken people who are consumers of sub-standard food from injurious effects. There is a corresponding duty on the Food Corporation of India to prevent the sub-standard quality of food from reaching the market. Since the Food Corporation of India is an agency of the State, it must conform to the principle enshrined in Article 47 of the Constitution.[19]

The Constitution gives Panchayats the power and authority to make decisions about matters related to health.[20] These include taking steps for sanitation and primary health care, such as hospitals and dispensaries.[21] Municipalities have been empowered under part IX-A of the

[13]Consumer Education and Research Center v. UOI, AIR 1995 SC 636
[14] Kirloskar Brothers Ltd. v. Employees' State Insurance Corporation, (1996) 2 SCC 682
[15] Paschim Banga Khet Mazdoor Samity &Ors v. State of West Bengal &Ors, (1996) 4 SCC 37
[16] Parmanand Katara v. Union of India, AIR 1989 SC 2039
[17]DR. P.K. AGRAWAL AND DR. K.N. CHATURVEDI, COMMENTARY ON THE CONSTITUTION OF INDIA, 52 (2016)
[18] Article 47, The Constitution of India
[19]Tapan Kumar v. Food Corporation of India, (1996) 6 SCC 101
[20] Article 243-G, Constitution of India 1950
[21] Id., Schedule 11

Constitution to ensure water supply for domestic, industrial and commercial purpose.[22] The municipalities must take measures for maintaining public health, sanitation conservancy, and safeguarding the interests of the weaker sections of society.[23]

**b. Other Legislative Provisions**

The link of health with laws, policies, and practices sustains a functional democracy and focuses on accountability. It elevates disparities in healthcare and quality treatment to fundamental questions of democracy and social justice. By enacting social welfare legislations, the Indian Parliament has done a lot to improve the social patterns of citizens.

The Factories Act, 1948 makes provisions for health[24], safety[25] and welfare[26] of workers. It recognises that health and strength of a worker is an essential facet of the right to life.[27] The Act puts an obligation on the occupier of the factory to make adequate ventilation for the circulation of fresh air.[28] There is also the inclusion of a provision[29] with the view to prevent overcrowding in the factory. It also provides specific safeguards against using and the handling of hazardous substances by occupiers of factories.[30] The Act lays down provisions to ensure that safe, clean drinking water is provided to the workers.[31]

The object of the Plantation Labour Act, 1951 is to provide for the welfare of labourand regulation of the conditions of work in plantations. The Act provides a timeframe prohibiting women from working between dusk to dawn.[32] The Act makes specific provisions about health under Chapter III. These include provisions for drinking water[33], conservancy[34] and medical facilities[35]. The Act also provides a separate chapter[36] concerning the welfare, thus providing for canteens[37], creches[38], recreational facilities[39], educational facilities[40] and housing facilities[41].

[22] Id., Article 243-W
[23] Id., Schedule 11
[24] Factories Act 1948, §§ 11-20
[25]Id., §§ 21-41
[26]Id., §§ 42-50
[27]C.E.S.C. Ltd. v. Subhash Chandra Bose & Others, AIR 1992 SC 573
[28] Id., §13
[29] Id., §16
[30] Id., §41-A to § 41-H
[31] Id., §18
[32] Plantation Labour Act, 1951, §25
[33] Id., §8
[34] Id., §9
[35] Id., §10
[36] Id., Chapter IV
[37] Id., §11
[38] Id., §12
[39] Id., §13
[40] Id., §14
[41] Id., §15

The aim of the Mines Act, 1952 is the regulation of labour and safety in mines. Chapter V of the Act lays down the provisions as to health and safety. Chapter VI deals with the hours and limitations of employment. There are provisions regulating employment of women[42]. It prohibits the employment of persons below eighteen years of age.

The Food Safety and Standards Act, 2006[43] lays down science-based standards for articles of food. It provides guidelines to be followed by the Central and State governments to achieve an appropriate level of health and life. It prohibits the use of food additives, contaminants, heavy metals and processing unless it is per the provisions of the Act. It also imposes corresponding obligations and liabilities on food business operators in the case where the food is unsafe, misbranded or sub-standard. It further imposes penalties and punishments in case there is selling of such misbranded or sub-standard food.

Similarly, The Prevention of Food Adulteration Act 1954 is a consumer protection legislation designed to prevent and curb adulteration of foods. It is a specific law, which aims to fill any gaps that continued to exist due to the loose and unfocused adulteration laws provided under the Indian Penal Code 1860. Various authorities have been established under the Act to ensure uniformity in procedures and punishments.

Some legislations mainly deal with drugs. The existence of drugs in India was ignorable before the beginning of the 20th century. It was after the formation of the Chopra Committee in 1931 that there was a gradual development of drug laws. The statutes dealing with drugs and pharmaceuticals include The Epidemic Diseases Act 1897, The Drugs and Cosmetics Act 1940, The Narcotic Drugs and Psychotropic Substances Act 1985 are a few examples.

Special legislations made for the disabled are note-worthy because they are evidence of the progressive nature of society. People are gradually realising and understanding that there should not be any stigmas attached to such illnesses. The acts dealing with disabled include are The Mental Health Act 1987, The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995, The National Trust (For the welfare of persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities) Act 1999, and The Rehabilitation Council Act of India (RCI, 1992).

Special laws enacted for the benefit of women are Pre-conception and Pre-Natal Diagnostic Techniques (Regulation and prevention of misuse) Act 1994, The Maternity Benefits Act 1961 and The Medical Termination of Pregnancy Act, 1971. Abortions are now legal under certain circumstances. Pre-natal diagnostic techniques shall be used only if certain conditions have been fulfilled.

[42] §46, Mines Act 1952
[43] Food Safety and Standards Act, 2006

Specific legislations dealing particularly with children include The Child Labour (Prohibition and Regulation) Act 1986, The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act 1992 and The Juvenile Justice (Care and Protection) Act, 2015.

**Judgments and Precedents**

The Supreme Court has examined[44] the issue of the right to health as a constitutional right. It observed that rights and duties go hand in hand. The rights of one person correlate to duty upon another individual, employer, government or authority. Though the Government is taking the initiative by setting up hospitals and health centers, these must be within reach of the public and sufficient quality. Maintenance and improvement of public health is the duty of the State to fulfil its constitutional obligations cast on it under Article 21 of the Constitution.[45]

Preventing pollution is a step towards attaining an adequate standard of health.[46] Citizens have a fundamental duty to protect and improve the natural environment, including forests, lakes, rivers, and wildlife.[47] Protection of the environment is not only a duty of the citizens but an obligation of the State as well. Preservation of nature's gifts is required for fruitfully enjoying the right to life.[48] It includes the right to pollution-free water and air.[49]

In the judgement of *T.Damodar Rao*[50], Justice P.A. Chaudhary held that the courts as enforcing organs of the constitutional objectives had the duty to forbid actions of the State as well as the citizens which would upset the ecological and environmental balance.[51] The Supreme Court held that environmental, ecological, air and water pollution should be regarded as amounting to a violation of the right to health covered under Article 21 of the Constitution.[52] Positive steps should be taken to eliminate air and water pollution for the better enjoyment of life and dignity.[53]

Another landmark case that came to light was *Savita Gulyani v. Orchid Hospital & Heart Centre & Others*[54]. Sh. Naik Subedar K.L. Gulyani received a deep knife wound in his right thigh in a pick-pocket attempt on the bus. He started bleeding and managed to get down the bus but

[44] State of Punjab v. Ram LubhayaBagga, AIR 1998 SC 1703
[45] Vincent Panikurlangara v. Union of India, AIR 1987 SC 990; *see also* Unnikrishnan, JP v. State of A.P, AIR 1993 SC 2178
[46] Javed v. State of Haryana, AIR 2003 SC 3057
[47] Article 51-A, Constitution of India
[48] *T. Ramakrishna Rao v. Hyderabad Development Authority, 2002 (2) ALT 193*
[49] Subhash Kumar v. State of Bihar, AIR 1991 SC 420; (1991) 1 SCC 598
[50] T. Damodar Rao and others v. Special Officer, Municipal Corporation of Hyderabad, AIR 1987 AP 171
[51] *Id.*
[52] Virender Gaur v. State of Haryana, (1995) 2 SCC 577; *see also* Shantistar Builders v. Narayan KhimalalTotame, (1990) 2 SCJ 10
[53] M.C. Mehta v. Union of India, (1987) 4 SCC 463; *see also* Rural Litigation and Entitlement Kendra v. State of U.P, AIR 1987 SC 359; *and* Subhash Kumar v. State of Bihar, (1991) 1 SCC 598
[54] Savita Gulyani v. Orchid Hospital & Heart Centre & Others, Appeal No. A-2008/752 (Arising from the order dated 16.06.2008 passed by District Forum (West) JanakPuri, New Delhi, in Complaint Case No.52/2006)

collapsed immediately on the roadside at a place, which was just in front of the clinic of a doctor named Dr A K Manocha. As per the evidence on record, the doctor came out of his clinic, saw the injured man bleeding profusely right outside his clinic, but instead of rendering any emergency life-saving treatment he just turned back and closed his clinic. The injured army man had bled to death for want of medical help. The Delhi State Consumer Disputes Redressal Commission observed that "*every doctor is bound by oath to render help to any person needing help*".

Further, the Court reiterated that a modified version of Hippocratic Oath is now part of the Indian Medical Council (Professional Conduct, Ethics and Etiquettes) Regulations-2002. This Oath is now binding and has the force of law. The Court emphasised that every patient has a right to get treatment in case of an emergency.

## Proposed General and Specific Measures

The right to health is categorised by conceptual confusion and lack of implementation.[55] In India, we see that healthcare has not been a priority of the Indian State. The low level of investment of resources and rapid, unregulated and uncontrolled development in the private health sector is a reflection of this callous attitude.

Suggestions that could bring a transformation in the right to healthcare include good governance, measures for women and children, and protection against traditional restrictive health practices.

### a. Good Governance

Society can progress only when the nations take upon the obligation to abolish harmful and traditional practices. For this, States should implement a variety of legislative, administrative and social measures. The underlying conditions of daily life should be improved. This includes the circumstances of birth, growth and work. The term "good" in *"good governance"* refers to distinctive features that characterise how governments formulate and implement policies, rather than the content of policies themselves. Good governance maximises the capacity of States to develop and implement policies for the public's benefit, to manage resources prudently, and to provide services efficiently and effectively.[56]

Countries should integrate the following six principles into the law reform process: stewardship, transparency, participation, fairness, accountability and following the rule of law.[57]

[55] BRIGIT TOEBES, THE RIGHT TO HEALTH AS A HUMAN RIGHT IN INTERNATIONAL LAW, 260 (1999)
[56] World Bank, *"Managing development: the governance dimension: a discussion paper",* Washington (DC) 1991
[57] Lawrence O. Gostinet al.*"Advancing the Right to Health: The Vital Role of Law"*, 107 AMERICAN JOURNAL OF PUBLIC HEALTH 1755 (2017)

i) Stewardship means the *"careful and responsible management of something entrusted to one's care"*.[58] Ministries and ministers who work to reform public health laws must exercise stewardship, putting aside personal desires and working to maximise the health interests of the people they serve.

ii) Transparency means that, as far as possible, the process of developing, implementing and enforcing the law should be open and visible to the public. Public forums, parliamentary debates and a political environment are processes that could favour transparency.

iii) Thirdly, there should be the participation of communities, civil society groups, public health organisations and other stakeholders. Publishing discussion papers and making draft legislation available (including on the Internet) is an effective mechanism to ensure participation of the community and also maintain transparency.

iv) All persons are entitled to the right to health, and governments should abstain from discrimination while fulfilling their obligations in this regard. There should be fairness. Fairness covers within its ambit two concepts – the absence of discrimination, and the presence of special treatment to vulnerable groups. States must ensure that individuals and vulnerable groups do not miss out on health care and health services because of their inability to pay.

v) Accountability means taking responsibility for the success and failure of laws and policies. Governments should allocate resources to ensure that laws are administered effectively at both national and local levels. A detailed discussion on the element of accountability has been covered above in the chapter The Foundations of Right to Health.

vi) The principle of the rule of law means that all persons, officials and institutions, including the State itself, are accountable under the law. This law is publicly disseminated, equally enforced, independently adjudicated, and consistent with international human rights standards.

Further, inequitable distribution of power, resources and income should be balanced out. Inequities are seen from the conditions of early childhood, schooling and education, the nature of employment and working conditions, the physical form of the built environment, and the quality of the natural environment in which people reside. Social stratification determines different access to and utilisation of medical care and facilities. Attention needs to be paid to specific groups of the international community, including, rights of children, rights of women, rights of old-aged, rights of the indigenous people, rights of disabled and rights of other marginalised sections of the society. The Government should take a comprehensive approach to prioritise the health rights of the citizens and the progressive realisation of these rights.

[58] World Health Organization, *"The World Health Report 2000: Health systems: improving performance"*, 2000

### b. Measures for Women and Children

Women's inferior status and the problem of oppression grow not only from the inequalities between men and women but rather as a function of gender discrimination. The harm faced by women occurs within homes. Girls are incredibly vulnerable and fall prey to oppressive practices.

As concerned about the health of infants, proper nutrition is crucial and begins in the womb with adequately nourished mothers. Mothers and children need continuous care and protection from pre-pregnancy, through pregnancy and childbirth, to the early days and years of life. Access to pre-natal, perinatal, neonatal, and postnatal care is a progressive step towards achieving healthy development of child and woman. This should be coupled with receipt of the information on family planning and emergency obstetric services.

Women should be given various choices in health care and be adequately informed about such choices. The concept of informed consent includes two concepts – informed consent or dissent, as well as the right to un-coerced choices. Women should have a sufficient understanding of proposed interventions, implications of refusal of treatment, and availability of alternative forms of management. The role of such information is to contribute to the decision-making process. A woman should also be allowed to give her consent freely, without being subject to any form of coercion, force, threat or over-inducement. There should not be any addition to the pressures that the woman is already experiencing. Women, being reluctant to appear ungrateful or non-compliant, often blindly agree to the treatment being proposed to them. If those with superior knowledge advise them on the methods to be followed, women do not bat an eyelid and accept the advice being tendered to them.

### c. Protection Against Harmful Traditional Practices

Traditional cultures and beliefs have been passed on from generation to generation. While some of these may be beneficial to the people, others are discriminatory and harmful.

The spread of awareness and education in urban areas has fostered a broad outlook, but in rural areas, most of the techniques employed are still restrictive. Often these harmful practices target women. Actions must be taken to shield women from orthodox practices that deny them their full reproductive rights. States must spread education and awareness about the ill effects of these harmful and restrictive health practices, and additionally, use legal prohibitions where appropriate.[59]

There is a need to adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls, including early marriage, female

[59] Article 5(a), Convention on the Elimination of Discrimination Against Women, *entered into force* Dec.18, 1979, 1249 U.N.T.S. 13

genital mutilation, preferential feeding and care of male children.[60] Female genital mutilation, for instance, reflects a stereotypical perception that women may legitimately be exposed to non-therapeutic surgery in order to comply with the gender-specific norms of their community. It is believed that, by mutilating female's genital organs, her sexuality will be controlled; but above all, it is to ensure woman's virginity before marriage and chastity after that.[61] The loss of virginity of women before marriage is a more significant stigma as compared to the loss of virginity by a man. It is also an obstacle preventing a woman from marrying without any fingers being pointed at her. This practice denies the girl child good health, education, recreation, economic opportunity and the right to choose her partner. Denial of these rights results in a violation of the Convention on the Rights of Child.[62] The consequences of this practice are both short-term and long-term in nature. It results in severe health complications and psychological problems. Mood swings, irritability, constant depression and anxiety are more frequently observed among teenage girls who have been subjected to this horrific practice.[63]

Another common orthodox practice prevalent in India is the preference of the male child. Discrimination in the feeding and care of female children is the cause of high rates of mortality and malnutrition among the girl child in these nations. Age of marriage is a factor contributing to the violation of women's rights.[64] Girls from communities where early marriages occur are also victims of son preferential treatment. Early marriage is a primary cause of premature pregnancies which pose severe risks to the life of the mother and child.

Preferential treatment is also witnessed where food is scarce due to poor climatic conditions, poor agriculture or due to the pitiable socio-economic conditions of the family. The sequence of feeding in such a family begins from the father or father-in-law, followed by the husband. The food then is shared with the sons, and finally, if there is any iota of grains left, they are given to the women of the house – the mother and daughters. In these societies, the survival of the men plays a paramount role in the distribution of resources. The health of the male members is given precedence over that of the females. New-born girls are breast-fed for a shorter period than new-born males.

The right to health under the ICESCR does not incorporate specific obligation of member States to abolish harmful traditional practices. One of the primary reasons why these practices persisted in the past is that neither the governments of nations nor the international community was initially concerned with these harmful practices. They were treated as ethical and moral in the eyes of those practising them and did not receive any objections. Blind adherence to practices

[60] W.H.A. Res. 47.10, World Health Assembly, 47th Session (1994)
[61] UN Office of the High Commissioner for Human Rights, *Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children* (1995)
[62] Convention on the Rights of Child, *entered into force* Sept. 2, 1990, 1577 U.N.T.S. 3
[63] EFUA DORKENOO, CUTTING THE ROSE: FEMALE GENITAL MUTILATION- THE PRACTICE AND ITS PREVENTION (1994)
[64] *Report of the Economic and Social Council*, UN ECOSOC, 50th Sess., U.N. Doc. E/CN.4/1995/42 (1994), ¶165

and state inaction about customs and traditions was a significant cause of large-scale violence against women.[65]

However, over time, the attitude of the people has started to change. The international community has begun to recognise the importance of spreading awareness amongst women who, because of their ignorance and lack of resources, continued to endure pain, suffering and even death, without batting an eyelid.

Health professionals and medical advisors who misguide women on the choice of treatment should be held liable for professional misconduct. Such unethical professional misbehaviour should be punished. The failure to adequately disclose information should be treated as an offence of medical negligence. The laws made for governing the health of women should be scrutinised to ensure that they do not discriminate against women. Trivial sex-related stereotypes should not prohibit women from being treated on merits. For example, pregnancy-related disadvantages should not be an obstacle to getting an education or employment. Laws that deny or restrict women's access to health services, or make access dependent on another's authorisation results in impairment of women's rights.[66]

**d. At the Workplace**

The conditions of work also affect health and health equity. Adverse working conditions can expose individuals to a range of physical health hazards and tend to cluster in lower-status occupations.

The Government is responsible for providing the infrastructure, the laws and services necessary to ensure that workers remain employable and that enterprises flourish. While workers have a fundamental right to work under safe and healthy conditions, employers have a corresponding fundamental duty to provide a safe and healthy workplace. The employers must take steps to improve the working conditions, prevent exposure to harmful and toxic substances, eradicate poverty, alleviate social inequities, reduce exposure to physical and psychosocial hazards, and enhance opportunities for health and well-being. Health hazards should be minimised as far as possible. Control of diseases can be made more effective by periodical check-ups, surveillance and data collection schemes. Regular screening programmes would help develop preventive, curative, rehabilitative, and reformative health services.

The Constitution of the International Labour Organisation specially provides for the protection of the worker against sickness, disease and injury arising out of his employment. The International Labour Organisation establishes conventions and recommendations that are universal standards

[65] *Id.*
[66] Zohra Rasekh, Heidi M. Bauer, M. Michele Manos & Vincent Iacopino, *Women's Health and Human Rights in Afghanistan*, THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION (1998)

for health rights in workplaces. 28th April is celebrated as *"World Day for Safety and Health"* at work.

## Conclusion

The right to health has varying definitions under international and national legislations. Despite there being many interpretations of human dignity, there is not one meaningful conceptual foundation for the right to health. Most countries have recognised the right to health and related obligations by ratifying the International Covenant on Economic, Social and Cultural Rights. However, despite the differences in wording, the essentials of each definition remain the same. There have been developments in the means to achieve the right to health. It is now recognised as a fundamental right in several countries, including India.

Today, there are numerous health movements and approaches, including health equity, primary health care, health promotion, social determinants, health security, the continuum of care, biomedical. Despite the notable evolution in the laws and ideologies, there is still a long way to go. Accommodating and comprehensive public laws need to be implemented by nations. There is a need to eliminate all forms of disparities and discriminations. Equitable, as well as equal treatment, needs to be provided to all members of society. Tax-based funding for universal coverage of essential health packages, regulations of private providers, and strengthening of implementation systems are some steps that could be taken for attainment of the highest standard of health.

Progressive governments must be persuaded to integrate the right across their policy-making processes, following their legal obligations. WHO and other international organisations must be prevailed upon to champion the right to the highest attainable standard of health. Civil society organisations have to campaign around health and human rights.

Questions surrounding the right to health, universal healthcare, and a healthy lifestyle will continue to dominate deliberations in the international community, as well as on the domestic front. The society has come a long way, but there is a long way to go, and many more obstacles to overcome.

# IMPACT OF INTELLECTUAL PROPERTY RIGHTS ON ECONOMIC GROWTH

*Reet Singh*[1]

**Abstract**

*This paper provides an overview on the impact of intellectual property law on the economy. It talks about the positive impact and the negative impact, the effect on potential gain and loss depending on the market and other business regulation, competition and technological development etc. there are governments all over the world who want to improve their economy and growth in the sector of technology, market and information which will help in the growth of new virtual products and services. There are still many developing countries which do not depend on IPR protection nor foster innovation. While developed countries push for strong protection of IPR in bilateral, regional and multilateral actions.*

**Key Words:** Intellectual property rights, Economy

## Introduction

The question of how Intellectual property law effect the economic growth depends on many factors; the main factor is the particular circumstance in each country. The stronger the system of protection of intellectual property stronger will be economy. There are many evidences that IPR could increase the overall economic growth and bring in technological growth and help in the overall growth in every prospect which would promote effective competition[2].

According to TRIPS (Trade related aspect of Intellectual property rights) in WTO there have been many questions regarding the impact on economic growth[3]. The reasons given where first, there many factors which effect the economic growth which would lead to domination on the growth of IPR with factors like market openness, micro economics and macroeconomics[4]. Secondly, many economics theories also state that IPRs will have both positive and negative impact however that will depend on various circumstances in every country. However, it can be said that IPR is structured in a way that may favour the different competitions within the system supported with many rights and obligations[5].

---

[1] Prof of Law, M.S Ramaiah University of Applied Science, Bengaluru, India.

[2] See Robert E. Evenson & Larry E. Westphal, Technological Change and Technology Strategy, in 3A HANDBOOK OF DEVELOPMENT ECONOMICS 2209, 2229-30 (Jere Behrman & T.N. Srinivasan eds. 1995); Keith E. Maskus, The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer, 9 DuKE J. COMP & INT'L L. 109, 128-38, 149 (1998) [hereinafter Maskus, Foreign Direct Investment]; Carlos A. Primo Braga et al., Intellectual Property Rights and Economic Development (1998) (unpublished manuscript, Background Paper for the World Development Report, on file with the author).

[3] David M. Gould and William C. Gruben (1996) The Role of Intellectual Property Rights in Economic Growth. J. DEV. ECON 323, 334–35.

[4] Griffith, R. (2000) How Important is Business R&D for Economic Growth and Should the Government Subsidise It? Briefing Note No. 12. London: Institute for Fiscal Studies (http://www.ifs.org.uk/innovation/randdcredit.pdf).

[5] De Soto, H. (2000) The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else. New York: Basic Books

## 1. Purpose

There are two main issues which will be discussed in the paper:

1) The factors which effect the growth of an economy due to IPR
2) The various theories regarding how IPR improves the economy
3) The various policies which will help in various IPR regimes in developing countries.

## 2. Research Methodology

The reason I chose this topic is because there are two sides to a coin

Limitation of the paper are:

- Comparison is done with few selective countries
- The research material has been taken from various research papers written in English.

## 3. The Relationship between IPR and Economic Growth

There are two main economic objective for protection of intellectual property protection[1].

First, it is important to invest in the knowledge creation, business growth and new goods and service. Without any competition companies will not want to invest in research and other commercialization activities[2]. Weak IPR create negative economic growth as they fail to overcome the problem of reach and development and face risks in competitive areas in private markets[3].

Second, importance of encouraging right holders to place their inventions and ideas on market as sharing information is non-rival and many developers may find it difficult to exclude others from using it.

In economic terms it is efficient to provide wide access to new technologies and products[4]. There is a fundamental trade-off between the overall protections of IPR which would limit the social gains from various inventions du to reduction in incentives[5]. The weak system would reduce creativity as it fails to provide adequate returns on various investments.

[1]Rafiquzzaman, Mohammed (2002) The Impact of Patent Rights on International Trade: Evidence from Canada. The Canadian Journal of Economics 35:2, 307–330

[2] PRIMO BRAGA, C.A. AND C. FINK. 1997. "The Economic Justification for the Grant of Intellectual Property Rights: Patterns of Convergence and Conflict." In F.M. Abbott and D.J. Gerber, eds., Public Policy and Global Technological Integration, pp. 99-121. The Netherlands: Kluwer Academic Publishers. ———. 1999. "International Transaction in Intellectual Property and Developing Countries." Forthcoming in the Journal of International Technology Management's special edition on Intellectual Property Rights and Economic Development

[3] Romer, P. (1986) Increasing Returns and Long Run Growth. Journal of Political Economy. 94, 1002–1037

[4] YUSUF, A.A. AND A.M VON HASE. 1992. "Intellectual Property Protection and International Trade: Exhaustion of Rights Revisited." World Competition: Law and Economics Review 16(1):115-131.

[5] SHERWOOD, R.M. 1997. "Intellectual Property Systems and Investment Stimulation: The Rating Systems in Eighteen Developing Countries." IDEA: The Journal of Law and Technology 37(2):261-370.

Different types of IPRs operate in a different manner[6]. Like patent provide protection from unauthorized making, selling and importing products and technology that is recognized to be novel and industrial utility[7]. In most countries patent applications are made public after a certain time period. There are several aspect of patent scope after effective protection[8].

Trademark is used to give protection to various names and symbols used in products and services. It is used to help the customers identify products with much confusion, as the main objective of any brand to get investments as it talks about the quality of the products and service[9]. Economists believe that there is danger to the economy due to market domination in competitive economies which play as a market a barrier for new entries[10].

Copyright is used to provide protection to literary work, artistic work etc as these rights provides an exclusive right to the owner for a certain period of time and they can choose to sell it[11]. However the short coming is that the doctrine of 'fair- use' provides only a limited number of copies to be made for research and education[12].

There are still many technologies which do not fit into the traditional categories, as some elements a technology may be applicable for patent in one country but not in another[13]. This is particularly in developing counties especially for bio-technologies and plant breeder's right. Due to unwarranted protection these inventions cannot be considered as an innovative step, this is the same case in seed varieties[14].

There is a fundamental issue in these objectives. Due to the over protectiveness of these IPRS it would limit various different social gains, a weak system would reduce innovations and effect the economy and not provide enough returns to the market[15].

---

[6] You and Katayama (2005) Intellectual Property Rights Protection and Imitation: An Empirical Examination of Japanese F.D.I. in China. Pacific Economic Review 10:4, 591–604.

[7] PRIMO BRAGA, C.A. 1990. "The Developing Country Case For and Against Intellectual Property Protection." In W.E. Siebeck, ed., Strengthening Protection of Intellectual Property in Developing Countries: A Survey of the Literature. World Bank Discussion Paper No. 112, pp. 69-87. Washington, D.C.: The World Bank. ———. 1996. "Trade-Related Intellectual Property Issues: The Uruguay Round Agreement and its Economic Implications." In W. Martin and L.A. Winters, eds., The Uruguay Round and the Developing Economies. World Bank Discussion Paper No. 307, pp. 381-411. Washington, D.C.: The World Bank.

[8]Schiffel, D. and C Kitti (1978) Rates of Invention: International Patent Comparisons. Research Policy 7: 4 (October), 324–340.

[9] WORLD BANK. 1998. World Development Report. New York, N.Y.: Oxford University Press.

[10] Zipfel, Jacob (2004) Determinants of Economic Growth. Florida State University (Social Sciences-Political Science).

[11] SIEBECK, W.E., ed. 1990. "Strengthening Protection of Intellectual Property in Developing Countries: A Survey of the Literature." World Bank Discussion Paper No. 112. Washington, D.C.: The World Bank

[12] YUSUF, A.A. AND A.M VON HASE. 1992. "Intellectual Property Protection and International Trade: Exhaustion of Rights Revisited." World Competition: Law and Economics Review 16(1):115-131.

[13] PRIMO BRAGA, C.A. AND A. YEATS. 1992. "How Monoliteral Trading Arrangements May Affect the Post-Uruguay Round World." Policy Research Working Paper, WPS 974. Washington, D.C.: International Economics Department, The World Bank

[14] UNESCO. 1996. World Science Report. Paris: UNESCO. UNITED NATIONS. 1997. World Investment Report. New York

[15] WATAL, J. 1997a. "Compensation to Developing Countries for the Use of Biological Resources and Traditional Knowledge." Paper commissioned by the World Development Report. 1997b. "Intellectual Property Rights and Standards." Paper commissioned by the World Development Report.

## 4. Protection of IPR in Different Countries

IPR is very important in every country[16]. However, they differ from country to country in spite of being members of TRIPS. Example: United States is said to have the strongest IPR protection in the world. It has responsive institutional system for administration and also ensure IPR effeteness of enforcement of the same and also provides equal treatment of national and international by following various IPR conventions[17]. The IPR protection of many developed countries come very close to that of the United states, although they may be different in the fields of governance and legal coverage[18]. However, in developing countries the protections is very low as not all developing counties protect all types of intellectual properties with minimum level of protection in administration and enforcement[19]. There is also difference in the research and development activity between the developed and developing countries, due to the privatization of the same increases the IPR protection. The IPR also influences the production and consumption in domestic and foreign residents[20]. For developing countries, the agricultural output is much higher, thus one can say that IPR protection on agriculture is higher in developing countries than developed countries[21].

[16] Koike, M., Keynote Speech at the Fourth Global Congress Combating Counterfeiting and Piracy, p. 1 (3 Feb. 2008), http://www. ipr.go.jp/e-material/keynote_speech_20080203dubai.pdf.

[17] "While some consumers are looking for what they believe to be bargains, knowingly buying counterfeit and pirated products, others may purchase counterfeit and pirated products believing they have purchased genuine articles. In both cases, products are often sub-standard and carry health and safety risks that range from mild to life threatening. Sectors where health and safety effects tend to occur include: car parts (brake pads, hydraulic hoses, engine and chassis parts, suspension and steering components, airbags, spark plugs, filters), electrical components (circuit breakers, fuses, switches, batteries), food and drink (tea, rice, vodka, raw spirits, baby formula), chemicals, toiletry, household products and tobacco products."

[18] OECD, Magnitude of Counterfeiting and Piracy of Tangible Products: An Update (Nov. 2009), http://www.oecd.org/document/2 3/0,3343, en_2649_34173_44088983_1_1_1_1, 00.html. 120 Frontier Economics, The Impact of Counterfeiting on Governments and Consumers (May 2009), http://www.iccwbo.org/ bascap/index.html?id=30506

[19] European Commission, Green Paper on Copyright and Related Rights in the Information Society, COM (95) 382 final, p. 3 (19 Jul. 1995), http://ec.europa.eu/internal_market/copyright/docs/docs/ com-95-382_en.pdf; see also Guellec, D., Madiès, T., and Prager, J.-C., Les marchés de brevets dans l'économie de la connaissance, Conseil d'AnalyseÉconomique (28 Jul. 2010) (Patent markets are likely to have increasing importance in the allocation of technology. Affirmative participation in these markets will be a prerequisite for access to knowledge and markets globally.), http://www.cae.gouv.fr/ spip.php? breve19.

[20]Jervelund, C., Jespersen, S.T. and Winiarczyk, M., Copenhagen Economics, Clean Technology and European Jobs, pp. 1, 8 (Oct. 2009) (citing IEA estimates), http://www.thecied.org/ NRrdonlyresesyxt37gmfw4siedbh6tjtaxai6gy4bzpzrtpv5g5bwq2xhsye6k6h7da7yz2jkz46rhotgjilyvo7oikkpttsge42e/ CleanTechandEuroJobsFullReportFINAL.pdf.

[21] WIPO, Global Financial Crisis Hits International Trademark Filings in 2009 (18 Mar. 2010) (describing profile of goods and services for which trademarks were registered in 2009), http://www.wipo.int/ pressroom/en/articles/2010/article_0006.html.

The privatization of agricultural research has increased the IPR, with the increasing development in seed and farming technology, the same is stated in section 5 of the as it has become complex in developed countries[22].

When it comes to service the copyright protection affects the industrial sector and software, publication and entertainment. This contributes to the GDP growth of the developed countries and on the other hand developing countries the service share is smaller and it's limited only to artistic and literary property[23].

**6. Intellectual Property Rights and Economic Development**

The IPRS plays a big role in the economic goals for any IPR Protection[24]. The aim is to promote investments in creation and business creation by establishing exclusive rights to use and sell new technologies, service, goods etc. When talking from the economics point of view a weak IPRS creates a negative externality. The problem fails in research and development and risks information from private market[25].

Secondly, it's to promote new knowledge and replace it with different inventions and ideas. Since information is public it is non-rival and developers find it difficult to exclude others from using it[26]. It is socially and economically efficient to provide product to new products, software,

[22] See, e.g., European Commission, Conference on Counterfeiting and Piracy: Frequently Asked Questions (FAQs) (13 May 2008), http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/299&format=HTML&aged=0&language=EN&guiLanguage=en : "While some consumers are looking for what they believe to be bargains, knowingly buying counterfeit and pirated products, others may purchase counterfeit and pirated products believing they have purchased genuine articles. In both cases, products are often sub-standard and carry health and safety risks that range from mild to life threatening. Sectors where health and safety effects tend to occur include: car parts (brake pads, hydraulic hoses, engine and chassis parts, suspension and steering components, airbags, spark plugs, filters), electrical components (circuit breakers, fuses, switches, batteries), food and drink (tea, rice, vodka, raw spirits, baby formula), chemicals, toiletry, household products and tobacco products."

[23] 3 Resurreccion, L., Tech-Transfer law seen to boost R&D, economy, Business Mirror (24 Apr. 2010), http://www.bic.searca.org/ news/2010/apr/phi/24.html; dela Pena, T., Undersecretary for S&T Services, Department of Science and Technology, Republic of the Philippines, The Technology Transfer Act of the Philippines (2009), http://www.healthresearch.ph/index.php?option=com_phocadownl oad&view=category&download=62technology-transfer-act-of-thephilippines&id=14:3rd-pnhrs.

[24] OECD, Turning Science into Business: Patenting and Licensing at Public Research Organizations, p. 11 (2003), http://www. oecdbookshop.org/oecd/display.asp?lang=EN&sf1=identifiers& st1=922003021p1. Countries that have adopted such legislation include Canada (1985), Japan (1998), Great Britain (1998), Germany (1998, 2001), France (1999), Austria (2002), Italy (2001), Belgium (1999), Spain (1986), Denmark (2000), Switzerland (2002), Netherlands (1998), and Korea (1998, 2000 and 2001). Davison, H., Public-Private Partnerships: The Role of IPRs, Stockholm Network, http://www.stockholm-network.org/downloads/events/ HelenDavison.pdf.

[25]Schwiebacher, F. and Müller, E., How Companies Use Different Forms of IPR Protection: Are Patents and Trademarks Complements or Substitutes? DRUID-DIME Academy Winter 2010 PhD Conference (Nov. 2009), http://www2.druid.dk/conferences/viewpaper. php?id=500648&cf=44.

[26] 0 Sandro Mendonça, Tiago Santos Pereira and Manuel Mira Godinho, Trademarks as an Indicator of Innovation and Industrial Change, DRUID Summer Conference 2004 on Industrial Dynamics, Innovation And Development (May 2004), http://www.druid.dk/ uploads/tx_picturedb/ds2004-1406.pdf; Smith, P. and Amos, J., Brands, Innovation and Growth: Evidence on the contribution from branded consumer businesses to economic growth (Apr. 2004), http://www.aim.be/Documents/Insight%20&%20innovation/growth/PIMS_brands_innovation&%20growth_2004.pdf; Clayton, T. and Turner, G., Brands, Innovation and Growth: The Role of Brands in Innovation and Growth for Consumer Businesses, in Tid, J. (ed.), From Knowledge Management to Strategic Competence: Measuring Technological, Market and organizational Innovation (2006).

technologies when they get developed. Having an overly protective IPRS could limit the social gains from invention by reducing the incentives on the other hand having an overly weak will fail to provide adequate returns[27].

**6.1 Positive Impact of Intellectual Property Rights on Economic Development**

Many economists have recognized several channels through which the Intellectual property rights have a positive impact on the overall growth and development of the economy[28]. They are independent and dependent on each other. While IPR plays an important role in encouraging new innovations, product development etc, in developing countries they have IPR system which favors information through low-cost imitation of other IPR systems all over the world by copying their product and technology[29]. Due to this there is insufficient development in the IPR growth in the domestic front which results in low level economic growth as they aim at local markets and could try to gain benefit from patents, copyright and trade secret[30].

In many cases inventions include only minor changes in the technology which causes effect in the growth in the knowledge and various other activities which have a cumulative impact in the same. In order to give a tough competition to the other developing countries they have to come up with new and latest management, effective laws and organizational skills. However, adapting requires large amount of capital investment which have high social returns to improve in global norms, especially where there is unfair competition and due to trademark infringement. IPR would help entrepreneurs with more creativity and risk taking[31]. Example, in Brazil helps domestic producers to gain significant share by encouraging foreign technologies to local market. The Japanese patent system effected technical progress, measured by increase in total factor productivity[32]. The mechanism for promoting these processes include the creator to disclose and also accept any opposition if any on the patent application. This process seems to also encourage the creators in a large number for their invention[33].

---

[27] 8 Bayh, B. (Sen.), Allen, J.P. and Bremer, H.W., Universities, Inventors, and the Bayh-Dole Act, Life Sciences Law & Industry Report, 24:3 (18 Dec. 2009) ("The Bayh-Dole Act unleashed the previously untapped potential of university inventions, allowing them to be turned from disclosures in scientific papers into products benefiting the taxpaying public.").

[28] Greenhalgh, C. and Rogers, M., Trade Marks and Performance in UK Firms: Evidence of Schumpeterian Competition Through Innovation, pp. 24-25 (Mar. 2007), http://www.economics.ox.ac.uk/ Research/wp/pdf/paper300.pdf.

[29] Greenhalgh, C. and Rogers, M., The Value of Innovation: The Interaction of Competition, R&D and IP, Research Policy 35:4, 562- 580, p. 577 (2006), http://www.sciencedirect.com/science/article/ B6V77-4JMKMP7-2/2/ca89c15d79ed303ce35756bdadc2e436.

[30] 9 Association of University Technology Managers, The unsung hero in job creation: New survey reveals universities' impact on the U.S. economy (2009) http://www.autm. net/AM/Template.cfm?Section=Licensing_Surveys_ AUTM&CONTENTID=4513&TEMPLATE=/CM/ContentDisplay.cfm.

[31] Interbrand, Best Global Brands (2010), http://www.interbrand.com/ en/best-global-brands/Best-Global-Brands-2010.aspx.

[32] Interbrand, Methodology, http://www.interbrand.com/en/bestglobal-brands/best-global-brands-methodology/Overview.aspx; see also Granstrand (1999), supra note 45, pp. 8-9.

[33]Magazzini, L., Pammolli, F., Riccaboni, M. and Rossi, M.A., Patent disclosure and R&D competition in pharmaceuticals, Economics of Innovation and New Technology, 18:5, 467-486, p. 482 (2009), http://www.informaworld.com/smpp/content~db=all?content=10.1 080/10438590802547183.

Recent studies have come up with product development and entry of new creators and firms for trademark protection as stated in a survey in Lebanon has provided evidence as they have extensive and weak intellectual property[34]. This problem was faced more in the food producers' sector this effected the food production sector in Middle East and Lebanon due large number of trademark infringement thus they shifted to domestic enterprises[35].

Similar problem exists in China, it suggested that trademark infringement affected the Chinese enterprises, problems like consumer goods, soft drinks, processed food etc. the companies who got their trademark also gained many counterfeit products[36]. According to various survey there are different effect on entries development and prevent interregional marketing as a result there were less economic growth as there was trademark infringement on products which have low capital requirement and high labor intensity as these were areas in which China had strong advantage in market. There is also a great number of growths in the software area in China which grow rapidly for business[37].

IPR also stimulate acquisition of new technology and information. Enterprise and creators apply for patent, in the USA 10-12 months' time period takes for the application process. With certainty it would induce more trade, license and product in the growing economy[38].

Comparing the same with developing countries they hope to attract stronger IPR[39]. There are about three channels through which technology is transferred all around the world (developing countries)[40].It is recognized that by many economists that goods, products and technology are

[34] Id., p. 103. See also Maskus, K., Will Stronger Copyright Protection Encourage Development of Copyright Sectors in Indonesia? in Krumm &Kharas (2004), supra note 57, pp. 149-154 (noting that impact was heaviest on local music firms). 60 WIPO, About Patents: Frequently Asked Questions, http://www. wipo.int/patentscope/en/patents_faq.html#patent_role.

[35] 6 Jensen, P. and Webster, E., Firm Size and the Use of Intellectual Property Rights, Economic Record, 82:256, 44-55, p. 46 (Mar. 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=889138.

[36]Luthria, M. and Maskus, K., Protecting Industrial Inventions, Authors' Rights, and Traditional Knowledge: Relevance, Lessons, and Unresolved Issues, in Krumm, K. and Kharas, H., East Asia Integrates: A Trade Policy Agenda for Shared Growth, p. 103 (2004), http:// www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2004 /03/04/000090341_20040304142642/Rendered/PDF/280410PAPER0 East0Asia0Integrates.pdf

[37] This discussion is summarized from OECD, Enhancing the Competitiveness of SMEs through Innovation, pp. 6-8 (2000), http:// www.oecd.org/dataoecd/20/1/2010176.pdf.

[38] 5 WIPO, Trademark Applications by Origin and Office (February 2010), http://www.wipo.int/export/sites/www/ipstats/en/statistics/ marks/xls/52_tm_appln_by_office_by_origin.xls.

[39] 5 Id., Table 4. When weighted by each sector's employment, the average number of all IP registrations per 1,000 employees for SMEs versus large companies, respectively, was .288 versus .242 for patents, 2.743 versus 1.835 for trademarks, and .339 versus.162 for design rights

[40] Ryan, M., Intellectual Property, Trade and Foreign Direct Investment, p. 3 (May 2004), WIPO Arab Regional Meeting on Intellectual Property as a Power Tool for Economic Growth, http:// www.wipo.int/edocs/mdocs/arab/en/wipo_reg_ip_amm_04/ wipo_reg_ip_amm_04_7.pdf; citing OECD, Technology Licensing: Survey Results (1987); United Nations Commission on Transnational Corporations (UNCTNC), New Issues in the Uruguay Round of Multilateral Trade Negotiations, E.90.II.A.15 (1989); UNCTNC, The Determinants of Foreign Direct Investment: A Survey of Evidence, E.92.II.A.2 (1990); Mansfield, E., Intellectual Property Protection, Direct Investment, and Technology Transfer: Germany, Japan, and the United States, International Finance Corporation/World Bank Group Discussion Paper #27 (1995); Lee, J.-Y. and Mansfield, E., Intellectual Property Policy and U.S. Foreign Direct Investment, Review of Economics and Statistics, 78:181-186 (1996); Maskus, Keith, Intellectual Property Rights in the Global Economy, pp. 197, 232 (2000).

imported which would directly reduce the production cost[41]. Example, there is one percent increase in import of products, technology and goods like Coe, Helpmanetc. so the import price would be around 0.5%- 1%[42]. Thus, the volume of impact is important to a developing country that need a revision in the IPR protection. The impact on the volume of trade depends on the revision and level of patent protection available in the said country, the target market size and the level of infringement which adhere to the guidelines of TRIPS[43]. Countries like USA and Switzerland are not required revise their IPR protection levels when importing goods, technology and products from China, Thailand, Indonesia and Mexico for which they need to adopt a much more IPR protection level[44]. Example in Mexico, updated their IPR regime in the NAFTA due to this there was a substantial increase in the manufacturing, import and export of goods, products and technology in the late 2000s from countries like India, Bangladesh and were also able to protect their patents from countries like Brazil and Argentina. It has also been shown in various studies that the stronger the patent protection there is lesser infringement and more increase in the import by almost 10% in the late 2000s. Seeing this almost 150 US firms applied for patent in over 20 countries from the FDI in 1990s[45]. Even various pharmaceutical companies, over 50% firms applied for IPR protection, especially the Research and development firms 100% of the companies applied for IPR protection[46]. In India, chemical industry indicate that they transfer 90% of their surveyed indicate that they could not differentiate between joint and subsidiary ventures[47]. Apart from chemical industry there is also transfer of products in the machinery industry however not in other industries because of weak IPR protection[48].

[41] 7 Rogers, M., Helmers, C. and Greenhalgh, C., An analysis of the characteristics of small and medium enterprises that use intellectual property, pp. 36-39, Tables 12-13 (Oct. 2007), http://users.ox.ac. uk/~manc0346/SMEReport1.pdf; see also Rogers, M., Helmers, C. and Greenhalgh, C., A comparison of the use and value of patents and trademarks in large and small firms (undated), www.oiprc.ox.ac. uk/EJWP0108.ppt

[42] 5 WIPO, Trademark Applications by Origin and Office (February 2010), http://www.wipo.int/export/sites/www/ipstats/en/statistics/ marks/xls/52_tm_appln_by_office_by_origin.xls.

[43] 3 Id., citing Arundel and Kabla (1998). Acs and Audretsch (1988) also found evidence in the US that patents are higher in industries where the share of innovations held by large firms is higher. However, the US definition of a small firm (

[44] World Intellectual Property Organization (WIPO), Economic Contribution of Copyright Industries, http://www.wipo.int/ ip-development/en/creative_industry/pdf/eco_table.pdf; Tera Consultants, Building a Digital Economy: The Importance of Saving Jobs in the EU's Creative Industries (Mar. 2010), http:// www.teraconsultants.fr/assets/publications/PDF/2010-MarsEtude_Piratage_TERA_full_report-En.pdf; Japan Copyright Institute, Copyright Research and Information Center (CRIC), Copyright White Paper – A view from the perspective of copyright industries, JCI Series No. 19, Vol. 3 (Aug. 2009), http://www.cric.or.jp/cric_e/cwp/ cwp.pdf.

[45] Dr. Angela Merkel, Policy Statement on the G8 World Economic Summit (24 May 2007), http://www.bundesregierung.de/Content/ EN/Regierungserklaerung/2007/05/2007-05-24-regierungserkl_C3_ A4rung-merkel,layoutVariant=Druckansicht.html.

[46] OECD, The Economic Impact of Counterfeiting and Piracy (2008), p. 134, http://www.oecd.org/document/4/0,3

[47]Tregear, A., F. Arfini, G. Belletti and A. Marescotti (2007) 'Regional Foods and Rural Development: The Role of Product Qualification'. Journal of Rural Studies 213(1): 12– 22

[48] WIPO, Guide on Surveying the Economic Contribution of the Copyright-Based Industries (2003), http://www.wipo.int/export/sites/ www/ip-development/en/creative_industry/pdf/893.pdf. 5 Raymond, Christopher, Intellectual Property Institute, The Economic Importance of Patents (1996).

Many firm are taking up FDI for licensing in product, goods and technology which has high licensing costs[49]. IPRS are upgraded because it makes it easy to discipline the application and avoid infringement of any patent or trademark[50]. It also makes the application and enforcement of contracts easy by and on multinational companies[51]. Thus if IPRS are strong and upgraded he licensing cost will come down making more growth and development in the field of IPR. Example in the US between 1980s and 1990s they affiliated themselves with many manufacturing companies in developed and developing countries[52]. Due to this the asset equation had a negative effect on the patent, trademark rights which brought a realization that there is a need for stronger IPR protection in order to have positive and efficient impact on the nations[53].
Thus in order to analysis the above statements made, first countries with weak IPR would not cause issues for countries to experiment or deal with new technology, knowledge and stop the growth in the given field[54]. Secondly, countries would obtain less economic growth. Thirdly, countries will have outdated goods, products and technology[55]. Finally, they will have limited initiative, less innovation and less technological transfers from other counties[56]. Countries like China also support this, as many countries showed their reluctance in the research and development facilities provided by China stating that their technology was five years old compared to other countries. Due to this they do not like to give full processing facilities to them to avoid the complete revel of technology[57]. Widespread distribution of goods, technology and products which are copied or counterfeit effect the image and also there is no quality assurance, example food products, technological products, cosmetics, medicines etc cause various hazards for the suppliers and consumers[58].

[49]Branstetter, L., Fisman, R., Foley, C.F., Saggi, K., Intellectual Property Rights, Imitation, and Foreign Direct Investment: Theory and Evidence, NBER Working Paper 13033, p. 1 (Apr. 2007), http://www. nber.org/papers/w13033.

[50] Park, W. and Lippoldt, D., Technology Transfer and the Economic Implications of the Strengthening of Intellectual Property Rights in Developing Countries, OECD Trade Policy Working Paper No. 62 (25 Jan. 2008), http://www.oecd.org/ officialdocuments/displaydocumentpdf/?cote=tad/tc/wp (2007)19/ final&doclanguage=en.

[51] Prime Minister Dr. Manmohan Singh, Speech to the India Caucus, Washington, DC (19 Jul. 2005), http://www.indianembassy.org/press_ release/2005/July/25.htm, reprinted at http://www.outlookindia. com/printarticle.aspx?227989.

[52]Vandenbussche, J., P. Aghion and C. Meghir (2006) 'Growth, Distance to Frontier and Composition of Human Capital'. Journal of Economic Growth 11(2): 97–127.

[53] Cullen, S.E., Alternative Energy Powers Up: Staking Out the Patent Landscape for Energy from Wind, Sun and Waves (2009), http://ip.thomsonreuters.com/media/pdfs/altenergy.pdf; see also Jervelund et al. (2009), supra note 114, p. 17.

[54]Tregear, A. (2002) Work Programme 4 (Link between Origin Labelled Products and Consumers and Citizens): Final Report. Dolphins – Concerted Action, Contract QLK5-2000-0593. Brussels: European Commission.

[55] Velho, L. (2004) 'Research Capacity Building for Development: From Old to New Assumptions'. Science Technology and Society 9(2): 171–207.

[56]Thiedig, F. and B. Sylvander (2000) 'Welcome to the Club? An Economical Approach to Geographical Indications in the European Union'. Agrarwirtschaft 49(12): 428–37.

[57]Watal, J. (2000) 'Pharmaceutical Patents, Prices and Welfare Losses: Policy Options for India Under the WTO TRIPS Agreement'. World Economy 23(5): 733–52.

[58] WIPO, Guide on Surveying the Economic Contribution of the Copyright-Based Industries (2003), http://www.wipo.int/export/sites/ www/ip-development/en/creative_industry/pdf/893.pdf. 5 Raymond, Christopher, Intellectual Property Institute, The Economic Importance of Patents (1996).

With the new regimes introduced in patent, trademark by TRIPS would change the situation. With the increase in research and development to help in various sectors of medicines, technology in developing countries specifically would be helpful[59]. However, there is a large amount of uncertainty regarding the outcome and its practical significance. As even with strong IPR protection the ability to improve and encourage people to buy goods, products or technology may not rise much for a certain or long period of time[60].

**6.2 NegativeImpact of Intellectual Property Rights on Economic Development**

IPR has many potentials for the growth and development in many circumstances[61]. However, it may also cause many economic issues. In developing economies, as they would experience overall net welfare loss because of the cause of protection causes as discussed. Thus, it is difficult to organize interest in developing countries. In most developing countries there is a large amount of labor employment in unauthorized products and goods. As they try to upgrade their laws and various activities as they find an alternative employment[62]. Example in Lebanese in 1998 the employment and price impact the IPR in their industry. The copyright software reduces the piracy by almost 40% which lowers the infringement the rate among the employment. Many evidences via interview state that many skilled and unskilled workers find employment in non-infringement companies. There was a rise in the software price by 19% than the earlier price which was 16%. This was only in Lebanon, they would have a strong copyright in experience[63].

