Chanakya National Law University Journal

Chanakya National Law University Journal

Vol. 10 2022-23

Cite this volume as CNLU LJ (10) 2022-23

2022-23

Price: Rs. 1250

Registration No. : BIHENG/2010/38114
ISSN 0976-805X

Published by:
The Registrar,
Chanakya National Law University,
Patna-800001.

Distributed exclusively by:
Eastern Book Company
34, Lalbagh, Lucknow - 226 001
U.P., India
Website: www.ebc.co.in Email: sales@ebc-india.com

Chanakya National Law University Journal

Prof. Srikrishna Deva Rao
Vice Chancellor NALSAR University of Law,
Hyderabad.

Prof. Dr. S. Sivakumar
Professor
ILI, New Delhi
Visiting Professor
Chanakya National Law University, Patna.

CNLU Law Journal

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FROM THE EDITORIAL BOARD

Books form the bedrock of all civilizations. In the field of law, a Law Journal is a significant pedagogical tool which introduces law students to judicial processes and their plausible outcomes. Legal issues are often intertwined with their social and economic counterparts, and it is only through a Law Journal that a student of law is able to appreciate the differences and discern the fine line between legal issues and other socio-economic considerations. You have in your hands, the sixth edition of the CNLU Law Journal, a literary endeavour of Chanakya National Law University, Patna. With the last nine volumes, the benchmark that we have set for ourselves is already very high, and with this edition, we only hope to match the high standard that we have set for ourselves. This journal is a holistic compilation of ideas and thoughts contributed by scholars, academicians and students of our esteemed legal fraternity.

The article titled '*Governance of Smart Cities in India: An Overview*' highlights the mechanisms of governance of smart cities in India, especially the corporate governance. It talks about the schemes that have been introduced by the government to increase the pace of urbanization in the country. It tries to give the definition of the smart cities and the need of the smart cities. It compares the meaning of smart cities with other foreign countries. It especially focuses on SPVs (Special Purpose Vehicle) in details which are constituted under Indian Company Act 2013 for any special purpose and the use of ICT (Information and communication technologies) in governing the smart cities more effectively. It further goes to highlight the overlapping works and differences between the ULBs (Urban Locla Bodies) and SPVs. Some of the lacunas of the SPVs have been highlighted. It highlights the role of stakeholders and PPPs (Public Private Partnerships in SCM. It raises alarm regarding e-governance and data protection laws in protecting the privacy of the people. Moreover, it takes into account the sustainable development in SCM (Smart Cities Mission).

In the article titled '*Technology, Science and Human Rights',* the author highlights how the technology and science engender in the forces of production, and its consequent effects upon the human rights. It argues that how technologies brings about subordination and changes in the society. It highlights that though these inventions are for the betterment of mankind, but it has pros and cons. Arms race and nuclear development by the countries put the betterment of mankind at the back leading human rights violation. Further, it points out that technologies should be available to agrarian societies in the developing countries, as the developed nations by the use of technologies engender inequalities among nations by making them the consumer of their products. It has examined the possible negative impacts of automation and robiticization on the human rights.

In '*Uniform Civil Code: Need of The Nation Or A Threat to Personal Laws',* the author explores the concept of a Uniform Civil Code in India, which aims to establish a common set of laws applicable to all citizens, regardless of their religion or personal beliefs. It traces the historical development of this idea from the British colonial era to the present. Although the Indian Constitution's Directive Principles of State Policy advocate for a uniform civil code, its full implementation remains incomplete. The article delves into the inherent tension between the uniform civil code and the fundamental right to freedom of religion. It emphasizes the importance of equality and non-discrimination in personal laws and examines the judiciary's role in determining essential religious practices. In summary, the article provides an unbiased analysis of the history, constitutional position, and implications of a uniform civil code in India.