There is loss in the printing, publishing music, books, video etc and the infringement reduced. There was increase in the books price by almost 8% and increase in video price by 12%[64].

[59]Schwiebacher, F. and Müller, E., How Companies Use Different Forms of IPR Protection: Are Patents and Trademarks Complements or Substitutes? DRUID-DIME Academy Winter 2010 PhD Conference (Nov. 2009), http://www2.druid.dk/conferences/viewpaper. php?id=500648&cf=44.

[60] WIPO, Global Financial Crisis Hits International Trademark Filings in 2009 (18 Mar. 2010) (describing profile of goods and services for which trademarks were registered in 2009), http://www.wipo.int/ pressroom/en/articles/2010/article_0006.html.

[61] 8 Markenverband, StatistischesBundesamt (2005), cited in Perry, J., McKinsey & Co., The Significance of Brands and the Branded Goods Industry: An Economic Perspective (2007), http://www.aim. be/Documents/Insight%20&%20innovation/growth/mckinsey_ germany_2007.pdf. These industries were also found to represent 1.5 million jobs and €46 billion (5%) of direct and indirect tax revenues in Germany. See also ESADE, The Economic and Social Impact of Manufacturers' Brands in Mass Consumption Markets (Apr. 2010), http://www.aim.be/Documents/Insight%20&%20 innovation/growth/spain_ESADE_study_2010.pdf.

[62] OECD, The Economic Impact of Counterfeiting and Piracy (2008), p. 134, http://www.oecd.org/document/4/0,3

[63] OECD, The Economic Impact of Counterfeiting and Piracy (2008), p. 134, http://www.oecd.org/document/4/0,3

[64] 0 Sandro Mendonça, Tiago Santos Pereira and Manuel Mira Godinho, Trademarks as an Indicator of Innovation and Industrial Change, DRUID Summer Conference 2004 on Industrial Dynamics, Innovation And Development (May 2004), http://www.druid.dk/ uploads/tx_picturedb/ds2004-1406.pdf; Smith, P. and Amos, J., Brands, Innovation and Growth: Evidence on the contribution from branded consumer businesses to economic growth (Apr. 2004), http://www.aim.be/Documents/Insight%20&%20innovation/growth/ PIMS_brands_innovation&%20growth_2004.pdf; Clayton, T. and Turner, G., Brands, Innovation and Growth: The Role of Brands in Innovation and Growth for Consumer Businesses, in Tid, J. (ed.), From Knowledge Management to Strategic Competence: Measuring Technological, Market and organizational Innovation (2006)

However, in food products, pharmaceuticals, technology and cosmetics which are subject to patent and trademark[65]. There was increase in the patent fee price by 50% which was 30% in the beginning. This impacts the infringement which raises the cost by many companies. There was fall in employment rate by almost 15% in large companies[66].

Another concern is the potential of IPR to support the monopoly[67]. Products, goods, technology, etc. companies might lower the sales to reduce the monopoly price in the market, there is an evidence that patent generates higher price to protect drugs, goods and other pharmaceutical products[68]. However, the increase in the price will depend on many factors like the type of pharmaceutical product, its production, the patent obtained. Many evidences in India show that there is large amount of infringement of the said products[69]. When there is an introduction to the patent in the market there is an increase in the price of that product causing an imbalance in the economy. Example in counties like Beijing, Shanghai etc there was an increase in the price of the said product by almost 5% between the years 1990-1995. This economic impact was also tested and proved in counties like Chile, Argentina etc. however the observation was made only on the basis of quality and not quantity[70].

There are no studies on software will vary between counties[71]. It's necessary that the price is higher when compared between retail and copied programs. Example, in Hong Kong between 1995-2000 they purchased windows 97 was bought by them for $7 and was copied all around[72].

---

[65]Yaqub, O. (2009b) 'Knowledge Accumulation and Vaccine Innovation: Lessons from Polio and HIV/AIDS', DPhil thesis, University of Sussex.

[66] 9 Alliance Against IP Theft, Economic Contribution of Intellectual Property (2009), http://www.allianceagainstiptheft.co.uk/downloads/ campaign-pdfs/economic%20contribution.pdf. An estimated 1 million people are employed in the UK in creating and building brands delivering an estimated £15 billion in investment in the UK economy. UK Intellectual Property Office, Branding in a Modern Economy, p. 6 (2009), http://www.ipo.gov.uk/branding-confreport. pdf.

[67] Rogers, M., Helmers, C. and Greenhalgh, C., An analysis of the characteristics of small and medium enterprises that use intellectual property, pp. 36-39, Tables 12-13 (Oct. 2007), http://users.ox.ac. uk/~manc0346/SMEReport1.pdf; see also Rogers, M., Helmers, C. and Greenhalgh, C., A comparison of the use and value of patents and trademarks in large and small firms (undated), www.oiprc.ox.ac. uk/EJWP0108.ppt

[68] While some consumers are looking for what they believe to be bargains, knowingly buying counterfeit and pirated products, others may purchase counterfeit and pirated products believing they have purchased genuine articles. In both cases, products are often sub-standard and carry health and safety risks that range from mild to life threatening. Sectors where health and safety effects tend to occur include: car parts (brake pads, hydraulic hoses, engine and chassis parts, suspension and steering components, airbags, spark plugs, filters), electrical components (circuit breakers, fuses, switches, batteries), food and drink (tea, rice, vodka, raw spirits, baby formula), chemicals, toiletry, household products and tobacco products."

[69] See, e.g., IDC/BSA, The Economic Benefits of Reducing PC Software Piracy (Sept. 2010) (estimate that a 10-percentage point reduction in business software piracy would generate $142 billion in economic growth, 500,000 jobs, and $43 billion in additional taxes world-wide over 4 years), www.bsa.org/idcstudy.

[70] Id., Table 4. When weighted by each sector's employment, the average number of all IP registrations per 1,000 employees for SMEs versus large companies, respectively, was .288 versus .242 for patents, 2.743 versus 1.835 for trademarks, and .339 versus.162 for design rights.

[71]Yaqub, O. (2009a) 'Knowledge Accumulation and the Development of Poliomyeltis Vaccines'. STEPS Working Paper 20. Brighton: STEPS Centre.

[72] WIPO, World Intellectual Property Indicators, Table ST.1 (2009), http://www.wipo.int/export/sites/www/ipstats/en/statistics/patents/ pdf/wipo_pub_941.pdf; see also WIPO, Patent Applications by Patent Office and Country of Origin (1995-2008), http://www.wipo.int/ export/sites/www/ipstats/en/statistics/patents/xls/wipo_pat_appl_ by_office_origin_table.xls.

Another concern about this is that the monopoly price which supports the IPR could be valid[73]. IPR introduced many competitive markets. Due to infringement, there would be diminished or less access to technological information. Patents on pharmaceutical goods and products raise the costs and pressure on the developing countries. Whereas trade secrets are concerned it makes it more difficult to get latest technology[74].

The cost explains many ways to strengthen the economy. First, the economy could be balanced by transfer through trade and licensing. Many markets, companies take advantage of the products and goods[75]. Second, IPR would help developing counties to enter developed countries. Third, cost imitation need not be damaging into many competitive economies for various technology[76].

The worry for a developing country is the higher cost in intellectual property rights which makes the overall profit very low[77]. In 2000s there was an impact of stronger patent rights according to TRIPS. Firm's profits depend on the degree of IPR protection in that country. In the pre-TRIPS the level of changes induced were not accounted[78]. Also, the stocks which depended on the patent were also affected. In 1990s the national GDP was also affected in the exchange rate. In the United States the GDP growth by almost 9 million dollars per year[79]. However, as TRIPS is concerned, the rules it is up to the countries to apply according to their law system however United States did not make any changes. In most countries experience net outflow of patent because of significant changes and technological imports[80].

---

[73] Yang, C.-H. and Y.-J. Huang (2009) 'Do Intellectual Property Rights Matter to Taiwan's exports? A Dynamic Panel Approach'. Pacific Economic Review 14(4): 555–78.

[74] Strong domestic IPRs may spur domestic innovative activity, and thus affect ... patented (from an ethical point of view—these ethical issues are ... www.ww.uni-magdeburg.de/bwl2/Lehre/WTO/WTO-L6 _2004

[75] Wilson, N., A. Fearne and K. van Ittersum (2000) 'Co-operation and Co-ordination in the Supply Chain: A Comparison between the Jersey Royal and the Opperdoezer Ronde Potato'. In B. Sylvander, D. Barjolle and F. A. Versailles (eds) The Socioeconomics of Origin Labelled Products in Agri-food Supply Chains: Spatial, Institutional and Coordination Aspects, Vol. 2, pp. 95–102. Versailles: INRA-Editions.

[76] 3 Kamiyama, S., Sheehan, J. and Martinez, C., Valuation and Exploitation of Intellectual Property, OECD STI Working Paper 2006/5, pp. 20-22 (2006), http://www.oecd.org/ dataoecd/62/52/37031481.pdf; Kortum, S. and Lerner, J., Does Venture Capital Spur Innovation?, National Bureau of Economic Research, Working Paper 6846 (1998), http://www.nber.org/papers/ w6846

[77]Guellec and van Pottelsberghe (2007), supra note 44, pp. 88- 94, citing European Patent Office, Applicant Panel Survey 2004 (internal report) (2005); Gambardella, A., Assessing the 'Market for Technology' in Europe: A Report to the European Patent Office (2005).

[78]Yaqub, O. (2009b) 'Knowledge Accumulation and Vaccine Innovation: Lessons from Polio and HIV/AIDS', DPhil thesis, University of Sussex.

[79] Whyte wolf 2010. Is Intellectual Property Itself Unethical? http://www.iacis.org/iis/2007_iis/PDFs/Peslak.pdf

[80] 4 Haeussler, C., Harhoff, D. and Mueller, E., Centre for European Economic Research, To Be Financed or Not… - The Role of Patents for Venture Capital Financing (Centre for European Economic Research, Jan. 2009), http://www.cepr.org/pubs/new-dps/dplist. asp?dpno=7115.asp; citing Baum, J.A. and Silverman, B.S., Picking winners or building them? Alliance, intellectual, and human capital as selection criteria in venture financing and performance of biotechnology start-ups, Journal of Business Venturing, 19:411-436 (2004); Mann, R.J. and Sager, T.W., Patents, venture capital, and software start-ups, Research Policy, 36:193-208 (2007); Hsu, D. and Ziedonis, R.H, Patents as quality signals for entrepreneurial ventures, Academy of Management Best Paper Proceedings (2008); Lerner, J., The importance of patent scope: an empirical analysis, RAND Journal of Economics, 25:319-333 (1994

Finally, it was noted that administration could be a burden in developing countries' economies example in countries like Chile the GDP increased by almost one million. Similarly in Bangladesh there was increase in the GDP[81].

If there is a fixed price country which a developing, small or poor to here will not be enough significant growth. First, the IPR office may make changes in the application fee[82]. Second, poor countries may file petition on various factors like technical and financial help in industrial country and with the help of WIPO and WTO help in the proper use of the cost[83]. Third, they make get cooperation from many international agreements and treaties[84].

## Conclusion

Finally, one can claim that strengthening the IPR system can help to rise the GDP, more technological growth, and economic growth of a country[85]. Studies have shown that economic growth access would help to strengthen the patent and other intellectual properties. The direct effect of patent and IPR growth there was an important openness in the trade[86]. With strong patent protection here was overall growth by 1%[87]. In open economies the experience in competition, being it even the FDI and requirement for a strong technology for better product quality. There was no relation between patent strength and growth and development of the goods, product tec[88]. It was in 2000s the IPR growth and investment is not fund in direct correlation between patent strength and growth and there was a strong impact on physical and on research and development[89]. Many economic theories have stated that IPR could play both positive and negative role in the overall growth and development of the economy and many evidences have depend on many factors as stated to promote IPR[90]. It may pose problem for which we can get a solution and many policies which are complementary and might maximize

[81] The IP Roadmap published by ICC provides a guide to the roles of business and government in ensuring that IP protection performs its important function effectively. This Roadmap includes an overview of the policy debate on IP issues and addresses many of these issues in detail. See International Chamber of Commerce, Current and emerging intellectual property issues for business: A roadmap for business and policy makers (2010), http://www.iccwbo. org/uploadedFiles/ICC/policy/intellectual property/pages/IP%20 Roadmap-%202010-%20FINAL%20Web+cover (5).pdf.

[82] World Bank (2008) World Development Indicators. Washington DC: World Bank.

[83] World Health Organization (WHO) (2002a) Infectious Diseases Report. Geneva: WHO.

[84] Wilson, N., A. Fearne and K. van Ittersum (2000) 'Co-operation and Co-ordination in the Supply Chain: A Comparison between the Jersey Royal and the Opperdoezer Ronde Potato'. In B. Sylvander, D. Barjolle and F. A. Versailles (eds) The Socioeconomics of Origin Labelled Products in Agri-food Supply Chains: Spatial, Institutional and Coordination Aspects, Vol. 2, pp. 95–102. Versailles: INRA-Editions.

[85]Branstetter, L., Fisman, R., Foley, C.F., Saggi, K., Intellectual Property Rights, Imitation, and Foreign Direct Investment: Theory and Evidence, NBER Working Paper 13033, p. 1 (Apr. 2007), http://www. nber.org/papers/w13033

[86] Scherer, F.M. (1959) Patents and the Corporation. Boston, MA: James Galvin and Associates

[87] Wong, E.V. (2002) 'Inequality and Pharmaceutical Drug Prices: An Empirical Exercise'. University of Colorado at Boulder Working Papers.

[88] WIPO. Intellectual property and bioethics-An overview.

[89] Alan RP 2007. information technology intellectual property ethics; issues and analysis. Issue in Information system, 8(2).

[90]Smale, M., M.P. Reynolds, M. Wharburton, B. Skovmand, R. Trethowan, R.P. Singh, I. Ortiz-Monasterio and J. Crossa (2002) 'Dimensions of Diversity in Modern Spring Bread Wheat in Developing Countries from 1965'. Crop Science 42: 1766–79

the profit or might affect the losses in the growing competition and these policies would include human capital, skills and flexibilities, organization, market and to have a non-discriminatory effective competition[91].

IPR also plays a very important role in becoming a relevant of the policy making in developing economies for negotiation and private sector research and development example many IPR policies may affect the lives of millions who are low-income farmers and developing world influence the pace I biotechnology[92].

However, these developments pose threat in many significant ways[93]. The legal standard of protection, discuss many other variables that determine the economic growth and development that factor the judicial system and macroeconomics and micro economics, also to have a pro-competitive approach toward IPR which regulate and help in the innovation process in many developing countries[94].

There are many ambiguities in IPR protection of how the countries will get effected[95]. The IPR protection will be supported by TRIPS which will redistribute the income between developed and developing countries[96]. There will be additional market power that would harm various information and help in growth and development in various importing countries to get some improvement. The range of various policies can be divided into in four criteria's[97].

First, IPR growth and development helps to open the economy[98]. With coming of liberalization, free entry and exist will help in the removal of monopolies in the market[99].

---

[91] Ryan, M., Intellectual Property, Trade and Foreign Direct Investment, p. 3 (May 2004), WIPO Arab Regional Meeting on Intellectual Property as a Power Tool for Economic Growth, http:// www.wipo.int/edocs/mdocs/arab/en/wipo_reg_ip_amm_04/ wipo_reg_ip_amm_04_7.pdf; citing OECD, Technology Licensing: Survey Results (1987); United Nations Commission on Transnational Corporations (UNCTNC), New Issues in the Uruguay Round of Multilateral Trade Negotiations, E.90.II.A.15 (1989); UNCTNC, The Determinants of Foreign Direct Investment: A Survey of Evidence, E.92.II.A.2 (1990); Mansfield, E., Intellectual Property Protection, Direct Investment, and Technology Transfer: Germany, Japan, and the United States, International Finance Corporation/World Bank Group Discussion Paper #27 (1995); Lee, J.-Y. and Mansfield, E., Intellectual Property Policy and U.S. Foreign Direct Investment, Review of Economics and Statistics, 78:181-186 (1996); Maskus, Keith, Intellectual Property Rights in the Global Economy, pp. 197, 232 (2000).

[92]Branstetter, L., Fisman, R., Foley, C.F., Saggi, K., Intellectual Property Rights, Imitation, and Foreign Direct Investment: Theory and Evidence, NBER Working Paper 13033, p. 1 (Apr. 2007), http://www. nber.org/papers/w13033.

[93] Cavazos Cepeda, R., Lippoldt, D. and Senft, J., Policy Complements to the Strengthening of IPRs in Developing Countries, OECD Trade Policy Working Paper No. 104, pp. 21-22 (14 Sept. 2010), http://www.oecd-ilibrary.org/trade/policy-complements-to-thestrengthening-of-iprs-in-developing-countries_5km7fmwz85d4-en.

[94] Ministry of Foreign Affairs, Hu Jintao Delivers an Important Speech at the Welcome Dinner Hosted by the Sweden-China Trade Council (11 Jun. 2007), http://www.fmprc.gov.cn/eng/wjb/zzjg/xos/ xwlb/t329830.htm.

[95]Maskis K 2000. Intellectual property Rights and global economy. Institute for international economic, Washington DC

[96] Park, W. and Lippoldt, D., Technology Transfer and the Economic Implications of the Strengthening of Intellectual Property Rights in Developing Countries, OECD Trade Policy Working Paper No. 62 (25 Jan. 2008), http://www.oecd.org/ officialdocuments/displaydocumentpdf/?cote=tad/tc/wp (2007)19/ final&doclanguage=en.

[97] Prime Minister Dr. Manmohan Singh, Speech to the India Caucus, Washington, DC (19 Jul. 2005), http://www.indianembassy.org/press_ release/2005/July/25.htm, reprinted at http://www.outlookindia. com/printarticle.aspx?227989.

[98] Roderick RL 1995. The libertarian case against intellectual Property Rights. Liberal National foundation. http://www.libertariannation.org/a/f31l1.html

Second, having enough supplies of various labor skills to help promote growth in the areas of technology and innovation[100].

Third, it helps in economic growth which helps in innovation in the market area[101].

Finally, due to various consumers and customers it helps in protection of abuse of IPR and various authorities to be able to investigate the various complaints and to give proper remedies.[102] By the regulation of competition in developing countries it helps to strengthen the IPR and helps to avoid abuse of licensing, monopoly price etc.[103]

[99] WIPO, World Intellectual Property Indicators, Table ST.1 (2009), http://www.wipo.int/export/sites/www/ipstats/en/statistics/patents/ pdf/wipo_pub_941.pdf; see also WIPO, Patent Applications by Patent Office and Country of Origin (1995-2008), http://www.wipo.int/ export/sites/www/ipstats/en/statistics/patents/xls/wipo_pat_appl_ by_office_origin_table.xls.

[100] Cavazos Cepeda, R., Lippoldt, D. and Senft, J., Policy Complements to the Strengthening of IPRs in Developing Countries, OECD Trade Policy Working Paper No. 104, pp. 21-22 (14 Sept. 2010), http://www.oecd-ilibrary.org/trade/policy-complements-to-thestrengthening-of-iprs-in-developing-countries_5km7fmwz85d4-en

[101] Kumar n 2002 Intellectual property Rights, Technology and Economic development; Experience in Asian countries. Commission on Intellectual Property Rights background paper. London.

[102]SmarzynskaJavorcik, B. (2004) 'The Composition of Foreign Direct Investment and Protection of Intellectual Property Rights: Evidence from Transition Economies'. European Economic Review 48(1): 39–62.

[103] WIPO, World Intellectual Property Indicators, Table ST.1 (2009), http://www.wipo.int/export/sites/www/ipstats/en/statistics/patents/ pdf/wipo_pub_941.pdf; see also WIPO, Patent Applications by Patent Office and Country of Origin (1995-2008), http://www.wipo.int/ export/sites/www/ipstats/en/statistics/patents/xls/wipo_pat_appl_ by_office_origin_table.xls.

# MENACE OF WITCH HUNTING IN INDIA: DOES REPARATIVE JUSTICE NEED SPECIAL LAWS?

*Manaswi*[1]

## Abstract

*The intrinsic human rights hold ergaomnes obligation under international fora. Yet, the outbreaks of violence against women, in all its manifestations, involve huge aberrations from these obligations. One such blatant infraction of human rights lies at the roots of witch-hunting. The age old mythological practice in filters its venom in the mind of the innocent- either by actual beliefs or via concocted superstition. Whatever be the trajectory of this venom, the outcome is so ghastly that it trespasses any other form of human rights violation. The modern day witch hunting sadly triggers this premise with greater intensity. Where on one place globalization has leveraged spirit of cultural revivalism amongst the indigenous tribes, it simultaneously witnesses rise in social exclusion of selected few within the same groups, in the form of witch hunting. In the absence of Central legislation in India, few states have come up with special laws to curb the menace, while others are demanding such laws. The atrocities perpetrated in name of witch hunt are not alien forms of violence. So a core question that arises here – does reparative justice really needs a special law? The author believes that complexities of modern day witch hunt are problems of implementation, accountability and awareness rather than the legislation per se. In this backdrop, the paper entails on a critical analysis of the socio-legal paradigm to ensure contemporary solution to the menace of modern day witch hunt.*

## Introduction

The temporal trajectory of progression of Homo sapiens to contemporary period has been complex and hirsute. Most commendable progression with bipedalism was the cranial development. The burgeoning of brain-induced functionalities propelled communication skills, advancement in technology and agriculture, formation of beliefs, customs, etc. This set Homo sapiens apart from other animals. Simultaneously, the undulating trajectory faced hiccups of diseases, pandemic, natural calamities, all of which leveraged the accentuation of "religion" and "magic"[2] in the life of Homo sapiens. While the former was assigned the task of pleasing the natural forces, later connotation was aimed at taming these forces via either socially acceptable (benevolent) sway or via a negative (malevolent) ascendancy.

This cradled the evolution of "white magic" and "black magic" in human life.[3] The protuberant occult praxis of this black magic was witchcraft. The supernatural belief has time travelled and wherever the society revered its natural forces, this praxis marked its territory there[4]. Divination, sorcery, shamanism, mysticism, or any other techniques to call upon supernatural power for mala

[1] Assistant Professor of Law, Chotanagpur Law College. The author can be reached at manaswi9797@gmail.com
[2] James George Frazer, The Golden Bough: A Study in Magic and Religion, (Oxford University Press, London 1994)
[3] *Ibid*
[4] Gary R. Varner, Mysteries of Native American Myth and Religion, (lulu.com, 2007)

fide purposes, come within the garb of witch craft[5]. The people propounding or propagating such practices got socially boycotted. The general feminine affiliation of witch-craft practices gets evidenced in various documents[6]. The supernatural powers of such feminine creatures are believed to augment the natures' course. The witch trials to weed out malevolent forces include socially acceptable methods of branding, raping, burning, killing, or even chopping off body parts in the name of purification[7]. Be it the Old, New Testament, Babylonian culture, Hebrew Society, Jewish community, or the documents, scriptures, paintings emanating from Asian, African, Middle East nations, and various other parts of globe, all evidence a zealous faith in dark forces[8].

## Grabbing the Dynamics of Poverty induced Paradox

Witchcraft for India is not an alien concept. It was a sanctioned practice under Hindu Scriptures, a profession under Rig Veda and a discipline imparted at various universities.[9] However, the term "witch" was the brain child of scientific studies in ethnology and anthropology, as undertaken by colonial researchers. The penalization of witch-hunt in 1800s was resisted by a majority in India, as it hindered the process of "divining the evil", i.e., punishing the atrocity of perpetrators. These perpetrators were serving a noble purpose in society's' eyes[10]. The dynamics of witch craft and witch hunt in contemporary scenario are riddled with myriad of intricacies.

The poverty induced paradox is the irony of modern Indian democracy. The boon of rapid economic growth illusions the superstitious curse that poverty shields itself in. Superstition becomes the riposte to every illness, death, crop failure, natural calamity or any other destruction that the ignorant mind fails to comprehend easily. This poverty coupled with lack of transportation facilities, infrastructural inadequacies and illiteracy, builds a vicious nexus when it works in tandem with the existing beliefs, age old customs and traditions. The material crisis makes ojhas or the witch-doctors a feasible solution for all problems, be it marital, financial, emotional or health related.[11] Women become easy targets for all the incomprehensible problems. The witch-craft motivated torture resulted in 2500 deaths between 2000-16 as per the NCRB reports. In 2016 itself, 134 killing were reported in the name of witch-hunt. The police data in 2016-19 for the tribal state of Jharkhand, witnessed 123 such killings, most of whom were women[12].

[5] Mensah Adinkrah, Witchcraft, Witches and Violence in Ghana, ( Oxford: Berghahn Books, New York, 2017)
[6] Carol F. Karlsen, The Devil in the Shape of a Woman: Witchcraft in Colonial New England, (W.W.Norton& Company, 1998)
[7] Ryan Shaffer, Modern Witch-Hunt and Superstitious Murder in India, 38 Centre for Inquiry Affiliate (2014)
[8] S. Alam& A.Raj, The Academic Journey of Witchcraft Studies in India, 97 MAN IN INDIA ISSUE 21, 123-138 (2017)
[9] RN Saletore, Witchcraft: A Study in Indian Occultism, (Abhinav Publications, Buldana, 2003)
[10] Manasi Gopalakrishnana, India's Witches victims of Superstition and Poverty DW, (July 26, 2019, https://www.dw.com/en/indias-witches-victims-of-superstition-and-poverty/a-49757742
[11] T.S.Sandhu, Black Magic Practices in India DW, (May 23, 2013), https://www.dw.com/en/black-magic-practices-in-india/a-15969540
[12] *Supra* note 10

The non-reporting or under-reporting of such cases, along with reluctance on States' end to show this practice as a motive behind murder, result in failure to reveal the true magnitude of this atrocity. In fact, if the government stats are to be believed witch-hunt kills an Indian woman every other day. Besides gender inequality, refusal to sexual gratification and having the audacity to question male dominance in her community, make women easy scapegoats for victimization. So her branding and torturing could occur for any misfortune befalling her surroundings be it a child's death in the neighborhood, or a pandemic outburst, or a natural calamity or even crop failure. Herein, the socio-demographic profile of the woman attains vital importance. A widow or a single woman holding property especially land or having land dispute with her kin, becomes a vulnerable target. Such branding ends in boycotting or social outcast of the woman, thereby clearing the way to confiscate her property. So, the horizons of contemporary witch-hunt have trespassed the boundaries of belief in dark magic to enter the domain of concocted superstition which witnesses such human rights infractions even in the regions which had zero history of such actual superstitious belief, while this concoction dramatically surged the instances of witch-hunt in the areas already veiled by blind faith.

Post- colonial era witnessed a wave cultural revivalism amongst the indigenous tribes. In this globalization era, for instance the Adivasi communities of HO, Santhal, Oran and Munda in the Jharkhand, the tribal communities in Orissa, the Bodo community in Assam, all chose the path of preserving their cultural identity while promoting their indigenous character. Yet, the NCRB reports showed 99 cases of social out casting in 2017, as compared to 83 in 2016 in Orissa, which placed Orissa at second place after Jharkhand (27 murders in 2016) , to witness such blatant practices in contemporary scenario[13]. Sadly, the last decade saw 984 deaths in Adivasi dominated communities across 19 districts of Jharkhand[14]. Surprisingly the profile of such female victims/ survivors is quite similar in majority of the cases. Such attacks are carried out mostly by relatives on the widows or women living without a male provider. The health and infrastructural inadequacies, scare transportation facilities, coupled with the power play of politics in the mineral rich tribal states determine how the evil is divined. The proprietary rights of women play another crucial role, for instance Santhal is the only Adivasi tribe which acknowledges the property rights of a widow yet women solely are hunted as witches in this community[15]. These women get marginalized in the race of cultural revivalism and become victims of double patriarchy. GladsonDungdung rightly points that, "Men use the weapon of witch-hunt to get rid of the women they fear…the greed of property and depriving women of

[13]Debabrata Mohapatra, Witch Hunting continues unabated in tribal pockets of Odisha TIMES OF INDIA (Feb. 23, 2018, 3:53 PM) , https://timesofindia.indiatimes.com/city/bhubaneswar/witch-hunting-continues-unabated-in-tribal-pockets-of-odisha/articleshow/63043374.cms

[14]GladsonDungdung, In the name of Witch Hunt ADIVASI HUNKAR , (Aug 3, 2009), https://adivasihunkar.com/2009/08/03/in-the-name-of-witch-hunting/

[15] *Ibid*

traditional property rights is a sidelined fact. Illiteracy, poor educational levels and superstitious beliefs are reasons fit enough to be icing on the cake…"[16]

The savagery of witch hunt goes way beyond recorded narratives. Once the witch is identified via weird rituals, mostly performed by ojha, her subsequent torture and ostracisation involve barbarous acts of gang-rape, mob lynching, head tonsuring, cutting off of breasts, tongue or other body parts, insertion of objects in her private parts in name of chaotization, feeding her human excreta or urine, and other forms of gross human rights atrocities[17]. The women who survive this ordeal have their property confiscated and get driven out of the community to lead a life of lifetime social-stigma. This phenomenon is more spread in Eastern India, especially in tribal dominated regions; however that does not shy away other states in India from showcasing this barbarity. As stated above the reported data fails to reveal true magnitude of its dynamics. Thus, the veil of concocted superstition, strengthened by socio-economic and financial bottlenecks, cautiously spreads its tentacles to its female victims/ survivors in a way that the community praises and celebrates the worst form of bestiality on mankind.

## Legal Paradigm of Safeguards:

As stated earlier, the wheels of globalization work in tandem with cultural revivalism. The phoenix of cultural traditions has consciously moved from a gypsy livelihood to politically defining the boundaries of indigenous life. The power politics entails a purposive eradication of "weaker strata". Mitch Horowitz rightly asserted that, "Globalization means that paranoia over black magic and spirit possession are no longer confined to developing nation"[18]. While witch hunt across the globe is beyond the scope of present research, recent past has witnessed sporadic attacks in Africa, Latin America, and immigrant communities of developed nations. Child abuse, live burning of the victim, stoning to death in the garb of witch hunt are becoming rampant tentacles of global witch-hunt persecutions[19]. The human rights infraction of ergaomnes obligations under International law has been on surge in recent past, where "healers" charge exorbitant fees for exorcism. The witch-craft goes beyond the horizons of sadistic vigilantism to venal motives, where vulnerable women are banished or murdered and their properties confiscated. The fatalistic assumptions on repetition of ancient aggression associated to traditional witch practices, in the modern period, coupled with indifference of policies about the magnitude of violence under this umbrella hunt, is becoming a cause of international concern.

The international fora do not have dearth of treaties dealing with gender-centric violence issues. The UDHR, 1948; ICCPR, 1979; CEDAW, 1993; CAT, 1987; all have promotion of equality

[16] *Ibid*

[17] Terrence McCoy, Thousannds of women accused of sorcery, tortured and executed in Indian witch hunt THE WASHINGTON POST, ( July 21, 2014, 02:20 P.M), https://www.washingtonpost.com/news/morning-mix/wp/2014/07/21/thousands-of-women-accused-of-sorcery-tortured-and-executed-in-indian-witch-hunts/

[18] Mitch Horowitz, The Persection of Witches, 21st – Century Style NEW YORK TIMES (July 4, 2014), https://www.nytimes.com/2014/07/05/opinion/the-persecution-of-witches-21st-century-style.html

[19] *Ibid*

and prevention of any degrading treatment against either sex as their central theme, with balance more towards protecting the weaker sex, i.e., women. The Constitutional guarantees of life and personal liberty[20]; and equality before law[21] also vehemently vocalize this protection zeal. Also, a "self-evident directive"[22] to accord respect to international law and obligations[23] and to incorporate the same within municipal forum[24], constitute a part of the international mandate under the constitution. The general consensus of nations to assign certain principles as part of International law[25], obligate the legislature to strike a harmonious construction of the domestic laws with international law[26] and simultaneously these principles attain relevance on questions of international law before the judiciary. In crux, the rule of law of a nation ascribes to the "…principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated…which are consistent with international human rights norms and standards."[27] Thus, the human rights obligation which has transitioned to jus cogens norms, divest itself from all sorts of violence and demand domestic legislations to ensure the same.

In India, the facets of victimization propagated under witch-hunt indirectly come within the radar of other laws, for instance, the IPC, 1960; CrPC, 1973; Legal Services Authorities Act, 1987; The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989; The Protection of Human Rights Act, 1993; and The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1989.[28] Specifically, the violence of murder[29] or its attempt[30]; hurt[31]; rape[32]; "outraging a women's modesty"[33]; kidnapping and abduction[34]; pin down various aberrations of witch-hunt indirectly, by punishing the perpetrator from simple to rigorous imprisonment, including life imprisonment or death punishment, in extreme scenarios.

A bill especially focused on preventing this evil was introduced in the Lok Sabha in 2016[35] by Shri Raghav Lakhanpal with the objective "to provide for more effective measures to prevent and protect women from 'witch-hunt' practices to eliminate their torture, oppression, humiliation, and killing by providing punishment for such offences, relief and rehabilitation of

[20] The Constitution of India, 1950, art. 21
[21] *Ibid* at art. 14
[22] P.Chandrashekhara Rao, The Indian Constitution and International Law, (Springer, 1995)
[23] *Supra* note 21, art.51
[24] *Ibid* at Art. 253
[25] Gramophone Company of India Ltd v Birendra Bahadur Pandey, 1984 SCR (2) 664
[26] Kesavananda Bharti v State of Kerela, AIR 1973 SC 1461
[27] Secretary General, The rule of Law and transnational justice in conflict and post conflict societies UNSC, (Aug. 23, 2004), https://www.un.org/ruleoflaw/files/2004%20report.pdf
[28] SashipravaBindhani, Witch Hunting and Rule of Law, 75 ODISHA REVIEW 5, 46-52 (2018)
[29] The Indian Penal Code, 1960, S.302
[30] *Ibid* at S.307
[31] *Ibid* at S.323
[32] *Ibid* at S.376
[33] *Ibid*at S.354
[34] *Ibid*at S.359-369
[35] The Prevention of Witch Hunting Bill, 2016

women victims of such offences and for matters connected therewith or incidental thereto"[36]. It provided punishments for branding, intimidation, use of criminal force, assault, or subjugation to any other torture or humiliation of the victim, which are synchronous with the penalizations under IPC and CrPC. However, the bill has not entered into force yet.

In the absence of a central legislation, different states came up with their own legislations. The Prevention of Witch (Daain) Practices Act, 1999, Bihar provides for "effective measures to prevent the witch practices and identification of woman as a witch and their oppression mostly prevalent in tribal areas and else-where in the state of Bihar and to eliminate the women's torture, humiliation and killing by the society and for any other matter connected therewith or which are incidental thereto"[37]. Bihar, and subsequently Jharkhand, were among the initial states to make offences related to witch hunting "cognizable and non bailable"[38], a trend which subsequent state legislations followed. The punishments for labeling as witch, torture, and abetment in such practices range from Rs. 1000/- to Rs. 2000/-, along with imprisonment for 3months to 1 year, depending on severity of the crime.[39] Subsequently, Chhattisgarh[40], Orissa[41], Maharashtra[42], Rajasthan[43], Assam[44] and most recently Karnataka[45] came up with their respective legislations on witch-hunt.

**Illustrative Trajectory of Recent Legislations**

Seeing the magnitude of violence against rural women, previously Rajasthan was opting for a comprehensive legislation for them. Later it narrowed its scope to witch-hunt alone, yet, the realization framework ofpreventive actions, provisions for rehabilitation and resettlement, collective fines via future special schemes by government, makes it unique compared to previous laws. The Rajasthan Prevention of Witch-Hunting Act, 2015 goes on to provide for rigorous imprisonment ranging from 1 year[46] to 7 years[47], depending on the savagery involved and if the torture culminates into the victims' "unnatural death"[48], the perpetrator may be punished with life imprisonment. The Preamble of Assam Witch Hunting (Prohibition, Prevention and Protection) Act additionally provides for "the relief and rehabilitation of victims of such

[36] Shri Raghav Lakhanpal, The Prevention of Witch Hunting Bill, 2016, http://164.100.47.4/billstexts/lsbilltexts/asintroduced/4572LS.pdf
[37] The Prevention of Witch (Daain) Practices Act, 1999, Bihar (No. 9 of 1999)
[38] *Ibid* at S.7; subsequently similar provisions were included in The Prevention of Witch-Hunting Practices Act, 2001, Jharkhand
[39] *Ibid*
[40] The ChhattisgarhTonahiPratadnaNivaran Act, 2005, Chattisgarh (No. 17 of 2005)
[41] The Odisha Prevention of Witch-Hunting Act, 2013, Odisha (No. 3 of 2014)
[42] The Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013, Maharashtra (No. 30 of 2013)
[43] The Rajasthan Prevention of Witch-Hunting Act, 2015, Rajasthan (No. 14 of 2015)
[44] The Assam Witch Hunting (Prohibition, Prevention and Protection) Act, 2015, Assam (No. 21 of 2018)
[45] The Karnataka Prevention and Eradication of Inhuman Evil Practices and Black Magic Act, 2017, Karnataka (No. 46 of 2017)
[46] *Supra* note 43, S.4 (1)
[47] *Supra* note 43, S. 4(2)
[48] *Supra* note 43, S.7

offences".[49] Under the act, if the perpetrator causes death of the victim[50], S. 302 of the IPC comes to aid, and if he/she is the reason behind suicide of the victim then the punishment may extent up to life imprisonment[51]. The gender-neutral paradigm of witch-hunt even elaborates various facets of torture involving "stoning, hanging, stabbing, dragging, public beating, burning of hair, pulling of teeth out, cutting of nose or other body parts, blackening of face, whipping, branding with hot objects…socially ostracize or stigmatize for life…"[52], where the imprisonment in extreme situations may go up to 10 years along with maximum fine of Rs. 1, 00,000/-[53].

The Karnataka Prevention and Eradication of Inhuman Evil Practices and Black Magic Act, 2017, elucidates the aim of bringing "social awakening and awareness in the society and to create healthy and safe social environment…"[54] The bill itself elucidated huge list of banned ceremonies, for instance, "Stone-pelting in name of Mata-Mantra, piercing from one side to the other of the jaw with rod (baibiga practice), forcing a person to carry on evil-practices, for e.g., killing an animal by biting its neck (gaavu), claiming to perform surgery by fingers or claiming to change the sex of a fetus in womb of a woman…"[55] etc. The act prescribes that torture results in death[56], or "endangering the life of the victim"[57] or resulting in suicide of the victim[58], be punished under provisions of IPC[59].

The recent state legislations seem to adopt a rigorous tone and trod the path of IPC when the episodes of witch-hunt violence cross all extremes. House-trespass and confiscation of property also get punished on the same lines as under IPC. Thus, these special laws are in tandem with the provisions under IPC in defining and penalizing those facets of witch-hunt torture which are already covered under IPC, for instance murder, theft, house-trespass, kidnapping and abduction, among others. Also, target selection of certain evil practices along with broader horizon of penalization, sets the trajectory of recent legislations apart from the previous ones. Where the state legislation is absent and the aspect of torture is not covered under IPC, other national and international instruments enunciated above, come to rescue. But one cannot ignore the huge uproar at the national and international fora for worldwide explicit recognition and resolution to eradicate this common evil.

[49] *Supra* note 44
[50] *Supra* note 44, S.5
[51] *Supra* note 44, S.6
[52] *Supra* note 44, S.9
[53] *Supra* note 44
[54] *Supra* note 45
[55] Nagesh Prabhu, Karnataka anti-superstition Bill: what is banned and what is not? THE HINDU, (Sept. 27, 2017, 05:24 PM)
[56] Death under the act is seen as "murder" as defined under S.300 of the IPC, 1860 and is punishable under S.302 of the code.
[57] Offender is seen as guilty of "attempt to murder" as defined under S.307 of IPC, 1860, and is punished accordingly.
[58] Offender is punished under S. 306 of the IPC as having abetted suicide of the victim and is punished accordingly
[59] *Supra* note 45, S.3(2) Proviso

## Analyzing the Normative Presumptions

The continual nature of witch-hunt victimization, from verbal acts of slangs, slurs, labeling as witch to physical acts of mob lynching, tonsuring hair, parading naked in the community, gang rape, feeding human excreta, ostracizing, make makes it one of the most outrageous forms of torture. The long-term agony, for the victim/survivor as well as her kin and well-wishers, of fear, isolation, stigmatizing, and dislocation are equally unimaginable. The closest kith and kin are worst affected while the expressions of extended family, neighbors vary from resentment to complete apathy. This passiveness is largely guided by fear of retaliation from the groups having vested interest in spreading concocted superstition. For the same reason, the level of positive participation by the lock panchayat remains questionable.

There is an inherent tendency in all the legislative enactments to treat specific laws as necessary and sufficient solution to the evil practices. These solutions root primarily on superstition and consider retribution as a just means to a rational end, for instance, Maharashtra and Karnataka legislations rely on criminalization of specific facets of witch-hunt to propagate scientific temper. However, these normative assumptions lack sound empirical structural evidence, fail to review gaps in existing literature and are inadequate answers to the atrocities perpetrated on the victims/ survivors. Hence, a socio-legal analysis of this menace grabs extreme relevance. Except for NCRB reports on "witch-craft motivated murders" and reports on human sacrifices from certain states, India lacks a holistic national data on witch hunt[60]. The NCRB report, focusing only on one or the end facet of witch-hunt torture, while overlooking other extremes of barbarity, fails to reveal the true magnitude of this savagery and hence faces issues of reliability and generalisability. Thus, the actual cases of witchcraft motivated torture far outnumber the statistics indicated by NCRB[61].

Our otherwise rational society provides anecdotal gender- centric narratives of this atrocity, which often views single helpless women as easy targets. But such normative assumption might overlook fine likes of contemporary witch hunt. Rather, any implementation decision should focus firstly, on the profile of victims/ survivors; on the case and effect relationship of such a hunt and secondly, the factors triggering existing gaps in reparative justice. An empirical study by PLD in three states revealed that, unlike the assumption above, showed that the married women, mostly in their 40s-50s were more prone to such hunt, unlike the general belief that this hunt grabs widowed or single women only in its tentacles[62]. Along with this, the perpetrators profile consisted primarily of kinship and the cause of target was "advertised superstition" (for instance due to denial of sexual advances, fear, jealousy, greed for property), instead of actual superstition. Also given the mixed economic profile of victims, the study found that economic

[60] PLD, Piecing Together Perspectives on Witch Hunting: A Review of Literature, (New Delhi, 2013)
[61] Jyoti Sharma, Witch Hunting in India, 3 SUPREMO AMICUS (2018)
[62] PLD, Contemporary Practices of Witch Hunting: A Report on Social Trends and the Interface with Law, (New Delhi, 2014)

strata had minimal effect on vulnerability of the victim[63] The researcher is not blindly believing in the reliability or generalisability of this data given the small size of sample, however, this form of violence against married women by husband or his relatives, even before any ojha comes into picture, irrespective of their economic background, becomes vital addition contra the anecdotal normative presumption.

The concoction of superstition is possible majorly because of infrastructural, transportation, and literacy issues discussed above[64]. This makes lacunae in reparative justice tilt more towards implementation, awareness and institutionalization rather than the law itself. The structural inadequacies and indifference of enforcement personnel make trivial motives of witch labeling accumulate abnormal proportions of attack.

## Demystifying the Vacuums in Reparative Justice

The convoluted dynamics of this gender-centric violence sadly gain sadistic pleasure from savagery against women even during the times of pandemic[65]. The NCRB report of 2001-14 of more than 2000 murders motivated by witchcraft reveals only the most barbaric end data of violence, while the comparatively less savage forms go unreported[66]. Most cases of such torture remain in dark, and the rest which do reach the police, are dismissed for want of witnesses, settlement between families, lack of evidences, etc.[67]. The consequence of this hunt in the long run suffers from "protection vacuum", for instance lifelong stigma, out casting, boycott from community and social ostracisation.

Despite several specific legislations in place, it takes a physical violence of disproportionate lengths to invoke the criminal justice machinery. For instance, while dismissing a writ petition with respect to victimization of 1000 women in name of alleged witchcraft practice, the Apex Court considered settlement before women electorate representatives as a better alternative then judging the issue at hand[68]. In another case the accused was convicted under relevant provisions of IPC but not under the Prevention of Witch (Daain) Practices, Act, on account of lack of proof on part of victim that her torture was connected to her "witch" branding, even though the fact that she was labeled and slanged as a "witch" for long, was well established before the court[69]. Thus, most apex court judgments arise from serious physical injury provisions of IPC (often

[63] *Ibid*
[64] Shiv Sahay Singh, The Witches of Jharkhand, THE HINDU, (Dec. 24, 2016, 00:14 AM), https://www.thehindu.com/news/national/The-%E2%80%98witches%E2%80%99-of-Jharkhand/article16933528.ece
[65] Archana Datta, Witch Hunting: Victims of Superstition? THE TRIBUNE. (March 7, 2020, 11:07 AM), https://www.tribuneindia.com/news/features/witch-hunting-victims-of-superstition-51378
[66] *Ibid*
[67] *Supra* note 62
[68] *Supra* note 65
[69] Tulsa Devi and Ors. V State of Jharkhand 2006 (3) JCR 222 Jhr.; similar acquittal for want of proof occurred in Madhu Mehra &Ors. V State of Bihar 2003(3) JCR 156 Jhr.

those resulting in death), rather than the trauma and torture having nexus with direct witch branding, under the specific state legislations or otherwise[70].

The state legislations focus on identification[71], identification associated physical and mental atrocities[72]; or the atrocity arising out of such hunt. The later legislations as enunciated above embarked upon wider ambit of punishments and enlisting the various facets of this torture, yet the modern hunt gleam contradictory results, which is strongly associated with abysmal intervention at the preliminary stages. Ironically, the "non cognizable" nature of these laws is hardly enforced as most; as most "comparatively less barbaric" aspects of torture such as hurt, house-trespass, beating are covered under bailable heads of IPC. Thus, even if the reporting happens IPC provisions overshadow witch-hunt cases to categorize the violence under different heads of IPC, by completely divesting them from their root cause, i.e., emanations from "witch" accusations and hence the comprehensive special legislations are rendered redundant. In this sense the special laws seem to contribute no more too preventive action than IPC; however, the graver problem lies in institutional passiveness and sluggishness of enforcement machinery.

The impunity for prolonged phases of barbarism garners shields from setting violence standards for enforcement sensitiveness extremely high. Coupled with irresponsive policies, high rates of acquittal present dismal state of affairs. This is vitally linked to substandard investigations on account of reasons above. Effective prosecution shall remain a hollow dream unless institutional aspirations live up to expectations, via sound investigation ensuring substantial provisions for witness protection. Even the 2013 amendment which made a robust paradigm of IPC for violence against women, yet this fails to capture the socio-political complexities involved in a witch-hunt, where atrocious facets like tonsuring, blackening face, parading naked, are aimed more at destroying societal stance and dignity for life than perpetrating physical violence. This aspect demands overhauling of institutional mechanism. Restitution and rehabilitation from long term impacts are two essential wheels of restorative justice. The support services post social ostracisation, confiscation of property, need to be comprehensively carved out. The "notional" justice based on normative assumptions cannot really fight the issue of "divining evil"[73]. A restorative framework, as per researcher, calls for a victim centric approach rather than further legislations in this behalf.

## Conclusion & Suggestions

Now we revert to the central theme of our argument, of whether special laws suffice needs of reparative justice. It's been enlisted in the propositions so far that how settlement of conflicts moulds itself in varying and abnormal proportions of witch hunt violence. The contemporary witch-hunt has traversed beyond the horizons of occult praxis to selected victimization for

[70] *Supra* note 62
[71] *Supra* note 38
[72] *Supra* note 40
[73] Sundar N., Divining Evil: The State and Witchcraft in Bastar, 5 GENDER, TECHNOLOGY AND DEVELOPMENT, 3, 425-48(2001)

myriad of reasons. Neither are the boundaries of witch hunt violence neatly defined nor the public demeaning limited only to this violence, it resonates with honor killings, inter-community dispute dynamics, etc. Despite the broad ambit of IPC the less physically-more mentally and psychologically harmful violence of face blackening, parading naked, tonsuring of head; deserve stricter scrutiny in terms of intention and overall aftermath, rather than being dismissed as hurt simpliciter. The social ostracisation and life-long stigma cannot be dealt so lightly. Over-emphasis on special law not only increases the benchmark of proving "intention" behind the violence as being witch-craft motivated but also dangerously precludes from redressal atrocity perpetrated for other reasons.

For India, the historical context of superstition has transgressed the caste related dynamics to enter socio-economic and sexual complexities. This contemporary practice demands an explicit recognition under the present justice system, having due regard to similar forms of violence. A three-pronged strategy of institutional safeguards, police sensitization along with grass-root awareness of the crime and effective evaluation of policy implementation is the need of the hour. The three Rs of relocation, restitution and rehabilitation only can save the reparative mechanism from turning merely rhetorical. The deep pocket theory of compensation, given the low social strata of perpetrators in majority of the cases, cannot be relied on. Hence, an immediate harm analysis should be the set criteria for the state here. Dislocation is inevitable in these circumstances, but the local authorities, all women group, NGOs, should mandatorily work towards effective relocation, keeping socio-demographic profile of victim/ survivor in mind. Equally important is questioning the normative assumptions which conclude framing special laws as sufficient redressed of the situation, while ignoring the structural similarity of social, infrastructural, economic, financial inadequacies in which this barbarism flourishes. This structural correlation needs a vigilant scrutiny to ensure effective implementation of already existing laws. Propagating rationality via awareness programmers, without a structural transition working in tandem, cannot materialize in the long run. Hence only a sound policy framework with better education policy, transportation facilities, health facilities, which transcends the structural scarcities, can ensure the long awaited reparative justice.

# THE ROAD AHEAD FOR TRANSFORMATION OF PUBLIC INTUITIONS INTO STRONG PUBLIC INSTITUTIONS

*Amardeep Singh Sandhu*[74]

## Abstract

*The Agenda 2030 settled under the Sustainable Development Goals (SDGs) by the United Nations have formulated ambitious goals. There are numerous political, social, economic and legal problems which limit the competency to achieve these goals. It is not possible to accomplish these goals by employing the existing problem solving methods. A novel approach which can redefine and completely overhaul the ailing public institutions is required. An all-inclusive, multi-disciplinary, comparative approach is required to strengthen our institutions rather than a narrow approach which looks at both the problem as well as the solution from a confined and rudimentary point of view. In order to illustrate how a multi-disciplinary approach can help in strengthening, specifically, the public institutions, an interplay of the Supreme Court of India and evolution of Public Interest Litigation (PIL) with the field of management studies has been put under scope and how it ended up bolstering the Supreme Court of India as a potent Public Institution has been explained. At the same time, future scope of multi-disciplinary approach in legal field and the steps undertaken to promote this approach have been discussed in the later portion of the article. The New National Policy on Education, 2020 has given emphasis to the SDGs and in order to attain them it has introduced the multi-disciplinary approach of study in all levels of education.*

**Keywords:** Strong Institution, Sustainable Development Goals, Supreme Court, Management, Public Interest Litigation.

## Introduction

The United Nations General Assembly came up with a list of seventeen Sustainable Development Goals (SDGs) to attain dignity, peace and prosperity for people and the planet[75]. The goal number sixteen is 'Peace, Justice and Strong Institutions' and the aim of this particular goal is to "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels"[76]. The importance of peace, justice and strong institutions have now been adequately recognized internationally which was not the situation a few years back when the United Nations Millennium Declaration was adopted in the year 2000 which did not include this in the Millennium Development Goals (MDGs).

The significance of the impact of strong institutions on the lives of people, particularly the weaker and the vulnerable section of the society is immeasurable because of the level of

[74]. Ph.D Research Scholar, University of Law and Legal studies, Guru Gobind Singh Indraprashtha University, Delhi. He can be reached at sandhu.amardeep08@gmail.com

[75] 'Why the SDGs Matter' <https://www.un.org/sustainabledevelopment/why-the-sdgs-matter/> accessed 20 July 2020.