In the article '*Corporate Criminal Liability in India'* the author highlights in the era of globalization and economic crimes, the focus on corporate criminal liability has gained significance alongside street crimes. These crimes not only affect financial interests but also impact lives, property, and state policies on issues like pollution control and consumer protection. Corporations, possessing significant economic power, have distinct legal personalities and play crucial roles at various levels. However, the concept of holding corporations criminally liable has faced resistance within the legal system, which traditionally focuses on individual criminality. The paper aims to examine the concept of corporate criminal liability, including the capacity of corporations to commit crimes and their criminal liability under the law. It explores the Indian perspective, analyzes complexities surrounding corporate punishments, and discusses common law principles and theories related to corporate criminal liability. This article examines the issue of corporate punishment when corporations face convictions that involve both imprisonment and fines. Since corporations cannot be imprisoned, the focus turns to imposing fines as the sole feasible penalty. The Law Commission of India recommends amending legislation to enable courts to impose fines exclusively on corporations. While courts previously held that corporations cannot be convicted if imprisonment is mandatory, the Supreme Court clarified that fines can be imposed. The article emphasizes the need to explore alternative sentencing methods that consider individual accountability while balancing punishment and corporate functioning. It also highlights the importance of aligning Indian laws with global developments in corporate criminal liability.

The article titled '*Cyberwarfare- The Emerging Threat to World Peace'* the author explores the application of *International Humanitarian Law* in the realm of cyber warfare. This article highlights that International Humanitarian Law still applies to cyberwarfare even though it isn't specifically covered in the rules of war. Cyber warfare is also governed by the jus in bello principles that govern parties' conduct during armed engagements. However, there are some gaps and challenges that must be resolved. The article makes a contrast between cybercrime and cyberwarfare, highlighting how crucial it is to know the difference.

Additionally, it discusses noteworthy cyberwarfare incidents like the Stuxnet worm strike and the DDoS assaults on Georgia and Estonia. The term "attack" in the context of cyberwarfare and the principle of differentiation, which calls for separating military targets from civilian objective.

The article titled '*Foreigners Tribunal: An Institutional Violation of Natural Justice'* the authors have extensively dealt with the topic of Foreigners Tribunals (F.Ts) in Assam, India, and offers a critical perspective on their legitimacy from the standpoint of administrative law principles. The authors shed light on the absence of procedural fairness and consistency in the F.Ts' adjudication process, which undermines the fundamental principle of natural justice. They express concerns regarding the vague appointment procedure and the lack of independence among F.T. judges, advocating for an amendment that guarantees the inclusion of experienced and impartial individuals. Additionally, the article argues that F.Ts are ill-equipped to determine citizenship due to the excessive delegation of legislative power. In conclusion, it emphasizes the need to establish a comprehensive judicial system to ensure fair and equitable citizenship determinations in Assam.

In the article '*Admissibility of Social Media Evidence: A Comparative Critical Appraisal'* the authors puts forth the challenges in dealing with the social media evidence in the jurisdiction of India and America by the court of law. It highlights the importance of social media evidence in criminal and civil case which have been accepted by the court in recent times. It also highlights the vulnerability of social media at the hands of hackers, which makes the admissibility the social media evidence doubtful in the court of law. However, the laws of evidence as well as IT have been amended, yet it is not devoid of loopholes. It compares the Indian jurisdiction and American jurisdiction on the admissibility of social media evidence. In India, there is mandatory certification of the content of social media as evidence by authority which places obstacles in presenting such social media artefacts in the court as evidence. In America, the court admits such artefacts based in circumstantial evidence, while ignoring the possible hacks by the 3rd party. It further argues that definition of computer evidence which is defined in IT act 2000 does not include the server in which huge data is stored by social media. There is also possible misuse of certification required under the law by the social media companies and in America the court disregards the real authorship of the uploaded content on the social media. It suggests bringing forth the concept of "Metadata" in making the social media evidence authentic and need to mull over this aspect of law.

In the paper titled *'Making A Case To Include Socially Excluded Group In The Framework Of Discrimination Law And To Argue Their Rights*

Under Article 14' This article focuses on the absence of discrimination law in India and puts forth the new group "Socially Excluded Group", defined by the author, to bring it under the ambit of discrimination law. It argues that, for the time being, such group can seek the help of article 14 of the constitution under indirect discrimination for remedy against discrimination until the discrimination law comes into force. While defining the said disadvantage group, it prescribes the eligibility criteria for its inclusion in the discrimination law based on the deprivation 4 basic goods. Moreover, it defines such groups in contrast to narrow definition of disadvantage group provided in the constitution.