[76]*Ibid.*

dependency of such people on these institutions for their basic necessities, life prospects and welfare measures. The policies of the government percolate to such people through these institutions in a top-down manner. Nations with strong institutions have been able to sustain themselves in a better manner whereas the nations with weak institutions have been unstable and dealing with issues such as failure of constitutions[77], political crisis[78], military dictatorships[79], crumbling economies, exploitation of vulnerable sections[80]. This easily noticeable in various cases of middle-eastern countries and our neighboring countries like Nepal[81], Sri Lanka[82] Bangladesh[83] and Pakistan[84]. Attainment of stability is directly proportional to the effective working of the public institutions like courts, police force and other socio legal and dispute resolution institutions. The article adopts a very unconventional and theoretical manner of analysis of the most prominent part of the institution of judiciary – the Supreme Court of India. The aim here is to establish, theoretically, that the Supreme Court grew stronger as an institute by looking beyond the 'Strictly Legal' answers and adopting a managerial solution to the problem of growing public mistrust after the initial years of its establishment and same should be replicated in other spheres and intuitions for attaining the goals set by the United Nations General Assembly.

Legal hegemony is not the way forward. The need of the hour is to apply new techniques and find inspiration from all quarters of life, i.e., to indulge in multi-disciplinary approach and looking for solutions in unusual places to strengthen our institutions. Looking at strictly legal solutions to an issue i.e., not looking beyond the horizon of law books in neither practical nor advisable as it means restricting our sphere of solution to a problem. The conventional approach of looking for solutions inside the knowledge span of the respected field is not efficient enough, if not unworkable. By shunning such approach, the scope of field from where a solution can come from becomes infinite. To demonstrate the point in a manner which can substantiate this argument, the model of Public Interest Litigation (PIL) and its introduction and evolution in the Supreme Court of India has been employed. PIL has certainly made the Supreme Court of India a stronger institution, to the point where it has been recognized the 'Most Powerful Supreme

[77] Hari Phuyal, 'Nepal's New Constitution: 65 Years in the Making' (*The Diplomat*, 18 September 2015) <https://thediplomat.com/2015/09/nepals-new-constitution-65-years-in-the-making/> accessed 1 August 2020.

[78] Michael Safi, 'Sri Lanka's political crisis: everything you need to know' (*The Guardian*, 29 October 2018) <https://www.theguardian.com/world/2018/oct/29/sri-lankas-political-crisis-everything-you-need-to-know> accessed 1 August 2020.

[79] 'Pakistan profile – Timeline' (*BBC News*, 4 March 2019) <https://www.bbc.com/news/world-south-asia-12966786> accessed 1 August 2020.

[80] UNICEF Bangladesh, 'Preventing violence and exploitation' <https://www.unicef.org/bangladesh/en/raising-awareness-child-rights/preventing-violence-and-exploitation> accessed August 01, 2020.

[81] Charles Haviland, 'Why is Nepal's new constitution controversial?' (*BBC News*, 19 September 2015) <https://www.bbc.com/news/world-asia-34280015> accessed 1 August 2020.

[82] Human Rights Watch, *Sri Lanka: Events of 2018*, (World Report, 2019).

[83] Overseas Development Institute, *Case study of the Challenging the Frontiers of Poverty Reduction Programme (CFPR), Specially Targeted Ultra Poor II (STUP II)* (Gendered risks, poverty and vulnerability in Bangladesh, 2010).

[84] Decades of military rule (*Development and Cooperation*, 1 February 2018) <https://www.dandc.eu/en/article/brief-history-military-rule-pakistan> accessed 1 August 2020.

Court of the World' by various legal experts, jurists and eminent professors[85]. Prof. Upendra Baxi wrote, "the Supreme Court of India is at long last becoming, after thirty-two years of the Republic, the Supreme Court for Indians". Subsequently, while comparing the Supreme Courts of United States of America, United Kingdom, India and elsewhere, Prof. Baxi recorded as his opinion that 'ours was clearly the most powerful'. In 2001, Prof. Sathe had unambiguously stated "The Supreme Court of India has become the most powerful apex court in the world". There is an unending series of cases where the Supreme Court has acted on the issues of the downtrodden section of the public. Then, the Supreme Court moved on to cases pertaining to environmental issues which generally involved a major fault on the part of the state which was going unnoticed and then further on to other public related issues.

Public Interest Litigation (PIL) is looked up to as a fighting sword, a tool of access that the members of the public have which was not available to them earlier. In reality, it may not be totally true that the public acquired this sword only after the Supreme Court of India devised the new method of hearing petitions as PILs. Nevertheless, for the public, the image of PIL is such that it is usually believed that the Supreme Court has become a guardian of not only their fundamental rights but every social and economic aspect and other facets of their basic rights. The public has found its tool to fight with the mighty state through the PIL.

This article juxtaposes the concept of P.I.L. with a marketing theory to showcase the importance of multi-disciplinary approach and the endless possibility which could open up by adopting a multi-disciplinary and comparative approach in finding solutions to socio legal problems and strengthening the institutions. The article attempts to answer the question, how the public has accepted Public Interest Litigation as more efficient and favorable than the regular litigation process taking place in the same court? The regular litigation process in India is perceived as a time consuming, lawyer centric[86], expansive and unfair. Indian courts are referred to as 'highly time consuming' in general parlance even by the people working in the courts, i.e., judges, advocates, staff and most importantly by the litigants. In short, most of the litigants are not satisfied with the way the court functions. The reason for such acceptability of the concept of PILs in the same court where regular litigation is seen as a very difficult thing to do lies in a theory of market management. This is not to suggest that the Supreme Court or the pioneer judges[87] of the concept of PIL adopted this theory of market management knowingly. What is being suggested is that it became popular and was accepted by the public because it concurs with the theory, though admittedly, most probably unknowingly so. How the most powerful court in the world, through judicial activism did gave birth to PIL as a lucrative alternative to regular litigation?

[85] Legal luminaries such as Prof. Upendra Baxi, Prof. S. P. Sathe and the former Chief Justice of India Hon'ble Justice A.M. Ahmadi. Chander Uday Singh, 'The Supreme Court Is in the Thrall of the Government' (*The Wire*, 28 May 2020) <https://thewire.in/law/supreme-court-public-institution> accessed 8 June 2020.
[86] Better the lawyer, greater the chances of getting a favourable order in a case.
[87] P. N. Bhagwati, V. R. Krishna Iyer, D. A. Desai, and O. Chinnappa Reddy, JJ.

**Juxtaposition of Law and Managerial Study**

The above-mentioned theory involves the five ways to reach out to the public without harming a brand.[88] A brief explanation of the theory before applying it to the concept of PIL: There are always three classes of customers in a given market, which are namely, the upper, the middle and the lower class. As per the theory, a brand can successfully cater only to any two consequent classes at most. No company in the entire world has ever, successfully, sold its goods to all category of customers under the same brand name. This means that to cater to the third class and cover the entire public, a brand has to form a subsidiary[89],entity or a separate brand to effectively keep its earlier class of buyers while adding the new ones. Following are the aforementioned five ways:

1. Distance from the core brand – Maruti Suzuki sold its premium cars through a separate chain of retail showrooms called NEXA. Public Interest Litigation is recognised as separate from the rest of the line-up of cases. Even the Supreme Court had different PIL benches at the beginning of the PIL litigation. Few of the judges were recognised as judges who were dealing with the PILs and conferring special attention to these matters. This caught the attention of the litigants who took up issues of public interest with a lot of enthusiasm. Certain litigants were always filing a PIL for some cause and these PILs even resulted in getting favourable orders from the court.

2. New customer type – Maruti Suzuki did this well, rightly trying to attract customers with extra disposable income who could become loyal long-term luxury buyers. The Supreme Court also diluted the concept of 'locus standi' to allow a new kind of litigant to enter the court for the larger good of the public for whom courts were out of bounds. This litigant was not the regular litigant who was fighting for a personal cause but instead, these were public spirited people who were entertained by the court as people arguing a case in public interest. The admission of such petitions, prima facie, meant that the court recognises the fact that the litigant is a public spirited person and hence a new type of litigant.

3. Embrace clearly distinguished tiers of value – The distinction between the various classes (upper, middle or lower) has to be acknowledged and then catered to according to their preferences. The Supreme Court also acknowledged that there is a different class of litigants which are distinguishable from the regular breed of litigants. The Supreme Court embraced

[88] Stephen Wunker, '5 Ways to Reach Down-Market Consumers Without Harming Your Brand' (*Forbes*, 8 October 2014) <https://www.forbes.com/sites/stephenwunker/2014/10/08/5-ways-to-reach-down-market-consumers-without-harming-your-brand/> accessed 20 July 2020.

[89] For instance, Maruti Suzuki had to form NEXA as a retail network for premium range of products which are not available at regular Maruti Suzuki showrooms. NEXA was formed after multiple failed attempts by Maruti Suzuki to enter the market of premium range cars. NEXA is now the third largest car seller in India.
PTI, 'Maruti's Nexa becomes the third largest auto retail brand in just five years' (*The Economic Times*, 4 August 2020) < https://economictimes.indiatimes.com/industry/auto/auto-news/marutis-brand-nexa-becomes-the-third-largest-auto-retail-brand-in-just-five-years/articleshow/77347038.cms?from=mdr > accessed 20 July 2020.

such litigants in a welcome manner. The Court was aware of the fact that the target population of the PILs are not necessarily capable of filing petitions in the court and took the innovative step of introducing epistolary jurisdiction through which it allowed even letters to be treated as writ petitions. People would send in letters addressed to the court or some judge which would then be converted into a proper PIL by the advocates appointed by the courts as amicus curiae. The amicus curiae appointed by the court were advocates of repute who were arguing these matters free of cost. Because of the inability of the people to come to the court for reasons of poverty or ignorance, the court allowed public spirited people to file PILs by relaxing the rule of locus standi. This reflected the seriousness which the bench and the bar had for PILs.

4. Different sales channels – This means that the new channel opened by the brand is different in terms of sales and marketing strategies from the established channels. One way to do this by selling products of different category in different ways. The Supreme Court also adopted a rather off beat and different approach towards PILs by relaxing the procedure of evidence gathering and appointing court commissioners, forming expert committees to perform the task of fact gathering which is not normally the task of the Supreme Court. Also, the original jurisdiction can be invoked by the litigants which is usually not the case.

5. Early positive reviews – Getting a lot of early publicity can be useful. Sustainable success, however, comes from getting positive reviews from the right segment of customers. But the initial reviews should be positive to allow the brand to carry on with the positive reviews and increase its sale. The concept of PIL was received with enthusiasm by the academicians, judges, members of society and the bar. Although, some resistance from the bar was received but the impact of the PILs was such that the resistance really did not have any force and ultimately the positive reviews garnered by the concept of PIL as a tool in the hands of the public spirited people to help the poor, marginalised, illiterate, prison inmates etc won over the trivial resistance. There was great amount of enthusiasm about the PIL and people filed PILs regularly. Many academicians[90], advocates[91] and groups[92] took up multitude of matters to the Supreme Court through PILs. The initial success of the PIL system played an important role in the general acceptance and overall positive response to the PIL system in India.

But for long term sustainability, concept of PIL kept getting updated and updated here means wider. When the issues of general public importance such as environmental cases came up, the court did not reject them because they were not contesting issues of down trodden people per se or people who could not afford a representation in the court, but rather accepted such petitions and acted on a series of cases which made the scope of the PILs wider. Acceptance of

[90] Prof. (Dr.) Upendra Baxi.
[91] M.C. Mehta, Colin Gonsalves, Prashant Bhushan.
[92] People's Union for Democratic Rights, People's Union for Civil Liberties, Centre for Public Interest Litigation.

environmental cases[93] and passing strict orders against the government also increased the presence, acceptability and respect of the court in general public. And then the court also heard several corruption cases[94] as PILs which again gave a lot of new ground to both the Supreme Court and the concept of PIL.

**Conclusion of the Argument**

At the offset, it is being acknowledged that the lens that has been used in looking at the system of PIL is rather off beat but the rationale behind it is that, with the Supreme Court's effort in positioning itself as a protector of the people and indulging in the art of democratic positioning[95], it was not essentially involved in a simple judicial work but it was rather involved in 'marketing' itself as a viable option, a remedy which the general public can avail for protection of their fundamental rights against the government. Therefore, this article uses a marketing theory to evaluate how the concept of Public Interest Litigation became so popular in the eyes of a litigant and the public generally. The recent trend of Masters in Business Administration in law also reflects that maybe the courts, just like any other organization can use some of the theories of management and marketing to manage the workload, to sort out the manner of working of the courts. It will, probably, take more than just efficient judges, serious advocates and litigants or a large force of judges to finish the backlog of judiciary and improve its image and functioning capabilities. The solution of the issues faced by the judiciary will, perhaps, come from outside the courts or the legal arena. Any suggestions from outside the circle of legal minds should also be welcomed in taking new steps to improve the condition of our courts. It is high time that legal fraternity acknowledges and implements ideas of different fields to improve the courts and the justice delivery system. Even the prison system of India can be relooked from this perspective for improvement through innovative changes to tackle issues such as overcrowding of prisons, reformation quotient of prisons. On the other hand, innovative punishments and sentencing policies for helping courts can be formulated after taking into account the kind of crime, economic standing of parties, reformation, psychological aspects.

From the study of the evolution of PIL vis-a-vis the parameters described in the theory[96], it becomes clear that, as per the prediction of the theory, the chances of success of the system of

[93]*M. C. Mehta v Union of India* Writ Petition Number 13381 of 1984 (Taj Trapezium Case), *M. C. Mehta v Union of India* Writ Petition Number 3727 of 1985 (Ganga Pollution Case), *M. C. Mehta v Union of India* Writ Petition Number 13029 of 1985 (Delhi Vehicular Pollution Case), *M. C. Mehta v Union of India* Writ Petition Number 4677 of 1985 (Delhi Industrial Relocation Case), *M. C. Mehta v Union of India* (1992) 3 SCC 256 (Delhi Stone Crushing Case), *Indian Council for Enviro-legal Action v Union of India* (1996) 3 SCC 212 (Bichhri Case), *Vellore Citizens' Welfare Forum v Union of India* (1996) 5 SCC 647, *Almitra Patel v Union of India* Writ Petition Number 888 of 1996 (Municipal Solid Waste Management Case).

[94]*Manohar Lal Sharma v Principal Secretary* (2014) SCC Online 634 (Coal Scam Case), *Subramaniam Swamy v Manmohan Singh* (2012) 3 SCC 64 and *Centre for Public Interest Litigation v Union of India* (2012) 3 SCC 1(Telecom Case).

[95] Pratap Bhanu Mehta, 'The Indian Supreme Court and the Art of Democratic Positioning' in Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2015).

[96]*Supra* note 14.

PIL was high. In addition, it can also be argued that if rather than starting the PIL system, if these cases were handled as regular writ petitions, then the treatment would also be regular. It would continue to follow the technicalities of locus standi, jurisdiction, evidence strictly and would also leave a considerable number of cases out of its purview on account of lack of jurisdiction or separation of powers. The court as well as the litigants, achieved a lot while riding on a wave of enthusiasm for public interest which would otherwise be left up to the other organs of the government very conveniently. It should also be mentioned that this paper leaves a magnanimous scope for further multi-disciplinary research to find similarities between the legal concepts and theories and the concepts in other fields of study. Various inter connections can be established between these concepts to understand both of them better and to develop the legal field in a more scientific and logical manner. This provides a very potent opportunity to test the theories from other fields of study in legal arena and look beyond legal circles to find the solution to multifaceted problems faced by the courts and the justice delivery system today.

## The Link between the Juxtaposition Argument and Transforming the Supreme Court into a Strong Institution

The point of drawing the above comparison is that if an unintended application of management theory by the Supreme Court could boost its image of being a robust institution, then the Supreme Court can intentionally recreate such solutions to other problems by looking for solutions in different fields. It will lead to building a highly efficient and an even stronger institution which provides a great impetus to the ultimate aim of achieving the SDGs in a timely manner.

## The Future Course for the Supreme Court of India

Public perception of an institution is a major factor which decides the operational strength of the institution. "The prestige, stature and independence of the judiciary are dependent on public trust and confidence"[97]. In order to strengthen an institution like judiciary, an efficient and lawful working of the institution is vital. The efficiency and the lawfulness of the judicial system has become questionable because of various reasons including corruption, delay and other issues.[98] The Supreme Court of India has been the Centre of controversies in the recent past but a constant blot on the image of entire Indian judicial system is that they are painfully slow and many matters go on in courts for decades.[99] Justice delayed is justice denied is used in a routine manner to caution the courts in India. A new phrase, 'Justice delayed is development denied'[100] has been coined recently which reflects that the courts are seen as a hindrance in development by the

[97] Justice (Retd.) Madan B. Lokur, 'India's Judiciary Is Facing an Increasing Lack of Trust by Public' (*Outlook India*, 13 January 2020) <https://www.outlookindia.com/magazine/story/india-news-indias-judiciary-is-facing-an-increasing-lack-of-trust-by-public/302545> accessed 23 June 2020.
[98] *Ibid.*
[99] *Ibid.*
[100] Amrit Amirapu,'Justice delayed is development denied: The effect of slow courts on economic outcomes in India' (*Ideas for India*, 22 August 2016) <https://www.ideasforindia.in/topics/governance/justice-delayed-is-development-denied-the-effect-of-slow-courts-on-economic-outcomes-in-india.html> accessed 23 June 2020.

public as well as the government. The performance of courts have implication on an International level. According to World Bank, ability and speed of enforcement of a contract by the courts impacts the foreign investors[101]. The enforceability of the contracts is directly proportional to the level of investments and business pouring in a country from abroad. India's ranking on an aggregate of 10 parameters in the Ease of Doing Business is 63 but on the parameter of 'Enforcing Contracts', it is still ranked 163 out of 190 countries[102]. The parameter of 'enforcing contracts' evaluates the "time and cost for resolving a commercial dispute through a local first-instance court, and the quality of judicial processes"[103]. The Specific Relief (Amendment) Act, 2018 was introduced by the Government of India with an aim to enhance the business activity and minimize the constraints as much as possible. The judiciary should make efforts for resolving the long standing issues plaguing working, public perception and justice delivery system in order to improve the socio-legal structure.

## Conclusion

A multi-disciplinary approach is not a distant dream it was up until now, the commitment to achieve the SDGs is visible with the introduction of the new National Policy on Education (NPE), 2020[104] which changes the ailing Indian education structure and stresses on a multi-disciplinary pattern of education from primary school to the higher education. A direct inspiration and a target for this policy is to fulfil the Indian commitments to the SDGs[105]. The idea, possibility and henceforth the practical experience of engaging in multi-disciplinary study straight from the primary education will inculcate a habit of attempting comparative and multi-disciplinary study. The students are being prepared in this field of study as it has been recognized as the need of the coming times if nations are to sustain themselves and their development.

The COVID-19 pandemic has forced the nations across the globe to take notice of the shortcomings and incapability of their institutions to function under emergency and strained situations. The pandemic has derailed the march towards the achievement of the SDGs.[106] The pandemic and the countrywide lockdowns around the world has pushed millions of people into poverty and it has exposed the weakness and the fragility of our socio-legal, economic and healthcare institutions. The pandemic has exposed the weakness in our health care system; it has exposed the lack of coverage of our social security measures. It has also exposed the weak financial support and credit support given to small industries, especially the Micro, Small and

[101] The World Bank, *Doing Business: Measuring Business Regulations* (Doing Business, 2020).
[102] The World Bank, *Economy Profile of India* (Doing Business 2020 Indicators, 2020).
[103] *Ibid*.
[104] PIB Delhi, 'Cabinet Approves National Education Policy 2020, paving way for transformational reforms in school and higher education systems in the country' <https://pib.gov.in/PressReleasePage.aspx?PRID=1642049> accessed 30 July 2020.
[105] *Ibid*.
[106] Armida SalsiahAlisjahbana, 'A revolution in policy mindset' (*The Hindu*, 27 July 2020) <https://www.thehindu.com/opinion/op-ed/a-revolution-in-policy-mindset/article32197815.ece> accessed 1 August 2020.

Medium Enterprise (MSME) sector[107]. Governments around the world, including India have been forced to adapt and to innovate by expanding their welfare programmes. A number of countries have expanded the scope of their food security schemes; they have diverted huge amounts of financial resources to strengthen their healthcare infrastructure and tried to increase the coverage of social security measures such as insurance. They have announced greater credit and financial support to MSMEs. The pandemic has breached the capacities of the public sector, it has pushed governments around the world to seek greater partnerships with the private sector in order to jointly mobilise their resources and fight the pandemic and as well as combat the socio-economic challenges that have been brought up by the pandemic.

In order to achieve the SDGs, a complete revolution in the policy mind-set of government is required to make our institutions more resilient and enable the institutions to adapt to any future shocks on the scale of the COVID-19 pandemic. The tensions in the international political scenario have scaled to alarming levels. The situation of a 'hostile peace' has been created where world peace, harmony, security and economy are hanging by a thread. The capacity of the public institutions to handle such a 360˚ urgency is a requirement for achieving the SDGs. The magnitude of the issue demands a more inclusive approach towards governance by adopting a universal approach towards social protection and provide for universal coverage of the food security schemes, insurance programmes, education and health care in order to ensure complete social protection for the weaker sections. The multidisciplinary approach is not the solution per se but a gateway to finding the solution of complex multifaceted problems. The role and requirement of strong institutions is to establish a cohesive network which can provide a sustainable future to tackle the combined effects of poverty, climate degradation, future pandemics and societal challenges.

[107] *Ibid*.

# A CLOSER LOOK AT THE PAROL EVIDENCE RULE: UNDERSTANDING INTERPRETATIONS IN COMMON LAW, AMERICAN LAW & LEX MERCATORIA

*Prateek Singh*[1]

**Abstract**

*The parol evidence rule is a doctrine emerging from English common law that regulates what kind of evidences parties may present to the court in their favor in a contractual dispute. As a long-standing principle, parties are prohibited from contradicting the contents of the written contract by presenting evidences of prior oral negotiations. But due to the frequent judicial deliberations on the matter, courts have interpreted a series of exceptional circumstances where the parole evidence rule remains inapplicable. However, the law is not uniform in all jurisdictions of the world, and all of them seem to have their own understanding. This paper aims to establish a pattern of judicial trends in three different jurisdictions – namely English Common law, American law, and also under international statutes - to help identify the similarities and the differences in judicial determinations.*

## Introduction

The parol evidence rule is a doctrine in contract law which prohibits the permissibility of any evidence other than what has been specified in the written contract, thereby rendering any external evidence immaterial. In essence, the rule prevents parties from presenting evidences such as oral agreements and background discussions which may be used to indicate a different intent of the explicit provision in the contract.[2] The rule originated in Common law by the end of the Middle Ages, through a custom of stamping an agreement document with a seal in order to confirm its authenticity.[3]

The rule is used to govern the extent up to which parties may supplement evidences to the court in order to explain, modify or supplement the agreement under consideration. Based on this law, it may be interpreted that when parties authorize a written contract, they also impliedly give their consent to relinquish their right to bring any evidence, refuting the provisions of the written contract, and making all such extrinsic sources inadmissible in court.[4]

However, there is a lack of uniformity in the idea whether the law is to be considered as a matter of evidence law or of the nature of legal acts. Common law treats parole evidence under evidence law.[5] Similarly, Section 92 of the Indian Evidence Act rejects the admissibility of any oral evidences in cases where the parties have reduced the agreement to the form of a written document. On the other hand, American law categorizes parole evidence as a factual issue, and not relating to evidences.[6] As per § 2-202 UCC, the terms with respect to which the confirmatory

[1] BBA LLB student from National Law University, Jodhpur. He can be reached at prateek.singh@nlujodhpur.ac.in.

[2] *Harvard Law Review*, 1904. The Parol Evidence Rule. 17(4), p.271.

[3] John H. Wigmore, *A Brief History of the Parol Evidence Rule*, 4 Columbia Law Review, 338 (1904)

[4] Corbin, A., 1944. The Parol Evidence Rule. *The Yale Law Journal*, 53(4), p.603.

[5] [1907] 1 KB 10.

[6] Alberto Zuppi, *The Parol Evidence Rule: A Comparative Study of The Common Law, The Civil Law Tradition, And Lex Mercatoria*, 35 Georgia Journal of International and Comparative Law, 239-240 (2007).

memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented, based on the circumstances.

**Interpretation in Common Law**

The Law Commission of England and Wales identified three specific rules which essentially govern the parole evidence rule prohibit the explanation of (a) any terms within the document through external sources; (b) any terms not expressly included in the document; or (c) proving the framer's intention behind the contract.[7] If these three principles are to be followed with a rigorous interpretation, then no facts, representations and undertakings on behalf of the parties apart from what has been quoted in the original document may be admissible by the court.

### 1.1 Justification for restricting parol evidence

The very purpose of a formal contract is to put an end to disputes which may arise if the matter were to be left upon verbal negotiations partly consisting of letters and partly of conversations.[8]

In cases where there exists a disagreement on the terms on which the contract was made, the application of the rule narrows the issues and keeps the dispute within reasonable bounds. This helps simplify the court's work while also ensuring that parties only enter into a contract after diligently reading its language.[9] Some have even said that admittance of parole evidence would simply lead to the contradiction of written documents, which may in turn lead to great inconveniences and cause extended litigations.[10]

Calamari has provided two justifications for the rule in common law. The first is based on parties' implicit consent to make the document an expression of their final agreement that shall supersede all background evidences. The second approach is based on the quality of evidence, as per which, a final writing drafted carefully in order to reflect parties' intentions deserves a priority in being interpreted as a proof than any prior agreements between the parties.[11]

### 1.2 Significance of written agreements

In *Evans* v. *Roe,*[12] the plaintiff was engaged by the defendants as a foreman of their works. The two signed an agreement stating:

[7] Page 2 of Law Commission of England and Wales, Law of Contract: The Parol Evidence Rule (1976).
[8] Inglis v. Buttery (1878) LR App Cas 552.
[9] CT McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 11 41 Yale LJ, 365-385 (1932).
[10] Mercantile Agency Co. Ltd. v. Flitwick Chalybeate Co. (1897) 14 TLR 90.
[11] Alberto Zuppi, *The Parol Evidence Rule: A Comparative Study of The Common Law, The Civil Law Tradition, And Lex Mercatoria*, 35 Georgia Journal of International and Comparative Law, 239-240 (2007) *See also John D. Calamari & Joseph M. Perillo, Contracts 234 (4th ed. 1999).*
[12] (1872) LR 7 CP 138.

> "April 13, 1871. I hereby agree to accept the situation as foreman of the works of Messrs. J.T. Roe & Co., flock and shoddy manufacturers, etc., and to do all that lays in my power to serve them faithfully, and promote the welfare of the said firm, on my receiving a salary of two pounds per week and house to live in from 19th April, 1871."

Before signing the document, the defendants orally confirmed with the plaintiff whether he agrees that the contract shall be in place for a year to which he obliged. The plaintiff started his work about 45 days after the decided date due to which the defendants gave him wages amounting to a week and dismissed his services.

With a strict approach to the agreement, it may be construed that the defendants were well within the agreement and had full authority to dismiss the plaintiff. However, the jury took into consideration, the oral testimony proving that the contract was intended to be for a period of one year, meaning that the defendant had violated the contract.

The jury's approach, however, was rejected in the appellate court with the opinion that the evidence of what was said at the time of framing the contract has no regard. Rather, if the court accepts such extrinsic evidences. Justice Grove added, "it would render written agreements useless if conversations which take place at the time could be let in to vary them."

Thus, the court established a trend of preserving the sanctity of written agreements and referring to oral agreements only when there is a specific need to do so.

Oftentimes courts have reduced their rigidity towards the rule based on the facts leading upto the case. As the law gradually permitted the admissibility of extrinsic sources, scholars have also opined that written contracts merely hold a "position of interpretative priority" over extrinsic evidences, since both of them have become tolerable to the courts.[13]

### 1.3 Exceptions

In *Henderson* v. *Arthur*,[14] the court held that there may be certain situations in which parties may present external evidences to support their claims, such as i. when the contract has explicit provisions which clearly indicate the intentions of the contract, yet there exists an ambiguity due to extrinsic circumstances; ii. in case due to the passage of time, the language of the deed has become obscure; iii. in cases where it has to be proved that a certain form of consideration is not repugnant with what has been stated in the deed; iv. in cases where the goods have been delivered at time different from what the deed significances; v. where it is required to prove a customary right which has not been explicitly mentioned in the deed, but not inconsistent with any of its stipulations; or lastly vi. where fraud or illegality in the formation of the deed is relied on to avoid it.

Yet due to the continually evolving nature of law, the rigidity of parole evidence rule was

[13]John Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 Loyola of Los Angeles Law Review, 293 (2000), *see also*James J. White, Robert Summers, Robert Hillman, Uniform Commercial Code, § 2-9, at 95.
[14][1907] 1 KB 10.

debilitated by the courts by taking into account more situations in which the rule may be relaxed. Since the rule of parol evidence evolved from common law, several judgments by English courts on the law have become universal landmarks and are considered the cornerstone for parole evidence.

**1.4 Uncertainty regarding the existence of agreement**

In *Pym* v. *Campbell,*[15]parties entered a written agreement wherein the defendant agreed to pay three-eighths of the profits which are to accrue from the plaintiff's new invention. However, the invention was never approved by the defendant before it came to the market. Accordingly, the defendant refused to pay the purchase price and was sued for breach of contract. The defendant claimed that despite there being no clause in the agreement which says so, but the agreement was conditional upon the approval of the invention. The court accepted the defense and held that parole evidence is inapplicable here because the issue was not the construction of terms of the contract, but whether there existed an agreement or not.

**1.5 Customs and implied terms**

In general course contracts between two businesses are drafted by legal advisors who ensure minimum ambiguity in the language of the agreement. But contracts are often drafted by the parties themselves who are working in the same line of business. In such cases, they may use their own expressions and leave certain provisions unexplained with an assumption of uniformity of interpretation. With regard to this, Justice Park opined:

> "It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent."

Following this idea, in *Smith* v. *Wilson,*[16]the court admitted extrinsic evidences in order to determine the true meaning of the phrase "1000 rabbits" was actually "1200 rabbits".

**1.6 Document not conclusive**

In *Evans* v. *Andrea Merzario,*[17]the defendant gave an oral assurance to the plaintiff that the plaintiff's goods shall be carried by placing them below the deck of the ship, where they will remain safe. However, the defendant failed to do that due to which most of the goods belonging to the plaintiff were perished due to a storm. Though the pre-printed conditions of the agreement allowed the defendant to store goods as per his convenience, the court held that he breached his contract, and therefore the court could not simply rely on the written agreement and held that an exception to the rule shall be made in instances where the written agreement does not explicitly constitute the entire agreement on which the parties had actually agreed.

[15] (1856) 6 E & B 370.
[16] (1832) 3 B. & Ad. 728.
[17] [1976] 1 WLR 1078.

### 1.7 Parties' capacity to contract

In *Humfreys*v. *Dale,*[18] the court held that parties shall be allowed to bring in external evidence in order to indicate the capacities in which the parties contracted. In case a person contracts as a principal, oral evidence may be admitted to prove that he in turn acted as another's agent.

### 1.8 Linguistic ambiguity

Lord Denning, in a dissenting opinion affirmed that in in case a clause in a deed is so ambiguously or defectively expressed that a court cannot, even by reference to the context, collect the meaning of the parties, it would be void on account of uncertainty. In such instances, parties are "the very best guides to the way in which it was used."[19]

### 1.9 Implicit meaning of contract

In *BP Refinery (Westernport) Pty Ltd* v. *Hastings Shire Council,*[20]the court established that in case a term whose implicit meaning is to be sought, it must be "reasonable and equitable," so as to provide "business efficacy" to the contract. The same shall help make the contract capable of "clear expression," and not contradictory to any express term of the contract.

### 1.10 Contingent contract

In cases where the parties to a written contract have orally decided that the contract shall only be enforced upon the happening of a certain instance, the court may accept oral testimonies in order to understand the context in which the agreement was drafted.[21]

### 1.11 Rectification of contract

In *Joscelyne* v. *Nissen,*[22]a father and daughter came to an agreement for the transfer of business to the daughter, wherein the father understood the contract entitles him to timely pensions from his daughter so that he can manage his daily expenses. Since there was an ambiguity in the contract, the court allowed the document to be rectified in order to include the provision that had been omitted.

### 1.12 Applicability in commercial practice

Contracting parties may not always be bound by a written document while coming to an agreement. Often the documents that may seem to be of contractual nature are merely declaratory. For example, the King's Bench recognizes a bill of lading not as a contract for carriage, but as simply a document confirming the receipt of goods on behalf of the carrier.[23] A

[18] (1857) 7 E & B 266.
[19] Wickman Machine Tool Sales Ltd v. Schuler AG, (1972) 2 All ER 1173.
[20] (1977) 52 A.L.J.R. 20, 26 (P.C.)
[21] (1856) 6 E & B 370.
[22][1970] 2 QB 86, *See*P Kavanagh, *Rectifying Written Agreements*, 34 Modern Law Review, 102 (1971), https://www.jstor.org/stable/1094034 (last visited Sep 18, 2020).
[23] The Ardennes [1951] 1 KB 55.

ticket provided to a customer is not always a contract for service, but can simply be a declaration of receipt of money.[24]

The Law Commission of England and Wales has also pointed out that even when the document between the parties is of a contractual nature, it may not always be binding upon parties. Parties may have come to an oral agreement collateral to the written agreement. But any evidence of the collateral agreement should not be excluded by the rule since it is what delivers the essence of the contract.[25]

Similarly, Lord Campbell has also mentioned a difficulty which arises in day-to-day transactions. Since parties may not always have recourse to a legal advisor to draft their contracts, they need to draft the contract themselves. But this may lead to the omission of certain terms and conditions which actually build the essence of the contract. This issue happens in both commercial as well as non-commercial transactions, especially when the parties have a pre-existing bond with each other:

> "...the minds of lawyers are under a different influence from that which, in spite of them, will always influence the practices of traders.... The former desire certainty, and would have a written contract express all its terms, and desire that no parole evidence beyond it should be receivable. But merchants and traders, with a multiplicity of transactions pressing on them, and moving in a narrow circle, and meeting each other daily, desire to write little, and leave unwritten what they take for granted in every contract. They will continue to do so.... It is the business of Courts reasonably so to shape their rules of evidence as to make them suitable to the habits of mankind, and such as are not likely to exclude the actual facts of the dealings between parties when they are to determine on the controversies which grow out of them."[26]

In order to make account for such matters, courts have molded the parole evidence rule in order to incorporate certain "habits of mankind", and have also reduced its scope so as to diminish any scope for uncertainty.

Owing to the reformations the courts have had to make to facilitate such cases, several jurists are of the idea that the certainty and finality which the rule once could provide through its rigidity can no more be obtained. Most matters eventually conclude with the courts admitting extrinsic evidences due to an exception established by the court which has now led to fallibility, due to which the commission recommended for its abolishment in 1976.[27] However, it must be noted that the same commission pointed out that the various extensive exceptions which have been admitted to the rule judicial deliberation have actually preserved the rule from extinction.[28] The

[24]Chapelton v. Barry UDC [1940] 1 KB 532.
[25] Law Commission of England and Wales, *The Parol Evidence Rule* (Her Majesty's Stationery Office) (1976)
[26]*Ibid.*
[27]*Ibid.*
[28] Law Commission of England and Wales, *The Parol Evidence Rule* (Her Majesty's Stationery Office) (1986)

idea that a documented contract may be regarded as the whole contract has less strength today than in prior times, so it has become more than important for courts to make provisions for external evidences, thereby continuing with a significant need for the parole evidence rule in the judicial system.

## Interpretation in American Law

American law has codified the rule of parole evidence in § 2-202 of Uniform Commercial Code which permits extrinsic evidences only (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement. As per § 213, Restatement (Second) of Contracts, a completely integrated binding agreement discharges all prior agreements to the extent that they are within its scope.

Though America has adopted this provision from common law, it does not consider parol evidence as a matter of evidence or procedure, but as a matter of substantive law that acknowledges the significance of a certain fact in order to establish the substance of an agreement.[29] As per the Restatement, the rule is not a rule of interpretation of law, but merely a definition of the themes of interpretation.[30] Some have even disregarded the idea of recognising the rule of parol evidence as a binding law, but instead view it as a cluster of legal concepts and doctrines, relating to the distinction of relevant facts from immaterial facts from within a written instrument.[31]

### Doctrine of integration

A contract is said to be 'integrated' when the parties came consented to the written document with an intention to regard it as a complete, accurate and final representation of their agreement. Under American jurisprudence, the parol evidence rule has progressed in a way that its application is impacted by writings, written instruments and memorials that have been integrated by the parties. This characterization of writings has a huge legal significance. As per Williston, its major impression is that it triggers the application of the rule.[32] Further, simply reducing an agreement to a single written memorial does not necessarily mean that parties intended the terms contained therein to be a final or a complete representation of their agreement. Instead, integration simply means that a specific part of the contract, as enshrined in the memorial, is complete in its individual sense and requires no extrinsic evidence to support itself.[33] Written

[29]*Demystifying the Parol Evidence Rule: An Analysis of the Parol Evidence Rule in American Contract Jurisprudence and the Lack thereof under the CISGSee* Juanda Daniel, *K.I.S.S. The Parol Evidence Rule Goodbye: Simplifying the Concept of Protecting the Parties' Written Agreement,* 57 Syracuse Law Review 227, 228 (2007).
[30] § 212, Restatement (Second) of Contracts, American Law Institute (1981).
[31] Scott Burnham, *The Parol Evidence Rule: Don't Be Afraid of the Dark*, 55 Montana Law Review (1994).
[32]Samuel Williston, *Williston on Contracts* (Lawyers Co-operative Pub. Co.) (1979)
[33]Juanda Daniel, *K.I.S.S. The Parol Evidence Rule Goodbye: Simplifying the Concept of Protecting the Parties' Written Agreement*, 57 Syracuse Law Review 238-240 (2007).

memorials are generally produced during negotiations with different terms, a memorial might thus represent only part of an agreement, or it might be merely tentative. As per Daniel, in order for a written memorial to be integrated, the parties must have intended for the memorial to be the final and accurate expression of the terms contained.[34] Consequently, courts prohibit the admissibility of extrinsic evidence in cases where the part of the agreement in question is integrated.

In cases where the contract is only partially integrated, the contracts may be supplemented, but not contradicted. Some courts opine that a term outside the writing must directly conflict with an express term of the writing to be held contradictory, whereas others use a broader view of a contradictory term, as per which, any term that contradicts express as well as implied terms is contradictory to the written contract.[35]

**Williston rule**

Similar to the original parol evidence rule, this approach offers a legal significance to the act of reducing an agreement into a written document. Under this approach, the determination of whether the agreement is integrated or not is to be made by deliberating over the document alone, with no regard to extrinsic evidences.[36] As per the rule, the mere act of reducing an agreement to a writing is an implicit intention of parties to make the writing an enforceable agreement.

As per this approach, the law does not recognize intent unless it is memorialized in the writing that embodied the agreement, either explicitly or impliedly. This approach to the parol evidence rule does not emphasize parties' actual intentions, but only the intentions expressed within the writing, and implies that the parties' intent lies solely on the written instrument.

Although applied in certain instances, courts have generally refused the Williston rule since it fails in regard to giving consideration to the possibility of erroneous drafting of the contract, which does not reflect the true intentions of the parties. If a judgment is impugned by following these ideas, it may lead to the enforcement of an agreement that was not originally intended by either party.

**Corbin Rule**

Corbin opposes the parole evidence rule, since he believes that parties have a dynamic relationship amongst themselves and one can never be sure when there is a complete expression of the agreement. Due to this, Corbin believes that law should recognize negotiations that may modify, explain, or supplement the contract.[37]

[34] *Id* 239.
[35] Housekeeper Publishing Co. v. Swift, 38 C. C. A. 187, 97 Fed. 290 (8th Cir. 1899).
[36] 11 Samuel Williston, *Williston on Contracts* (Lawyers Co-operative Pub. Co.) (1979).
[37] Arthur L. Corbin, *The Parol Evidence Rule*, 53 The Yale Law Journal, 603 (1944).

However, Corbin's approach is not suitable for business contracts. Rather, a Willistonian approach would be more appropriate to promote efficiency and maximizing joint gains of a transaction since it dictates a simpler dispute resolution. The Corbin approach also dampens the need for parties to be careful and precise while drafting a written contract, since it permits parties to significantly alter it through judicial processes. If enforced, the rule would instead promote litigation and in turn decrease the level of efficiency in private, as well as commercial transactions.

**Determination of ambiguity**

The courts in the United States follow a general rule to first determine what evidences a party wishes to offer to show the meaning of a specific term belonging to the contract. Courts generally allow extrinsic evidence as to what a term means only after establishing that the term in question is rather ambiguous. The question that arises is whether a court should allow extrinsic evidence to determine that a certain term is ambiguous? Just the way courts allow extrinsic evidence to determine whether an agreement is integrated in parol evidence rule analysis, a court hears the evidence to prove that a term is ambiguous after excusing the jury.[38] In case the term is not ambiguous, the court does not admit the evidence. If otherwise, the court permits the jury to hear the evidence and determine the meaning of the term, because determination of the meaning of a term is a matter of fact.[39]

In *Weston* v. *Montana State Highway Commission*, the plaintiff contended that "supervisor" in the written agreement actually meant "non-supervisor."[40] After considering the evidence regarding the ambiguity, the court stated:

> "[t]he language in the contract is clear and unambiguous. We find no need for further interpretation and/or parole [sic] evidence."

American law recognizes to forms of ambiguities that may arise from a contract, patent ambiguity and latent ambiguity, wherein the former refers to uncertainties that may be visible on the face of the document,[41] while the latter refers to uncertainties that require deliberation for identification.[42] To resolve such doubts, the United States resorts to the reasoning by Lord Bacon, who asserted that some patent ambiguities allow a resort to extrinsic evidence, and others do not.

As per him, an ambiguity is patent when a simple perusal of the document indicates that additions must be made before one can correctly interpret its meaning; and then the rule is

[38]Scott Burnham, *The Parol Evidence Rule: Don 't Be Afraid of the Dark*, 55 Montana Law Review (1994), https://scholarship.law.umt.edu/mlr/vol55/iss1/4 (last visited Sep 23, 2020) *See* E. Allan Farnsworth, Contracts (Aspen Law & Business 2) (1999).
[39] Holman v. Hansen, 237 Mont. 198, 773 P.2d 1200 (1989).
[40] 186 Mont. 46, 48, 606 P.2d 150, 151 (1980).
[41] Metric Constructors, Inc. v. NASA, 169 F.3d 747, 751 (Fed. Cir. 1999).
[42] Turner Const. Co., Inc. v. United States, 367 F.3d 1319, 1321 (Fed. Cir. 2004); Metric Constructors, 169 F.3d at 751.

inflexible that no evidence to supply the deficiency can be admitted. The admission of such evidence in many cases would be, as Lord Bacon said, "to make that pass without deed, which the law appointed shall not pass but by deed."[43]

**Uniform Commercial Code**

The UCC is a comprehensive set of laws that aim to govern all commercial transactions in the. Though it is not federally legislated, it does have a uniform recognition from states. Since the code has been adopted by all the states, parties feel free to enter commercial contracts with confidence that the contract shall be enforced in the same way by the courts of every American jurisdiction. § 2-202, titled "Parol or Extrinsic Evidence", reads:

> "Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2 208); and
>
> b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement."

The Code has somewhat modified the doctrine of parol evidence rule, since its version is intended to liberalize the rule, and to reject the conventional idea that a written document amounts to complete integration. Based on the provision, extrinsic evidence cannot contradict a writing that parties consider as the final expression of their agreement. A writing intended as a final document is only to be treated as a partially integrated document. Only a final as well as complete writing is regarded a completely integrated writing, thus, cannot be contradicted through extrinsic evidence. Further, official comments in the code command courts to permit external evidence in order to determine whether the writing was agreed upon as a partial or complete integration of the parties' agreement. Only thereafter can any such evidence be excluded.

## Lex Mercatoria

*Lex Mercatoria*is a Latin maxim that refers to a set of international rules established by merchants to regulate trade. It consists of international commercial usages and customs along with treaties, conventions, and rules recognized universally by merchants and traders.[44] The

[43] David N. Hernandez, *Sternloff v. Hughes: Vagueness as Affecting the Admissibility of Extrinsic Evidence in Deed Descriptions,* 9 N.M. L. Rev. 383 (1979).
[44] Friedrich Juenger, *The Lex Mercatoria and Private International Law*, 60 Louisiana Law Review (2000).

United Nations Convention on the Contracts for the International Sale of Goods, CISG, is the most prominent codified law in the domain of international mercantile law. Although certain principles of the UNIDROIT are applicable, but majority of the law on parol evidence rule comes from the CISG.

**1980 Vienna Convention – Convention on Contracts for the International Sale of Goods**

Article 8 and 11 of the treaty talk about the inclusion of extrinsic evidences in the interpretation of written contracts. As per Article 8,[45] the subjective intent of the parties is to be the primary interpretative source, but only insofar as the other party knew or could not have been unaware what that intent was. When this approach is insufficient, the Article dictates that an objective test, the understanding of a reasonable person, shall be applied. Article 8 may be termed as an adoption of the modern objective theory of contract formation, since it emphasizes solely on subjective intent insofar as that intent was clearly communicated to the other party. This approach similar to the patterns established in American contract jurisprudence.[46]

Further, Article 8(3) directs courts to give due consideration to all relevant evidences in the interpretation process under (1) and (2). This is a clear rejection of any limits to what types of evidence a party can argue along the lines of in this regard.

Article 11 of the treaty reads: "a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses."[47] As a generalized postulate, the first part of the text of Article 11 alludes consensualism, as per which there is no requirement of specific formal requirement to form contracts.[48] The second part explains procedural consequences related to the evidence accepted to prove a contract regulated by the CISG in the civil law tradition.

It is pertinent to note that Article 11 shall remain inapplicable in case the country in question, at the time of ratification made a declaration conforming to Article 96 of the CISG,[49] which states:

> "A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State."

[45] Article 8, *United Nations Convention on Contracts for the International Sale of Goods*, Apr. 11, 1980, S. TREATY Doc. No. 98-99 (1983), 1489 U.N.T.S. 3.
[46] John Murray, *An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods,* 8 J.L. & Com. 11, 45 (1988).
[47] Article 11, *Id.* 44.
[48] JerziRajski, *Article 11 in Commentary on the International Sales Law: The 1980 Vienna Sales Convention,* 122 (Michael J. Bonell& C.M. Bianca eds., 1987).
[49] Article 46, *Id.* 44.

Article 8(3) when read with Article 11 establishes a general principle that written evidence of contracts does not enjoy a special status substantively, other than having inherent practical evidentiary advantages. Accordingly, the CISG does not effectuate a presumption that a writing constitutes an integration, either partial or complete. Of course, written contracts may be held in higher regard, relative to oral contracts, pursuant to the applicable rules of evidence, which, according to the general international private law principle, will be governed by the law of the forum, not the CISG. However, the CISG, as a substantive contract law, does not make any such stipulation.

Coming to the applicability of the treaty, American courts have often rejected the incorporation of the parol evidence rule within the scope of CISG. In *MCC - Marble Ceramic Center,*[50] despite the buyer having consented to the printed conditions on the printed form, the court admitted previous negotiations and the subjective intent of the parties. The tribunal stated that parties wishing to avoid parol evidence problems may include a merger clause in their contract. As per the court, such mergers or integration clauses would exclude evidence outside the contract. The court came to the conclusion that is a correct application of the general rule stated in Article 8(3) of CISG, which excuses a tribunal deciding a case under the CISG from any domestic parol evidence rule or other kind of restrictions of other means of proof different from a writing. This approach has been seen as a "benchmark against which the progress of future U.S. decisions on the Convention can be measured."[51]

**UNIDROIT Principles of International Commercial Contracts**

Unlike the CISG, the Principles of UNIDROIT do not constitute a legislation or a statute, due to which they lack binding upon parties *per se.* Rather, they come into question only when parties expressly incorporate them into the contract in order to bring ease in case of judicial intervention.[52] As per Article 2.1.17 of the Principles:

> "A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing."[53]

In the absence of such a merger clause, Article 1.2 of the Principles permits any evidences that can be proved by any means.[54] This equalizes the parol evidence rule by admitting evidence subsequent to the written document, but only for interpretational purposes. It is also consistent

[50] 8 MCC - Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino S.p.A., 144 F.3d 1384 (11th Cir. 1998)
[51] Harry Flechtner, *The U.N. Sales Convention (CISG) and MCC - Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.: The Eleventh Circuit Weighs in on Interpretation, Subjective Intent, Procedural Limits to the Convention's Scope, and the Parol Evidence Rule*, 18 J.L. & COM. 259, 287 (1999), *See also* Bruno Zeller, *The Parol Evidence Rule and the CISG - A Comparative Analysis,* 36 COMP. & INT'L L.J. S. AIR. 308 (2003).
[52] UNIDROIT Principles of International Commercial Contracts (2004).
[53] *Id.* art. 2.1.17.
[54] *Id.* art. 1.2.

with the principle stated in Article 4.3 (a),[55] which permits preliminary negotiations between the parties to be considered when applying the main rules of interpretation. As per this idea, first of all, the common intention of the parties or subjective test must be considered. Second, in case the intention is unascertainable, the standard of a reasonable man may be used.

## Conclusion

From its inception in 1604 in the *Countess of Rutland's Case,*[56] to its international codification in the CISG, parol evidence rule has undergone a significant transformation by reducing its extent of application by the admission of numerous exceptions. After summarizing the forms adopted by this common law principle and its equivalents in other legal systems, along with a recognizing a lack of regard for this rule in modern *lex mercatoria*, it is reasonable to conclude that there remains only a tame hybrid, which is applied domestically in some jurisdictions, of the rule as it was originally conceived. Its application has considerably reduced and narrowed its scope when compared with the solutions shaped by other international principles.

In England, where the parol evidence rules originated, a large number of exceptions which are allowed by the judiciary invite inquiry into whether the rule has survived. Only in the United States does the rule continue to be domestically considered, but only within the boundaries identified in this paper. Certainly, the concept of a written agreement today is different from the one when the rule was in full application.

Conventionally, a written document refers to a writing in paper. However today, electronic documents and transactions are terms of common use, and expressions like electronic commerce, electronic records, or e-mails are part of our lives. The extraordinary changes in communications, the common use of computers in the legal profession, the advances of technology, and the easy global access to sources of information are alternatives that help to show the parties' true intentions more accurately.

[55] *Id.* art. 4.3.
[56] (1604) 77 Eng. Rep. 89 (KB), *See* Lawrence Solan, *The Written Contract as Safe Harbor for Dishonest Conduct,* 77 Chicago-Kent Law Review 87, 91 (2001).

# PANOPTICAL SURVEILLANCE OF THE STATE IN A DYSTOPIAN FUTURE- A THREAT TO PRIVACY

*Sagnik Sarkar*[1]*&Akarsh Kumar*[2]

*If you want to keep a secret, you must also hide it from yourself*[3]

## Abstract

*An individual develops in a true sense when she has the chance to express its opinion freely. And one can only be able to freely express when one can freely think without any interference. This is the foundational necessity of privacy. But with the implementation of a surveillance mechanism, the idea of privacy takes a backseat. The basic principle of surveillance is that if one does no wrong then one should not have anything to hide. But it is often forgotten that result of any surveillance mechanism undoubtedly creates a chilling Orwellian State in which free speech is eroded to such an extent that a democratic society is turned into a panoptical prison. The concern is that when any single entity holds large scale private information of its citizens, it gives them huge control over their lives. In view of that, in this article, the authors have analyzed different legislations and license agreements in the light of Puttaswamyjudgment and Shri Krishna report to understand its legal validity. The paper also has analyzed the government's power to undertake different surveillance mechanism in the backdrop of national security. With the emergence of Puttaswamy judgment and Shri Krishna report, the archaic laws and license agreements should be amended as it gives unfettered and unhindered power to the government for surveillance without any accountability. The current laws fall short in providing any sort of restriction in the collection of personal data and in lieu of that government have a free hand in collecting any data and retaining it for a number of years. Such laws are in violation of Krishna report and fails to pass the test of constitutional validity. Such laws are not only dangerous for the interest of the people but also turn a democratic society into a Policing State.*

## Introduction

Human beings are self-learning creatures. They thrive by learning different ideas and expressing them in different forms. They need space for thinking, understanding and exploring their intellectual capacities before expressing any ideas. 'Privacy' provides a safe cocoon where individuals are free to express any idea irrespective of how ridiculous they sound. The problem arises when the government begins to feel that an idea poses a threat to their establishment. Governments often veil their insecurity of power under the garb of national security to give legitimacy to different surveillance programmes. Though surveillance serves its purpose in certain extreme situations, a line needs to be drawn on when the surveillance should be allowed and what information can be procured. It is only when mass surveillance takes place not limiting any particular type of data and without any legitimate purpose that it becomes problematic. The concern is that when any single entity holds large scale private information of its citizens, it

[1] BBA.LLB, 4th Year, National Law University. The author can be reached at sagsarkar1998@gmail.com
[2] BBA.LLB, 4th Year, National Law University. The author can be reached at akarshkumar177@gmail.com
[3] GEORGE ORWELL, 1984 280 (2014).

gives them huge control over their lives. Surveillance programmes like these chillsfree speech, association and leads to the unanimity of the graveyard.

The paper analyses the connection of surveillance programmes and their impact on the individual's privacy. The paper begins by analyzing the Puttaswamy judgment in light of the Shri Krishna committee report to understand the ambit of privacy. Thereafter, it analyses different telecom license agreements, various legal enactments, and also the recent Personal Data Protection (PDP) bill from the perspective of Shri Krishna committee report (hereinafter Shri Krishna report) and the Puttaswamy judgement, while determining its constitutional validity. The paper finally concludes by giving certain recommendations to rectify the present situation and to ensure that surveillance mechanisms are applied within reasonable standards.

### *I.I Panopticon analysis of Bentham*

Bentham's panoptical prison is a classical concept of surveillance where he proposed an idea of a structure monitored by a central tower in such a way that all the inmates are governed at the same time.[4] The distinguishing aspect of this concept is that the inmates shall be aware that they are being watched but they will not know when, as the structure shall be built in such a way that only the guard will be able to see the inmate but not vice-versa. So inmates will be policing their own behavior and thus creating order in the prison. This way, Bentham postulated the idea of a panoptical country where all the citizens are in their best behavior even when no one is watching them but at the same time creating an illusion that they are being watched.

The data-driven surveillance system tries to achieve the same wherein the government aims to control all the aspects of data monitoring so that they can ensure national security. So the idea is when people are aware that they are being monitored they will be cautioned and refrain from freely expressing themselves. This shall create an environment where the government without using any force would create fear in the mind of people and ensure order.

This phenomenon causes 'chilling of speech and expression' where individuals cannot express themselves because 'virtual censorship' of the government causes hindrance in free speech and expression (like Thought Police in 1984[5]). The panoptical concept postulates a Police State which monitors every aspect of its citizen under the veil of national security restricting the enjoyment of the right to liberty and freedom.

## I. Privacy analysis

The Puttaswamyjudgment[6] played an important role in not only recognizing privacy as an inseparable part of the right to life but also recognizing it as an important component of liberty, freedom and dignity. Any endangerment to its existence would have a direct impact on the

[4] Thomas McMullan, *What Does The Panopticon Mean In The Age Of Digital Surveillance*?, The Guardian (Jul. 23, 2015), https://www.theguardian.com/technology/2015/jul/23/panopticon-digital-surveillance-jeremy-bentham.
[5] Orwell, *supra* note 1.
[6] Justice K.S. Puttaswamy and Another v. Union of India and Others, AIR 2017 SC 416.

freedom of speech and expression. Moreover, the judgment needs to be analyzed in the light of the Shri Krishna committee to understand the ambit of privacy.

Nariman J., in Puttaswamy, focusing on informational privacy stated that individuals ought to have command over the circulation of their information/data and any use of such information without their prior consent would amount to illegal dissemination of information. This principle was later included in the Shri Krishna report as end-use limitation where the data shall be used only for the purpose for which it has been given and any other usage has to be preceded by taking prior consent of the individual.

The idea of consent was further cemented by Chandrachud J., through the objective theory of privacy.[7] It states that every person has a reasonable expectation of privacy when they undertake a certain activity. So when any information is collected from password-protected content then it is the reasonable expectation of the individual that the information will not be revealed to any third party. This idea of consent was further stretched by Kaul J., where he focused on the control over the disseminated information by the individual which was renamed as the "right to correct" data in the recent PDP bill.[8] It ensures that an individual has control over its data and can decide whether to disseminate the information or not based on the purpose of ones' usage.

The point to note here is that none of the judges differentiated between personal and non-personal data nor did they give any leeway to investigative agencies to exclude the consent element howsoever exigent the matter might be. The only exception the judgement makes regarding any surveillance provision is the Strict Scrutiny test and the Proportionality principle. The *former* states that when any enactment violates the fundamental right of any citizen then the standard of judicial review shall be strict[9] and the legislation shall be deemed valid only if it follows two components:

a) Compelling State Interest: It states that legislation which violates fundamental rights can be constitutionally valid only if it serves the purpose of Compelling State Interest.[10] That is, it serves the immediate emergency need of the State. It is based on the Utilitarian principle where the urgent public need overrides the fulfilment of fundamental rights of certain people provided that government could show that such law is based on actual compelling State interest, and not on any illusionary ground.

b) Narrow Tailoring: As per this, legislatures have the right to make laws which restrict the application of fundamental right provided such restrictions should be narrowly construed rather than totally excluding its operation.[11] The idea is that such law should be narrowly

[7] Katz v. United States, 389 U.S. 347 (1967).
[8] MINISTRY OF ELECTRONICS & IT, A FREE AND FAIR DIGITAL ECONOMY PROTECTING PRIVACY, EMPOWERING INDIANS (2018).
[9] Anuj Garg v. Hotel Association of India, AIR 2008 SC 663.
[10] Govind v. State of Madhya Pradesh, AIR 1975 SC 1378.
[11] PUCL v. Union of India, AIR 1997 SC 568.

enacted so that it infringes the right in the narrowest manner possible to achieve the intended purpose. But if such law excludes the implementation of fundamental right entirely then it shall be held as unconstitutional.

The *latter* part consists of three principles that have been laid down by Chandrachud J., in the Puttaswamy Judgement:

a) Legitimate State Aim: It is similar to the compelling State interest where any law which intends to violate fundamental right should fulfil legitimate State aim, i.e. such laws should intend to address the pressing needs of the State.

b) Proportionality: The aim of the law enacted should be proportional to the measures that it ought to take to achieve its purpose. It means that aim of the legislation and means used to attain it should have a reasonable nexus between both of them. The problem with national security laws is that they are disproportionate in nature since they unreasonably restrict the application of fundamental rights to achieve the intended purpose. Even in such case, the court has held that the State must show that there exists a reasonable nexus between the interest it seeks to secure and the means it uses to enforce it are proportional.[12]

c) Law in Existence: It states that any infringement of fundamental rights should be based on existing laws. The problem arises when the executive gives the order of surveillance without having statutory backing, which makes the order illegal as such order is not limited in its scope or application.

Kaul J., stated the principle of procedural guarantee against abuse, which deals with the accountability principle where individual should have a forum to address their grievance due to infringement of privacy. The problem arises when surveillance is done by the intelligence agencies. There is no redressal mechanism if any breach of data takes place during monitoring or analyzing of data by the agencies.

## II. State surveillance

In the light of the 2008 Mumbai terrorist attack, India implemented many data sharing and surveillance schemes to tackle terrorism. However, these schemes have given rise to various controversies since their inception.[13]

### *III.I state surveillance system*

There does not exist any unified policy on surveillance in India rather it has various agreements in place which in combination gives shape to the surveillance policy of India.[14] The latest one is

[12] Arup Bhuyan v. State of Assam, (2011) 3 SCC 377.

[13] Maria Xynou, *Security, Surveillance and Data Sharing Schemes and Bodies in India*, THE CENTRE FOR INTERNET & SOCIETY, https://cis-india.org/internet-governance/blog/security-surveillance-and-data-sharing.pdf. (last visited Sept. 12, 2020).

the order from the Ministry of Home Affairs (MHA) which empowers 10 government agencies to snoop on any computer.[15]

*III.II license agreements*

The initial point of surveillance for the government is the telecom sector. It is the only sector which has connected 1.17 billion people into a common grid of network. So for the government to initiate surveillance mechanism on any individual all they have to do is to order the telecom companies to provide details of the call records of the person concerned. Further, to ensure that telecom companies would be bound to follow the direction, the Department of Telecommunications has drafted different agreements authorizing legal surveillance.

**III.II.I Internet Service Provider agreement**

The Internet Service Providers (ISP)[16] is required to follow the clauses inscribed in the ISP agreement which were enacted on the lines of the Indian Telegraph Act 1885,[17] the Indian Wireless Telegraph Act 1933,[18] and the TRAI Act 1997.[19] The present analysis shall be restricted to part-VI of the agreement which deals with the security condition that each ISP has to follow to get government authorization to enter into the telecom sector.

According to clause 32.1[20], no bulk encryption equipment should be employed in the network. It means that government is disallowing encryptions of any type of data which significantly decreases the security of data. So the problem is that it is inconsistent with the recommendations of the Shri Krishna committee[21] which has suggested data encryption and pseudonymisation for increasing the safety of data. Also, since the agreement has not created any classification between personal and non-personal data, so sweeping prohibition on encryption of data without recognizing the differential status of each type of data is again a violation of Shri Krishan committee report.

As per clause 33.4[22] the licensee shall, without any delay will provide to government agencies all the tracing facilities to trace malicious calls, messages for detection of crime and maintaining the national security. This clause gives a blanket power to the government to demand personal sensitive data without any regards to privacy concern. This violates the proportionality, reasonableness and consent principles as mentioned in the Shri Krishna report.[23]

---

[14]*Policy Paper on Surveillance in India*, THE CENTRE FOR INTERNET AND SOCIETY, https://cis-india.org/internet-governance/blog/policy-paper-on-surveillance-in-india. (last visited Sept. 15, 2020).
[15]MINISTRY OF HOME AFFAIRS, ORDER, S.O 6227 (E).
[16]DEPARTMENT OF TELECOMMUNICATIONS, LICENCE AGREEMENT FOR PROVISION OF INTERNET SERVICES.
[17] Indian Telegraph Act, 1885, No. 13, Acts of Parliament, 1885.
[18] Indian Wireless Telegraph Act, 1933, No. 17, Acts of Parliament, 1933.
[19] Telecom Regulatory Authority of India Act, 1997, No.24, Acts of Parliament, 1997.
[20] License Agreement, *supra* note 14, at 29.
[21] Krishna Report, *supra* note 6.
[22] License Agreement, *supra* note 14, at 30.
[23] Krishna Report, *supra* note 6.

Furthermore, the clause 34.4[24] states that government shall specify the equipment that are to be used for interception purposes and clause 34.6[25] states that the designated government agencies will have the authority to monitor the telecommunication traffic for monitoring simultaneous calls at every network setup point. So by reading clause 33.4[26] 34.4,[27] and 34.6[28] together, it suggests that government will not only have control over the data, but it shall have the control over the different ways in which data is collected and analyzed.

Furthermore, the question arises how far government shall snoop into the personal lives of its citizens and who shall be made accountable in case of breach of personal sensitive data of the individuals during such interception? This has been partly answered in clause 32.2[29] which states that it is the duty of telecom operator to ensure privacy and safeguard the data of the consumers. But it does not mention the government's accountability in the event of a breach of data during interception. In such cases, the individual suffers without anyone being made accountable for such breach and due to such back-door surveillance activity of the government, it becomes difficult to claim any remedy as well.

Moreover, reading clause 34.12[30] with 34.22[31] shows that intelligence authorities shall have unfettered access to the password-protected subscriber list and government shall have access to the database of the subscriber. It means that intelligence authorities shall have the phone numbers of any individual which can be used to intercept the phone calls to listen to any sensitive personal information under the veil of national security. Further, it directly fulfils the requirement of continuous monitoring by the government as per clause 30.1.[32] All the three clauses directly contravene the principle of proportionality and necessity as it gives the government the right to undertake surveillance programme of all the citizens without stating any reason for such violation. It would mean that the government can monitor any citizens on any ground as long as it is remotely related to national security.

### III.II.II Cellular Mobile Telephone Service & Basic Telephone Services agreements

Apart from the above-mentioned agreement, telecom operators also have to comply with two other license agreements; Cellular Mobile Telephone Service (CMTS)[33] and Provision of Basic Telephone Services (BTS)[34] license agreements. The former deals with cellular mobile connections while the latter with landline connections. Throughout both the agreements, there

[24] License Agreement, *supra* note 14, at 31.
[25] *Id*.
[26] License Agreement, *supra* note 14, at 30.
[27] *Id*.
[28] *Id*.
[29] License Agreement, *supra* note 14, at 29.
[30] License Agreement, *supra* note 14, at 32.
[31] License Agreement, *supra* note 14, at 34.
[32] License Agreement, *supra* note 14, at 28.
[33] MINISTRY OF COMMUNICATIONS, LICENCE AGREEMENT FOR PROVISION OF CELLULAR MOBILE TELEPHONE SERVICE.
[34] MINISTRY OF COMMUNICATIONS, LICENCE AGREEMENT FOR PROVISION OF BASIC TELEPHONE SERVICE.

are certain clauses which allow for unchecked surveillance by the government without any regard to the privacy of the individual.

According to clause 23.1[35] of BTS agreement and clause 42.1[36] and 44.11[37] of the CMTS agreement no telecom operators shall employ bulk encryption equipment in its network. Even if they are employed, it has to be after getting prior approval from the government. The clauses are self-contradictory as both the agreements talk about the protection of the data of the individual[38] and at the same time it prohibits encryption without the prior approval of the government.

Furthermore, as per clause 23.4 of BTS[39] and clause 44.1 of CMTS,[40] the government shall have access to every transmission center and other necessary facilities for surveillance. Such a clause allows for bulk surveillance without stating any reason for the same. It is a direct violation of proportionality principles[41] since bulk surveillance is highly disproportionate provision even in national security cases.

## III.III Legal Manipulation

Apart from the various license agreements government have further drafted different laws to ensure two objectives, *firstly*, to have the ability to undertake surveillance without any hindrance and s*econdly*, to give legal recognition to such surveillance provisions.

### *III.III.I Information technology act 2008 and its allied rules*

The section in question is section 69[42] of the Act which states that the central government can monitor the information from any computer if it is required for the security of the State. It further mandates telecom operators to assists in the interception of the data. So, it can be said that the main essence of the section is to monitor and regulate free speech by the system of 'private censorship' through the intermediary of telecom providers.[43]

So to ensure smooth surveillance mechanism government came up with the IT Interception Rules, 2009[44] which were enacted under section (u/s) 69 & 69B of the Act. The rules govern as to who can issue directions regarding the interception, how that data be disclosed and till what time such order will be valid.

---

[35] *Id*. at 22.
[36] C.M.T.S, *supra* note 31, at 30.
[37] C.M.T.S, *supra* note 31, at 33.
[38] C.M.T.S, *supra* note 31, at 32 (Clause 44.4).
[39] B.T.S, *supra* note 32, at 22.
[40] C.M.T.S, *supra* note 31, at 31.
[41] Krishna Report, *supra* note 6.
[42] Information Technology Act, 2008, No. 21, Acts of Parliament, 2000, sec 69.
[43] Addison Litton, *The State of Surveillance in India: The Central Monitoring System's Chilling Effect on Self Expression*, 14 Wash. U. Global Stud. L. Rev. 799 (2015), https://openscholarship.wustl.edu/law_globalstudies/vol14/iss4/17.
[44] Information Technology (Procedure and Safeguard for interception, Monitoring and Decryption of Information) Rules, 2009, G.S.R. 780 (E).

As per rule 2 (d),[45] the order of interception shall be given by the Ministry of Home Affairs (MHA). Furthermore, rule 4[46] provides that interception would include decryption of 'any' computer for the purpose mentioned u/s 69 (1) of the Act. On reading both the rules together, it can be said that executive has the unilateral power to intercept any computer in its jurisdiction and monitor any data which would serve the purpose as mentioned u/s 69(1) of the Act.

Though the presences of these rules are essential for the security of the country, such blanket power can lead to misuse of the same. Furthermore, when viewed from the Puttaswamy angle[47] it does not fulfil the strict scrutiny test as it failed to fulfil both of its components; compelling State interest and narrow tailoring policy.[48]

On analyzing the above rule it can be said that it fails to provide, *firstly*, what should constitute as security of the State, and what should be its ambit, *secondly*, the above rules have not only failed to narrow the application of fundamental rights but have restricted them altogether and *thirdly*, it does not specify as to what type of information is to be collected (personal or non-personal) since rule 2(1)[49] failed to provide any differentiation and allowed government agencies to intercept any information.

One of the safeguards given in the rule against the blatant misuse of such power is that such interception order shall be sent to a review committee to analyze its usefulness.[50] But the problem with such a review mechanism is that it only addresses one side of the problem. When any suggestion is sent to the review committee, they do not have any yardstick to measure as to what shall constitute security of the State. Furthermore, the review committee constitutes members of the executive. In that case, the committee becomes the mouthpiece of the authority which has given the order.

Another rule to be examined is rule 6 of the IT Sensitive Personal Data Rules, 2011[51]. The rule states that personal and sensitive information collected by the body corporate should only be disclosed for the investigation, prosecution and verification of identity.

On prima facie, it can be said that the rule is in contravention with the Puttaswamyjudgment[52] since infringement can be allowed only when:-

a) There is a legitimate aim: This clause would be triggered when the collection of information becomes difficult after using all the means available. Only then the surveillance technique should be used. But the rule provides for usage of surveillance as the only means of collecting information. The rule does not use surveillance as a

[45] Information Technology (Procedure and Safeguard for interception, Monitoring and Decryption of Information) Rules, 2009, rule 2(d).
[46] Information Technology (Procedure and Safeguard for interception, Monitoring and Decryption of Information) Rules, 2009, rule 4.
[47]Puttaswamy Judgment, *supra* note 4.
[48]Puttaswamy Judgment, *supra* note 4.
[49] Monitoring Rules, *supra* note 42.
[50] Monitoring Rules, *supra* note 42.
[51] IT Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, G.S.R 313 (E).
[52]Puttaswamy Judgment, *supra* note 4.

necessity but as a regular investigative technique. That is, surveillance provisions should be used as a means of last resort not as a means of convenience.

b) Law in existence: The rules are supposed to define the working mechanism of the parent Act. But the grounds for collecting the personal sensitive data are not mentioned in the parent Act (section 69). So, any collection of data which includes personal sensitive data is outside the ambit of the rules since.

### *III.III.II Personal data protection bill 2019*

As a consequence of the recent WhatsApp-Pegasus crisis,[53] the government tabled the modified version of the PDP bill[54] with certain changes which had the following problems:

Firstly, as per the section 3(36) of the Bill,[55] it defines the ambit of personal sensitive data and includes data like financial record and sex life but interestingly it excluded 'password' from its scope. The impact of that can be analyzed by reading section 91(2)[56] of the bill. According to it, the central government can order data fiduciary to give non-personal or anonymised data for target delivery service. Now, since 'password' does not come under the definition of personal sensitive data, it will come under the non-personal data. It means that the government can have control over the password-protected content of the individual's credentials under the garb of target delivery services. Furthermore, the surveillance of those accounts become easy as the necessity and the proportionate principle of Shri Krishna committee[57] need not be followed since those are applicable only at the time of collection of sensitive data.

Secondly, the bill used ambiguous terms like 'national security' and 'public order' to ensure the sustainability of the surveillance environment. As per section 35 of the PDP bill,[58] government agencies can obtain personal data for 'national security'. This creates an environment of State bullying, where because of lack of legislation defining what act constitutes as national security, the State can obtain any information on any illusionary grounds.[59] This violates the guidelines of Puttaswamyjudgment, as for infringing privacy, there has to be:[60]

a) Law in existence: But there exists no law which can determine what situation shall be considered as national security.
b) Procedural guarantee against the abuse: The bill does not provide any safeguard if any data is breached when it is being monitored or analyzed by the intelligence agencies.

Thirdly, section 12 (f) of the bill deals with the collection of personal data without the consent of the individual.[61] It states that processing of the data (collection, storage and disclosure of data)[62]

---

[53] *Pegasus: India May Cite WhatsApp Breach to Store Data Locally*, BBC NEWS, Nov. 28, 2019, https://www.bbc.com/news/world-asia-india-50582728.
[54] The Personal Data Protection Bill, 2019, Bill No. 373 (pending).
[55] The Personal Data Protection Bill, 2019, Bill No. 373, sec 3 (36).
[56] The Personal Data Protection Bill, 2019, Bill No. 373, sec 91 (2).
[57] Krishna Report, *supra* note 6.
[58] The Personal Data Protection Bill, 2019, Bill No. 373, sec 35.
[59] Section III.II.I of this paper.
[60] Puttaswamy Judgment, *supra* note 4.
[61] The Personal Data Protection Bill, 2019, Bill No. 373, sec 12(f).
[62] The Personal Data Protection Bill, 2019, Bill No. 373, sec 2 (31).

can be done without consent in case of breakdown of 'public order'. Since the ambit of public order is not defined the government can name any protest or procession as a breakdown of public order. This section should be read with section 7(2) of the PDP bill,[63] as per which no notice of the collection of personal data shall be given to an individual if it defeats the purpose of such collection. Both these sections violate the privacy judgment[64] and Shri Krishna report,[65] as *firstly*, it provides for surveillance of personal data without providing any clear, lawful and specific purpose. *Secondly*, it is disproportionate to the aim it sought to achieve since it allows for the accumulation of personal data without specifying the circumstances when such collection has to be undertaken. *Thirdly*, the section did not specify what shall be the situation where the supply of notice will not be a condition precedent for the collection of personal data.

### *III.III.III Telegraph Act and Indian Post Office Act*

The Telegraph Act primarily governs the surveillance of telephone networks. The ambit of the Act as given under section 3(1AA) of the Act covers all the communication devices.[66] Further, the Indian Post Office Act, 1898 (hereinafter referred to as IPO Act) in section 26 states the powers of the central and state government to intercept postal articles for surveillance purposes.

Section 5(2)[67] of the Telegraph Act and section 26 (2)[68] of IPO Act states two prerequisites for interception of telegraphs and postal things: the first prerequisite talks about "occurrence of public emergency" whereas the second one talks about "the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states or public order or for preventing incitement to the commission of an offence." A major concern here is with the term "public emergency" which has not been amended or clarified despite everyone being aware of its vague expression.[69] The same was contended once by the 38th Law Commission in 1968 whereas it contended the constitutionality of the expression. The Law Commission then said that since the expression has not been used or defined in the Constitution of India thus it is not reasonable to suspend fundamental rights based on it.[70] It further questioned the very part of the Act wherein the decision as to whether it is a public emergency or not was left to the discretion of the concerned administrative officials. It thus suggested amending the interception part of it. Though questions about the exact interpretation of the expression and its manipulations were raised in both the houses, no new clarification was provided. Rather government claimed the expression is "exactly those that are used in the Constitution." However, the reality is that the term has neither been defined nor used in the Indian Constitution.

---

[63] The Personal Data Protection Bill, 2019, Bill No. 373, sec 7(2).
[64] Puttaswamy Judgement, *supra* note 4.
[65] Krishna Report, *supra* note 6.
[66] The Telegraph Act, 1885, No. 6, Acts of Parliament, 1885, sec 3(1AA).
[67] The Telegraph Act, 1885, No. 13, Acts of Parliament, 1885, sec 5(2).
[68] The Indian Post Office Act, 1898, No. 6, Acts of Parliament, 1898, sec 26 (2).
[69] Bedavyasa Mohanty, *The Constitutionality of Indian Surveillance Law: Public Emergency as a Condition Precedent for Intercepting Communications*, THE CENTRE FOR INTERNET & SOCIETYBLOG, (Jul. 4, 2014), https://cis-india.org/internet-governance/blog/the-constitutionality-of-indian-surveillance-law.
[70] LAW COMMISSION OF INDIA, 38th REPORT ON INDIAN POST OFFICE ACT, 1898 (1968).

In the case of Hukam Chand[71], it was said by the court that the terms "public emergency" and "any emergency" when used in the statutes give distinct meaning and cannot be equated merely because of being similar to each other. It further said the two prerequisites that are "public emergency and public safety" ought to "take color from each other." Nonetheless, the interpretation of the term public emergency in the terms of second pre-requisite was not done elaborately by the court. Thus, these interpretations in bits and pieces have not actually helped in bringing clarity to the expression.

The Acts say that the condition of "public emergency" should exist before deciding whether there is any threat to public order and integrity and sovereignty of the State whereas the court's interpretation suggests that it is the other way around. Thus, it can be said that though pre-requisite conditions are meted out for the application of section 26 and section 5 of IPO Act and the Telegraph Act respectively, there is no specified objective standard given to test their applicability.

## Recommendations

Surveillance is an old concept but the means to undertake it are evolving every day and it is necessary to have certain guidelines on its regulation so that both the national security and the fundamental right are equally maintained.

I. Appointment of judicial members in the committee which is responsible for deciding the initiation of surveillance order and also in the review committee which is responsible for reviewing such orders.
II. In the PDP bill, a new section should be included which will deal with the accountability of the government agencies in case any breach of data takes place while monitoring or analysing personal or sensitive data.
III. The monitoring aspect of clause 34.6 of ISP agreement should come with the safety net that the order should be reviewed by a committee headed by a retired judge to have independent oversight. Furthermore, clause 2.2 (VIII) of ISP agreement needs to be amended to allow for bulk encryption of data which exceeds 40 bits.
IV. Establishment of surveillance oversight committee with the objective is to oversee the misuse of security solutions and whether transparency is maintained in the telecommunications.
V. Terms like national security, public order should be defined in the PDP bill to limit their application in surveillance mechanism. Furthermore, the PDP bill should widen the definition of 'sensitive data' to encompass 'password 'under it. Further, the exclusion of consent should always be preceded by giving a clear and specific reason for doing so.
VI. Individuals should have a redressal mechanism in the event any breach of data happens in the investigation process by government agencies.

[71]Hukam Chand v. Union of India, AIR 1976 SC 789.

VII. Section 80 of the IT Act should be amended to include the conditions under which police can violate the privacy and undertake search and seizer and also the inclusion of necessity of requiring a judicial warrant in such case.

VIII. All the surveillance/monitoring /interception of data order should have clear & specific purpose and should follow the reasonable infringement criteria as prescribed in the Puttaswamy judgement.

IX. It is recommended that the current Act and the PDP bill should prescribe a different retention period for different types of data so that the right to be forgotten could be efficiently be utilised. Furthermore, it should also prescribe the detailed procedure for the destruction of data so that no abuse of data principals can take place.

X. Any collection of call details record under any Act or rules should be preceded by permission from oversight committee detailing why such data are being collected and for what use.

## Conclusion

In analyzing the chequered history of this country, it can be safely assumed that surveillance mechanism is an age-old concept which is still relevant in present times. It is important to understand that the need for a surveillance system is more pertinent than ever since the global threats have expanded their warfare bandwidth to infiltrate national borders. In times like these, requirements of an efficient surveillance system to launch pre-emptive strike become important. But to ensure the safety of the country, the government does not have to compromise on the privacy of its citizen. When a monitoring system undertakes surveillance without any specific purpose and intends to collect data in the pretext of national security it turns the democratic State into a Policing State.

The problem is that when the government has such unlimited information on the lives of its citizen, it tends to control their way of living to ensure conformity to their ideology. The whole country becomes a huge panoptical prison where each individual undertakes self-policing to ensure conformity as per the ideals of the government. It creates a paradox of freedom where one is free to act as per the certain limited way or else, he calls for deterrence.

It is when the surveillance order is based on clear reasons, and in the process, if data is collected those can be regarded as valid surveillance. It also goes without saying that when the government invokes the national security clause, it is a burden on the government to prove that threat to national security was real, not illusionary. Even in the General Data Protection Right, it has been inscribed that the collection of information should be based on a legitimate only[72].

At the same time, it is important that judges play an important role in the process to ensure that the government does not turn the surveillance mechanism into State bullying to seek revenge

[72] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, (General Data Protection Regulation) 2016, O.J ( L 119/1), art 23 (2) (a).

against any of its whistle-blowers. It is often when the establishment of the government is threatened that they retaliate through surveillance system under the thin veil of national security. So the system which was supposed to be an instrument to fight terrorism becomes an instrument to crush any resistance movement. It is important to take reference from the United States' Foreign Intelligence Act, 1978. As per which, a warrant is essential to initiate any surveillance activity in a situation where a person would have a reasonable expectation of privacy.[73] This protection is further extended to US persons residing outside the United States and that warrant is a necessary condition before any surveillance takes place.[74]

Another aspect of the surveillance programme on which Indian laws are silent is the accountability of the government agencies. All the surveillance laws focused on the telecom operators' liability in case any breach takes place of an individual's data. But the laws are silent in case the breach is made by the agencies during interception or analyzing of those data. The problem arises when an individual suffers loss and does not have any forum to address the issue. Reference has to be taken from the GDPR provision where the data controller has the accountability to ensure that data of the individual are kept secured.[75] Furthermore, once the agencies are done with the data, there is no clause for the destruction of such data. To ensure the privacy of its citizen GPDR has included the right to forgotten cause to ensure all the digital footprints of usage of such data are erased so that carte blanche record of the individual can be created.[76] Though the recent PDP bill has added the right to be forgotten clause, it can be enforced only against private entities. The clause is silent regarding its application on government agencies.

Situations have started to change for the better with the landmark Puttaswamy judgment and the recent PDP bill which despite having certain problems if rectified could serve as a shield to unnecessary surveillance by the government. The focus must also be given to make necessary amendments to the existing laws and license agreements to ensure that the privacy of every individual are given the highest regard. Till such time comes it is important to remember- BIG BROTHER IS WATCHING YOU![77]

[73] Foreign Intelligence Surveillance Act of 1978 §101 (f) (1), 50 U.S.C. § 1801 (1978) (United States).
[74] Foreign Intelligence Surveillance Act of 1978 §704(2), 50 U.S.C. § 1801 (1978) (United States).
[75] GDPR, *supra* note 70, art 5(1).
[76] GDPR, *supra* note 70, art 17.
[77] Orwell, *supra* note 1, at 3.

# ASSESSING THE INDIAN DATA PROTECTION REGIME

*SeemonSnigdha Jena[1]& Sukanya Subhadarshana[2]*

## Abstract

*With the advancement in technology, the world is becoming a much smaller place to cohabit and there is no doubt that this is the era of 'disruptive innovations. With the divide between personal and public sphere gradually becoming indistinct, India by drafting the Personal Data Protection Bill, 2018 has not only given the 'right of privacy' the much needed recognition of a natural right but has paved the way for a transform shift towards safeguarding personal data which is an essential aspect of informational privacy, thus, keeping pace with the rapid digitalization the country has ever experienced.*

*This research paper discusses why it is indispensable to protect private information which has been identified as a facet of human autonomy and the role of the recently drafted data protection law in doing so, why it is better to classify privacy as a right (rights-based approach) as opposed to the harms-based approach adopted by our draftsmen by analyzing the Bill on the touchstone of the test of proportionality and propose certain changes in the Bill with respect to the existing provisions pertaining to data ownership, non-consensual processing of personal data and having an independent Data Protection Authority so as to ensure that a robust mechanism is put in place to combat the ever growing rate of cyber-crimes and the sanctity of privacy is always safeguarded.*

**Keywords:** Informational Privacy, Rights-based approach, Test of Proportionality, Data Ownership, Non-consensual processing of personal data, Data Protection Authority.

## Introduction: Recognition of Right to Privacy

The Indian Constitution[3] safeguards the right to life and personal liberty of every individual and over the years it's ambit has been expanded to include almost every facet of human life which was the outcome of exceptional judicial interpretations. It is ironical and at the same time invokes burning curiosity as to what made the Hon'ble Apex Court ignore the importance of the most sacrosanct right of man (i.e. Right to Privacy) for so many years despite the fact that there have been cases in the past in which this issue has been raised.[4]

[1] A 5th Year BA LLB student of KIIT School of Law (deemed to be University). The author can be reached at seemonsnigdhajena@gmail.com;.
[2] 5th Year, BA LLB student of KIIT School of Law (deemed to be University); . The author can be reached at subhadarshana@gmail.com.
[3] INDIAN CONST. art. 21.
[4]Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295.

The took hesitant steps to try and acknowledge the right to privacy in the case of *Govind v. State of Madhya Pradesh*[5], giving right to privacy the status of fundamental right but also stated that this right is not absolute and can be compromised in the greater interest of public good. From 1975 onwards there was a growing concern to afford this right the protection it deserves and many more cases followed in which the Court held that privacy was indeed the bedrock of "Right to life and personal Liberty" under the Constitution.[6]

The recognition of this right has gone through case-by-case development as we do see that the apex court has realized that privacy is a natural right and it's various aspects has been vastly discussed in *Puttaswamy*[7]judgment which shall forever be regarded as a historic moment in Indian legal regime as it paved the way for India to realize that it should have a robust law for protection of data in place to ensure protection for informational privacy[8], as the entire hue and cry around the AADHAR scheme was founded on the fear that the state is getting transformed into a surveillance state and concerns were raised that there can be no guarantee that a future dystopian government might not try and use the personal information of the people for the fulfillment of their needs and according to their whims and fancies. The Apex Court rejected the notion that as "right to privacy" is not expressly guaranteed by the Constitution it requires a constitutional amendment to confer this right on the people and held that right to privacy is the foundation of all other rights guaranteed in the Indian Constitution[9], thus placing the right to privacy at the highest pedestal.

## Importance of Ensuring Informational Privacy

Right to privacy has three aspects- (i) right to bodily autonomy (ii) informational privacy[10] and (iii) privacy of choice.[11] Informational privacy has become a matter of concern over the last few decades considering how small the world has become because of the revolutionary development in the arena of information technology with internet emerging to be a bonafide 'disruptive technology' as it has substantially disrupted the traditional modes of communication like the postal service and telephone system.

There is an old adage that 'Knowledge is Power' and there is no denial of the fact that being privy to the personal information of people does brings with it an immense control over the

[5]Govind v. State of Madhya Pradesh, AIR 1975 SC 1378.
[6] R Rajagopal v. State of Tamil Nadu,AIR 1995 SC 264.
[7] Justice KS Puttaswammy v. State of Kerela,W.P. (C) 494 OF 2012.
8 Informational Privacy in India: An Emerging Discourse, THE CENTRE FOR INTERNET AND SOCIETY, https://cis-india.org/internet-governance/news/informational-privacy-in-india-an-emerging-discourse (last visited Jul. 18, 09: 20 A.M)
[9] INDIAN CONST. Part III.
[10]*Supra* note 8.
[11]*Supra* note 7, at 202 (Justice DY Chandrachud).

personal lives of people as we seldom realize that the information all of us provide when we avail services online can be used against us as our personal information can act as a key to assess the private aspects of our lives which we choose not to disclose like a person's food habits, friend circle, sexual orientation and etc.

Two of the reasons why right to privacy is of prime importance is- firstly, every individual has the right to not disclose matters of his private life which he does not wants to disclose and secondly to reserve the right of deciding for oneself (i.e. making personal choices about one's life without any interference even by way of influence).[12]

It was unimaginable a few years earlier that information collected could also have huge impact on our professional lives as well as have political ramifications. Atul Kochhar, a London based Michelin starred chef was fired from his job when he made a controversial tweet labelling follower of Islam as terrorists.[13] A high school teacher was fired when she posted on the Facebook that she was not interested in continuing with her job as the residents of the district where the school is situated are arrogant.[14]

The whole world went into a frenzy when Facebook confessed that Cambridge Analytica (a third party application) had accessed the personal information of almost eighty-seven million Facebook users and used it for helping the current American President Donald Trump win the presidential elections and amidst all the hue and cry the founder of Facebook, Mark Zukerburg responded with a articulately written response[15] about Facebook's commitment to privacy protection of users which did raise concerns worldwide about lack of reasonable security practices being employed by internet intermediaries and considering the safe harbor regime prevalent in India[16] which affords complete immunity to passive intermediaries which only act as a platform for information exchange, one cannot help but feel that is unsurprising that intermediaries can escape liability. Twitter, in what can be called a great move, has declared that it would no longer carry political advertisements considering that social media platforms do have the ability to micro-target people and political affiliations of a person can be inferred from the personal information he has provided and this can have an adverse impact on the democracy.

---

[12] Christina P. Moniodis, *Moving from Nixon to NASA: Privacy's Second Strand- A Right to Informational Privacy,* 15 YALE JOURNAL OF LAW AND TECHNOLOGY139 (2012), https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1080&context=yjolt (last visited July 27, 2020).

[13] Michael Safi, *Michelin-starred chef Atul Kochhar sacked over anti-Islam tweet*, THE GUARDIAN, https://www.theguardian.com/business/2018/jun/13/dubai-hotel-sacks-chef-atul-kochhar-anti-islam-tweet, (last visited Jun. 13, 2018, 7:07 PM)

[14] Patricia Sanchez Abril et al., *Blurred Boundaries : Social Media Privacy and the Twenty-First Century Employee*, 49 AMERICAN BUSINESS LAW JOURNAL63 (2012), file:///C:/Users/nEW%20u/Downloads/SSRN-id2004438%20(2).pdf (last visited July 27, 2020).

[15] Julia Carrie Wong, *The Cambridge Analytical scandal changed the world- but it didn't change Facebook*, THE GUARDIAN (Mar. 18, 2019, 10:30 AM), https://www.theguardian.com/technology/2019/mar/17/the-cambridge-analytica-scandal-changed-the-world-but-it-didnt-change-facebook (last visited July 27, 2020).

[16] INFORMATION TECHNOLOGY (AMENDMENT) ACT, §79 (2009).

Information posted/ provided online has the ability to be perpetually accessed and considering the vast storage capacity of internet[17] (even if the information is deleted still digital footprints remains) and considering the fact that countries across the world have started the process of profiling of personal data of people under the garb of protecting public interest and because of increase in threats to world peace (cyber terrorism), the *Puttaswammy*Judgment is nothing short of commendable as it recognizes the fact that every individual has the absolute right to determine how his/her personal information (which he provides with utmost trust) shall be used as well as have the final say in the matter as to what extent such information can be used for the purpose for which such information was furnished in the first place.[18]

**Doctrine of Proportionality**

No constitutional right is absolute and there are two justifications for this- individual right can be infringed in larger public interest and to keep up with the principle of rule of law. This dilemma depicts the fundamental tension persisting between right and restrictions imposed on such right to achieve a bigger aim. Democratic States have the primary duty to ensure that an individual is afforded with the utmost right to be master of his own destiny and at the same time they have to take steps to ensure that public security and popular interest of the general masses is safeguarded. The right to privacy is no exception to this conflict as it imposes both affirmative and negative obligations on the State (State has to ensure that it puts in place effective mechanisms as to guarantee that the privacy of its citizens is protected and at the same time restricts the State from intruding into the private lives of people).

This doctrine proposes that if any fundamental right is infringed then it should be for a legitimate state purpose and the action infringing the right should be proportionate to the necessity to interfere with the right and most importantly such action should be sanctioned by law.[19] This doctrine has been incorporated in Article 19 of the Indian Constitution in the form of 'Reasonable Restrictions'. The reasonable restrictions laid down can only be imposed by or under authority of law and not through mere executive directions which lacks statutory binding[20] and must be only related to the purposes so enumerated and legislature cannot restrict the freedoms guaranteed by the constitution.[21]

The Apex Court has proposed the 'Doctrine of Proportionality'[22] in order to make sure that even if the privacy rights of a person is violated it should be in accordance to a procedure established

[17] Michael L Rustad&SannaKulevska, *Reconceptualizing the Right to be Forgotten to Enable Transatlantic Data Flow*, 28 HAVARD JOURNAL OF LAW AND TECHNOLOGY 350, https://jolt.law.harvard.edu/assets/articlePDFs/v28/28HarvJLTech349.pdf (last visited July 27, 2020).
[18]*OECD Guidelines on Protection of privacy and Transborder Flows of Personal Data*, https://www.oecd.org/internet/ieconomy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldata.htm (last visited July 27, 2020).
[19] Modern Dental College &Ors. v. State of MP &Ors., (2016) 7 SCC 353.
[20]Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295.
[21] INDIAN CONST. art 19.
[22]*Supra* note 7, at 255.

by law. The action undertaken to infringe a person's right privacy must be backed by law, must be for a legitimate goal and the extent of interference must be consistent with the need to interfere.[23]

## Need for a Stringent Data Protection Law

The Information Technology Act, 2000 was the principal law which dealt with cybercrimes and provided legal validity to electronic transactions but with iinternetrevolutionizing our lives in ways unimaginable informational privacy has never been so critical. Section 43A of the IT Act, 2000 provides for the punishment for body corporates who fail to or neglect in implementing reasonable security practices and procedures for protecting the sensitive personal data of the general public. Under section 69 of the IT Act, any person soauthorisezed by the Government or any of its officer, if the Government us satisfied that it is necessary in the interest of sovereignty or integrity of India or defence of India or security of the State etc. it may direct any of it's agency to intercept, monitor or decrypt any information so generated, transmitted, received or stored in any computer resource.section 72A of the IT Act, 2000 makes disclosure of information, knowingly and intentionally, without the consent of the person concerned and in breach of the lawful contract is made punishable. The *Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011* only deals with the protection of "Sensitive personal data of a person", which consists of information relating to- Passwords;Financial information such as details pertaining to bank account or credit card or debit card; Biometric Information etc. One of the most criticized aspects of the Rules is that it does not affords protection to electronic communication records of individual (Emails, chat logs and internet search histories are susceptible to misuse).

Even though the IT Act, 2000 provided for certain safeguards with respect to protection of data but the need to have a separate Personal Data Protection Law was acute as compared to the IT Act, 2000 the clear focus of the Personal Data protection Bill, 2019 is to empower the citizens by giving them considerably more control over their data, thus, changing the way we handle our personal data.[24] One of the biggest improvements of the PDP Bill, 2019 over IT Act is data has been classified into Personal, Sensitive and Critical Personal data[25] (IT Act only dealt with protection of Sensitive Personal Data). The ambit of Sensitive Personal Data under the Personal Data Protection Bill, 2019 is not exhaustive (as the Central Government can in consultation with the Data Protection Authority include additional categories other than those already specified as Sensitive Personal Data)[26], whereas in IT Act the term 'sensitive personal data' has not been

[23] *Supra* note 7.
[24] *Personal Data Protection Bill, 2019: What Indian citizens can expect*, https://www.pwc.in/assets/pdfs/consulting/cyber-security/data-privacy/personal-data-protection-bill-2019-what-indian-citizens-can-expect.pdf (last visited November 11, 2020).
[25] THE PERSONAL DATA PROTECTION BILL, §33 (2019).
[26] *Id.* at §3(36).

clearly defined leaving it completely upto the Central Government to determine which data can be categorized as sensitive in consultation with professional bodies.[27]Paul Ohm has proposed a four- factor test to discern as to whether information is sensitive or not- (a) one of the most essential factor is the connection between the information and potential harm it poses to the data subject (b) if the legislature categorizes information as having sufficiently high probability of harm (c) whether the information laws recognize a class of people who can suffer harm because of because of breach of duty of confidentiality (d) Adequacy of information laws which would cater to the interests of all sections of society and not only safeguard the majoritarian interests.[28] This test has formed the basis for categorization of the personal data as 'sensitive' in the Personal Data Protection Bill. The PDP Bill, 2019 makes it mandatory for the Data protection Authority (DPA) to mention the "reasonable purposes' for which it undertakes to process the personal data of a person but does not provides for separate and independent grounds for processing of sensitive personal data (the grounds for processing of non-sensitive and sensitive personal data) are the same.

In this age of technology danger to informational privacy is not limited to an Orwellian state but also fellow human beings who can access information for their own selfish interests which mandates the enacting of a data protection legislation. The PDP Bill is modelled more or less after the European General Data Protection Regulation[29] as the European notion about protection of data regime is also centred around the necessity to uphold human dignity. The existing Indian legal framework does recognize the liability of body corporate for failure to protect sensitive personal data of people.[30]

The Supreme Court opined that formulation of a data protection regime should be undertaken by the State which has to achieve this daunting task by balancing the opposing notions of protecting privacy of individuals and legitimate concerns of the state is valued.[31] In pursuance of the Supreme Court's directions a committee was established by the Union Government chaired by Shri Justice BN Srikrishna. The bill defines 'data principal' as any natural person to whom the personal data is related to[32] and 'data fiduciary' as any person (including juristic persons and the State) who are involved in processing of the personal data.[33]

[27]*Id.* at §15.
[28] Paul Ohm, "Sensitive Information", 88 *Southern California Law Review* 1125 (2015), *available at:*https://southerncalifornialawreview.com/wp-content/uploads/2018/01/88_1125.pdf (last visited November 11, 2020).
[29] Chris Lawley, *India's new data protection law is modelled after EU's GDP*, DILIGENT(Apr. 16, 2019),https://diligent.com/au/indias-new-data-protection-law-modelled-after-eus-gdpr/ accessed (last visited July 27, 2020).
[30]*Supra* note 16, at §43A.
[31]*Supra* note 7, at252.
[32]*Supra* note 25, at §3(14).
[33]*Id.* at§3(13).

It is inspiring and comforting to finally have a data protection law which seeks to balance the boom of digitalization and right of privacy of people but one cannot fail to ignore the obvious loopholes in the proposed bill which if passed would lead to serious ramifications for everyone as the bill negates the very premise of right to privacy which has been guaranteed to limit government interference in the inner recesses of man's life. Since the day the Bill has been released there has been extensive debate and consultation, with the Joint Parliamentary Committee on the Bill even inviting comments from various stakeholders.[34]

The Bill has been severely criticized as it fails to comply with the doctrine of proportionality proposed by Supreme Court and the safeguards proposed by Justice BN Srikrishna Committee. The most condemned provision incorporated in the Bill is Section 35 which provides a blanket protection to all or any agency of the government to be exempted from liability under this Act which is the biggest mockery of the *Puttaswamy*judgment and completely eliminates the accountability of the Government and even Justice BN Srikrishna has vehemently opposed this move of the government and has expressed his concerns about India gradually transforming into an 'orwellian state'.

Another disturbing aspect of the bill is that it advocates a harm-based approach rather than a rights based approach in catering to the grievances of the data principals. The definition of 'harm' includes many instances which are open to multiple interpretations like loss of reputation and any discriminatory treatment.[35] The harm based grievance redressal mechanism is quite subjective and abstract in nature considering the fact that harm caused is not always quantifiable and the burden of proof on the data principal to show the kind of harm he/she has gone through because of the breach of data can have adverse impact on the frequency and number of data breaches being reported and is too much to ask of the data principal. The definition lacks clarity and gives wide discretionary powers to the data fiduciary to decide the matter upon intimation of the breach of privacy. The data fiduciaries are afforded unbridled powers as they are empowered to inform the Data Protection Authority[36] about a breach of personal data which is likely to cause harm to the data principal, thus not affording any opportunity to the data principal to specify the kind of harm he or she is anticipating.

## Comparative Analysis

A democratic government's most unique feature is that it affords utmost freedom to people in every aspect of their lives and is not controlling and authoritative as dictatorship but with the separation between the real and the virtual world growing blurry who is to ensure that the welfare state which acts as a guardian of the society safeguarding the interests of the people

[34]MeghaMandavia, *Parliamentary panel invites comments on personal protection bill*, THE ECONOMIC TIMES, https://economictimes.indiatimes.com/news/politics-and-nation/parliamentary-panel-invites-comments-on-personal-data-protection-bill/articleshow/73589688.cms?from=mdr (last updated Jan. 24, 2020).
[35]*Supra* note 25, at §3(20).
[36]*Id*. at §25.

would not try to regulate the human behaviour by accessing personal information of people and compelling online gatekeepers (intermediaries) to assist it in ensuring so.

The fact that the Bill is yet to receive President's assent and the bill is still being discussed at length by the Joint Parliamentary Committee goes to show that the law on data protection lacks certainty and there is an urgent need for a careful analysis of the impact of this law on the Indian economy, the problems faced by the Data Principals and the significance of this law in tackling the issues.[37]

The Personal Data Protection Bill, 2019 is largely inspired by the European Union General Data Protection Regulation (EU GDPR) but lacks it's seamlessness and coherence. Provides for specified grounds for which personal data can be retained for longer time period[38] whereas the PDP Bill provides for personal data not to be retained beyond the period necessary to satisfy the purpose for which it was processed.[39] One of the debated aspects of the PDP Bill, 2019 is 'Data Localization' so much so that the Joint Parliamentary Committee has in recent times opined tat the biggest detriment to the passing of the data protection law is the issue of data localization as a huge proportion of the data of data principals is being stored outside the territorial limits of India.[40] The PDP Bill, 2019[41] enables transfer of data outside but it is only for the sensitive personal data that it mandates having a copy of the data kept in the country, which is a clear transgression of the earlier version of the draft bill of 2018[42] which required copies to be kept in the country both for personal and sensitive personal data. Data Localization is one of the areas wherein the PDP Bill, 2019 and EU GDPR diverge from each other as EU GDPR does not provides for data localization as such, only specifying that transfer of personal data shall be allowed to a third country only if such country has 'adequate level of protection'.[43] This is an interesting and more effective approach as organizations operating in EU and elsewhere have to ensure compliance with EU GDPR and their own country's specific data protection law. Without having to make a stringent data localization law, European Union has managed to ensure that the data protection laws of every country is amenable to the GDPR.

With respect to processing of sensitive personal data of children the Personal Data Protection Bill is much more stringent as compared to EU GDPR as the Personal Data Protection Bill sets the age threshold for being considered a child higher (In India a child means a person who has not completed 18 years of age)[44] than the GDPR permits. The Personal Data protection Bill's

[37] Anirudh Burman, *Will a GDPR-Style Data Protection Law Work for India?*, CARNEGIE INDIA, https://carnegieendowment.org/files/4-17-19_Burman_India_GDPR.pdf (last visited November 11, 2020).
[38] EUROPEAN UNION GENERAL DATA PROTECTION REGULATION, Art. 5(1)(e) (2018).
[39] *Supra* note 25, §9(1).
[40] Shubham Singh, *PDP Bill's Ambit Likely To Include Data Localisation, Digitisation*, Inc 42, https://inc42.com/buzz/pdp-bills-ambit-likely-to-include-data-localisation-digitisation/ (last visited November 11, 2020).
[41] *Supra* note 25, §36.
[42] THE PERSONAL DATA PROTECTION BILL, §40 (2018).
[43] *Supra* note 38, Art. 45.
[44] *Id.*, s.2(8).

requirement to verify a child's age before any processing imposes a significant new requirement[45]not present in the EU GDPR.[46] Unlike the EU GDPR, the Personal data protection Bill requires obtaining the parental consent which applies to the processing of all children's data, not just where consent is the legal basis. It is a widely accepted fact that the data of children has to subjected to greater protection for the simple fact that children are not fully aware of the consequences their actions would entail. Section 23 (2) of the Personal Data Protection Bill, 2019 incorporates that age verification and parental consent mechanisms have to be incorporated by the Data Fiduciaries but this provision has invited severe criticism from all quarters on the simple premise that children constitute a vast majority of internet users and one of the vehement criticisms against the strict parental consent regime is that this would result in children resorting to lying about their age.[47]

Canada's Personal Information Protection and Electronic Documents Act, 2000 (PIPEDA) was considered to be ahead of its time when it was enacted but upon comparison with the EU-GDPR it has narrower scope, as it has no extraterritorial application so to speak unless a substantial connection is established between PIPEDA and the processing activities carried outside of Canada.[48] PIPEDA does not provides for right to be forgotten whereas EU-GDPR provides for the data principal to request deletion of his personal data being processed by the controller. PDP Bill, 2019 provides for both right of erasure and right to be forgotten but this aspect is criticized as contrary to EU-GDPR adjudicating officers rather than the controller is given the responsibility for determining the scope of the right to be forgotten.[49]

One of the most talked about components of the Brazilian Civil Rights Framework for the Internet (also popularly referred to as the Brazilian Internet Act, 2014) is 'net neutrality' which calls for internet users to be able to access all the content on the internet without any discrimination.[50] Incorporation of net neutrality has been in talks since quite a few years in India with the Telecom Regulatory Authority establishing a committee for examining this issue in detail.[51] This issue is further fuelled by the fact that the government has suggested some controversial amendments to be brought about to the IT Act, 2000 which includes requiring intermediaries to use proactive technology to filter out unlawful content and breaking end-to-end

[45]*Id.*, s.16(2).
[46]*GDPR Consent*,INTERSOFT CONSULTING,https://gdpr-info.eu/issues/consent/ (last visited November 11, 2020).
[47] Milda Macenaite& Eleni Kosta, "Consent for processing children's personal data in EU: following in US footsteps?", 26 *Information and Communications Technology Law* 146 (2017), https://www.tandfonline.com/doi/full/10.1080/13600834.2017.1321096 (last visited November 11, 2020).
[48]PIPEDA vs GDPR: The Key Differences, ENDPOINT PROTECTOR, https://www.endpointprotector.com/blog/pipeda-vs-gdpr-the-key-differences/ (last visited November 11, 2020).
[49]*Supra* note 25, §20(2).
[50]*Brazilian Internet Act*, MOTTA FERNANDES ADVOGADOS, http://mottafernandes.com.br/en/publicacoes/brazilian-internet-act/ (last visited November 11, 2020).
[51]*Net Neutrality Debate in India*, PRS INDIA, https://www.prsindia.org/theprsblog/net-neutrality-debate-india (last visited November 11, 2020).

encryption so that the origin of messages[52] can be easily traced which would be a gross violation of the right to privacy considering that it has been held to be sacrosanct as there is a growing fear worldwide that information a person willingly shares online can be used to assess one's behavioral patterns, track one's daily activities and basically be mutualized by a surveillance state.