In the article '*Trading Interests: Locating The Security Exception Within The Framework Of Sanctions Placed On Russia* This article examines the economic impact of sanctions imposed on Russia in response to the conflict with Ukraine. It analyzes the trade-related coercive measures used by countries and their compliance with international trade law, particularly the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS). The article explores the exception for essential security needs provided in Article XXI of GATT and Article XIV of GATS, taking into account relevant case law and disputes. It concludes that the exception for essential security needs may be applicable in the case of sanctions against Russia. The article also highlights the global consequences of the conflict and the potentially high cost for Russia.

In the article 'Relevancy of The NDPS Act, 1985 and Use Of Palliative Care In India- An Analysis' This article emphasises on the palliative care and the hindrance in its use due to NDPS Act, 1985. It highlights the evolution of palliative care for terminal diseases in India and how the NDPS Act 1985 has become stumbling-block in catering palliative care to the patients. It explains the human dignity for the patients who are suffering from terminal diseases to bring the attention of state to ease the access of palliative care service. It tries to bring forth the section 27 of the act to highlight that how it penalizes for prolonged use of palliative care. It further goes to state the challenges of palliative care in India and dilemmas in its use. It concludes it with the emphasis on the effectiveness of palliative care in relieving the excruciating pain and gives suggestions in making the palliative care service available to all.

In the article 'A Sentencing Judge's Dilemma – Juxtaposition of Just Desert and Individualization of Punishment' This article explores the crucial phase of sentencing in criminal trials and the intricate challenges faced by judges in India due to the absence of consistent sentencing policies and guidelines. The author explores the tensions that exist between the concepts of individualization of punishment and just desert, which aims to fit the offender's characteristics with the appropriate punishment. Individualization of punishment focuses on matching the severity of the crime with the appropriate punishment. Judges face a challenge when deciding punishments because they must strike a balance between retributive justice, deterrence, and rehabilitation. The lack of clear

criteria makes this challenge even more difficult. The essay also emphasises the negative effects that could result from harsh or unduly lenient sentencing, such as encouraging victims to seek retribution or a return to primitive behaviours. The article emphasises the need of making thoughtful and responsible sentencing judgments by highlighting the need to take into account elements including the case's facts, the convict's background, and the crime's overall societal impact.

In the article 'Comparative Analysis of Information Laws: India And The USA' This article provides a comparative analysis of the Freedom of Information laws in India and the United States, with a focus on the Right to Information Act in India and the Freedom of Information Act (FOIA) in the USA. It examines the definitions, provisions, and procedures for accessing information held by public authorities in both countries. The report emphasises both the parallels and contrasts, highlighting the roles of information officers, processing digitally signed by Akshat Anunay times for requests, disclosure exemptions, and how private agencies are handled. It also discusses various international viewpoints on the right to information access, highlighting the value of openness, responsibility, and informed citizens. The article's conclusion makes the case that in order to successfully achieve the goals of good governance, effective adjudicators, international knowledge exchange, and specialised legislation are required.

BOOK REVIEW

The book Syed Mahmood Colonial India's Dissenting Judge (2022) The article revolves around the book titled "India's First Dissenting Judge" as reviewed by the author delves into the captivating life and significant contributions of Justice Syed Mahmood, the inaugural Indian judge to serve on the Allahabad High Court during the British colonial era. The book sheds light on Mahmood's unwavering dedication to judicial autonomy, displaying his unwavering courage through his dissenting opinions. Noteworthy aspects explored include his instrumental role in the establishment of Aligarh Muslim University and his influential judgments, notably his dissent in the Queen Empress v Pohpi case, which upheld the right to legal representation in criminal appeals. The narrative further explores Mahmood's clashes with Chief Justice Edge and ultimately his resignation, driven by his unwavering commitment to dignity and judicial independence. The article ultimately stresses the vital role of judicial fearlessness in safeguarding judicial autonomy and celebrates Justice Mahmood's lasting impact.