## Recommendations Proposed

### Data Ownership

Data ownership has been a major concern as it has been contended by many stakeholders (including the Telecom Regularity Authority of India) that ownership of the personal data should be vested on the individual to whom such data in question is related to and the entities involved in processing, storing and retention of data are mere custodians and have no rights over the data. The Bill should clearly specify that the data principal is the owner of the data as ownership entails rights over the data. Ownership and rights have to be understood in conjugation as ownership can be understood as a right which is available against everyone else and denotes the relationship existing between a person and the right vested in him.

### Non-consensual processing of Personal Data

The exception under Section 12(a) allowing processing of personal data without the consent of the data principal is quite broad and goes against the test of proportionality. The need to specify the grounds for non-consensual processing of data arises as it is not always possible to obtain consent in all situations. India should adopt the 'legitimate interest' concept incorporated in European Union General Data Protection Regulation (EU GDPR).

The Supreme Court while commenting on non-consensual processing of personal data has specified the legitimate state aims for which it can be undertaken- crime investigation and prevention, revenue protection, allocation of resources and national security.[53] The term 'service or benefit' remains under Section 12(a)(i) remains undefined. As Section 12 authorizes the Aadhar scheme it is necessary to afford the definition assigned to 'service'[54] and 'benefit'[55] in

[52] Seema Chisti, *Govt. Moves to access and trace all 'unlawful' content online*, INDIAN EXPRESS, Dec 24, 2018 (10:26 AM), https://indianexpress.com/article/india/it-act-amendments-data-privacy-freedom-of-speech-fb-twitter-5506572/ (last visited November 11, 2020).
[53] *Supra* note 7.
[54] THE AADHAR (TARGETED DELIVERY OF FINANCIAL AND OTHER SUBSIDIES, BENEFITS AND SERVICES) ACT, § 2(w) (2016).
[55] *Id*.at §2(f).

the Aadhar Act to these terms in Section 12. There is no safeguards provided in Section 12 if there is misuse of this discretionary power conferred on State.

'State' shall have the same meaning which is afforded to it under Article 12 of Indian Constitution.[56] The meaning afforded to 'other authorities'[57] in Article 12 would act as a check and limit the kind of bodies who can process personal data without the consent of the data principal. These entities also carry out certain private functions but it is necessary to ensure that these bodies are allowed to exercise this wide power only in performance of a 'public function'. Even though private functions are excluded from the ambit still to allow non-consensual processing of personal data for all public functions is far too unreasonable. The Justice BN Srikrishna Committee report suggested that the ambiguities in Section 12 be removed and more clarity is provided as to the entities who are engaged in performance of public functions (as 'State' under Article 12 has an expansive ambit because of the years of jurisprudence) and this provision of non-consensual processing of personal data be modified in line with the EU GDPR.

## Establishing an independent Data Protection Authority of India (DPAI)

Data Protection Authority of India(DPAI) should be a high-powered independent authority responsible for data handling which requires that this body remains immune from external influence. It has been recommended that the committee which shall select the Chairman and the members of the DPA should consist of Chief Justice of India or his nominee who shall also be a Supreme Court Judge, Cabinet Secretary (Union Government) and an expert who has experience in matters of Information Technology, data protection and handling which seems apt as it is the perfect balance between executive and expert opinion. The Bill in its current form is clearly biased as the selection committee is an all-out executive forum.[58] In addition to this there was also a recommendation that the DPA should have a separate quasi-judicial adjudication wing (keep the administrative and legal wings distinct) consisting of adjudication officers having legal and technical expertise and experience which has not been incorporated in the Bill.[59]

For what it's worth upon scrutinizing Section 86 of the Bill we observe that the Central Government is empowered to give directions to the DPAI in the interest of security of India and maintenance of public order etc. which is alarming as this power can be misused by the

[56] *Supra* note 27, at §3(39).
[57] Ajay Hassia v. Khalid Mujib, AIR 1981 SC 487.
[58] *Supra* note 27, at §42(2).
[59] Malavika Raghavan et al., *Effective Enforcement of a Data Protection Regime (A Model for the Risk-based Supervision using Responsive Regulatory Tools)* (2019), DVARA RESEARCH WORKING PAPER SERIES WP-2018-01, https://www.dvara.com/research/wp-content/uploads/2019/12/Effective-Enforcement-of-a-Data-Protection-Regime.pdf (last visited July 28, 2020).

executive. In the case of *Commission v. Hungary*[60], it was held that data protection authority should be immunized from external instructions with respect to performance of its functions for ensuring transparency and independence of this authority. In yet another case it was held that the independence of Data protection authority is of prime importance and cannot be compromised in any way.[61]

The Bill also includes the provision for appointment of a data protection officer.[62] It is important that independence is also afforded to data protection officers as well as they play an essential role in data processing considering that the DPAI cannot cater to all the grievance of such a huge user-base in India. The European Union General Data Protection Regulation affords an independent position to the data protection officers[63] which should be incorporated in the 2019 Bill. It is also recommended that there should be decentralization of powers as it is not feasible to entrust a single authority with the utmost power with respect to monitoring and processing of data of the entire nation. There should be data protection authorities set up in every State.

## Conclusion

History is replete with examples where man's liberty has been fettered in numerous ways- be it slavery, colonialism and now it's the threat of a surveillance state. It has never been so apparent that man's every choice (be it his food habits, the kind of work he chooses to do and even a woman's choice to bear or not to bear a child) is a part of the larger picture of privacy. It's intriguing that we had never thought of everything we do as falling in the domain of privacy until now when we are confronted with the problem of having our personal data used to target us. We are not to be blamed for living in oblivion for so long as who could have fathomed a decade earlier that internet would soon emerge to be the most powerful weapon which would dictate our everyday life.

The Bill is an epitome of the fact that the success of the society shall always depend on the freedom afforded to people to lead their lives on their own terms. Freedom can be curbed for the greater good but in today's world where everything has become just a click away one has to be careful in drawing informational boundaries because there is nothing more despicable than intrusion in a person's private life without his permission for which it inevitable to bring to effectively restrict the State from turning into a draconian State. In the words of Justice Hansraj Khanna the guarantee of life and personal liberty is not a gift of the Constitution and the State cannot deprive a person of his life and personal liberty even in the absence of a Constitution.

[60] Commission v. Hungary, C-286/12.
[61] Maximilian Schrems v. Data Protection Commissioner, C-362/14.
[62] *Supra* note 25, at §30.
[63] *Supra* note 38, at art. 38.

# DIGITAL LENDING AND FAIR USE: UNDERMINING THE SCOPE OF EXHAUSTION DURING COVID-19

*-Prabhdeep Kaur Malhotra*[1]

## Abstract

*An unprecedented change brought by COVID-19 is changing the face of entire planet. The explosive growth of the pandemic is much more than it was expected. The epidemiologic features of the pandemic relevantly vary among countries. In response to this, various unprecedented measures have been taken across nations for the containment of this disease. The Government of India has implemented a strict quarantine policy against the Pandemic. The entire structure of schooling and learning was the first to be affected by lockdown. In this regard, the response of education sector is overwhelming as many countries have already started deploying different modes of online learning. Academicians are encouraged to continue the process of learning using online methods of communication or virtual live sessions which is presumed to have the potential to accelerate the adoption of technology being a logical solution to resolve the problem. It is quite evident that online method of teaching is leading to an unprecedented transformation from traditional i.e. teacher-centric to the modern i.e. student-centric education. This has resulted in Copyright issues in India as well as other countries posing a challenge to the "fair use" provisions under their respective Copyright laws. While discussing the exceptions under Fair Dealing for educational purposes, the relationship between the "physical" work and "digital" work is conveniently forgotten. This has led to difficulty in interpreting the doctrine of exhaustion when digital lending happens for educational purposes, as the present Copyright law has not designed the exhaustion principles to deal with works of digital nature. The Objective of this Paper is to analyse the fair dealing provisions for educational purposes under the Indian Copyright Law. It aims to evaluate the applicability of Section 52 to the online modes of teaching in the wake of COVID-19 scenario and scope of digital exhaustion under the existing copyright regime. It articulates the advantages and disadvantages of digital exhaustion under the modern Copyright law. The Paper concludes with suggestions and recommendations for better policy considerations for future to ensure greater protection of Copyright law in India.*

**KEYWORDS:** Fair Use, Copyright, Fair Dealing, COVID-19, Exhaustion.

## I.Introduction

The explosive growth of COVID-19 is rampantly extending its reach throughout the globe and is erupting in new hotspots worldwide. The disease has spread throughout the world leading the World Health Organization (WHO) to consider it a pandemic. Stakeholders from various sectors have been working hard to ensure the proper adherence to Government guidelines for the containment of this disease. The response of education sector is overwhelming in this regard as many countries have already started deploying online different modes of learning. Online education has the potential to accelerate the adoption of technology. The United Nations Educational, Scientific and Cultural Organization (UNESCO) has also figured out certain

[1] PhD Scholar, University School of Law and Legal Studies (GGSIPU), Dwarka. He can be reached at Prabhdeep.guddu@gmail.com.

distance learning solutions to help parents, teachers, schools and school administrators to ensure student learning and provide social care and interaction during the periods of school closure.

In India, the Right to education is a cherished Constitutional value. The history of introducing the education as a fundamental right can be traced back to the recommendation made by Indian Education Commission (Kothari Commission) which reviewed the status of education in India. Thereafter, the National Policy on Education was formed,[2] whereas first official recommendation for introducing education as a fundamental right was made by Acharya Ramamurti Committee in 1990.[3]

With the decision of Supreme Court of India in Mohini Jain v. State of Karnataka,[4] a great legal breakthrough was achieved. It was observed that "Right to life is the compendious expression for all those rights which the Courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from the right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavor to provide educational facilities at all levels to its citizens."

Education, employment and economic empowerment are the programmes of the State by virtue of articles 15(3), 46 and 39 of the constitution of India.[5] The Supreme Court of India has reiterated that Right to Education is a part of Article 21[6] of the Constitution which deals with Right to Life and Personal Liberty. It is true that the right to education flows directly from right to life and the same along with the dignity of an individual cannot be assured unless it is supplemented by the right to education.[7] However, in Unni Krishnan, J.P. v. State of Andhra

[2]NiranjanaradhyaArunaKashyappage, The Fundamentals of the Fundamental Right to Education in India, 4 (2006), http://www.pecuc.org/Upload/CenterOfRight/46.pdf, National Policy on Education, 1968 was the first official document evidencing the Indian Government's commitment towards school education. It re-affirmed the goal of universalization of school education and aimed in achieving common school system but was criticised because of its narrow scope. But Free and Compulsory Education remained the Directive Principle of State Policy.

[3] Id.

[4] 1992 AIR 1858; In this case, constitutionality of capitation fee was challenged. This fee was required to be paid by people who wanted to enter private medical school and were not allotted 'government seats. These seats were reserved by the Government of India for the members of communities to overcome the historic discrimination in furtherance of the Constitution of India. The fees was Rs. 2,000 for 'government seats, Rs. 25,000 for 'non-government seats within the state' and Rs. 60,000 for 'non-government seats outside the state'. The main issues involved were; Whether there is a right to education under the Constitution of India? Whether charging capitation fees violates the right to equality under Article 14 of the Constitution of India.

[5]RameshbhaiDabhaiNaika v. State Of Gujarat, decided on 18 January, 2012; MurlidharDayandeoKesekar v. Vishwanath Pandu Barde, 1995 supp. (2) SCC 549); R. Chandevarappa v. State of Karnataka (1995) 6 SCC 309

[6] Indian Const. art. 21 - No person shall be deprived of his life or personal liberty except according to procedure established by law.

[7]Maria Grace Rural Middle School v. The Government of Tamil Nadu, decided on 4 November, 2006; M. Veera Siva Nagi Reddy v. Osmania University, 1997 (4) ALT 243, the right to education is implicit in the right to life and personal liberty guaranteed under Article 21; Maharshi Mahesh Jogi v. State of M.P., decided on 3 July, 2013, a provision which puts embargo in one's right to seek for education, will be violative of Article 14 and 21 of the Constitution of India and will be violative of Article 14 and 21 of the Constitution of India; Society for Unaided

Pradesh,[8] it was held that "the right to education which is implicit in the right to life and personal liberty guaranteed by Article 21 must be construed in the fight of the directive principles in Part IV of the Constitution. So far as the right to education is concerned, there are several articles in Part IV which expressly speak of it."

Article 21A[9] of the Constitution that deals with Right to Free and Compulsory Education was inserted by way of 86th Amendment in the year 2002. The enactment of this provision mandated the robust involvement of the Supreme Court than was the case with Mohini Jain or Unni Krishnan.[10] Article 21A is referred as the positive right to have an elementary education irrespective of caste, creed, race, sex or religion.[11] Right of Children to Free and Compulsory Education Act also known as Right to Education Act was introduced in 2009 which deals with the Right of children to free and compulsory education till the completion of elementary education in a neighborhood school.[12] This Act is a milestone as it intends to provide full time elementary education to every child in a formal school.[13] As per the constitutional mandate provided under articles 41,[14] 45[15] and 46,[16] as well as various judgments of the Apex Court, the Government of India has taken several steps to eradicate illiteracy, improvement the quality of education and make children back to school who left the schools for one or the other reasons.

Part I of the Paper gives introductory background on the impact of pandemic across the world. It briefs about the Constitutional guarantee of Right to Education in India and the role of judiciary in the enforcement of this Right. It finds mention under Fundamental Rights as well as Directive Principles of State Policy.

Part II of the Paper highlights present provisions under the Indian Copyright Act, 1957 related to Fair Dealing for Educational Purposes. These include research or private study, publication of short passage for instructional use, reproduction of any work by teacher and pupil during course

---

Private Schools of Rajasthan v. Union of India (2012) 6 SCC 1; Bhartiya SevaSamaj Trust v. Yogeshbhai Ambalal Patel (2012) 9 SCC; State of T.N. v. K. Shyam Sunder (2011) 8 SCC 737; Satimbla Sharma v. St. Paul's Sr. Sec. School (2011) 13 SCC 760; Ashoka Kumar Thakur v. Union of India (2008) 6 SCC 1.

[8] 1993 AIR 2178; the Court modified the decision given in Mohini Jain's case and decided that fundamental right to education extends only to students up to the age of 14 years; St. Stephen's College v. University of Delhi, [1992] 1 SCC 558; In Re Kerala Education Bill, (1970) 2 SCC 417; Bandhua Mukti Morcha v. Union of India, 1984 AIR 802.

[9] Indian Const. amend. LXXXVI, art. 21A.

[10] Rishad Chowdhury, The Road Less Travelled: Article 21A and the Fundamental Right to Primary Education in India, 24 INDIAN J. CONST. L. 34 (2010).

[11] Vishal Sharma, Article 21A versus Article 30(1): Right to Education versus Minority Rights, 38 ILI LAW REVIEW 40 (2016); every child has a right which cannot be waived off because doctrine of waiver does not apply in case of fundamental rights.

[12] The Right to Education Act, (June 15, 2020, 10:10 AM),http://in.one.un.org/page/the-right-to-education-act/.

[13] Sanjay Sindhu, Fundamental Right to Education in India: An Overview, 92 GJISS94 (2014).

[14] Indian Const. art. 41 - Right to work, to education and to public assistance in certain cases

[15] Indian Const. art. 45 - Provision for free and compulsory education for children.

[16] Indian Const. art. 46 - Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.

of instruction and Performance of work in the course of activities of an educational institution. It also analysis the landmark decision of Delhi High Court in Rameshwari Photocopy Case.

Part III of the Paper deals with the effect of technological developments in the light of Fair Dealing provisions. It highlights the role of Digital Environment in imparting education following a Paradigm shift from Classroom teaching to Online Teaching post COVID-19 outbreak. It reflects the revolution of communication process enabling the transmission of information rapidly. Digitization has resulted in the modern ways of distributing works in today's scenario. The rapid growth of digitization and its effect on education has also been discussed in this Part. As the Pandemic has already given a crucial time to the education sector in India, this Part gives a detailed picture of the education system in India nowadays, beginning from the inception of Constitutional regime recognizing the Right to education and international provisions governing this Right.

Part IV of the Paper gives an insight of doctrine of exhaustion in India with respect to digital media files. It gives a brief highlight of the kinds of exhaustion prevailing in the global market. The provisions under the Indian Copyright Act, 1957 dealing with exhaustion have been discussed under this Part along with judicial endeavor in this regard. It also discusses the provisions under US and European Copyright laws dealing with the same issue. This Part gives an analysis of the possible application of digital exhaustion keeping in mind the access to digital files during COVID-19. Part V of the Paper concludes with highlighting the relevance of education in COVID scenario establishing the linkage between copyright and learning. It mentions the need for proper dissemination of material among teachers and students which is important nowadays but with possible permissions and exemptions.

## II.Fair Dealing for Educational Purposes: The Provisions

> *"Education is the power to think clearly, the power to act well in the world's work, and the power to appreciate life."*
>
> \- Brigham Young

Education is the key to development. It is the basis for empowerment and expansion of every nation. It has become a buzz word for the evolution and progress of every nation. According to Nelson Mandela, "Education is the most powerful weapon that can be used to change the world." The success story of every person is directly or indirectly related to education. Thus, it can be said that education is the supreme manifestation of human as well as nation's growth and progress. The concept of Education is not something new and has been part of the upliftment of society from centuries. It has deep impact on the advancement of society.

*Research or Private Study*

Under the Indian Copyright Act, 1957 fair dealing with any work for the purpose of private or personal use including research is permissible. But no such act is permissible in case of computer programmes.[17] Prior to 2012 Amendment, fair dealing was work specific for this purpose and was limited to literary, dramatic, musical or artistic work not being a computer programme.[18] Under UK Copyright Law, fair dealing for the purpose of private study or research does not infringe copyright in the work and such defense applies in case of literary, dramatic, musical and artistic works and typographical formats of published works.[19] The rationale for this defense is to further the generation of new works and also that research and private study does not normally interfere with incentives and rewards to creators and owners of copyrighted works. Thus, this defense helps in maximizing the production of works.[20] Research must be for non-commercial purposes and private study does not include any study which is directly or indirectly for commercial purpose.[21] In Authors Guild, Inc. v. Google Inc.,[22] it was held that it was fair use to digitally copy the entire books from library collections to make them available for library collections without permission or payment for the public to search electronically using a search engine.[23]

If a publisher publishes a book for commercial exploitation and in doing so infringes a Copyright, the defense under section 52(1)(a)(i) would not be available to such a publisher

[17] The Copyright Act s. 52 (2012) - Certain acts not to be infringement of copyright - (1) The following acts shall not constitute an infringement of copyright, namely: (a) a fair dealing with any work not being a computer programme for the purposes of (i) private or personal use, including research.

[18] The Copyright Act s. 52 (1957) - Certain acts not to be infringement of copyright - (1) The following acts shall not constitute an infringement of copyright, namely: (a) a fair dealing with a literary, dramatic, musical or artistic work not being a computer programme for the purposes of (i) Private use including research.

[19] The Copyright, Designs and Patents Act s. 29 (1988).

[20] Lionel Bently and Brad Sherman, Intellectual Property Law199 (1st ed. 2003).

[21] Tanya Aplin and Jennifer Davis, Intellectual Property Law: Text, Cases and Materials147 (1st ed. 2009); See also Controller HMSO and Ordinance Survey v. Green Amps, [2017] EWHC 2755 (Ch), research for commercial purposes cannot be described as fair dealing; Code Revision Comm. v. Public. Resource.Org, Inc., No. 1:15-cv-02594-RWS (N.D. Ga. Mar. 23, 2017), while considering four factors, it was held that it is not fair use to make available verbatim copy of state annotations free online without obtaining authorization from the copyright owner; Am. Soc'y for Testing Materials v. Public.Resource.Org, Inc., No. 13-CV-01215-TSC (D. D.C. Feb. 2, 2017), making available free online copies of privately developed standards without obtaining authorization from the copyright owner does not amount to fair use.

[22] No. 13-4829-cv (2d Cir. Oct. 16, 2015).

[23] Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014), in this case HDL (defendant) contained digital copies of more than ten million works, "published over many centuries, written in a multitude of languages covering almost every subject imaginable." HathiTrust used the digital copies (1) to create a database for full-text searching by the general public, (2) to permit library patrons with certified print disabilities to have access to full texts of works, and (3) to allow libraries to replace their original copies that were lost, destroyed, or stolen where a replacement was unobtainable at a fair price elsewhere. It was held that defendant's uses of copyrighted material are protected by fair use; Am. Inst. of Physics v. Schwegman, Lundberg &Woessner, P.A., No. 0:12-cv-00528-RHK-JJK (D. Minn. July. 30, 2013), obtaining, storing, copying, and distributing copyrighted publications for use in the patent application process, without a license or other permission, constitutes fair use; Nat'l Ctr. for Jewish Film v. Riverside Films, L.L.C., No. 5:12-cv-00044-ODW (DTB) (C.D. Cal. Sept. 14, 2012), defendant's use of clips from plaintiff's film were old and tentatively in the public domain, weighing in favor of fair use.

though the book published by him may be used or be meant for use in research or private study.[24] In Syndicate Press of University of Cambridge v. Kasturi Lal & Sons,[25] it was observed that:

> *"Copyright cannot be treated as a barrier against research and scholarship and against all frontiers of human knowledge. It is true that the law should encourage enterprise, research and scholarship. But such encouragement cannot come at the cost of the right of an individual to protect against the misappropriation of what is essentially a product of his intellect and ingenuity. The law encourages innovation and improvement but not plagiarism. Copyright is a form of protection and not a barrier against research and scholarship."*

*Publication of Short Passages for Instructional Use*

In a collection which is *bonafide* intended for instructional use and consists mainly of a material in which no copyright subsists, it shall be lawful to include short passages from published literary or dramatic works in which copyright subsists. This exception is not absolute because the work so published should not have been published for such use. Also, the connection must be described in its title and in any advertisements issued by or on behalf of the publisher intended for instructional use. The inclusion of the passage must be accompanied by a sufficient acknowledgement and the publisher is not allowed to use total of more than two passages from the works of the same author in such collections during any given period of five years.[26]

*Educational Purpose*

According to section 52(i) of the Copyright Act, the Reproduction of any work by teacher and Pupil in the course of instruction, or as a part of questions to be answered in an examination or in answer to such questions shall constitute fair use.[27] Indian Judiciary has played a very important role in dealing with this exception.

*Performance of work in the Course of Activities of an Educational Institution*

The performance of literary, dramatic or musical work by the staff and students of the institution or the cinematographic film for sound recording in the audience is limited to staff and students, the parents and Guardians of the students and the person connected with the activities of the Institution or the communication of cinematograph film or sound recording in the course of activities of an education institution, to such an audience in the course of the activities of an education institution.[28]

**Rameshwari Photocopy Case: A Revisit**

[24] Rupendra Kashyap v. Jiwan Publishing House, 1996 (38) DRJ 81.
[25] 2006 (32) PTC 487 Del; Blackwood And Sons Ltd. v. A.N. Parasuraman, AIR 1959 Mad 410.
[26] The Copyright Act s. 52(1)(h) (1957).
[27] The Copyright Act s. 52(1)(i) (1957).
[28] The Copyright Act s. 52(1)(j) (1957).

In The Chancellor, Masters and Scholars of the University of Oxford v. Rameshwari Photocopy Services,[29](also known as DU Photocopy Case) a suit for Permanent injunction was instituted by five plaintiff's[30] on 14th August, 2012 restraining Rameshwari Photocopy Service (which was carrying on business from Delhi School of Economics (DSE), University of Delhi) from infringing the copyright of the plaintiffs in their publications by photocopying, reproduction and distribution of plaintiff's publications on a large scale and circulating the same and by sale of unauthorised compilations of substantial extracts from the plaintiff's publications by compiling them into course packs/anthologies for sale. The Delhi High Court, on 16th September, 2016, observed that the act of defendant's amounted to fair dealing and did not constitute infringement of plaintiff's copyright because it was hit by the provisions of Section 52 of the Copyright Act, 1957 and that there was no commercial use since the copyrighted material was intended to be used by the students for educational purpose which amounted to 'fair use'.

With the decision of this case, a milestone is achieved in the copyright system by providing a blanket exception for educational purposes. While deciding the case, the Court has rightly focussed on the constitutional mandate providing Right to education both as a 'Fundamental Right' and 'Directive Principle of State Policy'. Articles 21 and 21A provide that Right to education is a fundamental right of every citizen of India. Also, Articles 39(f) and 41 gives opportunities and facilities to children to develop in a healthy manner, protected from exploitation and right to education. It is thus, clear that Right to education is a cherished constitutional value.

While discussing the provisions of Copyright Act, 1957, the Court emphasised on Section 52(1)(i) saying that the reproduction of any work by a teacher or a pupil in the course of instruction or as a part of questions to be answered in an examination amounts to 'fair dealing'. The Court elaborated the term 'in the course of instruction' encompassing preparation of material to be used in the course of instruction and copying of it to be used in course of instruction by teacher provided that it is for the instruction, as held in Longman Group Ltd. v. Carrington Technical Institute Board of Governor.[31] Therefore, 'in the course of instruction' would include the reproduction of any work during the process of imparting education which is not only limited to the personal interface between a teacher and a pupil but it has to be understood as a process which begins from teacher whereby he/she reads for himself/herself for imparting instructions or the pupil approaches her in order to clarify the doubts or to get instructions. The Court further determined that Copyright as a piece of welfare legislation aims at balancing the interest and

[29] CS(OS) 2439/2012, decided on 16th September, 2016.

[30] Oxford University Press, Cambridge University Press, United Kingdom (UK), Cambridge University Press India Pvt. Ltd., Taylor & Francis Group, U.K. and, Taylor & Francis Books India Pvt. Ltd.

[31] (1991) 2 NZLR 574; Md. Serajuddin v. The State of Orissa, (1975) 2 SCC 47, it was held that the use of word 'instruction' preceded with the words 'in the course of' implies not only a period of time during which the movement is in progress but postulates a connected relation; Regional Director, E.S.I. Corporation v. Francis De Costa, (1996) 6 SCC 1, it was held that the term 'in the course of' means during (in the course of time, as time goes by), while doing.

rights of authors and owners keeping in view the competing interest of the society. Also, India being a developing nation, only few is able to afford the cost of education, the Copyright Act seeks to maintain a balance between the rights of copyright owners and rights of public to have access to these works.[32]

It can be said that the Court has though tried to make a fair balance between the provisions contained therein because "On one hand, India has a freedom to legislate for the utilization of copyrighted works for teaching or educational purposes and on the other hand, it has agreed to ensure that it is 'justified' by the purpose and do not unreasonably prejudice the interest of author." This decision has a far-reaching impact in a country like India where photocopying is being done on a large scale. The judgment will have adverse effect on the interest of authors because there will be no use of copyright law if photocopying will be allowed to happen on such a massive scale.[33] This judgment is consumer friendly and is going to have a long-term trickle-down effect. The interest groups favouring the judgment argue that even if the profits of publishing industry take a hit, a reduction in the private profits is of less importance than the social advantages of disseminating the knowledge without any type of cost barriers.[34]

## III. Fair Dealing in the Digital Environment: A Paradigm shift from Classroom teaching to Online Teaching

> *"We need technology in every classroom and in every student and teacher's hand, because it is the pen and paper of our time, and it is the lens through which we experience much of our world."*
>
> \- David Warlick

Technological developments have facilitated new forms of creative expressions, due to its interactions with the cultural products. Whenever technology has provided a new method of use of the cultural goods in the society, the copyright system has brought rules and regulations to enable the effective distribution in the market place and ensure adequate returns to the creator. Also, internet has revolutionized the communication process and compressibility of digitized works has made transmission of files containing huge data easier and faster. Thus, it is effortless for an individual with home equipment to deliver the copies of digitized works to individuals anywhere in the world.[35]

---

[32] Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd., (2008) 13 SCC 30; Ramniklal N. Bhutta v. Maharashtra, (1997) 1 SCC 134.

[33] Prabhdeep Kaur Malhotra, Case Commentary of the Chancellor, Masters and Scholars of the University of Oxford v. Rameshwari Photocopy Services, 133 LEGAL MESSENGER 137 (2016).

[34] Sampad Patnaik, Media may have Misjudged Copyright Verdict (June 15, 2020, 04:04 AM), http://www.thehoot.org/media-watch/law-and-policy/media-may-have-misjudged-copyright-verdict-9671.

[35] Zakir Thomas, Digital Technologies and Emerging Copyright Scenario 276 J INTELLEC PROP RIGHTS277, 278 (2003).

Although digitization has many advantages, but has also provided new ways of infringing authors rights.[36] Digital technology has brought in revolutionary changes in the administration and management of copyright which has been made difficult by technological changes. It has made reproduction and communication of works much easier and now the copies can be made with ease and can be dispersed to millions of people in few seconds. This has led to materially affecting the economic interests of owners.[37]

Fair use is an indeterminate area of copyright law that can become contentious when a new technology changes how the creative works are used and produced. Consumers of copyrighted works may believe that they can copy a creative material for personal use without the authorization of copyright owner but such activity has not been recognized as fair use.[38] Since, the technology has emerged, it has challenged copyright's traditional principles and it further aggravates its subject matter of copyright. All the debates surrounding copyright are 'technologized' because technology actualizes the copyright by changing the game and changing the space where previous modern copyright law existed.[39]

Technological solutions were found for the problems posed by new technologies.[40] The Government of India has introduced several amendments due to pressure from various quarters, domestic as well as international, introducing the Copyright (Amendment) Act, 2012 by inserting Sections 65A and 65B.[41] Section 65A[42] deals with the Protection of Technological Measures along with the exceptions. It is a unique provision with reference to the liability of a person who facilitates the creation of technology to circumvent under this section.[43] This provision has been introduced to provide protection of technological measures used by a copyright owner to protect his rights on the copyrighted work. Any person, who, with the intention of infringing a right

[36] Iftikhar Hussian Bhat, Technological Protection Measures under Copyright Law, 319 INTL. JOURNAL EMERGING TRENDS TECH. IN COMP. SCIENCE 320 (2013); the benefits of digitization are endless. For authors, digitization offers not only new paths of creating works but also the wide and efficient dissemination of their works by digital transmission. For the computer, broadcasting, cable, satellite, and telecommunication industries, there is potential for technical innovation and growth. And for virtually every member of the public, digital transmission makes works, information, and services available online in forms much more useful than the traditional analogue formats.

[37] T.C. James, Indian Copyright Law and Digital Technologies, 423 J INTELLEC PROP RIGHTS 431 (2002); The prominent Copyright issues in the digital area can be classified into three groups: a. Issues relating to the whole new set of work, namely the computer programs, databases and multimedia works; b. Issues relating to reproduction, distribution and communication to the public of a work through digital media; and c. Issues relating to management and administration of copyright in the digital environment.

[38] Douglas Holtz-Eakin, Copyright Issues in Digital Media, 1 (2004), https://www.cbo.gov/sites/default/files/108th-congress-2003-2004/reports/08-09-copyright.pdf.

[39] Danilo Mandic, Balance: Resolving the conundrum between copyright and technology?,8 (2011), https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipr_ge_11/wipo_ipr_ge_11_topic2-related2.pdf.

[40] Supra note 36, this includes access control or copy control mechanisms such as encryption technology or water making incorporated into works distributed over digital networks with a view to protecting them from illegal exploitations.

[41] Arathi Ashok, Technology Protection Measures and the Indian Copyright (Amendment) Act, 2012: A Comment 521 J INTELLEC PROP RIGHTS 524 (2012).

[42] The Copyright Act s. 65A (2012).

[43] Supranote 38 at 528.

circumvents the effective technological measure applied for protecting any of the right shall be punished with the imprisonment which may extend to 2 years and may also be liable to fine.[44] This provision has emanated from Article 11[45] of WCT and Article 18[46] of WPPT, with the purpose to prevent possibility of higher rate of infringement in the digital media. Section 65B[47] of the Act which deals with Protection of Rights Management Information provides punishment for those who act in violation with this section. This provision confirms to the provision enshrined in Article 12[48] of WCT, 1971 and Article 19[49] of WPPT, 1996.

In the United States, the Digital Millennium Copyright Act is a legislation enacted by the United States Congress in 1988 in order to bring changes to the US Copyright Act so as to bring it in compliance with the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.[50]

In the academic community, it is a routine course of some researchers and teachers who copy the digital copyrighted content made available online without mentioning the relevant source but since, technology is an answer to the technology, it has become feasible to check the plagiarized content through various software's. Free online software's are also available to determine the percentage of the copied amount. Thus, it is always advisable to the researchers working in various fields, to acknowledge the source of the material.

The Government of India has initiated two programmes namely the SWAYAM Portal and NPTEL. The SWAYAM Portal allows the students to pursue an online course on any subject, like Indian History or Political Theory, from a university of their choice by registering on a Government portal. This project has been named as SWAYAM i.e., Study Webs of Active-learning for Young Aspiring Minds which is a web portal where Massive Open On-line Courses (MOOCs) are available on all kinds of subjects which has been launched by the Human Resource Development (HRD) Ministry.[51] It was launched on 15th August, 2016 by Prime

[44] Zakir Thomas, Overview of changes to the Indian Copyright Law, 324 J INTELLEC PROP RIGHTS 332 (2012).
[45] WIPO Copyright Treaty art. 11 (1971) - Obligations concerning Technological Measures.
[46] WIPO Performances and Phonograms Treaty art. 18 (1996) - Obligations concerning technological measures.
[47] The Copyright Act s. 65B (2012) - Protection of Rights Management Information.
[48] WIPO Copyright Treaty art. 12 (1971) - Obligations concerning Rights Management Information.
[49] WIPO Performances and Phonograms Treaty art. 19 (1996) - Obligations concerning Rights Management Information.
[50] Indiana University, What is the Digital Millennium Copyright Act? (June 22, 2020, 11:10 AM), https://kb.iu.edu/d/alik; Divided in to five "titles", the DMCA is a complex act that addresses a number of issues that are of concern to libraries. Among its many provision, the Act: imposes rules prohibiting, the circumvention of technological protection measures, sets limitations on copyright infringement liability for online service providers (OSPs), expands an existing exemption for making copies of computer programs, provides a significant updating of the rules and procedures regarding archival preservation, mandates a study of distance education activities in networked environments, mandates a study of the effects of anti-circumvention protection rules on the "first sale" doctrine.

[51] India Today, SWAYAM to launch online courses in various subjects: A substitute to classroom teaching? (June 12, 2020, 12:12 PM), http://indiatoday.intoday.in/education/story/swayam-project/1/579226.html.

Minister Narendra Modi.[52] Similarly, NPTEL (National Programme of Technology enhanced Learning) was launched by the Ministry of Human Resource and Development to enhance quality of engineering education in the country by developing curriculum based video and web courses.[53]

## Education System in India post COVID-19

*"The Educated differ from the uneducated as much as the living differs from the dead"*

- **Aristotle**

The Pandemic has already given a crucial time to the education sector in India. The entire structure of schooling and learning was the first to be affected by lockdown. As a result, online teaching methods came into being which were followed by only a handful of private institutions because others were not having access to e-learning solutions leading to the missed opportunities for learning. Well, it is of no doubt that the online method of teaching is leading to an unprecedented transformation from traditional i.e. teacher-centric to the modern i.e. student-centric education.

The role of Government in this regard cannot be ignored as numerous measures have been taken to help students continue their education during the pandemic to ensure that the effect of pandemic is least on education. Various applications and e-learning platforms have been initiated by the Government in the form of Shagun Online Junction which covers three e-learning platforms namely the NROER (National Repository of Open Educational Resources), DIKHSA Portal, e-Pathshala, etc. For delivering updated content to the students, SWAYAM is another initiative of the Government without payment of any fee. There are several other platforms such as Swayam Prabha, National Academic Depository (NAD), National Digital Library of India, Virtual Labs etc.

## Is the dealing "Fair" under Indian Copyright Law?

The legislative context of fair dealing in India is enshrined under Section 52 of the Indian Copyright Act, 1957. The main objective of this provision is to make a balance between public interest and private interest. The terms 'fair dealing' and 'fair use' are used simultaneously but there is a difference in their meaning, application, and usage. Fair dealing restricts itself to the set of enumerated facts, and in case if any act is committed in lieu of fair dealing but outside the

[52] Economic Times, P M Narendra Modi to Launch Swayam, Massive Open Online Courses Platform on Aug 15, (June 12, 2020, 12:15 PM),http://economictimes.indiatimes.com/industry/services/education/pm-narendra-modi-to-launch-swayam-massive-open-online-courses-platform-on-aug-15/articleshow/53029959.cms.

[53] National Programme on Technology Enhanced Learning (NPTEL), (June 12, 2020, 12:25 AM),http://nptel.iitg.ernet.in/.

scope of acts so listed, the same shall not be granted protection and would ultimately result in infringement. Whereas, in case of Fair Use, more flexible approach is adopted as it is for the Courts to decide whether the alleged act amounts to infringement or not on the basis of four factors i.e. Purpose and character of work, nature of work, amount and substantiality of the portion used and effect on market values of the original work. Under Fair Use, Courts are not bound to restrict themselves to the list of factors and it is for them only to apply the correct approach to make a fair balance between the rights of copyright authors and the public interest to have access to copyrighted works.

Fair dealing is one of the defenses to the exclusive rights granted to the Copyright Owner under the Act. The concept of 'Fair Dealing' is based on the British Copyright concept in comparison to the doctrine of 'fair use' which is based on the American Copyright Law and is more flexible. Fair Dealing permits the reproduction of copyrighted works, which would otherwise amount to infringement.[54] Fair Dealing is a question of fact and the same has to be determined on case to case basis.[55] However, if the purpose of the reproduction is not one of those enumerated in the statute as exceptions, then the question of "fair dealing" would not arise.[56]

Under the Indian Copyright Act, Section 52 enumerates a list of exceptions which constitutes fair dealing. The said provisions are in consonance with the constitutional obligations. The justification of providing these defences is the public policy to ensure that fair use continues to protect the freedom of expression.[57] All rights must have limitations. It is enumerated in every right in the Constitution of India, whether it is the freedom of speech or the freedom of expression or the freedom to do trade the freedom to move anywhere in India or the freedom to form associations.[58] The primary objective of Section 52 is to protect the freedom of expression under Article 19(1) of the Constitution of India, so that research, private study, criticism or review or reporting of current events could be protected. Section 52 is not intended by Parliament to negatively prescribe the infringement.[59]

Members of WTO are under an obligation to confirm with the exceptions as provided under the TRIPS Agreement and Berne Convention. Article 13 of the TRIPS Agreement lays down the three-step test i.e., special exception, it must not conflict with normal exploitation, it must not

[54] Rishabh Saxena, Pracheta Kar, Is Fair Dealing Really Fair in India 40 RGNULSTUD LAW REVIEW 42 (2014).
[55]ESPN Star Sports v. Global Broadcast News Ltd., (2008) 38 PTC 477 (Del.) (DB), Belloff v. Pressdram Limited, (1973) 1 AER 241 at 263, where it was held that "fair dealing is a question of fact and of impression. One has to consider whether the allegedly infringing material may amount to an illegitimate exploitation of the copyright holder's work."
[56]Blackwood And Sons Ltd. v. A.N. Parasuraman, AIR 1959 Mad 410.
[57]Tekla Corporation v. Survo Ghosh, decided on 16 May, 2014.
[58]Lok Sabha Debate as on 22 May, 2012, Discussion on the motion for consideration of the Copyright (Amendment) Bill, 2012, (May 20, 2020, 10:20 AM), https://indiankanoon.org/doc/104277827/.
[59]Wiley Eastern Ltd. v. Indian Institute Of Management, 61 (1996) DLT 281; Star India Pvt. Ltd. v. Piyush Agarwal, decided on 13 March, 2013; Tata Press Limited v. Mahanagar Telephone-Nigam Limited, AIR 1995 SC 2438; Archana Nair v. Ministry Of Human Resource Development, decided on 21 September, 2016.

reasonably prejudice the legitimate interest of right holders.[60] The Three-Step Test under Berne Convention applies only to the right of reproduction and does not apply to other exclusive rights such as public performance, broadcasting, public recitation, adaption or other rights which are granted to the producers of cinematographic works.[61]

In recent times, the interaction between copyright and human rights is at the center of attention[62] and for the same purpose the drafters of the UDHR and ICESCR recognized the claims of authors, creators and inventors as human right.[63] Article 15 of ICESCR[64] which closely resembles Article 27 of UDHR[65] has three components dealing with right to culture, scientific advancement, and intellectual property but it does not strictly mention the balance between author's rights and societal rights.[66] Balance needs to be struck not only within the international copyright regime but also within a 'copyright' whole.[67]

## IV. The applicability of "Exhaustion" during COVID scenario: How it matters?

The expression "exhaustion of intellectual property rights" means that right holders lose the right to control the resale of the protected goods. Once the relevant good is put on sale for the first time by the intellectual property right (IPR) owner (directly by him or with his consent), he cannot object to subsequent circulation of the product. Indeed, his rights are "exhausted". This principle is also known as "first-sale doctrine" and determines the moment when the right owner loses the resale right on the protected goods.

The doctrine of exhaustion is categorized into domestic, regional and international exhaustion. The concept of national exhaustion does not allow the IP owner to control the commercial exploitation of goods put on the domestic market by the IP owner or with his consent. However, the IP owner (or his authorized licensee) could still oppose the importation of original goods marketed abroad based on the right of importation. The first sale of the IP protected product by the IP owner or with his consent exhausts any IP rights over these given products not only domestically, but within the whole region, and parallel imports within the region can no longer be opposed based on the IP right. This doctrine is referred to as regional exhaustion. In case of

[60]Ayush Sharma, Indian Perspective of Fair Dealing Under Copyright Law: *Lex Lata* or *Lex Ferenda* 523 J INTELLEC PROP RIGHTS 523 (2009).
[61] Eric J. Schwartz, An Overview of the International Treatment of Exceptions, 1 PIJIP Research Paper No. 2014-02 9 (2014).
[62]Holyoak&Torremans, Intellectual Property Law267 (6th ed. 2010). In the United Kingdom The Human Rights Act 1988 and European Convention of Human Rights, Article 10.
[63] Copyright Bulletin, Approaching Intellectual Property as a Human Right, 11 (2001), http://www.pijip-impact.org/wp-content/uploads/2013/02/Approaching-Intellectual-Property-as-a-Human-Right.pdf.
[64] International Covenant on Economic, Social and Cultural Rights art. 15 (1966).
[65] Universal Declaration of Human Rights art. 27 (1948).
[66] Supranote 62 at 84.
[67] Saleh Al-Sharieh, Toward a Human Rights Method for Measuring International Copyright Law's Compliance with International Human Rights Law, (June 15, 2020, 1:10 PM), http://www.utrechtjournal.org/articles/10.5334/ujiel.233/.

international exhaustion, the IP rights are exhausted once the product has been sold by the IP owner or with his consent in any part of the world.

The overall purpose of exhaustion regimes is therefore to strike and maintain a balance between a public interest (i.e. free movement of innovative goods) and the private interest of IPR owners (i.e. remuneration for their creative and artistic efforts). Exhaustion is internationally regulated by Article 6 of TRIPs Agreement. It states:

> *"For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights."*

Most international intellectual property agreements are silent about exhaustion. Article 6 of the TRIPS agreement expressly pronounces this silence, effectively leaving the matter of exhaustion to nation states. Also, Paragraph 5(d) Doha Declaration on the TRIPS Agreement and Public Health states that *"the effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime of exhaustion, without challenge […]"*

India follows national exhaustion with respect to copyrighted works. This doctrine flows from Section 14(a)(ii) of the Copyright Act, 1957, which states that the owner of a literary, dramatic or musical work, not being a computer programme, has the exclusive right to issue copies of the work to the public "not being copies already in circulation". Amendments to the Act in 2012 extended the exhaustion doctrine to cinematographic films and sound recordings. Sections 14(d)(ii) and 14(e)(ii) now state that the right owner has the exclusive right to sell or give on commercial rental or offer for sale or for such rental "any" copy of the work.

Also, section 51(b)(iv) states that a copyright is infringed when any person imports into India any infringing copies of the work. An "infringing copy", as defined in section 2(m) of the Act, in the case of literary, dramatic, musical or artistic work is a "reproduction" of the work, in the case of cinematographic film is a "copy of the film made on any medium by any means", and in the case of sound recording is "any other recording embodying the same sound recording, by any means".

In John Wiley v. Prabhat Chander,[68] Delhi High Court held that exporting books whose sale and distribution was subject to territorial restrictions amounts to copyright infringement. In this case, the plaintiff published low-priced editions (LPEs) of a book with the rider that they were meant for sale/resale only in India, Bangladesh, Nepal, Pakistan, Sri Lanka, Indonesia, Myanmar, the Philippines and Vietnam. The defendants offered the LPEs online for sale worldwide. The plaintiff contended that after first sale its rights in the LPEs were exhausted only in India and the defendants had contravened of their distribution right under the Act.The Court held that in the absence of an express provision for international exhaustion, regional exhaustion would apply

[68] (2010) 170 DLT 701.

and affirmed that the right owner had the exclusive right to assign or license the work, which could be limited by way of period or territory, and could be exclusive or non-exclusive. Therefore, a copyright owner's distribution right may be exhausted with respect to some countries and not others.

Nowadays, social distancing is one of the main objective behind lockdown in any country which has resulted in most of the activities taking place through online medium. Imparting education through digital means has created issues in the copyright industry despite of having the legislation on copyright in India. The position of Indian law on the questions related to the expansion of fair dealing provisions on online education is unclear. The main reason behind these issues is mainly because there is no clear demarcation between physical work and digital work in case of online transmission and whether similar protection is granted to online classes as in the case of classes obtained physically.

Going back to the past and applying the judgment of DU Photocopy Case (Supra) gives an idea of extending the protection under Section 52(1)(i) to online classes given the reproduction is meant solely for the purpose of imparting education. The video recording of classes has created a dilemma in the copyright industry particularly under Section 52(1)(h) of the Copyright Act, 1957 which bars the usage of passages in a publication beyond two short passages from the protected work as compared to Section 52(1)(i) which does not mention any such limitation on the number of paragraphs.

Another important concern is the interpretation of Section 52(1)(n) which states "the storing of a work in any medium by electronic means by a non-commercial public library, for preservation if the library already possesses a non-digital copy of the work" amounts to fair dealing. In the course of online education, the storage of content by the libraries and its subsequent sharing is one of the significant challenge copyright holders are facing. As the provision does not clearly mention any kind of permitted/ non-permitted communication or reproduction of work after storage, it is difficult to extend the protection of this provision to the digital libraries sharing work freely amongst people while imparting online education.

While technological arguments against allowing or denying digital exhaustion may become increasingly weaker, the law around digital exhaustion remains uncertain. In addition, at the moment it appears that the issue of digital exhaustion is not really part of any meaningful policy discussion in India. In order to answer the question whether to have digital exhaustion or not, there is a need to figure out possible interpretations of the related provisions.

One plausible justification for allowing digital exhaustion may be to ignore the difference between tangible and intangible medium and focusing on the fair use defense for educational purpose keeping in view of the interest of academicians. Moreover, looking into the reward theory of copyright, which entitles the copyright holder to receive the reward only once i.e., on the first sale of goods, it is appropriate that distribution of any copyrighted work after first authorized sale can take place through physical or digital means. It implies that law should not

distinguish between digital work and physical work. Apart from ensuring free movement of goods, enabling digital exhaustion especially during the pandemic will enable the free movement of goods i.e. education and will also lead to non-discrimination amongst the buyers of physical or digital works.

In the United States, 17 U.S.C. § 106(3) of the US Copyright Act, 1976 grants distribution right to the copyright holder. The Section reads:

> *"Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:*
>
> *....*
>
> *(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending……"*

This right is explicitly subject to 17 U.S.C. § 109(a), which states that a person who owns a copy that is "lawfully made under this title" may sell, gift, or otherwise dispose of the copy "without the authority of the copyright owner." The provision reads:

> *"17 U.S.C. § 109 Limitation on Exclusive Rights:……..(a) Notwithstanding the provisions of section 106(3) , the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord……."*

To help domestic industries fighting the importation of copyrighted works from other countries, 17 U.S.C. § 602. Section 602(a) makes importation of a copy of a copyrighted work into the U.S. without the permission of the copyright holder an act of infringement under § 106(3). By its statutory language, § 602(a), also called the importation provision, does not create a new act of copyright infringement, but merely specifies an act that will be considered an act of infringement under existing law. It reads as under:

> *"17 U.S.C. § 602: Infringing Importation or Exportation of copies or phonorecords- (a) Infringing Importation or Exportation- (1) Importation- Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501…."*

The exceptions to this provision include importation or exportation under the authority or for use of the Government; importation or exportation for private use of the importer or exporter with no more than one copy at one point of time; and importation by or for an organization for scholarly,

educational or religious purposes and not for private gain with respect to not more than one copy for archival purposes and not more than five copies when it is for library lending.

The case between Capitol Records and ReDigi[69] is the first one that brought to the spotlight the possible application of the first sale doctrine to digital works in the US. In this case, it was held that reselling downloaded music amounted to an infringement of the reproduction right of the copyright owner and that the first sale principle applied only to "material items, like records, that the copyright owner put into the stream of commerce". No legislature or Court anywhere has defined "digital exhaustion". With the rapid growth of the copyright marketplace, statutory clarifications of digital first sale rights are needed.

In the European Union, due to the different legal, economic and technological features of brick-and-mortar and digital markets, the introduction of digital exhaustion has been challenged by right holders, afraid of its impact on piracy rates and on the original market of the work, and questioned by judges and scholars, who found it incompatible with the current architecture of EU copyright law. In the United States, the most important provision of the Copyright Act for educators is the Technology, Education and Copyright Harmonization Act ("TEACH Act"), 17 U.S.C. § 110, which was signed in 2002. Many educators may already be familiar with this Act because it addresses both in-class and online use of educational materials.[70]

In Used Soft GmbH v. Oracle International Corp,[71] the European Court of Justice discussed the issue of digital exhaustion with respect to download-to-own software. The court held that under certain circumstances, the exhaustion of the right to distribute under the EU Software Directive may be applicable to both physical copies of the software (CD/DVD) and digital files downloaded online with the consent of the copyright owner, therefore allowing sale of second-hand software online. A German court of appeal, in a decision with regard to audio books in June 2014, held that under another EU directive, the doctrine of exhaustion did not apply to download-to-own digital content.

In the United States and United Kingdom, the judiciary has been active in dealing with the matters related to transfer of copyrighted work through digital means. However, "digital exhaustion" is not really a topic of discussion in the Indian copyright regime. With the incorporation of DRM provisions in the year 2012, it can be argued that the purpose of this amendment goes against digital exhaustion. It goes against the spirit of exhaustion in the digital market because the objective is to protect copyright in the digital media.

Another viewpoint leads to the conclusion that digital exhaustion results into piracy, harming the incentives naturally. For instance, when X transfers a physical copy to Y, the possession is with

[69] Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640.
[70] Meaghan H. Kent and Danae Tinelli, COVID-19: Copyright Concerns in Online Classrooms (June 17, 2020, 12:07 AM), https://www.venable.com/insights/publications/2020/04/covid19-copyright-concerns-in-online-classrooms.
[71] C-128/11, July 3, 2012 (ECJ).

Y as per the doctrine of exhaustion. However, if both X and Y would like to read the book at the same time, they will need to purchase another copy of the book. Even if digital exhaustion applies here, X will not be legally allowed to "transfer" copy of the book to Y, while keeping one copy for her own use.

Due to the existing conflict between digital exhaustion and the current legal regime encouraging DRMs to reduce piracy, the exhaustion in the digital world would necessarily require limiting and regulating the DRMs. Since, the implementation of DRMs are aimed to fight against piracy, limiting their scope of protection would lead to piracy and discourage copyright owners from using methods of digital distribution that are modern in nature.[72]

## V. Conclusion

Education is regarded as one of the strong public interest[73] in limiting the copyright protection.[74] It is a limitation to encourage dissemination of works on the ground that they are in the public interest.[75] In case of educational institutions, the situation is different because the concept of fair dealing, here, is governed by a complex web of provisions. There are a number of defenses that relate to the copying carried out by schools and other educational institutions.[76]

Education is an area of activity for which the dissemination of material among teachers and students is important but the permissions and exemptions are narrowly drawn. For instance, copying of literary, dramatic, musical and artistic works in the course of instruction which is non-commercial does not amount to infringement provided that the copying is done by person giving or receiving instructions, not done by a reprographic process, accompanied by sufficient acknowledgement. Also, if the work is made available to public, the copying must amount to fair dealing. Other exemptions include copying sound recordings, films, or broadcasts by making

---

[72] Guy A. Rub, Rebalancing Copyright Exhaustion (June 20, 2020, 10:30 AM), https://law.emory.edu/elj/content/volume-64/issue-3/articles/rebalancing-copyright-exhaustion.html.

[73] Supra note 61 at 265. If the allegedly infringing act is in public interest, this will provide a valid defence against the alleged infringement. Public interest defence is based on court's inherent jurisdiction to refuse an action for infringement of copyright in cases in which the enforcement of copyright would offend against the policy of law. It is difficult to determine precisely as to what amounts to public interest. What is clear is the jurisdiction of the court in determining depending upon the nature of work at issue rather than the issue of ownership of work. Examples of work injurious to public policy include works which are immoral, scandalous or contrary to family life.

[74] Copinger and Skone James on Copyright 593 (2012).

[75] Charlotte Waelde, Giaeme Laurie, Abbe Brown, SmitaKheria, Jane Cornwell, Contemporary Intellectual Property: Law and Policy 194 (2nd ed. 2011);See also Hyde Park Residence v. Yelland, [1999] RPC 655, it was held that: i. There was no public interest defence separate from that of public policy; ii. The circumstances in which copyright would not be enforced must derive from the work itself rather than from the conduct of the copyright owner; iii. The considerations arising from breach of confidence cases, where the courts balance the public interest in maintaining confidentiality against the public interest in knowledge of truth and freedom of expression are different from copyright where property rights are involved and the legislation already provide fair dealing defences in public interest; Ashdown v. Telegraph Group Ltd, [2002] Ch 149 (CA); HRH The Prince of Wales v. Associated Newspapers Ltd (No 3) [2008] Ch 57 (CA).

[76] Supra note 19 at212.

films or film sound tracks in the course of instruction in the making of films or film sound tracks; anything done for the purposes of examinations, apart from reprography of musical works for exam candidates to perform; exclusion of short extracts from published literary and dramatic works in educational anthologies; performing, playing or showing works in the course of educational activities and recording broadcasts for educational purposes.[77]

The link between copyright and learning is not something new, rather it is an old one. Free dissemination of knowledge and culture has always been formative spirit of copyright law. The Statute of Anne, which was the first statute of copyright law, was titled as 'advancement of learning'. This approach pushed the concept of public interest in the circulation or dissemination of knowledge and was the philosophical basis for granting limited exclusive rights to the authors. In the modern world, the concern for public interest has been recognized by regional legislations, international documents and has formed part of global regulation of copyright.[78]

The three areas of copyright having special significance for educational institutions are the laws relating to the works protected, the ownership of copyright and the use of works protected by copyright regime. Copyright protection has been extended to several artistic works and creative expressions, literary works has been the major area and various issues have been agitated in the past. Various types of work have come within the purview of literary works.[79]

It is only when the buyers know the rights, they have over the digital work they are buying, the market will operate in a better way. In opposition to this, if buyers do not know their rights, the market will not operate efficiently. The extent of knowledge buyers have as regards the transfer of items they have purchased is a question that needs to be answered. In some cases, they know their rights, while in some cases they don't. To what extent they know of their rights requires a sensible policy to be promoted among buyers, but the same should not lead to unrestricted digital distribution.

[77] Supra note 74 at 188.

[78] Lawrence Liang, Exceptions and Limitations in Indian Copyright Law for Education: An Assessment 198 THE LAW AND DEV REVIEW 210 (2010).

[79] T.C. James, Copyright Law of India and the Academic Community 207 J INTELLEC PROP RIGHTS 213 (2004), Courts have settled various issues concerning the scope of literary works, Jagdish Prasad v. Parameshwar Prasad, AIR 1966 Patna 33, question papers set for examination; Fateh Singh Mehta v. Singhal, AIR 1990 Rajasthan 8, research thesis and dissertations prepared by students; Manohar Lal Gupta v. State of Haryana, (1977) 79 Punj LR 181 (Delhi), compilation of book; Ghafur v. Jwala, AIR 1921 All 95, school textbook; E M Forster v. A N Parasuram, AIR 1964 Madras 391, guide books; Jarrold v. Houlston, (1857) 3 K&J 708, book of scientific questions and answers; Interfirm Comparison (Australia) Pty Ltd v. Law Society of New South Wales (1977) RPC 149, questionnaire for collecting scientific information.

# TRADE SECRETS: A STRONG FORM OF PROTECTION

*Garima Singh[1]&DikshantTomar[2]*

**Abstract**

*Trade secrets are intellectual property (IP) rights on confidential information which may be sold or licensed. Any confidential business information which provides an enterprise a competitive edge may be considered a trade secret. Trade secrets encompass manufacturing or industrial secrets and commercial secrets. Firstly in this paper, the researchers will give an extensive introduction about Trade Secret & what constitutes the Trade Secrets, followed by the emergence of Trade Secrets and its need in the contemporary world. In addition to it, we also will throw light on various theories regarding the justification of Trade Secret as a Property. The researchers will also discuss what can be and cannot be protected under Trade Secrets as well as misappropriation of Trade Secrets. Protection of Trade Secrets under the TRIPs Agreement is also a crucial aspect to be discussed. The Trade Secrets will be compared with other Intellectual Property Rights by the researchers and the case laws related to Trade secrets will also be discussed and lastly, the question mushrooms out that* whether there is a need for separate legislation for Trade Secrets in India or not?

**Key Words**: Trade Secrets, Protection, confidential, legislation, Industrial

## Introduction

*Outright and forthright duplication is a dull and very rare type of infringement*[3]

Trade Secrets are certain intellectual assets of a business or company that are kept undisclosed to the public; such assets are not covered under traditional Intellectual Property system such as Patent and Copyrights etc. This concept of secrecy has existed in practice way before than the term "Trade Secrets" saw the light of the day as one of the intellectual property rights. For example, Coca Cola's formula is best-kept secret in the world, its secret formula is more than a century old and KFC's secret recipe is more than 70 years old and is kept secret in a digital safe. The New York Times has not revealed the process for which they decide their famous Bestseller List.

World Intellectual Property Organization (WIPO) defines Trade Secrets are intellectual property (IP) rights on confidential information which may be sold or licensed. Any confidential business information which provides an enterprise with a competitive edge may be considered a trade secret.[4] Some secrets add value to the business, constitute the

[1]LL.B (3rd Year) Lloyd Law College, Greater Noida. The author can be reached at garima7teen@gmail.com

[2]LL.B (3rd Year) Lloyd Law College, Greater Noida. The author can be reached at dikshanttomar@gmail.com

[3] Graver Tank & Mfg. Co. v. Linde Air Prods. Co. 339 U.S. 605, 607 (1950).

[4] World Intellectual Property Organization, *Trade Secrets,* WORLD INTELLECTUAL PROPERTY ORGANIZATION (October 10, 2020, 2:42 AM), https://www.wipo.int/tradesecrets/en

trade secrets. Such secrets are not exhaustive, unlike other intellectual property (IP) rights. Sensitive information regarding the formula and pattern of business. Information related to marketing, manufacturing and technology used in a business. These secrets are confidential, are entitled to be protected under Trade Secrets.

Currently, In India there is no separate legislation has been made for the protection of trade secrets and the courts in India are dealing with its breach according to the principle of equity of common law principle. But the trade secrets are itself an old principle and originated many years ago. Trade Secrets are a vital part of the intellectual property (IP) rights which is yet to be given the same stature as the other intellectual properties. In today's world with growing competitions and market trade secrets rights are soaring, which reflects the need for its separate statute.

## Emergence of Trade Secrets

The practice of Trade Secrets can be traced back to the Renaissance when the new ideas and interests were surging in Europe during the 14th-16th centuries. Trade Secrets laws had paved its way into the Industrial Revolution, during which Statutes were enacted to protect the Industrial Secrets. It was then trade secrets had found the foundation and mushroomed internationally.

India used to be a closed economy until 1991 when the Liberalization Privatization Globalization (LPG), economic reform was brought. After the economic reform Multi-National Companies (MNCs) started to rush in the country, it was then India became familiar and felt the need for trade secrets laws. India has not enacted trade secrets law, although it protects trade secrets under the common law which essentially districts from Patent Laws.

The epicenter of trade secrets laws is found in Common Laws and Principal of Equity. Since then, many nations have incorporated trade secrets laws in their domestic laws. United States (US) has been the torchbearer for the entire world for enacting the Trade Secrets laws. In 1939, for the first time, the trade secrets found the law for its misappropriation in Section 757 of the Restatement of Torts.[5] In the year 1979, the Uniform Trade Secrets Act (UTSA), the first exclusive Trade Secrets Act in the World, was enacted in the US, which was adopted by the most of the States. UTSA provides trade secrets extensive protection. This Act has been revised and tailored by the States as per their needs to date.

In the year 2016, Directives (EU) 2016/943 of the European Parliament (EP) and of the Council on the protection of undisclosed know-how and business information (trade secrets) was approved to standardize the national laws on the protection of Trade Secrets in the European Union.

[5] Christopher Rebel J. Pace, *The Case For a Federal Trade SecretsAct,* HARVARD JOURNAL OF LAW & TECHNOLOGY (October 11, 2020, 10:36 AM), http://jolt.law.harvard.edu/articles/pdf/v08/08HarvJLTech427.pdf

Japan enacted the Unfair Competition Prevention Law (UCPL) in 1934 at that time there was not any provision regarding trade secrets. In 1990, Trade Secrets (civil) provisions were added to UCPL. Since then it had been revised many times as the need of it felt. Again in 2005, the criminal punishments were added as there was a surge in the cases of misappropriation of Trade Secrets. The latest amendment was made in the year 2016 to strengthen and widen the scope of trade secrets laws in Japan.

## Need for Trade Secrets

Lack of trade secrets laws led to misappropriation and unjust enrichment of the valuable information of a company all around the globe. Its need has felt as the cases of theft had surged as new industries were being established. Trade Secrets come under the ambit of Intellectual Properties. Trade Secrets play a very crucial role in the growth of the company. The Growth of the company is directly proportional to the trade secrets or depends upon trade secrets. Higher the secrets trades are, higher are the chances of the company to reach its maximum growth. That is why they are called as the most essential part of Intellectual property. Trade Secrets are win-win situation; it not only helps the economy to soar but also protects the interest of the discoverer.

The economic value of the company is acquired by trade secrets only. They are flexible and have a very wide horizon as compare to other Intellectual property. Trade Secrets are also less risky than other Intellectual property, because while filing the patent, copyright or trademark the company has to reveal the secret itself of the innovation which itself is risky because if the application is rejected their secret will be disclosed in the market which is unlikely in trade secrets.

Trade Secrets laws are need of the hour in the contemporary world. Trade Secrets have layers of protections; first to distinguish followed by classification then value calculation. Enactment of separate legislation is required to protect valuable information. India does not have separate trade secrets laws, the judicial decisions are based on the Common Laws and principal of equity. Trade Secrets have flourished lately internationally as well as domestically now is the time to enact a statute to strengthen the protection of the secret information.

## Trade Secrets as a Property

It has been a debate for quite a time about whether trade secrets are property. Many scholars have propounded theories that consider trade secrets as property. MichaleRisch[6] has mentioned theories that recognize trade secrets as property which are exclusivity theory, integrated theory, and bundle theory.

**Exclusivity theory**

[6] Michael Risch, *Why Do We have Trade Secrets?*, 11 MARQUETTE INTELLECTUAL PROPERTY LAW REVIEW 16 (2007).

The property, whether tangible or intangible, have exclusive rights against others. There has been raging debate amongst the scholarly minds whether trade secrets are property or not. Many scholars and judges have talked about this theory in their research papers or books. For example, Judge Frank Easterbrook[7]writes that Intellectual Property also encircles the right to exclude as any other physical property. United States Supreme Court has also held trade secrets are property; owner of such property has the right to extend protection from discloser to public domain.[8]

**Integrated Theory**

Integration theorist defines property as to how an asset is attained and used; in their opinion exclusivity is not a considerable factor, to define a property. According to Pamela Samuelson[9] essential rights related to a property are use, enjoyment, possession, transfer, and exclusion. Other scholars believe that the discoverer of the property has the right to share the secret information or not. Therefore, trade secrets are eligible to be protected as property.

**Bundle Theory**

Trade Secrets are defined as a bundle of rights. Exclusivity theory and integrated theory are of the disputing opinion for the definition of Property. Bundle theory gives trade secrets, social rights and duties as any other tangible and intangible property.

Not all scholars have been in favor of considering trade secrets as property. Some scholars are of the view that to make the information as a property, it must be distinguished that which information should be protected? A proper demarcation must be made.[10] Mark A. Lemley writes that if Information is considered as property, it gets captured by the developer only and deprived of the social value.[11] There have been mixed views on considering trade secrets or Information as property. Now with the changing time and need the views towards trade secrets have evolved. Trade Secrets are now getting its due recognition.

## Comparison of Trade Secrets From Other Intellectual Property

Many Intellectual properties existing in the current world but the trade secrets have their different place amongst all of them. Intellectual property like Copyright, Trademark is in the root of our system from past many years and gets its recognition a bit later. It is different from other Intellectual property in numerous ways.

---

[7] Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 112 (1990).

[8]Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1002 (1984).

[9] Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?* ,38, CATHOLIC UNIVERSITY LAW REVIEW 399 (1989).

[10] Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?* ,38, CATHOLIC UNIVERISTY LAW REVIEW 399 (1989).

[11] Mark A. Lemley, *Property, Intellectual Property, and Free Riding,* 83, TEXAS LAW REVIEW 1037 (2005).

Copyright law always derived from any creativity, whereas trade secrets do not necessarily come out of any creativity. On the other hand, Patent law is derived from any innovation but for maintaining the secrecy trade secrets do not need to be innovative.

Both Copyright and patent disclose the information on a public platform and made it usable to all. A person has the freedom to use that information without any prior approval. But in the case of trade secret, except the owner, no other person can use that information. It always keeps secret and away from the public. Unlike copyright and patent, the information also needs not to be creative or innovative to be kept secret.

If the two parties somehow come across on the same information and claiming their right over it individually, trade secrets can provide them with the protection as copyright does. On the other hand, patent and trademark does not do so. In terms of cost, trade secrets are also very cost-efficient as compared to other intellectual property like patent or copyright. It takes a handsome amount of money to file a single patent. Also, in the case of protection, the Patent can be protected only for 20 years & not beyond that, which is not in the case of trade secrets. Trade Secrets can be protected for all time. In the case of a patent, when the patent is granted to any innovation the information related to it becomes disclose and can be used on a public platform, but in the case of trade secrets, the information rests secret to the unlimited duration. All the other Intellectual property also has the right to exclude others like any other physical property but trade secrets do not have this right. Moreover, the checklist for admitting the patent is very long from applying for the examination, the applicant has to go a long way, but in the case of trade secrets, no such procedures are required. If the information used in your business attains advantage over other contenders in the market then that information shall be licensed & fit to be considered as a trade secret.

Summarized comparison of trade secrets with other Intellectual property in the tabular form is given below:

| **Subject Matter** | **Patent** | **Copyright** | **Trade Secret** |
|---|---|---|---|
| Original Information? | Yes | Yes | No |
| Registration Requirement? | Yes | Yes | No |
| Disclose of Information after registration? | Yes | Yes | No |
| Right to exclude? | Yes | Yes | No |
| Derivation. | Innovation | Creativity | The information must be valuable & secret. |
| Access of Information. | Yes | Yes | No |

| | | | |
|---|---|---|---|
| Protection on same information? | No | Yes | Yes |
| Checklist required for registering? | Required. | Required. | Not required |

**Protection under Trade Secrets**

Trade Secrets are protected as long as the secrecy of the information is maintained, through statutes and laws enacted. Information that is eligible to be protected has been defined in the international laws and domestic laws of the countries which have enacted the trade secrets laws. The list of secret information can be exhaustive and lengthy, for better protection and enforceability of the law a general standard for what can be protected under trade secrets must be set.

India has not enacted any trade secrets law, but it is a signatory to trade-related aspects of Intellectual Property Rights (TRIPs) Agreement and obliged to protect the Undisclosed Information or trade secrets. Indian Judges rely on Common Law principle, India Contract Act and provisions related to the protection of data of Securities and Exchange Board of India Act, Copyright Act, Information Technology Act etc. to pronounce judgments.

Trade Secrets are protected from misappropriation such as improper means to get the trade secrets and breach of duty. There is no uniform standard set for what information can be protected. International organizations, treaties and, countries have acquired different aspects for the same. Although the eligibility criteria of information as trade secrets are somewhat similar. Article 39 of the Trade-Related Aspects of Intellectual Property Rights[12] (TRIPs) agreement divides the eligibility criteria into three; the information must be secret, must possess commercial value and, efforts to be made to keep the information secret through non-discloser agreement etc.

European Union protects information such as novel invention, production activity and, records of suppliers and client, under trade secrets.[13] UTSA, under section 1, also has given uttermost importance to the efforts made to keep information secrets, such as formula, pattern, compilation, program, technique or process.[14] Japan is also an active member in this arena. Japan's Unfair Competition Prevention Act (UCPA) also obliges the TRIPs Agreement's minimum standard of trade secrets. Article 2(6) of UCPA protects technical subject matter and business information useful for business activity including records of customer and suppliers, manufacturing process, sales records and product design.[15]

[12]TRIPs AGREEMENT art. 39.

[13]Your Europe, *Trade Secrets in the EU: What is protected?*, EUROPEAN UNION ( October 13, 2020, 8:37 PM), https://europa.eu/youreurope/business/running-business/intellectual-property/trade-secrets/indexamp_en.htm

[14] Uniform Trade Secrets Act § 1.

[15] Unfair Competition Prevention Act art 2, cl. 6. (Unofficial English Translation).

Trade secrets protect information that carries commercial value or information useful for business activity. Worldwide protectable trade secrets subject matters are wide and exhaustive. Subject matters of trade secrets may differ from country to country and business to business, it has an endless array of categories which are mentioned below, for example:

| | | |
|---|---|---|
| Formulae | Pattern | Business Process |
| Compilation | Program | Software algorithm |
| Customer list | Supplier list | Sales record |
| Devices | Product design | Inventions |
| Strategic plans | Ingredients | Pricing |
| Manufacturing process | Advertising program | Technical information |
| R&D information | | |

**When Trade Secrets Cannot Be Protected?**

Due to increased networking and globalization threat to database and trade secrets has spiraled. Trade Secrets are protected only until the information is a secret and has not been come into the public domain. Trade Secrets can be lost even after keeping it as a secret using all sorts of means, if somebody independently innovates the same formula or chemical compound etc., if somebody reverse-engineers the secret and of course if the secret information inadvertently sees the light of the day. These may be a complete defense to Trade Secret misappropriation.

**Misappropriation of Trade Secrets**

Misappropriation of trade secrets has existed from a time when trade secrets laws came into force. Protection for misappropriation of trade secrets can be traced to earlier Roman Empire. Roman laws gave protection to the owners of a firm or brand against the unfair means of the competitors. Roman courts have protected such misappropriation under "actioservicorrupti" meaning action for making slaves ill.[16]

Trade secrets are confidential information which is not supposed to be disclosed. If any information found to be confident enough to maintain its secrecy it will be fit to be called trade secrets. But if that information is acquired falsely or with ill intention then it will be called as misappropriation of trade secrets. Earlier for misappropriation of trade secrets, there were layers of action that had to be fulfilled, such essential elements are: obtaining

[16] A. Arthur Schiller, *Trade Secrets and the Roman Law: The ActioServiCorrupti,* 30 COLUM. L. REV. 837 (1930).

trade secrets or confidential information through improper means, discloser of obtained trade secrets to the public domain, and use of such acquired trade secrets through improper means to get profit or advantage out of it. Trade Secrets laws have been advancing since its inception, now any of above-mentioned misappropriation is used against the owner or developer the person misappropriating will be liable. Even a mere attempt to acquire valuable information is punishable in a few countries.

Misappropriation is one of the reasons for strengthening the trade secrets law. Many countries have advanced their trade secrets laws when the cases for misappropriation raged. For example, Japan had only a civil remedy until 2005. When cases of improper means and theft of trade secrets were soaring, that's when the incorporation of criminal remedy against the misappropriation was added under Japan's Unfair Competition Prevention Act.

In the United States the Uniform Trade Secrets Act defines 'misappropriation' under Section 1(2) as mainly by acquiring secret information through improper means and disclosing trade secrets without the knowledge of the owner or the developer. Further 'improper means' is also defined under Section 1(1), there are several ways mentioned through which improper means can be exercised, for example, theft, through a bribe, by breach of duty to maintain secrecy, and by misrepresenting etc.[17]

In the broader perspective, the meaning of improper covers the acts or deeds for which we can take the action like trespass, breach of contract, conversion of physical property, and, under modern laws, the misuse of computer networks.[18]The word 'improper' itself has a very wide ambit to discuss. In the Restatement of Torts, it is mentioned that any act which is beyond the normal ethics and standards of society will be considered as or accepted as 'improper'. Reasonable conduct is expected for making it a proper one. Though the power of deciding, whether the particular activity is considered to be improper or not shall lie within the court.[19]

There are varieties of remedy available in particular trade secrets laws across the globe for misappropriation of trade secrets. In civil remedy, whosoever misappropriates trade secrets will be liable to pay fine, penalty, damages and court fee etc. Criminal charges are also attracted in few countries depending on how the secret information has been extracted? Liability for misappropriation extends when a person acquires the secret information inappropriately when such vulnerable information is circulated or published and deliberate use of information knowing it is a secret and against the law to use such information.[20]

[17] Uniform Trade Secrets Act §1, (1),(2).
[18] Physicians Interactive v. Lathian Sys., Inc., 69 U.S.P.Q.2d (BNA) 1981.
[19] DSC Commc'ns Corp. v. Pulse Commc'ns, Inc., 170 F.3d 1354, 1364 (Fed. Cir. 1999).
[20] Uniform Trade Secrets Act § 7.

## Trade Secrets under Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

"Undisclosed Information" or Trade Secrets were given exclusive protection under Article 39 of Trade-Related Aspects of Intellectual Property Rights (TRIPs) agreement. This is the first time an international agreement took Intellectual Property rights (IPRs) related laws under its realm. The Paris Convention (1967) includes "Unfair Competition" under Article 1(2) and ensures its protection under Article 10*bis.*[21]Protection of Undisclosed Information has been incorporated under Article 39 of TRIPs agreement, which relates the undisclosed information with the protection unfair competition under Article 10*bis* of Paris Convention (1967) to ensure the maximum protection for both.[22]

The multilateral agreement on IPRs has its genesis during the negotiation at Uruguay Round stretching from 1986 to 1994.[23] During this time multilateral trade negotiations were being discussed following that World Trade Organization (WTO) was established in 1995. The inauguration of the multilateral negotiations started at Punta del Este in1986 where 'Trade-Related Aspects of Intellectual Property Rights' was first negotiated by the countries. The Uruguay Round came to its end in 1994; agreement on TRIPs came into its being as well.

Before the establishment of WTO, countries had varied Intellectual Property Rights laws, to narrow down the gap TRIPs agreement came into force. TRIPs agreement has set a minimum global standard for the Intellectual Property Rights to be abided by the member countries of World Trade Organization (WTO). Trade Secrets was also incorporated and given protection along with the other traditional Intellectual Properties (IPs) under the agreement. TRIPs also give flexibility to its signatories to incorporate and modify laws into their national laws as per their need. Many countries and union now have their own trade secrets laws enacted, for example, the US, Japan, and Taiwan etc. Currently, India has no exclusive trade secrets laws enacted.

## Famous Case Laws Related to Trade Secrets

### *Ruckelshaus v. Monsanto Co.*[24]

The issue raised in this case was whether the Taking Clause of the Fifth Amendments protects the Trade Secret property rights or not? The answer is yes, it does. For the first time court held that trade secrets were property and protected under the Taking Clause of the Fifth Amendments.

---

[21] Paris Convention 1967 art. 1, cl. 2, art. 10bis.

[22] TRIPs Agreement Art. 39.

[23] World Trade Organization, *Intellectual Property: Protection and Enforcement*, WORLD TRADE ORGANIZATION (October 15, 2020, 03:07 PM), https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm

[24] Ruckelshaus v. Monsanto Co.467 U.S. 986 (1984).

***Saltman Engineering Co Ltd v. Campbell Engineering Co Ltd***[25]

Lord Green has observed in this case that the maintenance of secrecy either rely on the common law action for breach of confidence or rely on the principle of equity. An effort and brain must be put to keep the information secret, as the information cannot be decoded without going through the same process. Saltman's case has been cited in many Indian cases as well.

***Bombay Dyeing and Manufacturing Co. Ltd. v. Meher Karan Singh***[26]

In this case, six factors were observed for information to be classified as trade secrets:

1. The extent to which information is disclosed to the public domain.
2. The extent to which information is known by the employees.
3. Precaution is taken by the developer to safeguard the secret information.
4. Valued information is saved by the holder as against the competitors.
5. Time and money spent on acquiring and advancing the information.
6. Time and cost to be taken to duplicate or obtain the information by others.

***Burlington Home Shopping Limited v. Rajnish Chibber***[27]

In this case, the Delhi High Court observed that trade secrets are valuable information and must not be disclosed, revealing such information can cause harm to the owner. Court also observed that trade secret protects vast kind of subject matter which includes business data, consumer lists and other compilation of data.

## Need For Sui Generis System for Trade Secrets Protection in India

For trade secrets related disputes, India mostly relies on Section 27 of the Indian Contract Act and few other Acts, for example, Exchange Board of India Act, Copyright Act, andInformation Technology Act etc. Hence, there is no Sui Generis principle of trade secret laws in India. As of now, many countries are now participating to incorporate exclusive trade secrets law in their national laws. India's approach is contrary to the global trend, as many Asian countries also have incorporated trade secrets law date back to 1990, for example, Japan and it has been advancing as per the need. Japan has incorporated a criminal remedy to its Unfair Competition Prevention Act in 2005. A dispute regarding trade secrets in India mostly has a civil remedy as Section 27 of India Contract Act only provides civil remedy and no criminal remedy.

In this era of globalization, the need for trade secrets laws is vital to entice foreign investments and multinational companies (MNCs) and also to ensure protection for their proprietary information. Paris Convention (1967) under Section 10*bis* puts its signatories under an obligation to codify law to protect the confidential information. TRIPs have also referred to the same and establish a minimum global standard for trade secrets to be

25Saltman Engineering Co Ltd v. Campbell Engineering Co Ltd, 203 RPC 65 (1948).

[26] Bombay Dyeing and Manufacturing Co. Ltd. v. Meher Karan Singh, 2010 (112) BOM LR 375 ¶ 51.

[27] Burlington Home Shopping v. Rajnish Chibber 1995 (61) DLT 6 ¶ 9.

incorporated by its member countries in their national laws. India is yet to decide to codify a law to protect trade secrets under its regime.

Trade Secrets are extensive and are flexible contrary to other traditional Intellectual Properties (IPs). Patent Law and Copyright law etc. have their arenas defined, unlike trade secrets. Patent litigations are heavily burdened in India, enactment of trade secrets law may lessen its burden and it will also encourage speedy judicial pronouncement of Intellectual Property Rights (IPRs).

It is high time; India must act to enact trade secrets law to keep up with the world economy. The effective regime and proper implementation of trade secrets law promote innovations and give the Small and medium-sized enterprises (SMEs) an edge to flourish. Trade Secrets also stimulates trade and help the economy grow and its sectors as well.

## Conclusion

The jurisprudence of trade secrets has been deeply rooted in Intellectual Property Rights longer than it has been kept at the same footing as patent, copyrights, and trademark. Today trade secrets laws are rapidly recognized all around the globe, keeping in mind the changing market strategies and advancing technologies. At present, India is looked up to for its potentially vast market and must ensure all sorts of protection and remedies available to the businesses coming to India. Small and medium-sized enterprises (SMEs) must also be given extensive protection of trade secrets to flourish causing the growth of the economy, ultimately. It will be a win-win situation for India to enact a statute for trade secrets, must act upon it.

# THE RIDDLE OF THE MANDATORY CERTIFICATE: JUDICIAL TRENDS AND SOLUTIONS SURROUNDING SECTION 65B OF THE INDIAN EVIDENCE ACT, 1872

*Siddharth Srikanth*[1]

## Abstract

*The legal position surrounding the mandatory requirement of a certificate under Section 65B of the Indian Evidence Act, 1872, has recently been clarified by the Supreme Court. The Gorantyaljudgment has also called for a much-needed reformation of the laws governing admissibility of electronic evidence. Given that the legislation that was reproduced by Section 65B, has been repealed in the United Kingdom, it seems only apt for India to also amend its norms. This paper in order to arrive at the most apposite chrysalis of such amendment, first studies the existing statutory framework regulating the admissibility of electronic evidence in India. In this respect, the researcher also explores the law on admissibility of electronic evidence in various other foreign jurisdictions. Secondly, the paper explores the contours of judicial interpretation, with specific reference to the mandatory necessity of a certificate under Section 65B(4). The researcher analyses the oscillation of the judicial pendulum, beginning at Navjot Sandhu, moving to Anvar P.V., back to Shafhi Mohammad and finally coming to rest at Gorantyal. The paper further aims to elucidate on the various concerns and problems arising from the mandatory requirement of a certificate, and the manner in which these concerns have been addressed. Ranging from Canada to the United Kingdom, the paper explores the various lessons that could be learnt from the numerous international regimes concerning electronic evidence. The researcher in the course of this paper, has adopted the doctrinal method of research. The researcher has used both primary and secondary sources in order to come to a conclusion as to the best way forward.*

**Keywords:** Admissibility, Certificate, Computer Output, Electronic Record, Secondary Evidence

## Introduction

With increased development and especially with the occurrence of the Coronavirus pandemic, technology has started to play a greater and more central role in our lives. This central role hence leads to more instances of evidence being submitted in technological or electrical form, thereby leading to greater reliance on such forms of evidence. This reliance in turn implies that there indeed need to be rules that govern the introduction, admissibility and probative value of such evidence. But there arise certain problems. Electronic data or evidence are generally easier to produce, manipulate and destroy.[2] Therefore, their correctness and exactitude is constantly put into doubt. Nevertheless,

[1] 3rd Year student, 2020-2021, B.A. LL.B. School of Law, CHRIST (Deemed to be University), Bengaluru. . The author can be reached at siddharth.srikanth@law.christuniversity.in.

[2] Ashwini Vaidialingam, *Authenticating Electronic Evidence: Sec. 65B, Indian Evidence Act, 1872*, 8 NUJS L. REV. 43, 43 (2015).

newer techniques and devices play a crucial role in acting as evidence for a particular situation. But as such technology is susceptible to tampering and alteration, it must often be viewed cautiously.[3]

The legal scenario surrounding the admission and valuation of electronic evidence is essentially made of two statutes- the Indian Evidence Act, 1872[4] and the Information Technology Act, 2000.[5] With a view to incorporate modern developments into the former statute, the latter under Entry 9 of Schedule II, added Section 65A and 65B, which laid down guidelines for the admissibility of electronic records. Clause 1 of Section 65B (§65B) essentially deems any computer output, which is defined as any electronic record printed on paper, present in optical or magnetic media that is produced by a computer, to be within the ambit of the term 'document' provided certain conditions are met. Furthermore, §65B(4) mandates that a certificate enumerating the required information would act as evidence of such information enumerated.

The aforementioned sub-section was further explained in *Anvar P.V. v. P.K. Basheer*[6](*Anvar*) wherein the Apex Court held that under §65B, any secondary evidence pertaining to electronic records is inadmissible without the requisite certificate. However, in *Shafhi Mohammad v. State of Himachal Pradesh*[7](*Shafhi Mohammad*)the same Court in a lower Bench held that if the person producing the electronic evidence was not in possession of the device, as the provision mandating the requirement of a certificate was purely procedural in nature, such a provision could be waived when it serves the interests of justice. This confusion has finally been resolved in *Arjun PanditraoKhotkar v. Kailash KushanraoGorantyal*[8](*Gorantyal*)wherein the Court held the *Shafhi Mohammad* logic to be incorrect, and re-asserted the law as enumerated in *Anvar*.

It is this perceived confusion that this paper seeks to examine. The paper studies the development of the law on the introduction of electronic evidence through various case laws. Part II of the Paper looks into the statutory provisions that govern electronic evidence, and the issues that arise from them. It also studies the statutory provisions and interpretations of various other foreign jurisdictions. Part III then traces the development of the law through judicial decisions and their rationales. In doing so, it studies as to how various concerns arising out of a preceding judgment were addressed by successive ones. Part IV then provides certain principles and suggestions that could be adopted under the current regime of admissibility.

[3]Tukaram S. Dighole v. Manikrao Shivaji Kokate (2010) 4 S.C.C. 329 (India).
[4] Indian Evidence Act, 1872, No. 01 of 1872, INDIA CODE https://www.indiacode.nic.in/bitstream/123456789/2188/1/A1872-1.pdf.
[5] Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India).
[6]A.I.R. 2015 S.C. 180 (India).
[7](2018) 2 S.C.C. 801 (India).
[8] 2020 (5) CTC 200.

## The Statutory Environment around Electronic Evidence

### A. INDIA

It of course comes as no surprise that the Indian Evidence Act, 1872(IEA) did not concern itself with electronic forms of media and evidence given its time period. There nevertheless arose a need for it to recognise and provide for such forms of evidence. It is with this intention, that the Information Technology Act, 2000 made certain additions to the IEA viz. Section 65A and Section 65B. The former simply states that the contents of any electronic record may be proved in accordance with the latter section. §65B hence becomes central to understand how the Indian Evidence Act deals with the issue of electronic records. As mentioned, priorly, under §65B(1) any computer output is deemed to be a 'document'. Consequently, Section 3 of the IEA defines the term 'document' to mean any matter expressed through letters, figures or marks in order to record such matter. Furthermore, the same section defines 'evidence' as inclusive of oral evidence and all documents including electronic evidence produced to the Court for inspection.

This treatment of electronic records as documents is subject to certain conditions enumerated in §65B(2). The first condition is that the computer output should have been produced by a computer during a period in which it was regularly used to process or store information for the purpose of activities that were carried out regularly during that period, by the person having lawful control over it.[9] Secondly, during that time period, the aforementioned information must have been regularly fed into the computer in the ordinary course of activities.[10] The third condition was that the computer in question was operating properly, and if not, then the improper working of the computer should not have affected its electronic record or its content's accuracy.[11] And lastly, the information submitted in the electronic record should have been reproduced or should have been derived from the information that was fed into the computer in the ordinary course of activities.[12] In pursuance to this section, any combinations of multiple computers that have worked together or successively or in any other manner, over a given time period and have stored or processed information in the ordinary course of regularly carried out activities shall be deemed to be a single computer and shall be treated as the same.[13]

The next provision of particular concern is that of §65B(4). This sub-section as mentioned before states that any evidence that is to be introduced under this section is to be accompanied with a certificate. This certificate has to identify the electronic record which contains the statement that is to be treated as evidence, must describe the manner

[9] Indian Evidence Act, 1872, §65B(2)(a), No. 01 of 1872, INDIA CODE https://www.indiacode.nic.in/bitstream/123456789/2188/1/A1872-1.pdf.
[10] *Id.* §65B(2)(b).
[11] *Id.* §65B(2)(c).
[12] *Id.* §65B(2)(d).
[13] *Id.* §65B(3).

in which it was produced, has to provide the particulars of any device involved in the production of such electronic record and has to deal with any matter highlighted under §65B(2). This certificate must be signed by a person occupying a responsible official position in relation to the operation of the device or to the activities carried out. Such electronic record accompanied with such a certificate is treated to be evidence, and the information stated is only required to be true to the best knowledge and belief of the person whose statement it is.[14] The controversy surrounding §65B is primarily a result of various courts interpreting the section in different ways, thereby insisting on varying methods of establishing the conditions provided under §65B(2).[15] There is further confusion in the question of whether production of the certificate under §65B(4) is mandatory or is simply procedural and can be waived. It is this question that was further complicated by *Shafhi Mohammad.*

### B. OTHER FOREIGN JURISDICTIONS

The regime surrounding the admissibility of electronic evidence in India was primarily inspired out of Section 5 of the Civil Evidence Act, 1968 (CEA), of the United Kingdom.[16] This provision however, was consequently repealed by Schedule II of the Civil Evidence Act, 1995[17]. This repealing was pursuant to the recommendation of a Law Commission Report in 1993, titled "The Hearsay Rule in Civil Proceedings"[18]. Among other observations, the Report recommended that there should no special provisions with respect to computerized records, and the general rule of evidence should prevail.[19] Furthermore, the Report was of the opinion that when it came to authenticity of computer records, it was perhaps better left for the courts to decide the admissibility of records on a case-to-case basis, rather than for the legislature to impose "complex and inflexible conditions"[20]. The same then was mirrored in the Civil Evidence Act, 1995. It is also important to note, that when it came to criminal proceedings, Section 69 of the Police and Criminal Evidence Act, 1984 (PACE) governed admissibility of such evidence. A Law Commission dealing with this particular provision observed that the section was unsatisfactory due to five reasons.[21] Among these reasons, were also concerns surrounding the fact that often those seeking to adduce electronic evidence may not be in a position to certify the functioning of the computer. In fact, such power or ability may be

[14] *Id.* §65B(4).
[15] Vaidialingam, *supra* note 1, at 8.
[16] AradhyaSethia, *Rethinking Admissibility of Electronic Evidence*, 24 INT'L J.L. & INFO. TECH. 229, 232 (2016).
[17] Civil Evidence Act 1995, c. 38, sch. 2 (Eng.).
[18] UK LAW COMMISSION, REPORT NO. 216:THE HEARSAY RULE IN CIVIL PROCEEDINGS, 1993.
[19] *Id.* ¶4.43, ¶5.14.
[20] *Id.* ¶3.21.
[21] UK LAW COMMISSION, REPORT NO. 245: EVIDENCE IN CRIMINAL PROCEEDINGS: HEARSAY AND RELATED TOPICS ¶13.6, 1997.

with the opposing side.[22] Moreover, with the advancements in technology, it had become extremely tedious and impractical to certify all the intricacies of the operation of a computer.[23] Based on the recommendation of the Law Commission, Section 69 of PACE was repealed by the Youth Justice and Criminal Evidence Act, 1999.[24]

In the United States, this special treatment of electronic evidence is nowhere to be found. Traditional principles of admissibility of evidence are also applied to electronic evidence.[25] The authenticity of evidence under Federal American law, is found under Rule 901 and Rule 902 of the Federal Rules of Evidence (FRE). Authenticity was also held to be one of the requirements of admitting electronic evidence in *Lorraine v. Markel*[26]. Judge Grimm highlighted how electronic evidence can be authenticated by metadata and hashmarks.[27]As also recognized in the judgment, a few methods of authentication are seen to be more common and adequate.[28] These include testimony of a witness with personal knowledge (Rule 901(b)(1)) and authentication through distinctive characters and the like (Rule 901(b)(4)). Furthermore, it has been noted that the definition of 'original' is far wider in the American scenario, than in that of India.[29] The increased requirement of authentication of electronic evidence led to the incorporation of two more rules in 2017- Rule 902(13) and Rule 902(14). Both provide mechanisms for authentication through certification.[30]

Under Canadian law, emphasis is placed on the integrity of the system.[31] Canada therefore, falls within the countries that has special laws governing the admissibility of electronic evidence. There are also various presumptions at play here. Three predominant ones are regarding the proper operation of the computer, the integrity of electronic records being stored by an adverse party and finally, a presumption with respect to a neutral third-party storing electronic records.[32] In South Africa, the requirement of a certificate was charged with being overly cautious, and eventually, was reduced to an optional method of authentication.[33] Hence, it becomes clear that across jurisdictions, a

[22] *Id.* ¶13.9.
[23] *Id.* ¶13.8.
[24] Youth Justice and Criminal Evidence Act 1999, c. 23, §60 (Eng.).
[25] Jonathan D. Frieden & Leigh M. Murray, *The Admissibility of Electronic Evidence under the Federal Rules of Evidence*, 17 RICH J.L. TECH. 1, 2 (2011).
[26] Lorraine v. Markle and American Insurance Co. 241 F.R.D. 534 (D. Md. 2007).
[27] Brian W. Esler, *Lorraine v Markel: Unnecessarily Raising the Standard for Admissibility of Electronic Evidence*, 4 DIGITAL EVIDENCE & ELEC. SIGNATURE L. REV. 80, 81 (2007).
[28] Steven Goode, *The Admissibility of Electronic Evidence*, 29 REV. LITIG. 1, 9 (2009).
[29]Sethia, *supra* note 15, at 247.
[30] John M. Haried, *Two New Self-Authentication Rules That Make It Easier to Admit Electronic Evidence*, 66 U.S. ATT'YS BULL. 127, 128-131 (2018).
[31] Uniform Electronic Evidence Act, 1997, s. 4 (Can.), https://www.ulcc.ca/en/uniform-acts-new-order/older-uniform-acts/749-electronic-evidence/1924-electronic-evidence-act (last visited October 19, 2020).
[32]Sethia, *supra* note 15, at 239-240.
[33]*Id.* at 245.

certificate is not an essential element of admitting electronic evidence. However, it is accepted when submitted.

## The Judicial Pendulum

### A. THE PENDULUM PUT IN MOTION: STATE V. NAVJOT SANDHU

A central issue that arose with respect to §65B was the mandatory nature of the certificate. This concern was first clarified in the case of *State (NCT of Delhi) v. Navjot Sandhu*[34]. The case dealt with the infamous attack on Parliament. More specifically, one of the issues in this case was the admissibility of telephone call records or rather, their printouts. The Court held that there was no bar on introducing secondary evidence under the other sections of the IEA viz. Sections 65 and 63. Hence the call records evidence in *Navjot Sandhu* which was produced without a certificate, was allowed. Moreover, the Court held that a cross-examination of a competent witness who was conversant with the functioning of the computer during the relevant time and the manner in which the printouts were taken, was enough to determine the authenticity and reliability of the evidence so adduced.

By virtue of this decision, the Apex Court affirmed a Delhi High Court judgment also dealing with the attack on Parliament House.[35] In this case, the Delhi High Court had held that simply adhering to §65B(1) and §65B(2) was enough to make electronic records admissible. The provision for certificate was seen to be an alternative mode of proving electronic record and not the sole means of doing so.[36] Hence, the Supreme Court judgmentsignaled an approach of the courts in which the certificate would no longer be mandatory and could be replaced by procedure under Section 63 and 65 of the IEA.[37] However, there has been no uniformity in the interpretation of this section. Some have rejected this lenient reading of the requirement of certificate and have demanded one in order to authenticate, while others simply do away with any requirement as to authentication as both parties agreed to allow that evidence to be placed on record.[38] This hence had led to the reasonable conclusion that the admissibility of electronic evidence and the requirement of a certificate is solely predicated on judicial discretion and not on any uniform principle of interpretation.[39]

[34] (2005) 11 S.C.C. 600 (India).
[35] State v. Mohd. Afzal, (2003) 107 DLT 385 (Delhi).
[36] *Id.*
[37] State (NCT of Delhi) v. Navjot Sandhu (2005) 11 S.C.C. 600 (India).
[38] Vaidialingam, *supra* note 1, at 51.
[39] *Id.*

### B. THE SWING OF UNIFORMITY: THE ANVAR JUDGMENT

When a victory of a candidate in the general election to the Kerala Legislative Assembly was challenged by the runner-up, arguing that the winner had engaged in the commission of corrupt practices under Section 123(4) of the Representation of the People Act, 1951[40], the Court reassessed the position of law under §65B.[41] The petitioner contended that the defendant had made use of songs and announcements in the course of election propaganda, which were false in relation to his own conduct. Hence, the appellant sook to set aside the election, and to obtain a declaration in his favor.[42] As the CDs produced before the Court were not the original CDs used to make those announcements, the Court held that they could not be treated as primary evidence and hence attracted the provision for certificate under §65B.

While considering the decision in *Navjot Sandhu*, the Court made note of the principle *generaliaspecialibus non derogant*which means that a special law will always prevail over a general law. The Court opined that as Section 59, 65A and 65B are special provisions concerning electronic records, they in themselves form a code and the general law encapsulated under Section 63 and Section 65 with respect to secondary evidence, has to yield to that code. Therefore, the Court went on to hold that the position of law as laid down in *Navjot Sandhu* was incorrect as it did not take into account Sections 59, 65A and 65B, and went on to explicitly overrule the judgment. This therefore meant that no secondary evidence under §65B was admissible unless accompanied with the requisite certificate. As to the conditions provided under §65B(4), it would seem that the Court saw these conditions as individually mandatory, meaning that every single one of those conditions were needed to be fulfilled by virtue of the certificate.[43] This would therefore seemingly be against the statutory language provided under the section, as the section states that certificate can do "any"[44] of the given conditions. The Court also made a point of observing that the responsible official should have certified the document at the time at which it was produced.[45] If this concurrent certification is not provided, then the evidence is not admissible under the section.

The implications of this judgment are manifold. One principally problematic result of this judgment is that it makes a distinction between admissibility and genuineness, claiming it is only after duly producing the evidence under §65B, that its genuineness comes under question.[46] This goes against the law laid down by the judiciary in India with respect to

[40] Representation of the People Act, 1951, No. 43, Acts of Parliament, 1951 (India).
[41] Anvar P.V. v. P.K. Basheer A.I.R. 2015 S.C. 180 (India).
[42] *Id.*
[43] Vaidialingam, *supra* note 1, at 53.
[44] Indian Evidence Act, 1871, §65B(4), No. 01 of 1872, INDIA CODE https://www.indiacode.nic.in/bitstream/123456789/2188/1/A1872-1.pdf.
[45] Anvar P.V. v. P.K. Basheer A.I.R. 2015 S.C. 180, ¶ 22.
[46] *Id.* ¶ 16.

tape-recordings, stating that the reliability of evidence must be established before it is admitted.[47] The logic behind this being that such forms of evidence are extremely vulnerable to manipulation and alteration, and therefore there exists a question of genuineness which needs to be addressed before allowing for them to be admitted.[48] The requirement as to the certificate being obtained at the time of producing the document, leads to certain complications. Those who want to introduce such evidence, but have not obtained certificates at the time of producing that document, cannot admit that evidence, and those who want to avoid introducing such evidence, can simply forego obtaining the requisite certificate.[49]

### C. THE PENDULUM SWINGS BACK: THE JUDGMENT IN SHAFHI MOHAMMAD

On the issue of secondary electronic evidence, the Apex Court in *Tomaso Bruno v. Union of India*[50](*Tomaso Bruno*), held that such evidence could not only be made admissible under §65B, but also could be led under Section 65. These resultant ambiguities were further exacerbated by the Apex Court in *Shafhi Mohammad v. State of Himachal Pradesh*[51]. While the case concerned an appeal wherein the issue was the admissibility of videography of a crime scene or the scene of recovery in order to inspire confidence in evidence collected, the Court went on to address concerns surrounding the admissibility of electronic records. The obvious distinguishing factor which differentiated this case from *Anvar*was the issue of whether a certificate was still mandatory when the device from which the electronic document was generated, was not in the possession or custody of the person producing it. A two-judge Bench had previously held that when it came to evidence by means of audio or video tape technology, no exhaustive rule could be laid down for the admission of such evidence as it was neither feasible nor advisable.[52] Relying on this judgment among others[53], the Court in *Shafhi Mohammad* went on to hold that the provisions under §65A and §65B are merely procedural and clarificatory in nature. The Court clarified that provided the evidence was authentic and relevant, it was admissible subject to the Court being satisfied as to its authenticity. The Division Bench further went on to hold that §65A and §65B could not be said to be a complete code on the subject, as only secondary evidence could be introduced under those provisions.[54]

In accordance with their opinion as to the procedural nature of those provisions, the Court held that the provision require the furnishing of certificate was only applicable in cases

[47] R.M. Malkhani v. State of Maharashtra (1973) 1 SCC 471; Tukaram S. Dighole v. Manikrao Shivaji Kokate, (2010) 4 SCC 329; Vaidialingam, *supra* note 1, at 58.
[48]Vaidialingam, *supra* note 1, at 58.
[49]Sethia, *supra* note 15, at 242.
[50] (2015) 7 S.C.C. 178 (India).
[51]A.I.R. 2018 S.C. 714 (India).
[52] Tukaram S. Dighole v. Manikrao Shivaji Kokate (2010) 4 S.C.C. 329 (India).
[53] Tomaso Bruno v. Union of India (2015) 7 S.C.C. 178; Ram Singh v. Ram Singh A.I.R. 1986 S.C. 3.
[54]Shafhi Mohammad v. State of Himachal Pradesh A.I.R. 2018 S.C. 714.

where the person producing the document had the capacity to furnish the certificate by virtue of him being in control of the device that generated the electronic document.[55] For those who are not in possession of the device, they can certainly invoke Section 63 and Section 65 in order to produce electronic evidence. If such invocation is not permitted, the Court stated, it would be a denial of justice to the person who possessed authentic electronic evidence which was disallowed from admission merely on account of the absence of a certificate that they could not possibly secure.[56] Hence, the requirement of a certificate with respect to electronic evidence could be relaxed as and when the interests of justice justify the Court to do so.

One of the concerns that arose from the *Anvar*judgment was the fact that it mandated the furnishing of a certificate, which thereby led to the inadmissibility of electronic evidence that was illegally obtained, or electronic evidence provided by whistle-blowers.[57] This therefore leads to a double standard. For illegally obtained non-electronic evidence would be admissible but illegally obtained electronic evidence would not be as there would be no certificate accompanying it.[58] It is perhaps this problem that this judgment somewhat remedies. It allows for electronic evidence to be admitted through mechanisms available to even non-electronic evidence, thereby bringing some semblance of equivalency between the two types of evidence. Furthermore, the issue of evidence produced by whistle-blowers is also remedied with the allowance of those not in possession of the device, to produce evidence without a certificate. However, as this judgment was by a Division Bench, it does not adhere to the doctrine of binding precedent appositely summed up in *Central Board of Dawoodi Bohra Community v. State of Maharashtra*[59]. Hence a major question arose as to whether or not it was good law.