ACKNOWLEDGMENT

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

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

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

GOVERNANCE OF SMART CITIES IN INDIA: AN OVERVIEW

—*Mridula Mishra*[*] *& Dr. B. Ravi Narayana Sarma*[**]

Corporate Governance plays a pivotal role in managing any business or organization. The recent development in the field of corporate world reveals the impact of corporate governance and its functioning for sustainable as well as successful business. Corporate Governance as defined by the Institute of Company Secretaries of India, *"the application of the best management practices, compliance of law in true letter and spirit and adherence to ethical standards for effective management and distribution of wealth and discharge of social responsibility for the sustainable development of all stakeholders".*

For the governance of Smart Cities, Special Purpose Vehicle a LLP have been incorporated under Companies Act, 2013. At present, under corporate governance a sense of responsibility is not only shared by the corporation but also a citizen to share social responsibility while being a good corporate citizen.[1] There are multiple theories that is used to regulate corporate governance, Agency Theory (beneficial to both the parties), Resource Dependency Theory (dependent on the available resources), Shareholders Theory (increasing profits) and Stakeholders Theory (taking in account of development of all the entities).[2] All these theories act as features of smart city governance.

The one solution that has been incorporated from the western culture was to create Smart Cities to tackle Urbanization. Definition of Smart Cities is no where defined and can be exhaustive sometimes. It includes development in all the aspect of society be it sustainability, solid waste management, smart mobility, e-governance, transportation by integrating technology.

The development of the city is hindered as a result of problems arising due to public health, transportation, pollution, a lack of resources, improper waste

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[*] Vice Chancellor Chanakya National Law University, Patna.

[**] Associate professor of Law Chanakya National Law University, Patna.

1 Klaus Schwab, "Global Corporate Citizenship: Working with Governments and Civil Society", 87(1), *Foreign Affairs*, (2008), http://www.jstor.org/stable/20020271.

2 John Zinkin, J., "Chapter 1: What is Corporate Governance and Why it Matters" in *Better Governance Across the Board: Creating Value through Reputation, People, and Processes*, Berlin, Boston: De Gruyter. (25-7-2022, 4.01 p.m.), https://doi.org/10.1515/9781547400935-001.

management, and inadequate infrastructure. These issues are detrimental to society as a whole and prevent growth of an economy of a city. As a result of this, people are opting to technology as a means of finding answers to all of these problems and resolving them in more effective ways, which gives the development of idea Smart Cities. A Smart City incorporates Big data and IoTs to make the city productive and sustainable to live in. A Smart City is beneficial in long run for all the population in a country, it is implemented for the whole population in the same way as it is for other. Most of study suggests that people are not aware of this concept, as it is new and all its features are not clearly defined anywhere. People has a misconception that its development might impact system and governance structure in a bad way. The essential element which comprises of a smart city is governance structure and IT. The proposed framework also assists in recognising recent trends and conditions for becoming a Smart City.[3]

Formation of smart cities in India is done by all the three tiers of government as well as many other actors such as private shareholders to achieve global standard of living. The government has been making reforms since 90's by bringing 74th amendment and introducing local self help government, although the results seems to be uneven. In the year 2005, the JnNURM program was launched by the central government for the development of smart cities. Smart Cities Mission was launched in 2015 by the Central Government through a competition to give higher liveability index, economic stability and sustainability by adopting new modes of IT, digitalisation and improved governance. Hundred cities were chosen to make the existing cities smart by the means of area-based development as well as pan-city development. Later, these developments were carried out through AMRUT programme under SCM Mission. The funding and other plan of action is decided by Ministry of Housing and Urban Affairs. It also initiated to incorporate SPVs (Special Purpose Vehicle). It is an organisation formed to fulfil a specific purpose and then is dissolved. It evolved as a new governance structure to tackle the challenges of present governance system. The Special Purpose Vehicle is governed by the Companies Act 2013 and has decision making power and other managerial powers. It mandates financing through Public Private Partnership. According to the guidelines issued by the government a fund of Rs. 48,000 crore investment over five years with an average Rs. 100 crore per city per year was assigned directly from the Centre. However, until July 2019 about a third of the amount (Rs 17,114 crores) has been released by the Centre and only Rs. 6,160 crores utilised by the cities.

The development of technology over the course of the last few decades has not only had a significant influence on human lives, but it has also transformed

[3] Joshi Sujataa et al., "India Developing Smart Cities: An Integrated Framework", 6th International Conference on Advances on Computing & Communications, ICACC (2016).

it. Use of Information and communication Technology (ICT) has made lives easier and better. It has made the urban cities to function effectively while going through tremendous development and at the same time making use of technological innovation inexpensive in day to day life. Access to information about anything and anywhere has become very easy. European model of smart cities strategies has gained popularity all over the world. The main importances is given to the role of technology in making any management effective and also make resource allocation easy and the increasing importance of collaborations.[4]

In the development of Smart cities major power in the form of rights and obligations has been given to the corporate body, Special Purpose Vehicle (SPVs). The power of local urban body has been transferred to the SPVs. Thus, entrustment of decision making has been given in the hands of bureaucrats by the central government due to complex governance structure of the SPVs. Each city has been designated its own budget and management making power, turning it to be complicated resulting in some successful models such as Indore, Bhubaneshwar, etc. and some of them failed such as Bhagalpur, Shillong etc.. The lack of integrated vision questions the effectiveness, efficiency and transparency of the governance system of these smart cities. The concerning part is failure to record proper documentation of the data of the urban development and lack of citizen participation. With the surge of Covid-19 shortcomings of these cities have been revealed and result has shown that these smart cities has failed to address problems of the citizen of this country. Information and Communication Technology plays an important role in the formation of the smart cities, Indian smart cities suffer from their own technology driven challenges and lack of proper governance. Thus, the question arises that whether the introduction of purpose specific vehicle such as SPVs in the building of smart cities offers proper governance or has failed to work in a country like India, and what the future holds for such smart cities without strong legal and administrative framework.

The Ministry of Housing and Urban Affairs (MoHUA) and all the states and union territory administrations collaborated to launch the Smart Cities Mission (SCM) on June 25, 2015. It was to be completed by 2020 but has been extended due to the pandemic. Total of hundred cities were chosen for such competition. The Mission seeks to make these cities "liveable, inclusive, sustainable, and have thriving economies that offer multiple opportunities to people to pursue their varied interests". It also aims to promote economic growth by making sustainable living. It focuses on developing local area and use technology for benefits to give smart results. In other words, smart cities, in the words of MoHUA, "are cities that operate for the people". The SCM will

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[4] Margarita Angelidou, "Four European Smart City Strategies", 4 INT'L J. Soc. Sci. Stud. 18 (2016).

strengthen urban governance, maintain a clean and sustainable environment, and improve infrastructure and services such as housing, water supply, sanitation, energy supply, health, education, mobility, safety and security, and IT connectivity. Smart Cities Mission is new creation adopted from western culture to provide best infrastructure and resolve diverse urban challenges. It is different from the other urban reforms adopted by the Indian government.[5]