### D. THE PENDULUM COMES TO A REST: THE GORANTYALJUDGMENT

It would seem that the confusion caused by the previous case and various other judgments has finally been resolved by the Supreme Court in *Arjun PanditraoKhotkar vs Kailash KushanraoGorantyal*[60](*Gorantyal*). The case was filed by two petitioners who challenged the election of the Appellant under Section 80 and Section 81 of the Representation of the People Act, 1951. Those who challenged the election argued that the nomination papers filed by the Appellant were defective, and therefore were wrongfully accepted by the Returning Officer of the Election Commission. This case comes within the purview of this paper as the Respondents relied on video and camera arrangements to argue that the nomination papers were filed after the stipulated time

[55]*Id.*
[56]*Id.*
[57]Vaidialingam, *supra* note 1, at 59.
[58]*Id.*
[59]A.I.R. 2005 S.C. 752 (India).
[60]2020 (5) CTC 200.

within which such papers should have been filed. The High Court in this case had held that there was no requirement of a certificate under Section 65B(4), and hence the evidence was admissible. Based on this evidence, the High Court declared the Appellant's election to be void. The Apex Court after perusing the existing statutory framework, held that the conditions laid down under §65B(2) are to be fulfilled cumulatively, and the same treatment is to be meted out to the conditions given under §65B(4).[61] The Court opined that §65B(1) clearly states that the admissibility and proof of an electronic record solely dances to the tune of §65B, which means that Sections 62 to 65 are irrelevant for the same.

Upon completion of these observations the Court went on to address the "discordant"[62] views that were taken in various other cases. Tackling the issue of secondary electronic evidence, the Court held that such evidence cannot be led under Section 65, thereby explicitly overruling *Tomaso Bruno*. It identified that the Court in *Tomaso Bruno* had relied incorrectly on *Navjot Sandhu,* as that case had already been explicitly overruled by *Anvar*. The Court then went on to also overrule *Shafhi Mohammad* for a multitude of reasons. The Court was of the opinion that while the judgment of *Shafhi Mohammad* largely referred to cases either before 2000, or having very little to do with §65B, the idea that those not in possession of the device will find it hard to procure a certificate is in itself entirely wrong.[63] The powers of a Judge to order the production of a document,[64] the Civil Court to issue summons to produce document,[65] and a Judge conducting a criminal trial to issue orders for production for documents,[66] were all various avenues available to those who do not have in their possession the device, to obtain the requisite certificate through an application. Hence, as the rationale behind *Shafhi Mohammad* itself was found to be incorrect, the judgment was overruled.

While holding that the conditions under §65B(4) were mandatory, the Court nevertheless allowed for an exception. It found that if the person seeking to produce electronic evidence under §65B, had not produced the certificate by reason that he was not in possession of the device, he should then apply to the opposite authorities for the certificate. If upon doing so, the authorities refuse to provide the same, the person requiring the certificate can then approach the Court, at which point the Court could order the production of the requisite certificate, by the person to whom it sends the summons to produce such certificate. It is at this point that the person seeking the certificate has said to have done all that is possible by him, to get the said certificate. Using two Latin

[61] *Id.*
[62] *Id.*
[63] *Id*.
[64] Indian Evidence Act, 1872, §165, No. 01 of 1872, INDIA CODE https://www.indiacode.nic.in/bitstream/123456789/2188/1/A1872-1.pdf.
[65] The Code of Civil Procedure, 1908, Order XVI, Rule 6, No. 05 of 1908, INDIA CODE https://www.indiacode.nic.in/bitstream/123456789/2191/1/A1908-05.pdf.
[66] The Code of Criminal Procedure, 1973, §91, No. 2, Acts of Parliament, 1973 (India).

maxims viz. *lex non cogitadimpossibilia* (the law does not demand the impossible) and *impotentiaexcusatlegem* (when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused), the Court stated that when the person has done everything possible, and the production of the certificate is still not within his power, then this requirement of the certificate may be waived.[67]

One of the major issues arising out of *Anvar* was the requirement of the contemporaneous certification. This requirement was eased to some degree by *Gorantyal*. Here, the Court asserted that although in normal circumstances there should be contemporaneous certification, ample consideration should be given to cases where a defective certificate is produced, or where the person responsible to give, the certificate has refused to do so. A trial Judge in those circumstances, must summon the appropriate person and require them to produce the requisite certificate. This is however subject to discretion exercised in civil cases, in accordance with the law and with the interests of justice. The Court realized that this relaxation of the contemporaneous requirement may have certain adverse impacts in the realm of criminal law. Ensconced within the right to a fair trial, is the right for the accused to be furnished with all documents the prosecution seeks to introduce, so as to allow the accused to prepare a defense against them.[68] Conversely, the Court took cognizance of the fact that if the prosecution had mistakenly failed to file a document, then the said document could be allowed to be placed on the record.[69] Therefore the Court came to the conclusion that all said and done, the introduction of the certificate at a later point in time could be allowed as long as the hearing in a trial had not yet gotten over.

## Sundry Suggestions

Section 65B of the Indian Evidence Act, 1872 provides for a very wide ambit of evidence that is to evidence under the provision. The scope of the provision spans "any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer"[70]. However, this has led to certain problematic rulings. For instance, a computer-generated FIR was required to be proved in accordance with §65B.[71] Therefore, the seemingly straight-forward solution would make the scope of §65B somewhat narrower. This would mean to introduce the FRE standard of originality of electronic records, to include "any printout or other output readable by sight"[72]. This would allow for such printouts and records to fall within the ambit of primary evidence, and therefore could be authenticated through

[67] Arjun PanditraoKhotkar vs Kailash KushanraoGorantyal 2020 (5) CTC 200.
[68] *Id.*
[69] Central Bureau of Investigation v. R.S. Pai (2002) 5 S.C.C. 82 (India).
[70] Indian Evidence Act, 1872, §65B(1), No. 01 of 1872, INDIA CODE https://www.indiacode.nic.in/bitstream/123456789/2188/1/A1872-1.pdf.
[71] State v. Surender MANU/DE/2281/2014.
[72] FED. R. EVID. 1001(4).

individuals stepping into the witness box.[73] This change could obviously be done either through legislative amendments of §65B(1) or through judicial interpretation, the former being the more desirable option. Justice Ramasubramanian was of the opinion that the FRE and *Lorraine* solutions were indeed among 'good' solutions produced in other jurisdictions.[74] Given the fact that certificates in India do not guarantee reliability and also do not disincentives people from submitting fraudulent certificates,[75] there are perhaps two measures to be taken here. The first measure would be to incorporate within the certificate, details of the hash values, metadata and various methods including those that may arise in the future. Hash values are of particular significance towards providing authenticity to copies as even a slight alteration in the record leads to a change in the hash value of the copy, from that of the original. A second measure could be to allow for other forms of authenticating, as allowed for under the FRE.[76]

*Gorantyal* urged the legislature to re-look at §65B and made specific reference to the confusion generated by the provision. However, as technology advances, various new mechanisms of authenticating electronic records are going to be devised.[77] The solution then does not seem to be one of 'uniformity' but perhaps one of measured entropy. The current form of certificate under §65B, which requires certain information such as that of regular usage of computer and the information being fed in the ordinary course of activities, have largely become redundant.[78] Therefore, it hardly seems apposite to make the certificate the be-all and end-all of electronic evidence. The best way forward regardless of which model or framework is adopted by the legislature, would be to allow for a variety of mechanisms to authenticate evidence.

## Conclusion

India has seen great judicial turmoil with respect to the admissibility of electronic evidence by virtue of the requirements of §65B. This oscillation of the judiciary arises from the mandatory necessity of a certificate under the provision. This confusion for the time-being has been largely resolved, with *Gorantyal* somewhat reducing the burden on those required to produce a certificate. In the beginning, the Apex Court of India was of the opinion that a certificate was not mandatory and cross-examination of witness could be used to introduce electronic evidence. This leniency was swiftly put to rest in *Anvar*wherein the Court mandated the requirement of a certificate under §65B(4). Once again in a bid to appease the gods of justice, the Supreme Court in *Shafhi*allowed for electronic evidence to be introduced without a certificate. Finally, *Gorantyal*has brought

[73]Arjun PanditraoKhotkar vs Kailash KushanraoGorantyal 2020 (5) CTC 200.
[74]*Id*.
[75]Vaidialingam, *supra* note 1, at 59-60.
[76] Andrew Schupanitz& Jacklin Lem, *Judges' Treatment of Federal Rules of Evidence 902(13) and 902(14)*, 68 U.S. ATT'YS BULL. 109, 112 (2020).
[77]Vaidialingam, *supra* note 1, at 66.
[78]UK LAW COMMISSION, REPORT NO. 216:THE HEARSAY RULE IN CIVIL PROCEEDINGS, ¶3.14, 1993.

apparent parity by solving some of the issues that arose from *Shafhi Mohammad* and *Anvar*.

The legislation that inspired §65B has already been repealed. The format of the same has been extensively criticized by the UK Law Commission. Reasons ranging from impracticality and tediousness to the apparent redundancy of such certificates, certification in the manner contemplated by §65B has failed the test of time. Some jurisdictions have rejected a special law governing electronic evidence, and allow for the same to be provided within conventional frameworks. However, certification as a form of authentication has not completely been forsaken. It continues to endure in newer forms under the FRE. Each model adopted by the various countries surveyed in this paper, have their pros and cons. The model that is to be adopted is up to the wisdom of the legislature. It is only when such model is enforced can it be critiqued. This paper has simply put forward certain principles and ideas that warrant introduction in the current regime. The certificate with all its flaws cannot be forsaken, and at the same time cannot be made the sole factor in adducing electronic evidence. The FRE in its model allows for a variety of methods of authentication, as enumerated in *Lorraine.* The same should be provided for in India. The law reasonably cannot be expected to keep abreast with each and every development in technology. Therefore, the law then is expected to at least provide a wide enough net that allows for modern means of authentication to be incorporated, all the while ensuring appropriate standards of authenticating electronic evidence.

# PENAL COUPLE: REVISITING THE RIGHTS OF VICTIMS

*Vasundhara Kaushik*[1]


## Abstract

*"Unless we fight for the victims and champion their dignity, we will not be able to embrace fully our own dignity as human beings. Let us act now, tomorrow may be too late".*

*Dr. Justice. A.S. Anand, Fr. Chief Justice, Supreme Court.*

*Victim and Criminal have been termed as a 'Penal Couple' or 'duet frame of crime'*[2]*, reflecting a complementary relationship between a criminal and a victim. The theory of Penal Couple has been extended to mean that the attitude and behavior of the victim influences the acts of crime against the victims. While the only goal of the law is fixated on the offender's punishment and reformation, the victim is left with little or no assistance from the administration. Time and again, the punishments of all kinds of crime whether petty, serious, or heinous are amended in accordance with the frequency of occurrence and gravity of such crime. However, the rights of the victims remain the same. In fact, the rights of the victims were fairly developed in Ancient India, as compared to the present Indian Criminal Justice System. For instance, Manu in Chapter III verse 288 said that, "He who damaged the goods of another, be it intentionally or unintentionally, shall give to the owner a kind of five equal to damage". In ancient India, injuries or loss caused due to offence committed by government officers were compensated by his subordinates or by his family members. Again, traders or businessmen who lost their property while traveling through the kingdom were also compensated*[3]*.I propose, through this abstract, to contribute an article based on research work pertaining to the needs of revisiting and amending the rights of the victim. It shall include how the victims are ignored, the concept of a penal couple and victim precipitation theory, and a small comparison between the present and ancient method of compensation to the victims of a crime.*


## Introduction: Victim and Victimization

A victim is defined as a person who has suffered physical or emotional harm, property damage, or economic loss as a result of a crime.[4]The term "Victims" mean all those people who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, monetary hardship or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws

[1] Final Year Law Student, BA LLB(Hons), Faculty of Law, University of Allahabad.. The author can be reached at Email: kaushikvasundhara@gmail.com.

[2] Kritika, Victims and the law: a socio-legal study, Ph.D. thesis, Maharshi Dayanand University, 11 (2012).

[3] Rekha Rai, Right of Victim for compensation in India: A historical background, International Journal of Law 31, 31 (2016).

[4]'Who is a victim of crime?', Government of Canada (Sep. 14th, 2020, 02:09), https://www.justice.gc.ca/eng/cj-jp/victims-victimes/rights-droits/who-qui.html.

operative within Member States, including those laws proscribing criminal abuse of power.[5] In general terms, victim refers to all those who are made to experience or suffer injury, loss or hardship due to any cause and one such causes maybe a criminal act. Such injuries and losses can be physical, emotional, mental as well as financial loss.[6] Hence, victim is any person or a group of individuals who have suffered as a consequence of the wrongful, illegal acts of the perpetrator of a crime, either directly or indirectly, and therefore, the aftermath of a criminal act conceives the concept of direct or immediate and indirect victims. For instance, a person who has been sexually assaulted is the direct victim of the crime and its family that is unfairly disgraced by the society is the indirect victim of the incident of assault. In a case of Identity theft, wherein the person whose credit card number has been stolen is the direct victim of such financial fraud and the people who are financially dependent upon him or her are the indirect victims of the wrongful act. The direct victim of crime is also known as the primary victim and the indirect victim is known as secondary victim. Except for these two categories of victims, there can also be a third category of victim, a tertiary victim[7], in some incidences of wrongful or illegal conducts. Such victim is a person or group of people, besides the direct victim who suffers or is victimized as a result of the offender's actions. For instance, a communal riot broke between two communities in an area. Community X was targeted and attacked by people belonging to Community Y where many of them were murdered and their property was targeted. In such case, the people attacked are the primary victim and the families of such people are the secondary victim but the people of community X living in some other area where no communal riot took place are tertiary victim as because of the riot, they live in fear of being targeted in their respective areas and become victim of hate phobia towards their community. People belonging from the former community would shun out the people of the latter community and avoid having contacts with them.

Victimization is an unfair treatment that the victim and people dependent on it are made to go through at the hands of the offender. It doesn't only refer to any physical form of unpleasant treatment but also to some kind of mental trauma to the victim, wherein it is made to feel and believe that it is in a very bad position. In other words, victimization can be considered as a process of a person becoming a victim or being victimized. There are two categories of victimization, primary and secondary. Primary victimization is a treatment directly resulting from a crime, for instance, A is hitting B on the head with a stick. Here, the blow suffered by B as a result of being hit on the head by A is primary victimization. Secondary victimization, which is also known as post crime or double

[5] UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, art. 1.
[6] Prof. N.V.Paranjape, Criminology, Penology & Victimology 763 (7th Ed. 2018).
[7] Id. at 768.

victimization[8] is treatment provided to the victim by the society. It can be said to be the outcome of the primary victimization. For instance, a victim of sexual assault is treated as a person of 'easy virtue' and targeted with immoral questions leading to character assassination by various legal institutions. The person being a victim of sexual assault is an example of primary victimization and the unfair treatment by the police authorities while lodging a complaint can be considered as secondary victimization.

**Ignorance of rights of the Victims**

Victim Rights are such privileges provided to the victim of a crime which is written in black and white, and which forms a guarantee of specific treatment by the government, the community, the criminal and the criminal justice system towards the victim. They are those legal rights afforded by the statutes that can be accessed and exercised by a person only when it becomes a victim. However, even after these rights are in black and white and legally recognized, they are still blissfully ignored by the authorities, mostly because of their personal malafide reasons.

An act to constitute a crime needs to have mens rea (guilty mind or intent) to carry out the act, and actus reus (physical act) the actual carrying out of the act. Thus, an act shall become a crime only when a person or group of individuals have conducted a wrongful act with a guilty or malicious intent and the act has been carried out physically, whether it is an attempt to commit the offence or the offence has been successfully committed. Thus, whenever there is a criminal occurrence, there are two or more parties involved. An occurrence of a wrongful or illegal act cannot take place if there is either no victimizer(offender) or victim or either of them. One cannot steal a watch of its own, one cannot murder oneself, one cannot trespass on its own property, etc., In case the offender has trespassed on a property or stolen an object of another, the owner of the same shall be the victim.

According to Von Henting the relationship between the victimizer and the victim is very intricate. The victim is the one who suffers and the victimizer, one who harms appear in victimization in a close interpersonal relationship and the victim plays a determinant role with the victimizer.[9]The victim shapes and mounds the criminal although, the final outcome may appear to do one sides, the victim and criminal profoundly work upon each other, right up until the last moment in the drama. Ultimately the victim can assume the role of determinant in the event.[10]

Unfortunately, the victim's role is limited to reporting the crime to officials who decide whether or not to prosecute the case, how to proceed, and what type of punishment to

[8]Dheerendra Kumar Baisla, Secondary Victimization under the criminal justice system, JLSR 62, 65 (2016).
[9] Hans Von Henting, The criminal and his victim (1948) Yale university Press, New Haven.
[10] Kritika, supra, 12.

recommend.[11] The whole criminal justice system, be it the police or the court or any other authority pay much less attention to the victim and put all their efforts only on the type and amount of punishment to be awarded to the criminal. Even during the campaigns, protests by the civil or human rights activists for the reform in criminal justice system, the campaigners and protestors pay more than necessary attention towards the rights of the accused while completely ignoring the rights of the victims. For instance when violent protests emerge at a place by burning up the private properties and the protestors are arrested, rounds of deliberations take place on why the protests took place, with what were the protestors anguished, why weren't their demands addressed, etc., all the while ignoring those who had lost their properties in the protests and became victim of the violent public chaos and aggressions. In the opinion of the advocates of these protestors, amendments in criminal justice system means only the amount of relaxation and strictness exercised in the terms of rights and punishments of the offenders. The victims and their rights unfortunately receive only sporadic attention from the above activists and other authorities. They believe that the perspective of justice for the victim is same as that of the whole state, as a crime is an illegal act committed against the whole state. Therefore, once the accused has been proven guilty beyond doubt and receives the punishment in accordance to the offence he has committed from the court, the state believes that the race against injustice has been won but unfortunately, they seem to have been blinded by the due process of law that they are unable to see the hardships that the victim and its family must have gone through and whatever other hardships might emerge and follow. The question of whether or not the punishment has brought some meaning to the life of the victim remains unresolved and is also easily avoided by the authorities, time and again. Topics for debates is the increase in punishment for the criminal instead of deliberating on the inclusion of new aspects in the rights of victims. Even in law institutions, more preference is given to the rights of the accused instead of reading both the rights of an accused and victim as same as none can have rights without the other.

The main reason for its partial failure is overemphasis in court proceedings on the right of the defense of the accused, being his constitutional right under Articles 20, 21 and 22 of the Constitution.[12] The same articles of the Constitution have been interpreted in several ways by the Hon'ble courts in providing assistance to the criminals and upholding their human rights, yet the same are not implemented as effectively in favor of the victim, as are the rights of the accused. Secondary victimization like stigmatization, facing discrimination on the basis of being a victim, etc., are not addressed by interpreting these Articles. During the process of the trial, concentration of the police authorities is vested in providing the criminal with all assistance possible in order to give every occasion to the criminal to defend itself, whereas, the same authority believes that by only lodging

[11]Dipa Dube, Victim Compensation Schemes in India: An analysis, IJCJS 339, 339 (2018).
[12] Justice D.S.Dharmadhikari, Human Rights of the Victims,The Practical Lawyer (Sep. 10th, 2020, 23:12), http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=7009.

the complaint and setting the criminal case in motion, the victims have received their justice. The plight and rights of the victims suddenly disappear into oblivion in real practice. They are dragged back from the oblivion only if and when they can play the role of witness on which the verdict of the court depends.

**Why is there a need to implement the Rights of the Victims?**

The term Victim now no longer means or is confined to include only the witness of prosecution which the prosecution describes the court to have suffered damages and harm at the hands of the offender, but it now means an individual who has an autonomous participation in the criminal case. The position of a victim is no more limited to only reporting the crime but to be the focus of the whole criminal investigation. It has to borne in minds of the authorities that the subject of the crime is the victim and it has to conclude its investigation by carefully taking care of the rights of the victims, more than that of a criminal. Thus, the modern definition of victim defines and increases the level of participation that the victim is entitled to receive from a criminal case.

There is plethora of rights of the accused in the statutes which is also ideally enforced by the authorities and which is timely amended with the advancement of the society and adopts more humanistic approach towards awarding punishments. Time and again the society is made aware of all such rights through various mediums as well. Even the focus of the human rights activists, the studies based on various aspects or branches of criminology, the projects adopted by various universities is limited to the prisons and prisoners. The concentration of the criminal justice administration should have been mainly on the safety and betterment of the victims, which has been an illusion till now.

Article 21[13] and Article 14[14] of the constitution of India bestows upon the state, an obligation to protect the life of the people, to respect their freedom, to provide them security, to maintain peace and tranquility amongst the people of the country, to forward their interests, to safeguard them against any form of discrimination, to provide them equal treatment in all matters, etc., and all such rights have been equally vested in the victim of a crime or a wrongful act as well. A victim by no definition is different from the common citizen of any nation and yet, it has been considered different from the people or citizen of the country. The minute a person becomes a victim, the status does not mark its exit or withdrawal from its rightful access to fundamental rights and safeguards provided to it by the Constitution of India and any other legal statute. It occupies the same position of a person as it did before the commission of the crime. The obligation on the state to protect the victims also flow from Article 21 and Article 14 of the Constitution. Despite all these provisions available for the benefit of every person, victims are discriminated as soon as they file a complaint of a crime against them. The discrimination starts right from

[13] India Const. art 21.
[14] India Const. art 14.

the time they step out of their houses till even after the decision of the court. Especially, victims of abuse of power face discrimination on larger scale. Victim of abuse of power are people who have suffered at the hands of the people who were liable to protect them and their interests like the abuse of children at child orphanages. For instance, if a person lodges a complaint reporting a medical negligence against a medical officer or practitioner in a hospital, it is denied further medical services from that hospital and other doctors of the same hospital, it is denied medical services from nearby hospitals or doctors who were associated with the doctor accused of medical negligence and as denial of medical treatment from doctors, it may develop some serious health issues. They face discrimination from the society as well as they are now labelled as someone of aggressive and rebellious nature. The society, instead of approaching the victim with sympathy and positivity, treats it as a dirty element that can pollute the rest of them and the victim of a crime faces secondary victimization by way of stigmatization. Stigmatization is where people of the society name a person by using undignified adjectives and malign the image of the victim. Victims of crime should be protected from secondary and repeat victimization, from intimidation and from retaliation, they should be able to access and receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice."[15]

The conditions of the victims and the situations that they are put in clearly portray the criminal justice framework of our country. The legitimate and procedural arrangements contained in our rule book have been very pitiful as opposed to the enormous sufferings of the victims because of wrongdoing consistently.[16]One of the major challenges faced by us in preventing victimization and protecting victims is that no specialized law related to victimology has been established. No separate committee is setup in order to understand the amendment of laws on the basis of reports of the committee on advancement of victims. There is no systematic body for legal provisions defining the status, rights, role and the decision of victims in the lawful framework nor is there any form of rules or lawful arrangements that can provide a basis for process followed by the prosecution, police, health professionals and judicial officers and in assisting the victims in lodging their complaints with regards to the amazing improvements occurring in the domain of victim justice.

The victim needs more assistance and help than the criminal, either immediately or soon after the crime has been committed. It is an essential requirement to fanatically protect the rights of the victims as similarly as the privileges provided to the accused are. The protection of victim's rights is needed more during the period interceding the commission

[15]G.S.Bajpai, Duties of Frontline Professionals towards securing justice for victim: a manual, Centre for Criminology and Victimology at NLU Delhi1, 4 (2018).

[16] Anand Kakasaheb Deshmukh, Human Rights perspective of victim status in in Indian Criminal Justice System a critical study, Ph.D thesis, Babasaheb Ambedkar Marathwada University 20, 58 (2016).

of crime and beginnings of preliminary hearings in the court. In the current criminal justice framework, there exists no legitimate plan whereby a victim can seek assistance in terms of legal and financial matters and to make sure about the punishment that is to be awarded to the guilty and backing for the early rebuilding of his normal, 'prior to commission of crime' life.[17]

**Victim Precipitation, Penal Couple and degrade in status of a victim**

Victim Precipitation is a controversial theory propounded by Wolfgang[18] which stated that in some cases, civil or criminal, the actions of the victim itself leads to the harm suffered by it. It means that the criminal act is the result of the aggression that the victim displayed which led to the wrongful or illegal behavior of the offender towards the victim. The victim's acts or conduct were of such aggravating or provoking nature that resulted in its own suffering at the hands of the offender. Examples of victim precipitation theory can be seen in cases of contributory negligence, volenti non fit injuria. According to the theory of victim precipitation, the act of crime victimization involves, at the very least, two people offender and victim and both of them are acting and reacting before, during and after the incident. Identifying the roles based on this theory does not lead to negative outcomes, however, it becomes controversial when it is used to blame the victim and ignore the role of the offender. For instance, a drunken brawl started between A & B because of B's verbal altercation. B approached A with a pistol with the intention of shooting at him and killing A. B fired a shot but missed A. A pulled a knife out of his pocket and stabbed B to death. In the present example, although B was the victim, however, from the viewpoint of the theory of Victim Precipitation B's participation in his own death should be analyzed. B was the one who started the verbal altercation leading to a brawl, he charged himself towards A in order to shoot and kill him that made A take the help of his knife in self-defense and therefore, B can be considered as the initial aggressor who precipitated the act of murder by A on him.[19]

Similar to the theory of Victim Precipitation is the theory proposed by Benjamin Mendelsohn focusing on the relationship between an offender and a victim, the Penal Couple. Through this theory, Mendelsohn put forward the concept of 'shared responsibility'.[20] The theory of 'Penal Couple' essentially holds that an act of crime involves two partners, a criminal or the perpetrator, and a victim, where the victim lays down the opportunity for the criminal to carry out an act of crime against the victim.

[17]Dharmadhikari, supra.

[18] Wayne Petherick, Victim Precipitation: Why we need to Expand Upon the Theory, Forensic Res Criminol Int J (2017).

[19]Victim Precipitation: Definition and Theory, Study.com (Sep, 12, 2020, 22:45), https://study.com/academy/lesson/victim-precipitation-definition-theory.html#:~:text=These%20are%20the%20primary%20components,failure%20to%20pay%20his%20debt.

[20] Kritika, supra.

From the perspective of this theory, the victim is an equal participant in the crime and should take some 'functional responsibility' for the crime.[21]

However, both the above theories are being glaringly misused by the criminals and authorities, especially the police and developing a culture of victim blaming, which was the source of idea behind the theory of Penal Couple. With the help of these theories, the society has developed the habit of devaluing the victim out of the whole criminal investigation. They aim to discredit the victim's version of the story by simply ostracizing the acts of the victim prior to the happening of the crime. "She was raped because she walked home alone in the dark. I would never do that, so I won't be raped."[22] Instead of addressing and recording the complaints of the victims, their first line of question is aimed at the victim's act and character, especially in cases of sexual assaults or rape. Such treatment by the police towards the victims makes them lose faith in the system. They regret their decision of making a complaint in the first place and feeling demeaned by the very institutions that have been established for the purpose of protecting them. They are filled with resentment towards the authorities and soon they develop a feeling of bitterness as well towards the society. They feel out casted and isolate themselves which most of the times leads either to complete deterioration of their mental health or to the victims ending their lives. If a female has lodged a complaint against eve-teasing, the questions asked would first target at her like whether or not she wore a proper dress, was she walking, behaving ladylike and like this, the victim precipitation theory is expanded and converted into victim blaming to make the victims suffer again, following secondary victimization like discrimination, stigmatization, etc.,

## Ancient India and Victim Justice

The laws on rights of victims, which is being frequently used by courts of different countries and which is considered as a new modern phenomenon in India is actually not a modern adoption rather occupies a significant place as a part of criminology in the ancient period of our country.[23]The law in ancient times was developed and implemented by keeping in mind the betterment of and compensation to the victims, not centralizing on the form of punishment to be awarded to the accused or the convicted. It worked on the principle of retribution, wherein the severity of punishment is equivalent and proportional to the offence it had committed against the victim, and which was the only recognized form of punishment. Infact, the victims were vested with complete right to punish their offenders in the way they wish to, without any interference from the state, the king, the society as none of them existed at that time, even during the advanced age of

[21]M C Sengstock& J Liang, Elderly Victims of Crime - A Refinement of Theory in Victimology, NCJRS (Oct. 2, 2020, 14:02), https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=74191.

[22]Victim Blaming, The Canadian Resource Centre for Victims of Crime (Oct. 3, 2020, 13:38), https://crcvc.ca/docs/victim_blaming.pdf.

[23] Rai, supra, 31.

Rig Vedic Period.[24] Ancient thinkers like Manu was well versed with the concept of compensation to the victims of crime. Apart from payment (fine) to the king of the state, Manu provided reparation to the victims. It was provided in ancient laws like Brihaspati, Narada, and Yajnavalkya that the compensation provided to the victim shall be double the amount of purchase money of the product with which it was deceived and in cases where the sellers knowingly hid the defects of the good being sold or where sale of goods was made through fraudulent methods, fine equivalent to the amount of such goods sold was awarded as a punishment. It was provided in Manusmrirti and a few other Smritis that awarding punishment through administration of justice was based on the Varna system, adjudication of criminal cases was based on the status and class of both the victim and the victimizer, i.e., higher or lower the varna, same shall form the basis of amount of punishment and fine. Dharmashastras of Aapastamba and Baudhaayana provided that redemption in form of fine in case where the murder of kshatriya was committed, was 1000 cows and 1 bull while in case the victim was Sudra, it was only 10 cows. At the same time, Katyayana Smriti provided that if the offender is a kshatriya, the penalty awarded to it for an offence would be double the amount of penalty to be awarded to a Sudra for the similar offence.[25]

There can still be midway between duly following the law and achieving true justice. A few methods of ancient times mentioned above can be utilized in the present criminal justice system. A case should be filed and taken up in the court as is done in any fair and legal situation. Proceedings should take place by strictly following the procedure laid down and only when the guilt of the accused has been proven beyond doubt or is prima facie from the pieces of evidence adduced, only then the victims can exercise their matter of choice in the kind of punishment they would want their perpetrator to suffer or go through. Although, the victims still cannot be given full discretion to decide on the form of punishment to be awarded as they would be driven by their anger or other range of emotions towards the perpetrator and might award the perpetrator punishment of more intensity than the wrongful act itself yet, they can be provided with categories of punishments. For instance, wife of murdered husband may not necessarily seek life imprisonment or death penalty for the criminal. She could be given an offer that the offender is released and pays for her family for the rest of their lives. In case the offender belongs to a rich family or has too many properties, she could be given an option of both conviction of the accused as well as transfer of property or properties in her name to secure her family's future as a substitution of loss of their bread-winner. It should be of such a nature that it brings some solace to the family of the victim or the victim itself, if he or she is alive and also does not exceed the intensity and degree of crime that was committed and in response of which the punishment is being awarded.

[24] Rahul Tripathi, Evolution of criminal Justice System in Ancient India, IJMRD 153, 153 (2018).
[25]Debdatta Das, Legislative and Judicial Development of Victimology in India a critical appraisal,Ph.D thesis, KIIT University 27, 30 (2014).

## Legal Services Authority Act and the Rights of the Victim

Despite the existing criminal justice system seemingly being ignorant towards the rights of the victims, it is found to be alive through some legislations and laws having as their central focus, the condition of rights of the victims and making a sincere and candor effort in restoring the balance. In case the victims are poor and lack the resources to afford legal help, the state machineries along with the various district authorities, various NGOs, voluntary social service institutions, legal aid societies and centers, shall, under sections 8 and 11 of the Legal Services Authority Act, work in promoting competent and free legal services to the lower classes of the society. The same is especially useful in cases of victims of abuse of power as it can be safely observed that most of the times, authorities are successful in abusing their position against the weaker sections of the society. The statute promotes the ideals of justice- social, economic, and political that has been promised to the citizens of India through the Preamble and that also forms the foundation of Article 39-A of the constitution of India that aims at awarding justice on the basis of equal opportunity. It further helps in uplifting the safeguards provided under Articles 14 and 21 of the Constitution of India putting an obligation on the State to proceed in furtherance of equality before law and protecting one's life and liberty, and ensuring the victims fundamental right to appeal in courts to receive remedies and restore their dignity.

The above-mentioned laws sublimely depict the sincere intentions of the law makers that have been offered to be exploited by the victims with the help of authorities mentioned under section 8 of the act of 1987 yet, they are limited to occupying only theoretical importance and fail to extend their reach to the needful victims, a major reason for the same being lack of awareness amongst the common citizens.

## Conclusion

There is a dire and an urgent need for giving a well-defined status to the victim of crime under the criminal statutes. The role of the victim needs to be acknowledged by the authorities, not at the disadvantage of the victim, but as a guiding factor in order to help the victim receive justice in its true essence. Both the controversial theories of Penal Couple and Victim Precipitation cannot be applied in modern time by civilized states and societies. They are regressive for the modern criminal justice system. It puts the victim under the microscope in an equivalent or more harsh level than the criminal, which makes it suffer even more than it suffered by the act of crime or the criminal itself. The interests of the victims, in terms of getting the criminal or offender punished needs to occupy the central position, needs to be put at higher pedestal than that of the criminal, and it can no longer be ignored or dominated by the social control of the State. If no recourse is provided to the victim of a crime, it may develop a sense of contentment and a

tendency to take the laws in its own hands by seeking out revenge. Such instances are highly likeable to disrupt the concept of Rule of Law which is essential for sustaining the democracy, the people would no longer have any respect towards the judiciary, they would have no fear of the law, and it would soon turn and run down the whole society into chaos. The same concern was expressed by the Apex Court in P. Ramachandra Rao v. State of Karnataka[26], where it rightfully observed that the plight of the victims of crime who, if left without a remedy might "resort to taking revenge by unlawful means resulting in further increase in the crimes and criminals".

United States Senator Mike Mansfield, in introducing a bill in the Senate to compensate the victims of crime, said: "The point has been reached where we must give consideration to the victim of crime - to the one who suffers because of crime. For him, society has failed miserably.... Society has an obligation; when the protection of society is not sufficient to prevent a person from being victimized, society then has the obligation to compensate the victim for that failure of protection".[27] The responses of victims towards any framework of criminal justice and to society's endeavors to help them can't be comprehended without, first, becoming familiar to, considering, and thereafter, analyzing the impacts of wrongdoing on the victim. All such impacts are not limited to only the immediate outcomes of the offence on the victims like injury, loss of property, or monetary misfortunes. They can continue and interrupt into a large portion of the territories of the victim's life like resulting in a rather negative change in the relationship of the victims with its family members, neighbors, companions, or colleagues.[28]The marital and other relationships of crime victim are also likely to be adversely affected which may result in fatal consequences and even destroy its settled family life that generally happens in case of women who are victims of rape or any other sexual offence.[29]

Although the sanctity of the laws is upheld by following the due process of law, justice is not achieved. The result of such proceedings is a pseudo-justice, meaning, an idea or an illusion of justice only in the language of law and the State but not necessarily in the interest of the victim. Access to justice is a phrase which is used to mean a victim(s) or its family, relatives (direct and indirect victims) receiving justice for the wrong or the harm suffered by it, either by a judicial or a non-judicial authority. This phrase, although used quite effectively in research projects, papers, commissions, discussions and debates, etc., is yet to gain full adherence and inclusion in the criminal justice system. In order to truly provide justice to the victims, it is necessary to understand and examine the victim's

[26]P. Ramachandra Rao v. State of Karnataka, (2002) 4 SCC 607.
[27]V.V.Devasia, Victimology and the Role of Crime, Cochin University Law Review 221, 236 (1980).
[28] Joanna Shapland, Victim Assistance and the Criminal Justice System,SPRINGERNATURE (Oct. 8, 2020, 21:31), chrome://history/?q=https%3A//link.springer.com/chapter/10.1007/978-1-349-08305-3_12
[29]Ashpreet Kaur, Judiciary's contribution towards evolving victimology,iPleaders (Oct. 5, 2020, 14:46)https://blog.ipleaders.in/victimology/

version of justice. The restoration of justice should be done in the perception of the victim, rather than the society or state or even the laws.[30]"Justice" should not be limited to the response to violation of State law but also violations of what could be defined as human rights. It must be defined with a recognition of the centrality of the victim and the social and cultural context of the victimization. The doing of justice should address both the needs of society and the restoration of the victim.[31] The government of a welfare and democratic society like India, by its tendency, at one hand must serve and shield the person from becoming victim, from secondary victimization, and simultaneously should take care of the necessities and prerequisites of the victims.

Morality of a society can be understood from the way it deals with crime. It is not enough to treat criminals with as much compassion as we can, especially when this liberal spirit is carried to the excess of interfering with crime prevention as the courts have done."[32] It is high time that the country strengthens its moral character by acknowledging the victim's interests in crime and showing more compassion and sincerity towards the victim that is now gradually being suppressed by the human rights of only the criminals. It is a weakness of our jurisprudence that victims of crime and the dependents of the victims do not attract the attention of the law. In fact, the victim reparation is still the vanishing point of our law. This is the deficiency in the system, which must be rectified by the legislature.[33]

[30]Id.
[31] S. Chakrabarty, Victim compensation and support services a comparative study of criminal justice system,Ph.D thesis, KIIT University 21, 36 (2017).
[32] Pranav Kumar Kaushal &Priyamvada Kaushal, Justice should not only be done but also seems to be done Victimization and Administration of Criminal Justice in India, IJLMH 1, 5 (2018).
[33]Rattan Singh v. State of Punjab, AIR 1980 SC 84.

# IMPACT OF MOB LYNCHING IN THE CURRENT WORLD

*-Shrey Srivastav*[1]

## Abstract

*The concept of Mob Lynching is pervasive in current world due to which the liberty of humans is at greater risk. The act of manslaughter or giving the summary punishment which is committed by the crowd (offenders) in the absence of judicial body is not justice. Currently, the cases of mob lynching are increasing due to the circulation of fake news & rumours on social media. WhatsApp has achieved the most prominent digital app for slathering aversion, hoax news and cognitive indolence work unbelievably in tandem with subsisting social faith to permit spiteful subjects to slather virally. The article also attempts to analyse the crux of Social Media affecting perpetrators unjustly. Countries like South Africa, Israel, Afghanistan, Nigeria, Mexico, Europe, United States of America & India were dealing with the mobocracy. Discrimination on the ground of caste, race, and religion is the primary causes of mob lynching. The delay & unpredictability incident to legal trials leads to mob lynching. In this article, the emphasis given on the current situation of the United States of America regarding law regimes. The article critically analyses the law regimes of both countries India & USA. Suggestion to curb the mob lynching problem has also discussed.*

## Introduction

The concept of Mob Lynching is pervasive in current world due to which the liberty of humans is at greater risk. A person has the right to enjoy his free, his liberty & property unless declared to be forfeited by the judgements of his peers or law of the land[2]. This issue is nowadays hampering the main cornerstone of liberty. There are some general questions which always occurred in the minds of academicians. For example: What is Lynching? Is it only a course of action to propagate vengeance against alleged accused or Is it a punishment given to perpetrator without any judicial conscience? Another question, Whether Mob Lynching can be categorised under Culpable Homicide? Whether people misuse mob lynching in order to avoid any legal proceedings? The very fact that humans are easily aided or provoked by the offenders directly or indirectly. Is there any motive present in the mind of offenders? Many questions discussed below.

According to Black's Law Dictionary the word "Lynch law" means action done by an unofficial person, organised bands, or mobs against the person who alleged of or distrust of malfeasance, or draw them out of the incarceration, and foist summary damnation without any judicial trial and the warrant or authority of law[3]

---

[1] 3rd Year Student, National Law University Odisha. The author can be reached at 18ba101@nluo.ac.in

[2] Rema Rajeshwari, *Mob Lynching and Social Media*, 14 YALE JOURNAL OF INTERNATIONAL AFFAIRS 14 (2019).

[3] *Lynch law*, THE BLACK'S LAW DICTIONARY,(11th ed.,2019).

In the dictionary word, "Lynching" means the act of manslaughter or giving the summary punishment which is committed by the crowd (offenders) in the absence of judicial body or activity required. Generally, lynching occurs due to either great creating provocation in the mind of offenders which is connected with Great distrust in the preciseness and efficiency of Judicial System. Many Jurists firmly believes that the "strong injustice or sectarianism" towards the alleged perpetrator combined with "weak injustice or sectarianism" towards the alleged offenders is route cause Mob Lynching[4].

Mob Lynching has been seen in many countries where there is discrimination on the ground of caste, race, and gender is present. Countries like South Africa, Israel, Afghanistan, Nigeria, Mexico, Europe, United States of America & India were dealing with the mobocracy. The history of lynching started in the Mid-18th Century in the United States associated with two men named Charles Lynch & William Lynch. In India, the word Mob Lynching has aptly been fabricated as "horrendous acts of Mobocracy", but there is neither any specific section in Indian Penal Code which deals with this crime nor there is any legislation or an amendment introduced so far[5].

In a current world, social media is a whole new world where cases of mob lynching increased due to fake news, videos, images, most important hyper-pragmatic feigned intelligence spawned profound fake media circulating in social media[6]. There is no negating the aspect that red herring and deception are rapidly becoming a safekeeping menace in India. WhatsApp has achieved the most prominent digital app for slathering aversion, hoax news and cognitive indolence work unbelievably in tandem with subsisting social faith form to permit spiteful subject to slather virally[7]. It is very arduous for Bye-laws to recognise the motives behind sharing malicious content. In short, the act of Mob Lynching done with the use of Social media contains two types of offenders. First, offenders who directly use force to give summary punishment, but they do not have any specific motive. Second, offenders to the crime, the one who is responsible for initiating the malicious content & sharing it. In this article, the emphasis given to sections in the Indian Penal Code, which is close to the offence of Mob Lynching. The article also attempts to analyse the crux of Social Media affecting perpetrators unjustly. Further, a comparative study of provision relating to the offence of lynching from different countries such as the United States of America.

---

[4] *Lynching*,OXFORD ENGLISH DICTIONARY, (7th ed.,2012).
[5] Tehseen S. Poonawalla v. Union of India &Ors.,(2018) 9 SCC 501 (India).
[6] K. Deepalakshmi, *Lynching Caused by Rumours Spread Through Social Media,* The Hindu (19th July, 2018) https://www.thehindu.com/news/national/government-blames-social-media-for-the-spread-of-rumours-that-led-to-mob-lynchings/article24459732ece. (accessed on 5th September, 2020).
[7] Sunita Aron, *Mob lynching: Who's the villan? Social Media or trust deficit,* Hindustan Times (4th September, 2019)https://www.hindustantimes.com/opinion/it-is-time-to-act-against-mob-violence-firmly/story-0Is4xO0noibPzRG3fb6JDK.html (accessed on 5th September, 2019).

## Mob Violence

The first occurrence of the administration of lynching was in 1763, when the pioneers in Pennsylvania exasperated at the pacific policy embraced by the Quakers towards the Indians who committed individual atrocious acts, mobbed and killed several Indians[8]. Assembles to do violence to perpetrators, the object of its aversion or acrimony, and sometimes by people amalgamate together under some name as "Vigilantes" who, because of the dearth of law, or because the laws are not administered at all, undertake themselves in order to clampdown the crime & mete out such penal as they ponder necessarily to bring about the desired results[9].

The punishment took various forms, such as lashing, cutting off the perpetrator's arms or mutilating him. Earlier, the mob acts in the heat of passion, wrath & without even a pretence at observing the forms of law[10]. They frequently assemble, do their work & disperses in the space of an hour or two. Sometimes in the mob, there is one leader who is so obnoxious. An attempt has been made to justify Mob Lynching upon various grounds all the world. Some of them are as follows.

Firstly, discrimination on the ground of caste, race, and religion are the primary causes of Mob Lynching. Secondly, the delay & unpredictability incident to legal trials[11]. Thirdly, assuming a scenario where the perpetrator has been justly apprehended, convicted and sent for the imprisonment, there is no assurance that some obliging Governor or bureaucrats will turn him loose at the solicitation of a political friend. In the past few years, pardoning power has been so generally exercised, and the chances of early release from the punishment make mobs more angry and malicious. Fourthly, Inefficiency of the average police forces.

If any malicious content discriminating religion, or harming the reputation of political parties have been shared by a person (perpetrator) via WhatsApp and it went viral then offenders who were provoked by the contentious images, videos, fake news & rumours decided to lynch, that perpetrator who is responsible for the initiation of malicious content. The seeds of Mob Lynching I observed were routed in harmless enough soil; person, family zone prepare them to tackle social media circulated rumours & vivid threats at face value[12].

---

[8] Chas C. Butler, *Lynching*, 44 AMERICAN CRIMINAL LAW REVIEW 200 (1910).
[9] *Vigilantes*, THE BLACK'S LAW DICTIONARY,(11th ed.,2019).
[10] PTI, *Junaid Lynching: Main Accused 'Confessed' to Crime, Say Police* (*The Hindu*, 9 July 2019) https://www.thehindu.com/news/national/other-states/junaid-lynching-main-accused-confessed-to-crime-say-police/article19245913.ece (accessed on 5th September, 2020).
[11] Nathan Hall, *Hate Crime* (2nd ed., Routledge 2013).
[12] *Supra* note 5.

## Indian Legal Regime

Currently, In India, there is no specific law & punishment related to Mob Lynching but there as some sections in Indian Penal Code under which the word lynching has been used. Some of them are as follow:

### 1.13 Unlawful Assembly

A throng consisting of five or additional people may turn wild & which affects the people, belongings, or society's demand. Such a rebellious assembly is titled as an "Unlawful Assembly"[13]. Whoever, being known of actions which evince any throng an illegal assembly, deliberately ally that throng, or remains in it, is said to be a fellow of an unlawful assembly[14]. "An Assembly" which is lawful becomes unlawful the moment when the members of that assembly have an attempt to injure any person with an ordinary object. There are three essentials of an Unlawful Assembly. Firstly, there must be at least five or more persons. Secondly, an assembly must have an ordinary object[15]. The members of an assembly must contain the ordinary object to injure the person, property. Thirdly, the ordinary object must be to execute one of the five criminal offence stated in the sections.

Every member is liable for an offence of Unlawful Assembly when members of that assembly attempted to execute malpractices punishable through Indian Penal Code with ordinary object[16]. The person shall be penalised with the damnation of either category for a term which may elongate to six months, or with fine or with both[17]. *In Dharampal v. State of UP*[18], it was decided that the mere presence of a person in an assembly does not incriminate him to be the sole member of an Unlawful Assembly unless it is shown that he had done something or omitted to do something which has the direct connection to apprehension & make him a member of the assembly.

The meeting in conjunction with five or other persons, to the disruption of the social comfort and with the purpose of collaborating in the cogent & ferocious prosecution of some illegal undertaking. If they take place towards the conduct of their intention, it embellishes a rout; and if they put their fabrication into genuine prosecution, it is a riot. The standard object is the kernel of the crime. They should all be clued up of it and accord in it. This offence is quite similar to Mob lynching, but in Mob Lynching the

[13] The Indian Penal Code, No. 45 of 1860, INDIA CODE (1993), §141.
[14] Achhey Lal v. State of Uttar Pradesh (1978) 3 SCC 526 (India).
[15] Sheikh Yusuf v. Emperor AIR 1946 Pat. 127 (India).
[16] Ram Babu v. Emperor AIR 1955 Pat. 381 (India).
[17] The Indian Penal Code, No. 45 of 1860, INDIA CODE (1993), §145.
[18] Dharampal v. State of Uttar Pradesh AIR 1975 SC 1917 (India).

number of persons is not fixed & they don't have an ordinary object. All they want to show their anger & set an example of deterrence in society[19].

### 1.14 Rioting

Riot in criminal law, a vicious crime against public order containing three or more person similar to that of the Unlawful Assembly. Riot entails a meeting of offenders for an unlawful motive. The phenomenon is far-reaching & welcomes a voluminous reach of gang conduct, from a deadly skirmish between picketers &strike-breakers to the manners of a roadside gang. Whenever vigour or brutality is applied by an illegitimate gang, troop, or by any comrade thereof, in the execution of the standard object of such gang, each comrade of such troop is charged with the offence of rioting[20].

The expression "riot" means a society disruption including (1) an act or acts of brutality by one or additional people part of an assortment of three or additional people, which act or acts shall initiate an explicit & presents a hazard, or shall end in, harm or affecting the belongings of, any other person or to the person of any other independent or (2) a menace or menaces of the execution of an act or acts of brutality by one or additional people part of an assortment of three or more persons having, separately or jointly, the capability of a sudden commission of such menace or menaces, where the implementation of the warned act or acts of brutality would initiate a clear and present danger of or would end in, destruction or inquiry to the belonging of any person or to the person of any other individual[21].

A person is culpable of riot if he engages with five or others in the route of unsystematic execution: (a) with the intention to perform or encourage the execution of a crime or misdemeanour; (b) with intent to stop or constrain official action; or (c) when the actor or any other participants to the expertise of the actor uses or idea to use a roscoe or other lethal weapon[22]. The person culpable of rioting, shall be penalised with the damnation of either narration for a period which may lengthen to two years, or with fine, or with both[23].

*In-State of M.P. v. Sughar Singh & others*[24] it was stated by Hon'ble judges that Acquittal by High Court mainly on the ground that there was an inconsistency between evidence of eye-witnesses and medical evidence. Prosecution witnesses supported the cause of prosecution with regard to the incident as also the participation of the perpetrator. The High Court committed error in ordering acquittal on the ground of inconsistency in

[19] Deputy Legal Remembrancer &Ors. v. Matukdbari Singh &Ors. AIR 1917 Cal. 687 (India).
[20] The Indian Penal Code, No. 45 of 1860, INDIA CODE (1993), §. 146.
[21] Kari v. State of Bihar AIR 1952 Pat. 138 (India).
[22] Mohd. Ankoos v. Public Prosecutor, High Court of Andhra Pradesh AIR 2010 SC 566 (India).
[23] The Indian Penal Code, No. 45 of 1860, INDIA CODE (1993), §. 147.
[24] State of M.P. v. Sughar Singh & Others (2010) 15 SCC 96 (India).

medical evidence and ocular evidence. To that extent, the decision of the High Court deserves to interfere with that incident took place all of a sudden.

### 1.15 Culpable Homicide

The term "homicide" means the killing of human beings. The crime of manslaughter is also termed Culpable Homicide. It is mentioned under Chapter XVI of Indian Penal Code, 1860. When a person without any mala fide intention to kill but having knowledge that his act may injure the victim results in death, then the person is charged with the Culpable Homicide[25]. The mere appearance of the appellant in the crowd at time the lynching, would not guide to any deduction that the appellants had expertise or purpose to execute unlawful acts[26]. Goading need not surely be constrained to manual or oral strike, but there could be that small class of extraordinary situation, then the situational goading gives rise to the execution of a crime, and even though the is comparatively slightly familiar in criminal jurisprudence, it is not alien to it[27].

## Exploring India's Situation

The first case of Mob Lynching was seen in 2006 in Bhandara district of Maharashtra. There is discrimination on the ground of caste found the leading cause of Mob Lynching. There was a Dalit family who has a land dispute with many people living in the same village. One day, 50 villagers barged into the victim house, a 40-year-old woman along with her 17-year-old daughter were undressed, assaulted and marched unclothed, raped various times & murdered by Hindu Mob led by men of Kunbi caste goaded by the entire village. The head, not the family luckily survived, watched all the incident of lynching and rape lying low behind a bush. The head of the family approached the Court for justice, but the Court was unable to exercise justice because the whole village was involved in this incident and there is no specific punishment for the crime committed by Mob in India so far[28].

Another incident in 2007 occurred in Bihar on the ground of caste discrimination. In a state where casteism, feudalism, patriarchy and communitarian allegiance are highly active & interlinked. On 14th September 2007, 10 men were killed by the mob when they were trying to rob some houses in Dhelpurwa village of Vaishali district. This incident was preceded by the beating up of a supposed chain snatcher by the mob. From then on, beating & lynching of "victim" have become regular. It is this social reality which has

[25] The Indian Penal Code, No. 45 of 1860, INDIA CODE (1993), §. 299.
[26] Tribhuvan Nath v. State 1995 JCC 167 (India).
[27] Arnold H.T. Sangma, *Mob Lynching: An Uprising Offence Needed to be Strenuous under the Indian Legal System*, 2 INTERNATIONAL JOURNAL OF ACADEMIC RESEARCH & DEVELOPMENT 30, 31 (2017).
[28] Shrasti Jain, *The Dynamics of Lynching in India: Is it a New Normal?* CHANAKYA NATIONAL LAW UNIVERSITY LAW REVIEW 8 (2019) 245.

given an upper hand to the dominant caste to engage in heinous crimes against them. The recent Lynching of the Dalit here indicates their vulnerable & deplorable state and also the reassertion of the dominant caste of Bihar. One of the possible reasons cited by the villagers is that the kurariars made the mistake of eating in the same 'pankthi' (seating arrangements) with the backward caste Yadava which triggered the conflict resulting in the lynching. In Bihar, Lynching was a clear case of revenge by the dominant castes[29].