The development of smart cities may be traced all the way back to the 1970s, when Los Angeles launched the "A Cluster Analysis of Los Angeles" project, which was the first urban big data endeavour of its kind. Amsterdam is widely regarded as the world's first smart city. In 1994, it was known for launching a virtual digital metropolis. In the middle of the 2000s, IBM and Cisco each launched separate programmes which added to the evolution of Smart Cities. Barcelona hosted the first ever Smart City Expo World Congress in 2011. Now it is held annually to keep track of the progress of the smart cities. Amsterdam, which was founded in 1994 and was first known as a "virtual digital city," was the world's first "smart city." Its primary purpose was to encourage the use of the internet. In 2009, the American Recovery and Reinvestment Act (ARRA) laid out plans that included the utilisation of sensors, smart metres for electricity, and the development of a smart grid for the United States. There was a competition in 2011 between a total of 200 cities, IBM recognised 24 of the cities as being among the smartest cities. In 2013, Barcelona, became the first city in the world to implement a data-driven urban system, which included improvements to public transit, parking, and street lighting. At the same time China launched its ninety first smart batch of city projects. At present, China has more than two hundred and seventy seven smart cities in line for its development. The Smart London board was established in order to improve the digital administration of London. In 2015, India's smart cities mission was launched, which includes one hundred different cities and is still is in its implementation phase. Since that time, other nations have begun launching projects to build smart cities through the implementation of novel technologies, such as the "side walk labs,""data privacy issues," and "5G test beds" in New York City.[6] There is a look at the development of different countries in the domain of Smart Cities project implementation:-

Japan: In the year 2019, the Ministry of Land, Infrastructure, Transport and Tourism (MLIT) in Japan introduced many projects which included fifteen leading projects and twenty three prioritised projects. It was based on an association of private sectors and local government to solve urban and regional

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[5] Rumi Aijaz, India's Smart Cities Mission, 2015-2021: A Stocktaking, Special Report No. 155, Observer Research Foundation, (2021), https://www.orfonline.org/research/indias-smart-cities-mission-2015-2021- a-stocktaking/.

[6] Global data, https://store.globaldata.com/report/smart-cities-thematic-research/ (25-7-2022, 5.55 p.m.).

challenges through the use of new technologies and data. Many consortium has been set up to address problems that has been ignored.

Canada: The objective of the Smart Cities Challenge programme in Canada, which is a competition open to local and regional governments as well as indigenous communities, is to enable communities to adopt a smart city approach in order to improve the lives of their residents through innovation, data, and connected technology. The programme is run by the Government of Canada. It is a challenge where participation is open to all municipalities, regardless of the size of their resident population. There were four winners announced that gave a different solutions in areas such as food security, reducing the isolation of the senior population, integrating migrants, and accessibility for people with disabilities.

Italy: Metropolitan Cities 2014-2020 is a programme that promotes the regeneration of urban services and develops urban inclusion by empowering disadvantaged communities in Italy. This programme is sponsored by the European Union and is part of Italy's Metropolitan Cities initiative. The programme takes a new approach, in which cities and their residents are regarded as primary stakeholders in the process of innovation. The projects included are smart urban mobility, building permits, and waste management systems. It's main goal is to develop an integrated with data driven goals.[7]

India: According to the census that was conducted in 2011, around 30 percent of the overall population of India was living in urban areas, and it is anticipated that this number will reach 40 percent by the year 2050. India's urbanisation appears to be unplanned and poorly managed. It has resulted in several serious issues, such as the unplanned development of semi urban areas, the expansion of slums, water crisis, improper management of solid waste, and poverty. Smart Cities Mission was launched in the year 2014 to develop hundred smart cities. Prior to this, urban development had been directed by the Jawaharlal Nehru National Urban Renewal Mission (JNNURM), and more recently, it has been directed by the Atal Mission for Rejuvenation and Urban Transformation (AMRUT) schemes. There are similarities between AMRUT and smart cities, but there are also some key contrasts between the two. The AMRUT programme takes a project-based approach to urban development. Its primary goal is to enhance the quality of life in urban areas by focusing on the provision of fundamental services and amenities in five hundred cities and towns with populations of one lakh or more. It includes development of services including water supply, sanitation, and transportation. Whereas, Smart Cities is a designed initiative for building and developing hundred smart cities

[7] Smart Cities and Inclusive Growth, Building on the Outcomes of the 1st OECD Roundtable on Smart Cities and Inclusive Growth, OECD with the Support of Ministry of Land Export and Transport, Korea, (2020), https://www.oecd.org/cfe/cities/OECD_Policy_Paper_Smart_Cities_and_Inclusive_Growth.pdf.

based on the specific guidelines issued by the Ministry of Housing and Urban Affairs.[8]

I. THEORETICAL FOUNDATIONS OF SMART CITIES GOVERNANCE

A Smart City has different definitions. In general terms it means to includes all the factors which is essential for sustainable development.