In *Girish Chandra Sharma v. State of Bihar*[30] - On 30th November, Informant was a tenant in the house, and her eight-year daughter Soni Kumari was sexually assaulted by the landlord who is the petitioner. When the Informant got to know about the incident, she made a hue& cry, as a result of which several people of locality assembled and assaulted the petitioner. There was a clear case of Mob Lynching.

In *Tehseen S. Poonawalla v. Union of India*[31], it was clearly said Lynching & Mob violence are sneaking menace that may generally take the form of a Typhoon-like monster as confirmed in the wake of the increasing wave of occurrence of a repeated model by a frantic crowd across the country abetted by bigotry and mislead by the passage of false news & rumours. There has been a hapless devotion of twirling mobocracy and agonised dreadful dispensing a ghastly & gruesome canvas that impel aspersion as to whether the public of great freedom like ours has astray the benefits of forbearance to succour a various culture. Besides, observer passivity, immobility of the silent observer of the scene of the offence, hebetude of the law-imposing mechanism to stop such offence and nip them in the bud and grandstanding of the occurrence by the offenders of the offence involving in the social media irritates the whole trouble. An attitude of macabre bigotry is totally unbearable & agonisingly dreadful.

In the *Shahrukh Cow Slaughter case*[32] where a 20-year-old Shahrukh who fagged in Dubai & had come home for Eid was brutally beaten to death by the mob. On 28th August 2018, the eve of him coming back to Dubai, Shahrukh went mislaying. Next day, news of his death arrived at the door of his house. After inquiry, it was found that four of his neighbours gather together to find the cattle and after finding the Cattle they were forcefully taking the cattle home in the meantime people thought they were taking for Halala. Some people started garnering people & telling them about Cow slaughtering, which is against their religious beliefs. All the four men were brutally lynched by a mob for no reason. Three of them luckily escaped from the incident, but Shahrukh was the

[29] Prakash Louis, *Lynching in Bihar: Reassertion of Dominant Caste*, ECONOMIC & POLITICAL WEEKLY REVIEW Vol 42, No 44 (2007) 26, 28.
[30] Girish Chandra Sharma v. State of Bihar 2015 SCC Pat. 5151 (India).
[31] *Supra* note 5
[32] Vidisha Bajaj, *The Crime Vanishes: Mob Lynching, Hate Crime & Police Discretion In India*, JINDAL GLOBAL LAW REVIEW (2020).

remaining person at the incident. They were beating & lynching due to which he succumbed to death.

Another case of Mob Lynching occurred in Gorodoba village of Assam. On 5th August 2020, there is a celebration all over the country due to the establishment of Ram statue in Ayodhya, Uttar Pradesh. In Assam, some people, including Rajan, started a parade on his motorbike and planned to have a visit to every temple present in that locality. There is another village where the majority of people there were Muslim & in that village, there is a famous temple of Shiv Parvati. So, they decided to visit there. They smoothly went there, but while returning to their village, they were blocked by 300 angry people. They all were angry with the action of going to the temple & started beating & lynching all the people, including Rajan. Somehow, Ranjan escaped from the situation; all the motorbikes were destroyed by the mob. Ten men were restrained by the mob & they were continuously beaten. Another day, they were released by the mob. The horrendous act is agonisingly painful for any human being living in India.

On 11th September 2020, 8 workers of Shiv Sena attacked a retired Navy official for allegedly forwarding a satirical cartoon on Maharashtra Chief Minister Udhav Thackeray, Sharad Pawar & Sonia Gandhi. The eight people can be seen brutally assaulting in CCTV footage. These recent acts make me realise that if there is no remedy available to victims or nats soon, then there will be a greater risk of a person's liberty & access to justice with equity & conscience.

## Role of Media

Today most of the world is connected through social media which plays a crucial role in the development of Mob violence. It is projected that 10% of real-life violence is caused by media. The malicious theme is outspread online by vigilantes in order to create hate & to publicise political ideology[33]. These Vigilantes nowadays operate on social media such as WhatsApp, Facebook, Instagram, etc., and the close-nexus of distinctive ties it accelerates has delivered vigilantes a rostrum to attain their targets. There is an unwavering & purposive venture on social media rostrum to sabotaging person's sense of protection through the propagation of false news & rumours the relentless trouble is that it is immensely arduous for bye-law imposition to realise either who is accountable, or what their motives are[34].

[33]Chinmayi Arun, On WhatsApp, Rumours, and lynchings, ECONOMIC & POLITICAL WEEKLY REVIEW Vol. 6 No.6.
[34] M J David, *The Science of Fake News*, SCIENCE (Vol. 359 No. 6380) 1094.

The evil part of social nexus is its proclivity to enable its users, very often under the mask of anonymity, to activate recognition-defence channels & discharge an explosion of temper. Fake news is dormant to incite rage & disturb public peace. Accidentally in India, there is an immoderate emphasis on the uprightness of political transmission allowed by digital rostrum, at the cost of neglecting the influence these rostra have on the diurnal creature of mediocre society. There must be a keen strive on the part not only of the company but also of end-users and native society superiors on rostrum answerability and digital literacy[35].

**Lynch Law in United States of America**

The mob violence is increasing in the United States of America day by day. Statistics dealing with Mob lynching in this country are challenging to obtain. Census Office do not furnish them. There no specific definition of lynching is mentioned under any act of the United States of America[36]. The typical denotation of lynching is provided by the National Association for the Advancement of Coloured People in some ingredients must be obligated.

More than one thousand men & women have been lynched in the USA during the last ten years. The report of Mob Lynching is only obtainable in a disjointed, often incoherent, sometimes irresponsible, and always unsatisfactory manner. Local pride will sometimes attempt to suppress them. Political & social reasons will contribute to distort & misrepresent the incident[37]. USA's national crime is lynching. It was sufficient to brawl the foe from without; woe to the foe within! But the manes of crowd process appeared to have bolted itself upon the ungovernable categories, and the ghastly procedure that at first was involved in proclaiming justices was made the cover-up to cause retaliation & engulf crime[38].

In the USA, there is a confederate law which covers cases of mobocracy where the sufferer is subject of alienate power. Police were launching smoke grenades in order to clear the angry mob. Sporadically, mob were not cleared by smoke grenade then they arrest some people in order to make deterrence among the mob. In some situation, federal police are easily dominated by mob, then it is challenging to pacify the mob. Some of the offender present in the mob was beaten by federal police[39]. The USA's House of Senate has overpoweringly voted to make lynching a confederate despise offence in the country.

[35]NarrainSiddarth, *Dangerous Speech in Real Time: Social Media, Policing & Communal Violence*, ECONOMIC & POLITICAL WEEKLY REVIEW Vol. 52 No. 34.
[36] Thomas v. State of Arizona 1958 US SC 83 (USA).
[37] Moore v. Dempsey, 1923 US SC 59 (USA).
[38] S.S. Rane, *Impact of Mob Lynching Phenomenon on Well-Being*, INTERNATIONAL JOURNAL OF MANAGEMENT & SOCIAL SCIENCES Vol. 14 pp. 87, 93.
[39] Duane Mowry, *Mob Law in America*, 16 GREEN BAG JOURNAL 524 (1904).

The majority is 410- 4 minority. The Senate passed in 2018. The Emmett Till Antilynching Act is termed after a 14-year-old Chicago boy who was murdered while touring family in Mississippi in 1955.

## Suggestions to Curb the Problem

In India, to curb the problem of Mob Lynching, some of the preventive measures can be taken, some of them are mentioned below:

Firstly, the state government shall designate a senior police officer as Nodal Officer in every locality. Officers may form a distinctive task force so as to acquire intellect reports about the mob who are likely to execute such offence or comprised of outspreading despise speeches, exasperating assertion & rumours. Regular meeting with force is must in order to recognise the appearance of proclivities of vigilantism, mobocracy or lynching. Efforts should be made by force to exterminate the bellicose habitat against any society or race. It is the responsibility of police officer to root a mob to disseminate, by using reasonable amounts of power or force[40].

Secondly, for village areas, where mob violence, lynching & vigilantism is common, special teams must be formed & give them knowledge of fake news, rumours, misinformation, and disinformation & tell them how to recognise low-plausibility theme on social nexus rostrum. That newly trained officer was supposed to go door to door in order to interact about the same. This measure gives the inhabitant a sense of well-being, teaches them self-regulation while using social media[41].

Thirdly, the Central & State government should make an official broadcast on radio, media & television about the crime of lynching & mob violence which invites severe consequences under the law. It is the duty of the Station House Officer, to provide tight protection to the victim or nats& ensure that there is no further harassment caused.

Fourthly, neither any legislation have been passed, nor any amendment was made in Indian Penal Code. Judiciary must take crime seriously and set a capital punishment for people who involve in Mob Lynching. Victim's family shall be provided by full protection as well as compensation under Mob Lynching scheme or policy. Free legal aid must be provided to the victim in order to have justice with equity & conscience.

## Conclusion

Mob Lynching has been seen in many countries where there is discrimination on the ground of caste, race, and gender is present. Countries like South Africa, Israel, Afghanistan, Nigeria, Mexico, Europe, United States of America & India were dealing with the mobocracy. In short, the act of Mob Lynching done with the use of Social media

[40] Charles H. Watson, *Need of Federal Legislation in Respect to Mob Violence in Cases of Lynching of Aliens*, 25 YALE LAW JOURNAL 561 (1916).
[41] *Supra* note 4.

contains two types of offenders. First, offenders who directly use force to give summary punishment, but they do not have any specific motive. Second, offenders to the crime, the one who is responsible for initiating the malicious content & sharing it. An occurrence of Mob Lynching through Social Media is at Zenith in India. Currently, In India, there is no specific law & punishment related to Mob Lynching but there as some sections in Indian Penal Code under which the word lynching has been used.

There no specific definition of lynching is mentioned under any act of the United States of America. The typical denotation of lynching is provided by the National Association for the Advancement of Coloured People in some ingredients must be obligated. The report of Mob Lynching is only obtainable in a disjointed, often incoherent, sometimes irresponsible, and always unsatisfactory manner. In the USA, there is a confederate law which covers cases of mobocracy where the sufferer is subject of alienate power. The USA's House of Senate has overpoweringly voted to make lynching a confederate despise offence in the country.

To curb the problem of Mob Lynching, some of the preventive measures can be taken. Officers may form a distinctive task force so as to acquire intellect reports about the mob who are likely to execute such offence or comprised of outspreading despise speeches, exasperating assertion & rumours. Efforts should be made by force to exterminate the bellicose habitat against any society or race. Free legal aid must be provided to the victim in order to have justice with equity & conscience.

# STRIDHANA IN CONTEMPORARY HINDU SOCIETY: A CASE OF ECONOMIC EMPOWERMENT

*Ruchir Joshi*[1]

## Abstract

*Empowerment is a process through which women can gain the strength to oppose the traditional prejudices that deter their development. Equality can only be said to be achieved when women have the ability to challenge the existing power relations that place them at the subjugation of their male counterparts. This journey towards equality and empowerment will be sped up if women can achieve economic independence. Awarding Land titles to women is one of the ways in which they can attain economic independence. Property rights act as a mechanism for women to gain the respect of their spouses and family. In cases where women are not landowners, they are at a higher risk for mistreatment.*

*The overarching aim of this research article is to analyze the concept of Stridhana in light of Women's economic empowerment. The article discusses the concept of Stridhana and also analyses the relationship between women's property rights and their economic empowerment. In this article, the researcher aims to analyze the contours and ramifications of cessation of Stridhana, in light of the subsequent introduction of the concept of Absolute Ownership under the Hindu Succession Act, 1956 (HSA). The research article argues that while framing the HSA, the law makers had the opportunity to create a new customary practice that would promote equality, this however was squandered by the discriminatory aspect of Section 15 of the Act. The article also seeks to argue that, it would have been in better interest if attempts would have been made to achieve equality through the existing concept of Stridhana and its expansion.*

**Keywords** – Stridhana, empowerment, women, property, Hindu. Hindu Succession Act

## Introduction: Concept of Stridhana

During the British Era, a Hindu Woman had two kinds of properties: Stridhana and Woman's Estate. Literally, the word Stridhana means women's property and is derived from two words stri- which means woman and dhana- which means property.[2]

As per Smriti Kars, in order to ascertain the nature of the property as Stridhana, two factors are to be taken into consideration: a) Source from which the property is acquired

[1] B.A.LL.B.(Hons.) at National Law University, Nagpur. The author can be reached at ruchirjoshi@nlunagpur.ac.in

[2] DF MULLA, PRINCIPLES OF HINDU LAW 157 (Sunderlal Desai ed., 16d ed., 1990).

by the woman. b) Woman's status at the time of acquisition (here it refers to the fact that whether she is a widow, married or unmarried).[3]

Manu enumerated six kinds of properties to be included within the ambit of Stridhana, namely,

- "gifts made before the nuptial fire,
- gifts made at the bridal procession,
- gifts made as a token of love,
- gifts made by the father of the woman,
- gifts made by the mother of the woman,
- gifts made by the brother of the woman."[4]

With the rise of various schools of Hindu Law, the idea of Stridhana began growing its legitimate and exacting significance, conceding woman more rights to certain property.
If we refer to this Sanskrit saying "Na striswatantramarhati-"Swatrantam Na KachitStriyah", it meant that "women were unfit for any independent existence and was the rule of ancient Hindu Society."[5] Moreover, a woman was never indisputably the proprietor of her Stridhana, as according to Manu "a wife along with her property belongs to her husband."[6]

It has been noted that there have been several challenges plaguing an enquiry into what establishes as Stridhana. This is mainly because of the fact that none of the Smriti Kars have given any comprehensive definition of Stridhana.[7] For instance, Katyayana differs from Manu, and interprets the definition of Manu to include "gifts made before the nuptial fire and at the bridal procession by strangers" within the ambit of Stridhana.[8] The scope of interpretation is further widened by Vijnaneswara in Mitakshara, who includes "property obtained by inheritance, purchase, partition, seizure and finding".[9]

Stridhana is a concept that originated in ancient India whereas the estate of the Hindu woman was a concept developed by the British judicial administration in India. The limited rights a Hindu woman had to her property were lost in the event that she died, remarried or was adopted in which case the property was transferred to the next successor of the original owner.[10]

---

[3] Archana Mishra, *Devolution of Property of the Hindu Female: Autonomy, Rationality, and the Law*, 29 INT'L J.L POL. & FAM., 149, 150 (2015)
[4] DF Mulla, *supra* note 1, at 157.
[5] AM BHATTACHRJEE, HINDU LAW AND THE CONSTITUTION 120 (2d ed. 1994).
[6]Debarati Halder, K Jaishankar, *Property Rights of Hindu Women: A Feminist Review of Succession Laws of Ancient, Medieval and Modern India*, 24(2) JOURNAL OF LAW AND RELIGION, 663, 665 (2008).
[7]Leepakshi Rajpal, *Mayank Vats, Stridhana: A Critical* Approach, 7(1) IJRSSH, 83, 89 (2017).
[8] J.D. MAYNE, HINDU LAW AND USAGE 847 (15d ed. 2006).
[9] Id. at 847.
[10] Kuldip Mahato v BhulanMahato, (1995) 2 SCC 43 (India).

Over time, Stridhana evolved into two separate types.

The first one i.e. 'Sauadayika' includes property which a married woman inherits from her parents, receives as a gift from her natal or marital family before the holy fire and post the bridal possession and also that which she acquired through her own efforts before and after the end of her marriage. This property she is entitled to dispose of as she pleases including but not limited to a will, gift or sale deed. A husband could use this property only in times of extreme distress and was morally obligated to reimburse the wife.[11] The Bombay High Court in the case of *Tukaram v. Gunaji*,[12] restricted this use of property only to husband and the property could not be availed by any of his creditors.

The second type is known as Non-Sauadayika which is acquired jointly with her husband and over which she has limited rights as her husband too has powers to use it. This includes gifts received during the marriage and property which she attains through her own efforts as a married woman.[13]

Succession of Women's Property under the Mitakshara Law

Under the Mitakshara Law, the devolution of woman's property i.eStridhana, upon her heirs is based on the principle of propinquity. For the reasons of succession under Mitakshara Law, property is divided into two categories: Shukla and Non-Shukla.
The heirs to the Shukla property under Mitakshara are: "the full brothers, in their absence of mother and in her absence the father of the intestate".

However, the heirs for the Non-Shukla property in order are: (i) the unmarried daughter, (ii) the married daughter who is not provided for, (iii) the married daughter who is provided for, (iv) daughter's daughter, (V) daughter's son, (vi) son and (vii) son's son.[14]
The fundamentality, along these lines, of Stridhana is not in the mere conferment of ownership but the control that women exercised on Stridhana.

## Hindu Succession Act, 1956: The Concept of Absolute Ownership under Section 14.

The enactment of Hindu Succession Act 1956, annulled the idea of Stridhana and introduced the concept of absolute ownership right for women. The concept of absolute ownership, conferred property rights on woman regardless of the nature of the same,

[11] Mayne, *supra* note 7, at 847.
[12] Tukaram v. Gunaji, (1871) 8 Bom HC (ACJ) 129.
[13] Mayne, *supra* note 7, at 849.
[14] Mayne, *supra* note 7, at 855, 856.

"possessed as well as acquired by them."[15]

It was clarified by the Hon'ble Supreme Court in the case of *Pratibha Rani v. Suraj Kumar*[16] that "mere joint holding by a husband of the 'Stridhana' property did not constitute any legal partnership or co-ownership between the husband and his wife." The court was of the opinion that a suit can be brought by the wife under Section 27 of the Hindu Marriage Act, 1955[17], if the Husband does not return the Stridhana to his wife. The court has explicitly stated that the absolute ownership of woman's property lies with her, no matter the property was acquired after or before the Act.[18]

Why the Hindu Succession Act turns out to be discriminatory?

Hindu law originally designates the men as primary property owners with women usually delegated to a submissive and dependent state. After the Hindu Succession Act of 1956, a Hindu woman was finally able to become the owner in toto of property in her possession which had come to her as a result of a pre-existing right. In the act, all possible definition of Stridhana were explained and were decreed to be equivalent to the term property.[19]

The ultimate aim of this step was to achieve equal status for women and to lift them up from a subservient economic position in society to one where they had the complete freedom to control the properties they held as owners unimpeded unnatural constraints placed on their ownership rights to bring about a systemic subjugation of women for the benefit of the male sex.[20]

However, it is to be noted that the order succession for males and female under the Section 15 of the Hindu Succession Act is glaringly unfair. Though the statute progressively gives outright proprietorship rights to women over such property, the

---

[15] Dhruva Gandhi, *Stridhana& the Hindu Succession Act, 1956: A Positive Step?,* 9 NUALS LJ. 147, 159 (2015).

[16] Pratibha Rani v. Suraj Kumar, 1985 SCR (3) 191 (India).

[17] Section 27 in The Hindu Marriage Act, 1955 states: "*Disposal of property. In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife*."

[18] Sheetal Kotian, *Stridhana: An Insight on Women's Property*, FOX MANDAL (Sep. 5, 2009), https://www. foxmandal.in/stridhana-an-insight-on-womens-property/.

[19] Dhruva Gandhi, *supra* note 14, at 153.

[20]HaigreveKhaitan, *Female Inheritance rights in India: Empowered women a key to economic progress*, BUSINESS TODAY (Oct. 7, 2019), https://www.businesstoday.in/opinion/columns/female-property-and-inheritance-rights-in-india-empowered-women-a-key-to-economic-progress/story/383385.html#:~ :text= Ensu
ring%20women's%20inheritance%20rights%20and,spends%2C%20education%20spends%20and%20child care.

fundamentality of control and heirship have been turned around by the enactment, which has a damning effect on a women's individuality.[21]

Under the Section 15 of the Hindu Succession Act, in the event that a Hindu female dies without a will, and in the absence of her husband and children, the heirs of her husband will have a better claim to her property than her parents but in the event a male dies intestate, property will devolve upon his mother and other blood heirs.

The provision is so unfair that for instance[22], in order of succession, the rule prefers a son of the husband's sister over a female's mother herself.[23] While the husband has a patrilineal line of descent when his property is devolved, an absence of matrilineal descent for woman is discriminatory.[24]

It is pertinent to note that the under the Mitakshara Law, the principal of propinquity was the basis of Stridhana property's succession but the same has been reversed by Section 15 of the Hindu Succession Act. The perception that a woman leaves her parents family after marriage and that she adopts her husband's family as her own, has long been used to strengthen the patriarchal norms our society abides by. This is exactly what this act seeks to achieve.[25]

It is to be noted that when the law was challenged in *SonubhaiYeshwant Jadhav v. BalaGovinda Yadav*[26], as being discriminatory. The court, while upholding the constitutional validity of Section 15, described the distinction as an essential step for ensuring unity and emphasised the notion that the woman had merged and become a part of her husband's family.

It is to be noticed that the Hindu Succession Act, additionally blemishes by not making any qualification between the "separate property" and "self-acquired property" of females dying intestate. The Act sets down same general standards of devolution for both "separate" and "self-acquired" property of females, wherein it initially reverts on her children or offspring of her predeceased kid and spouse then to the second class, for example to her better half's heirs. The relations of her husband are given inclination over

[21] Archana Mishra, *supra* note 2, at 150.
[22] Refer the Case: Omprakash v. Radhacharan, (2009) 15 SCC 66 (India).
[23] Section 15 (1) of Hindu Succession Act, 1956 states: "General rules of succession in the case of female Hindus. —(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,—
(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband; (b) secondly, upon the heirs of the husband; (c) thirdly, upon the mother and father; (d) fourthly, upon the heirs of the father; and (e) lastly, upon the heirs of the mother."
[24] Kasturi Gakul, *Hindu Women's Property Rights under Hindu Succession Laws*, 2(2) THE CLARION 149, 153 (2013).
[25] Dhruva Gandhi, *supra* note 14, at 154.
[26]SonubaiYeshwant Jadhav v BalaGovinda Yadav, AIR 1983 Bom 156 (India).

her own folks.[27] The lawmakers didn't mull over that Hindu ladies would later have "self-acquired" property. It is commonly the guardians who give offices to a young lady kid to get equipped for acquiring her own pay, yet with regards to devolution of such property, legal inclination is given to the spouse's family members instead of her own folks.[28]

Offering inclination to spouse's beneficiaries may to a degree be advocated on account of discrete property on the ground that after marriage she turns out to be a piece of her better half's family, yet giving them special rights over her folks in regards to her self-obtained property isn't defended, especially when she might not have procured property with the help of her significant other or his relative.[29]

Considering the equivalent, it might even be commented that the property rights allowed to ladies under this rule are unimportant auxiliary land rights for example rights appreciated by in a roundabout way by ladies through men. The vesting of proprietorship in a lady keeps on staying a unimportant temporary re-route before property continues along a man centric heredity.[30]

Even the 207th Report of Law Commission has suggested to bring reforms in this law, either by bringing the devolution rules in parity or dividing the property equally among the matrimonial and natal heirs.[31]

Way Forward

In recent years, the outlook of society as far as women are concerned has changed drastically and women too have taken considerable steps socially and economically. Indian laws have often had a discriminatory shade as far as women are concerned and there is a growing demand to address this concern.[32]

The Law Commission of India (2008) suggested three options for devolution of separate property of a Hindu female dying intestate, namely:

1. "the self-acquired property should devolve first upon the heirs of her husband;
2. her self-acquired property should devolve first upon her heirs from the natal family;
3. Her self-acquired property should devolve equally upon the heirs of her husband and

[27]Maneck Mulla, Jinal Shah, *India: Property Of A Hindu Female Dying Intestate*, MONDAQ (Oct. 23, 2018), https://www.mondaq.com/india/wills-intestacy-estate-planning/747976/property-of-a-hindu-female-dying-intestate.
[28] Archana Mishra, *supra* note 3, at 157.
[29] Archana Mishra, *supra* note 3, at 158.
[30] World Survey on the Role of Women in Development: Globalization, Gender and Work, U.N. General Assembly, U.N. Doc. A/RES/54/227 (1999).
[31] Law Commission of India's 207th Report on Proposal to amend the Section 15 of the Hindu Succession Act, https://indiankanoon.org/ doc/22640795/.
[32] Sheetal Kotian, *supra* note 17.

the heirs from her natal family."[33]

Even the Report of National Commission for Women in 2014[34] suggested the abrogation of the rules of succession females passing on intestate and correcting the current standards for devolution of guys biting the dust intestate with the goal that the principles are uniform and material to any individual regardless of their sex.

The report suggested the following change: "General rules of succession – The property of a Hindu dying intestate shall devolve according to the provision of this chapter – a) Firstly, upon the heirs, being the relatives specified in Class I of the schedule; b) Secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in Class II of the schedule; c) Thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and d) Lastly, if there is no agnate, then upon the cognates of the deceased".[35]

Financial changes warrant relating administrative changes through setting down uniform standards of succession for both Hindu males and females passing away intestate. No motivation exists for proceeding with the distinct rules of succession for Hindu males and females.[36]

With the increase in social integration, economic independence, reform movements, there needs to be a further call for the improvement of the woman's position in Hindu society. As independent India relies heavily on legislation to bring in social reform and ensure removal of inequality and discrimination, the necessity is to review the present succession laws and to bring the position of women at par with men.[37]

## Property Rights and Women's Economic Empowerment

Empowerment is a process through which women can gain the strength to oppose the traditional prejudices that deter their development. Equality can only be said to be achieved when women have the ability to challenge the existing power relations that place them at the subjugation of their male counterparts. This journey towards equality and empowerment will be sped up if women can achieve economic independence. Awarding Land titles to women is one of the ways in which they can attain economic

[33] *supra* note 30.
[34] *Review of Laws and Legislative Measures Affecting Women, on The Hindu Succession Act 1956 (30 of 1956)*, NATIONAL COMMISSION FOR WOMEN, http://ncw.nic.in/frmReportLaws19.aspx (last visited Jun 2020).
[35] Id.
[36] AR Lakshmanan, *Let us amend the law, it is only fair to women*, THE HINDU (Jul 24, 2011), https://www. thehindu.com/opinion/open-page/let-us-amend-the-law-it-is-only-fair-to-women/article2288188.ece.
[37] Archana Mishra, *supra* note 3, at 163.

independence. Property rights act as a mechanism for women to gain the respect of their spouses and family. In cases where women are not landowners, they are at a higher risk for mistreatment.[38]

The concept of property has broader implications in India than in the West. In the west, a person having the legal right of ownership over a particular private property will automatically have the power to exercise such right and have unbridled access to their property. In India however, this is not always true. A person having the right of ownership to certain private property may be deprived of exercising this right in the absence of customary rights. Therefore, a legal right without the presence of a customary practice serves no purpose to its owner. However, when the question of lack of property rights for a woman arises, it is usually understood to mean the legal right. In rural areas however, customary practices and legal rights of women have equal importance.[39]

For there to be an improvement in the economic status of women, they must carry out economic activities that are socially acknowledged. Social acknowledgement of economic activities stems from their visibility. Thus, for the activity to be visible, women must undertake activities outside the four corners of the home. Even though the household chores performed by women contribute to the sustenance of the family, they are not considered to be economic in nature. A person's activity in the field whether in the capacity of the owner or hired help is socially visible and hence considered a viable economic activity.[40]

Land, the essential profitable resource in an agrarian economy as India, is of most extreme importance to guarantee to an individual a noble life.[41] Given that land is a wellspring of business and vocation, the salary earned in that can be used for the arrangement of instruction and medicinal services for the individuals from one's family.[42] Further, land may likewise be utilized as insurance over the span of business exchanges

[38] KC Roy, CL Tisdell, *Property Rights in Women's Empowerment in Rural India: A Review* 5 (University of Queensland, Working Paper No. 14, 2000), https://rsmg.group.uq.edu.au/files/2329/WP%2014.pdf.
[39] Id. at 1.
[40] *Achieving Gender Equality,Women's Empowerment and Strengthening Development Cooperation*, UN DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, https://www.un.org/en/ecosoc/docs/pdfs/10-501 43_(e)_(desa)dialogues_ecosoc_achieving_gender_equality_women_empowerment.pdf (last visited Jun 2020).
[41] *Realising Women's Rights to Land and Other Productive Resources*, UN WOMEN 2 (2013).
See: https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2013/11/ohchr-unwomen-land-rights-handbook-web%20pdf.pdf?la=en&vs=1455.
[42] *Women 's Control over Economic Resources and access to Financial Resources*, including Microfinance, UN DEPT. OF ECONOMIC AND SOCIAL AFFAIRS 8 (2009).
See: https://www.un.org/womenwatch/daw/public/WorldSurvey2009.pdf.

and as a wellspring of venture. Land, in this manner, is a confirmation of a satisfactory way of life and a proportion of strength and security.[43]

Gender equality has been the cornerstone of inheritance law, but in spite of this gender discrimination, endures and inequalities in succession law lead to inequalities in land law in developing countries. Bias against women in their role as landowners can have serious implications for their position within the family and society as well as their professional and economic options. In rural areas, these barriers to ownership affect their ability to invest in agriculture, adversely impact their earnings and also serve to reduce their importance in family decisions. It also impedes their social progress and helps patriarchal notions come to power and reduce their standing in society. Therefore, it is of paramount importance that land rights equity be used to spur gender equality.[44]

Though a significant bias persists, the chances of women inheriting land have increased in recent years. Two major reasons for the low number of women inheriting land have been found. First, land ownership is governed by personal religious laws which fall under the jurisdiction of the state and therefore constitutional ideals of equality are not easily enforceable which results in significant bias against women in inheritance laws. Second, a traditionally patriarchal society prevents the land ownership of women.[45]

Various studies have noted that women with land titles are given better treatment by other male members of the family as well. KC Roy in his paper observed that widows who were landowners and lived with their adult children were treated with greater respect and consideration than penniless and economically dependent widows.[46]
Asian Development Bank's paper suggests that, the reported contribution of women to decisions about issues like livelihood, household activities and farming with respect to the ownership of land title. This pattern affirms the supposition that ownership of land and women's empowerment and their ability to bargain and make decisions regarding the household. Though not a lot of data is available, there also appear to be indicators that suggest that women who own land have a greater say in family planning. This also supports the finding that elevating a woman to her husband's status also increases the use of modern contraceptives in India.[47]

The impact that women's ownership of land has on women's contribution to family decisions is quite important. This could be due to law or policy that elevates lands rights

[43] Id. at 7.
[44] Harold Glenn et.al, *Women's Land Title Ownership and Empowerment: Evidence from India* 1 (ADB, Working Paper No. 559, 2018), https://www.adb.org/sites/default/files/publication/453696/ewp-559-women-land-title-ownership-empowerment.pdf.
[45] Id., at 1.
[46] KC Roy, supra note 37, at 7.
[47] Harold Glenn et.al, *supra* note 44, at 9.

equity to help increase women's position in the family. Landownership acts as a bargaining chip for women while taking decisions.[48]

**Analysis of Section 6 of the Hindu Succession Act**

Section 6 of the Hindu Succession Act "HSA" 1956 talks about the devolution of coparcenary property of a person who died intestate i.e. without leaving a will. As per the Mitakshara Law, coparcenary may be described as a group consisting of all those males who take an interest in the joint or coparcenary property by birth.[49] The fundamental principle of coparcenary, therefore, can be said to be that only male members of the common Hindu family can constitute a coparcenary, fully excluding the female members of the family. Section 6 of the Hindu Succession Act, 1956 envisaged the same and the coparcenary was considered a narrower entity within the common family.[50]

The HSA, 1956 was amended by the Parliament in 2005 to grant daughters equal rights to inheritance and to make them coparceners on a par with sons. The Statement of Objects and Reasons of the 2005 Amendment Bill sets out the force for the amendment in which it was perceived that the exclusion of daughters from the coparcenary amounted to a breach of the Right to Equality enshrined under Article 14 of the Constitution of India.[51]

It is pertinent to note that the conventional patriarchal existence of the coparcenary underwent a dramatic shift following the 2005 amendment, which made the daughter of the coparcener a 'coparcener'. Prior to that change, women had a marginal right to inherit property from either their father or their spouse, but the reform led to the restructuring of the provisions of Section 6. The old provision was deleted and a new provision was added which stated that:

*"On and from the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005), in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall, —*

*(a) by birth become a coparcener in her own right the same manner as the son;*

*(b) have the same rights in the coparcenary property as she would have had if she had been a son;*

*(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener."*

[48] KC Roy, *supra* note 37, at 8.
[49] P.V. KANE, HISTORY OF DHARMASASTRA 591 (3d ed., 1993).
[50] Vijender Kumar, *Coparcenary Under Hindu Law: Boundaries Redefined*, 4(1) NLR 27, 39 (2009).
[51] V Venkatesan, *Interview | 'The Project of Reforming the Hindu Succession Act Is Far From Over': Dr Saumya Uma*, THE WIRE (Aug 17, 2020), https://thewire.in/law/hindu-succession-act-women-supreme-court.

Thus, by virtue of Section 6 of the Hindu Succession (Amendment) Act, 2005, the daughter is an acceptable member of the Hindu Coparcenary. In addition, daughters continue to hold the roles of coparceners even after marriage due to the said amendment.

Court's Interpretation

In making this amendment successful, the courts have played an essential role. They have done so by adopting liberal interpretation and by incorporating the concept of notional partition despite of the fact that it was not originally present in the text of the statute. It was noted by the Supreme Court in *GurupadKhandappaMagdum v. HirabaiKhandappaMagdum*[52], that disregarding a woman's right to get a share at the time of notional partition essentially means that: *"One unwittingly permits one's imagination to boggle under the oppression of the reality that there was in fact no partition between the plaintiff's husband and his sons. The fiction created by Explanation I has to be given its full and due effect."*

Moreover, in *G. Sekar v. Geetha & Others*[53]., which was a case before the Supreme Court after the 2005 amendment, the court while interpreting the intent of the Parliament, observed that *"It is, therefore, evident that the Parliament intended to achieve the goal of removal of discrimination not only as contained in Section 6 of the Act but also conferring an absolute right in a female heir to ask for a partition in a dwelling house wholly occupied by a joint family as provided for in terms of Section 23 of the Act."*

Court's ruling in *Vineeta Sharma v. Rakesh Sharma*

In my opinion, with regard to the interpretation of the Section 6 of the HSA, the recent ruling of the Supreme Court in *Vineeta Sharma v. Rakesh Sharma*[54] is the most pertinent one. In this case, the court dealt with the issues of retroactivity and the origins of coparcenary rights, both of which are analysed by the researcher below.

Origins of Coparcenary rights

The Supreme Court in its ruling in *Vineeta Sharma* cleared the confusion with regard to the interpretation of Section 6. The confusion was created by the apex court itself through its conflicting interpretations in *Prakash & Others v Phulavati*[55]*& Others* and *Danamma @ Suman Surpur v. Amar & Others*[56]. In Vineeta Sharma, the court in explicit terms made it clear that the question of when the father's death occurred was not relevant as survivorship was only the mode of succession, whereas coparcenary comes into existence by virtue of birth.

[52]GurupadKhandappaMagdum v. HirabaiKhandappaMagdum, AIR 1978 SC 1239 (India).
[53] G. Sekar v. Geetha & Others, AIR 2009 SC 2649 (India).
[54]Vineeta Sharma v. Rakesh Sharma, (2019) 6 SCC 164 (India).
[55] Prakash & Others v Phulavati, (2016) 2 SCC 36 (India).
[56]Danamma @ Suman Surpur& Others v. Amar & Others, (2018) 3 SCC 343 (India).

It is pertinent to note that Mitakshara Law classifies property into two categories: *ApratibandhaDaya* and *SaptratibandhaDaya*. *Apratibandha*, as the word suggests means unobstructed heritage whereas, *Saptratibandha* means obstructed heritage. As it is clear from the above discussion, coparcenary is a right that comes into existence by virtue of birth, it is *ApratibandhaDaya*, as the life of the property owner does not impede the interest in coparcenary.[57] In light of this, it is important for us to understand, that the Supreme Court has correctly reasoned that since the 2005 amendment granted daughters a coparcenary right to daughters by birth, it is unimpeded, and therefore the question of when the father's death occurred is not relevant.

Retroactive Application

With regard to the retroactive application, it should be noted first of all that retroactive statute or provision is one which applies after its enactment, but that its operation or application is based on the status or character which occurred or was acquired prior to its enactment, derived from preceding events.

The court clarified in *Vineeta Sharma* that the 2005 amendment to Section 6 of the HSA, explicitly makes it clear that the daughter of a coparcener by birth becomes a 'coparcener'. The court while holding the retroactive impact noted that it is possible to assert the right prospectively, on and from the date of the 2005 amendment, which is however, based on the birth of the daughter, which is an occurrence of precedence.

Analysis

It is pertinent to note that though the Hindu Succession Amendment Act, which introduced the concept of coparcenary for women is applicable all across the country after the 2005 amendment, land is still a state subject, and this may have contributed to the skewed findings in various states. That is, if discrimination as far as land ownership is concerned persist, it will affect women's inheritance and their status within the family on a state level.

The findings of this study by ADB, point towards a trend wherein women's land ownership increases their position and decision-making power within the family. However, this was found to vary across states mainly due to the fact that people may remain unaware about their legal rights as far as inheritance is concerned. Thus, delayed and feeble implantation of inheritance laws that empower women may have an adverse effect on other spheres of their lives like decision-making in the home.[58]

## Conclusion

[57] Venkatesan, *supra* note 50.
[58] Harold Glenn et.al, *supra* note 44, at 16.

In my opinion, if a totally different line of succession for the property held by females would have been created, it would have led to tangible differences in the way a woman's property is perceived. If provisions for a line of succession independent of patriarchal norms would have been made, the property of the woman would not remain in the clutches of male figures for all intents and purposes. A woman would gain a status of her own independent of masculine entities.

While framing the HSA, the makers had the opportunity to create a new customary practice that would promote equality. This however was squandered by the discriminatory aspect of Section 15 of the Act. In my opinion, it would have been in better interest if attempts would have been made to achieve equality through the existing concept of Stridhana and its expansion.

Stridhana represented, at a specific level, an unrefined acknowledgment of the separation between genders in contradistinction to the joining of the personality of a lady into that of the closest male family member.

# LOST IN CHAOS: WILL THE PARLIAMENTARY DEMOCRACY SUSTAIN WITH AN INCREASINGLY DISRUPTIVE PARLIAMENT?

*-Gaurav S. Gawande*[1]

## Abstract

*A genuine democracy is inconceivable without a representative, efficient and effective legislature. Our forefathers envisioned our democracy to be inclusive and robust. Hence, they chose Parliamentary Democracy to give voice to each and every section of the country. Parliament is recognized as one of the most democratic and open fora for debate. Cabinets have to prove and retain their majority through parliament. Disruptions and disorderly scenes in Parliament are not of recent vintage. As far back as 1952, the Preventive Detention (Amendment) Bill caused disruption in parliament. India accepted the pole system of the election through its constitution. Anti- Defection law was enacted by 52nd amendment by adding it in the 10th schedule for good reasons to prevent members from defecting. It allows parties to herd their members, weakens incentives of legislators to invest in developing their own viewpoints and express them freely as they cannot use their own stand on different issues to evolve or develop their own political careers. Disruptions affect the efficiency of parliament badly. The most important effect of disruption can be observed in people's reduced confidence in parliament. To minimize disruptions, we need to take into consideration the duality of the problem. One is regarding members of parliament and other is structural changes required. Parliament currently is facing a lot of issues. However, there is also a ray of hope. In monsoon session, 2018 productivity was 118% which is highest since the year 2000. Strengthening the institution is not an impossible task.*

## Introduction

"*The system of parliamentary democracy embodies the principles of change and continuity. If continuity is broken, we become rootless and the system of parliamentary democracy breaks down."*

-Jawaharlal Nehru[2]

A genuine democracy is inconceivable without a representative, efficient and effective legislature. Our forefathers envisioned our democracy to be inclusive and robust. Hence, they chose Parliamentary Democracy to give voice to each and every section of the country. Parliament is recognized as one of the most democratic and open forum for debate. Cabinets have to prove and retain their majority through parliament.Parliament is the lawmaking body of the country. Though it is actually bureaucracy that prepares the

[1] 5th year (BLS LL.B.), Government Law College, Mumbai. He can be reached at gawande.s.gaurav@gmail.com

[2] MINISTRY OF INFORMATION AND BROADCASTING, GOVERNMENT OF INDIA, *Jawaharlal Nehru's Speeches* (1983).

actual bill under the guidance of concerned minister still parliament largely overlooks the whole procedure through its various committees and debates.

Parliament is a multi-functional institution performing a wide variety of roles. It has a representative role, being the custodian of the nation's ideals, hopes and faith. Apart from lawmaking it also controls the executive and ensures its accountability. In a robust democracy, it is vital for parliament to ensure that the executive does not overstep its authority and remains responsible for people that have elected them. Similarly, the legislature also has the financial power to decide how the government raises the taxes and how the money is spent. The debating function of parliament ensures views of representatives of the different background are heard at the apex level. Members are free to debate any topic of national importance without fear and analyze it indepth. These discussions constitute the heart of democratic decision-making.

Yet in most democracies including India legislatures are losing a central place to the executive. This is being exacerbated by increasing disruptions in parliament leaving many parliamentary procedures tenuous. Hence the very idea behind parliamentary democracy is being subdued.

## Historical Overlook of Disruptions in Indian Parliament

Disruptions and disorderly scenes in Parliament are not of recent vintage. As far back as 1952, the Preventive Detention (Amendment) Bill caused disruption in parliament.[3]

In 1990s railway and union budget started to telecast on National TV and thus a new era began. On 24 July 2006, entire proceedings of Lok Sabha were telecast live. Since last 5 Lok Sabha, the disruptions have increased and the number of annual working days have decreased in arithmetic progression. In fact, in 10$^{th}$ Lok Sabha, less than 10% time was lost due to disruption whereas in 15$^{th}$Lok Sabha (2009-14) as much as 40% of total time lost in disruptions making it least productive Lok Sabha.[4]

The monsoon session of 2015 turned out to be near washout due to disruptions and as a result, the GST bill which was earlier agreed upon by all stakeholders could not be passed.[5]

## How Do the Members Disrupt Parliament?

Usually to project issues outside agenda members drown one another in their noisy

[3]*Dated August 2, 1952: Preventive Detention*, THE HINDU (Aug. 02, 2002), https://www.thehindu.com/2002/08/02/stories/2002080200390800.htm.

[4] Shri P.A. Sangma, *Functioning of Parliamentary Democracy in India*, VIVEKANANDA INTERNATIONAL FOUNDATION, (Apr.10, 2012), https://www.vifindia.org/transcriptions-paper/2012/04/04/functioning-of-parliamentary-democracy-in-india.

[5] Express Web Desk, *Parliament's Monsoon Session Washed Out, GST Bill Not Passed,* THE INDIAN EXPRESS(Aug. 13, 2005, 3:40 PM), https://indianexpress.com/article/india/india-others/live-gst-bill-unlikely-to-be-passed-in-monsoon-session-of-parliament/.

demands. Often, they do cross-talking, demand suspension of question hour. They highlight their protest by not complying with the instructions of the chair. Sometimes they shout slogans in well in front of the chair. They force adjournment of house hour to hour, day by day.

## Causes behind Disruption

India accepted the pole system of the election through its constitution. As our polity evolved, winnability of candidate became sole criteria subverting other important qualities such as prowess in parliamentary procedures, knowledge of country's problems etc. This has fundamentally changed the approach of members towards Parliament. Winnability being the sole criteria they try to solve problems through 'mass protest' rather than debate. Parliament is only as good as its individual members. With the rising trend of the percentage of candidates with criminal records, it has been observed that they tend to defy rules, create a ruckus in parliament. According to the association for Democratic reforms, 34% of MP's in 16$^{th}$Lok Sabha face criminal charges. The percentage in 2009 and 2004 stood at 30 and 24 respectively.[6]

Experts also point out that the increasing trend in disruptions is directly proportional to the evolution of TV media. A myriad number of 24*7 news channels have arrived on the scene. To get more viewership they tend to cover sensational news and hence give more importance to disruptions than debates. And members have a belief that publicity even though bad is better than no publicity as winning next election has the top spot on their priority list.

Today's era is the era of perception. Political parties also believe that their interests are better served through disruption. In order to portray the government as inefficient, they carry out protests rather than discussing the problem in parliament. Today political parties have somewhat legitimized disruption as a parliamentary tool to oppose executive.

Anti- Defection law was enacted by 52$^{nd}$ amendment by adding it in the 10th schedule for good reasons to prevent members from defecting. But it has created a new set of problems. It allows parties to herd their members, weakens incentives of legislators to invest in developing their own viewpoints and express them freely as they cannot use their own stand on different issues to evolve or develop their own political careers. This law was further strengthened by 91$^{st}$ amendment. Its ramifications include subversion intraparty democracy. Hence it further leads to tickets being given only to loyalists which finally lowers the quality of members getting elected.

[6] Rukmini S., *16$^{th}$ Lok Sabha will be Richest, have most MPs with Criminal* Charges, THE HINDU(May. 23, 2016, 6:48 PM), https://www.thehindu.com/news/national/16th-lok-sabha-will-be-richest-have-most-mps-with-criminal-charges/article6022513.ece.

**Effects**

Members of Lok Sabha represent not only their constituency but also their state. Rajya Sabha members are elected by elected members of state legislative assemblies. When working of parliament is stalled due to disruptions members lose their chance to put a stand of their state in front of other lawmakers. This undermines the principle of federalism.

The major function of parliament is to hold the executive accountable. It uses different means such as question hour, an indigenous innovation the zero hours to ask questions to concerned ministers. Members also use calling attention motion to highlight the matter of public importance and seek authoritative statement. Parliament can also use censure motion against the council of ministers to oppose specific policies and action. In the matter of urgency, Adjournment motion is introduced to highlight the matter of recent occurrence and urgent public importance. But when members disrupt parliament, they miss out on the opportunity to hold the executive accountable with facts and relevant points which is the very soul of parliamentary democracy.

Disruptions affect the efficiency of parliament badly. In 2016, Parliament saw 70 sittings and in 2015 it saw 72. In 2000, Lok Sabha was in session for as many as 85 days. In fact, in the last 10 years, the lower House has met for an average of 70 days a year. In 2017, it hit a record low of 57 days.[7] The average number of sittings of Lok Sabha in 1952-57 was 135 days in a year. Disruptions not only reduce working days but also efficiency. In 15th Lok Sabha, only 165 bills were passed making it the least deliberative full-term parliament ever.[8]

One among ramifications of parliamentary disruptions is an increased frequency of use of guillotine closure. While it's unavoidable looking at the increased workload of parliament guillotine lets many important undiscussed clauses of bill pass without deliberation. Hence chance to analyze nitty-gritty of bill is lost.[9]

The most important effect of disruption can be observed in people's reduced confidence in parliament. There is not merely a perception now, but an opinion in the minds of the general public, that there has been a steady decline in the standard of our Parliament and Parliamentarians. Disruptions also contribute to undermining the respect representatives ought to have in the eyes of the citizens.

---

[7] Rakesh Dubbudu, *The Winter Session of 2017 Will be the Shortest in 20 years*, THE QUINT (Nov. 29, 2017, 05:27 PM), https://www.thequint.com/news/india/winter-session-2017-to-be-shortest-in-20-years.

[8] Special Correspondent, *Parliament has 130 Pending Bills*, THE HINDU (May 18, 2016, 07:32 AM), https://www.thehindu.com/news/national/parliament-has-130-pending-bills/article5678494.ece.

[9] Pradeep Kaushal, *Guillotine: Fast-track Lawmaking*, INDIAN EXPRESS (Mar. 16, 2018, 02:10 AM), https://indianexpress.com/article/explained/guillotine-fast-track-lawmaking-lok-sabha-budget-session-bills-passed-arun-jaitley-5099440/.

## What Can Be Done

To minimize disruptions, we need to take into consideration the duality of the problem. One is regarding members of parliament and other is structural changes required.

### A] Improve the quality of members as well as their capacity building:

The criminalisation of politics is a serious concern. In a recentjudgment, Chief Justice Misrasaid: "Criminalisation in politics is a bitter manifest truth, which is a termite to the citadel of democracy".[10]Judgment instructs candidates fighting election who are facing criminal charges to advertise them thrice. As suggested in the judgment parliament must enact the law to bar those who are accused of a crime from contesting the election. It is not possible without consensus between all parties. Hence political parties must also need to observe restraint while giving tickets.

Today MP's have to perform many tasks. To ask questions in parliament they need be equipped with detailed knowledge both technical and legal about the country's problems. They must be ready with research, complex macroeconomic concepts to scrutinize budget. Hence MP's need to be assisted with competent research staff.

### B] Structural Improvements:

Article 85 of the constitution empowers the president to summon parliament. And the president follows the advice of the council of ministers. So, effectively, the government decides when parliament is going to meet to oversee its functioning. There has been a decline in a number of working days. In light of the fact that parliament does not have the power to convene itself, a solution can be to fix a minimum number of working days for it in a year. The National Commission to Review the Working of the Constitution had recommended that a minimum number of working days for Lok Sabha and Rajya Sabha should be fixed at 120 and 100 respectively.[11]

It can be concluded that majority of disruption is caused during question hour. It is the first hour in working of the LokSabha. In 15th Lok Sabha, 60% of question hour time was lost to disruptions.[12] Many times House is adjourned for the whole day due to disruption in a very first hour. Hence question hour can be shifted in LokSabha like it was in RajyaSabha in 2014 to 12 pm to 1 pm.

---

[10]Krishnadas Rajagopal, *Supreme Court asks Parliament to frame laws to bar those accused of crimes from fighting elections*, THE HINDU (Sept.25, 2018, 11:02 PM), https://www.thehindu.com/news/national/cant-bar-politicians-with-criminal-charges-from-contesting-elections-parliament-should-frame-laws-sc/article25035435.ece.

[11]*Summary of Recommenation*, OUTLOOK (Apr. 02, 2002), https://www.outlookindia.com/website/story/summary-of-recommendations/215076.

[12] PRS Legislative Research, *Perfomance of Parliament During the 15th Lok Sabha*, PRS (Sept.11, 2020), http://www.prsindia.org/administrator/uploads/general/1393227842~~Vital%20Stats%20-%20Performance%20of%2015th%20Lok%20Sabha.pdf.

Anti-defection law has curtailed the capacity of members to express their opinions beyond party lines in-house and increases the incentives to control or create a political party to be able to issue diktats to its members. Even though they can voice the concerns of their voters, they cannot vote according to their conscience in opposition to the official party position. We need to expand room for an individual member to express their opinion freely in parliament. The issuance of the whip can be limited to only those bills which can threaten the government such as money bill, no-confidence motion as suggested by Dinesh Goswami Committee on Electoral Reforms (1990)[13] and the Law Commission Report 170 (1999).[14]

## Conclusion

Parliament currently is facing a lot of issues. However, there is also a ray of hope. In monsoon session, 2018 productivity was 118% which is highest since the year 2000.[15]Strengtheningthe institution is not an impossible task. With determination and continuous effort, we need to build consensus along political spectrum about the selection of candidates, maturity and restraint among political parties which is vital to minimize disruptions and hence accentuate stature of our legislature.

[13] Ministry of Law and Justice, *Report on the Committee of Electoral Reforms* (1990).

[14] Law Commission of India, *Reform on Electoral Laws,* Report No. 170, http://www.lawcommissionofindia.nic.in/lc170.htm.

[15] PTI, *Monsoon Session: Lok Sabha records 118% Productivity, Best since 2000*, THE TIMES OF INDIA (Aug. 10, 2018, 11:00 PM), https://timesofindia.indiatimes.com/india/monsoon-session-productivity-of-lok-sabha-118-best-since-2000/articleshow/65359028.cms.

## DISCLAIMER