IBM defines a smart city as one connects information to better understand and regulate its operations and make the most use of the resources that are available to it.

According to Cisco, those areas that implement scalable solutions that make use of information and communications technology to improve quality of life and increase efficiencies is called Smart City.

The Department of Business, Innovation, and Skills in the United Kingdom defines a smart city as sustainable city and innovative city that makes use of ICTs and other means to improve the quality of life, efficiency of urban operation and services, and competitiveness. This is done while ensuring that the city satisfies the needs of both the current generation and future generations with regard to economic, social, and environmental concerns.

Thus, it sums up that Smart City is an initiative that requires effective implementation by the use of ICT to give efficient as well as sustainable results and use digitalisation in reforming urban services with the collaborative efforts of multiple stakeholders. Smart cities also connects cities, communities, and societies.

A. Need for smart cities

From the last two decades urbanisation has been at its peak. People are opting for urban areas to seek wealth, stability, and social and educational services, which leads to the abandonment of rural areas and increased population concentration in metropolitan areas. Over half of the world's population is urban.

By 2050, approximately 90% of the world's urban population growth will be in Asia and Africa. In certain states e.g., South Korea, the capital city

[8] Apala Saha, "The Socio-Political Relevance of the Indian Smart City Mission: A Critical Analysis NGJI", AIPRJ NGSI-BHU, 66, (2020), https://new.bhu.ac.in/Images/files/apala(1).pdf.

contributes half the country's GDP. Some cities are itself more capable than their own country.[9] National governments often form separate ministries for cities where there is huge population like U.S.A., Brazil and India, while local city mayors promote city reconstruction and expansion such as in London, New York, Barcelona, and Rio.

Cities have been very challenging to deal with, globally, excessive urban density leads to traffic congestion, energy supply and consumption challenges, increase of greenhouse gas emissions, uncontrolled development, lack of basic amenities, and rises in crime and antisocial behaviour. The political and social need to combat these problems including environmental concerns such as climate change with the developing market of telecommunications and digital solution has given rise to the word Smart Cities.

Smart Cities has been adopted in different parts of the world by national and municipal political leaders, major global tech corporations, international institutions, and many organisations. For example, European Smart Cities aim to reduce city challenges such as scarcity of resources like energy, healthcare, housing, and water, inadequate and deteriorating infrastructure, energy shortage and price instability.[10] Political shift from nation state to multi level government has been witnessed worldwide, which provides cities more authority and freedom to act. Recent improvements in Information and Communication Technologies (ICT) has brought many effective which enables cities to perform urban functions in a better way, such as cheap mobile apps, free social media, cloud computing, and cost-effective ways to handle big data. Smart city components include economy, people, environment, government, mobility, and buildings.[11] IBM lists people, business, transit, communication, water, and energy as smart city domains. ICT helps create smart cities by integrating government, social, economic, and environmental issues. It should be linked with social capital investment, stakeholder collaboration, and city integration. Smart city governance prioritises digital inclusion.

Changes in citizen norms and behaviours may be needed to coordinate an open data platform along with public policies and new technologies. Digital inclusion is an important aspect of Smart Cities development which means everyone can access and utilise the internet. For example, in the New York City, phone booths are being converted into Wi-Fi hotspots with city

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[9] Lilian Edwards, "Privacy, Security and Data Protection in Smart Cities: A Critical EU Law Perspective", 2 Eur. Data Prot. L. Rev. 28 (2016), https://www.datapanik.org/wpcontent/uploads/Edwards_EDPLR_2016_Privacy_security_and_data_protection_in_smart_cities_a_critical_EU.pdf.

[10] Mosannenzadeh, Famaz and Vettorato, Daniele, "Defining Smart City. A Conceptual Framework Based on Keyword Analysis", TeMA - JLUME, (683-694) (2014), https://www.researchgate.net/publication/271130694_Defrning_Smart_City_A_Conceptual_Framework_Based_on_Keyword_Analysis.

[11] *Id.,* at 50.

information tablets. This programme offers public access to communication technology and transforms an unsuitable space.[12]

B. Characteristics of Smart Cities

Smart city is a new concept. There are a number of cities throughout the world, each of which claims to be a smart city despite lacking the most important components of Smart Cities. Smart cities are based on shifting dynamics due to the advancement of the technologies, which makes it very difficult to fit in a specified definition. No city can fulfil the criteria of Smart Cities, but there are few important features of Smart Cities:-

- The smart city can be one which is adopting technology in respect of everything. The future of a city depends on the use of technology. Smart cities represent a conceptual development model that aspires to use ICTs integrating it with human capital as well as sustainable development in all the aspects of society.
- It is essential to point out the strategy and that strategic plans for smart cities be modified to the requirements, priorities, and limitations of the circumstances in which they are implemented.
- This information may then be used to improve urban functions and save resources. It should be accessible to all the people. Real-time data analysis and the IoT are emerging as a result of technological advancements that are becoming more accessible at lower costs and the extensive use of sensors to deal with the challenging issues prevailing in the society.
- The implementation of these technologically advanced system leads to development, which in turn improves functioning of a city.
- The development of human and social capital as a result of the creation and transmission of new information, increased involvement and digital inclusion, as well as the introduction of new innovations is a distinguishing character of smart city development. It is attracting more trained and skilled people which will lead to economic growth of a city. It provides a platform for all the stakeholders which interconnects different nations and regions together through viable network. The smart city development plays a specific role in developing and diversifying the economic and social environments of cities.[13]

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[12] Brandon A. Brooks and Alexis Schrubbe, "The Need for a Digitally Inclusive Smart City Governance Framework", 85 UMKC L. REV. 943, (2017), https://heinonline.org/HOL/Page?public=true&handle=hein.journals/umkc85&div=42&start_page=943& collection=usjournals&set_as_cursor=0&men_tab=srchresults.

[13] Margarita Angelidou, "Four European Smart City Strategies", 4 Intl. J. Soc. Sci. Stud. 18 (2016). https://heinonline.org/HOL/Page?public=true&handle=hein.journals/ijsoctu4&div=49&start_page=18&c ollection=usjournals&set_as_cursor=0&men_tab=srchresults.

C. Issues and Challenges

There are many challenges in the implementation of Smart Cities:-

- For the management of sustainability, one of the most important challenges is increase in the urban population and its consequences on environment.
- There is a problem with the implementation of each and every aspect such as social, economic, technological dimensions of the growth all together at the same time in the smart city governance.[14]

i. Smart Cities Mission in India

Smart Cities helps in making people's life better. They provide core infrastructure and give a decent quality of life to their citizens, a clean and sustainable environment, and the application of smart solutions.[15] This is the approach that the Smart Cities Mission of India is opting for, and the objective is to promote these cities as part of the Smart Cities Mission. The current legal, social, management, economic, technological, and sustainability issues all plays a role in determining the framework for a smart city. Each of these aspects makes it possible for the public sector as well as the other sectors to plan and carry out activities related to smart cities to give better results. The Smart Cities Mission operates on the basis of guidelines issued by MoHUA. This framework also conducts an analysis of the results on the variety of factors associated with the smart city development projects. In addition to sustainability, which should be the foundation of any type of development, this involves governance and the socioeconomic balance of the society.[16]

The Smart Cities Mission constitutes following components

1. Pan Development- It looks into the implementation of various smart solutions across the city's existing infrastructure. It aims to integrates information technology in order to offer intelligent solutions to the problems faced by current cities.
2. Area based development- The implementation of area based development involves retrofitting and redevelopment in order to improve the liveability of the entire city. It also includes planning and turning slums into a better planned areas. It aims to replace the built-up infrastructure

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[14] Jasrotia, Aruditya, "Smart Cities & Sustainable Development: A Conceptual Framework", 8, AJRBEM, (2018), https://www.researchgate.net/publication/323420209_Smart_Cities_Sustainable_Development_A_Conce ptual_Framework_ISSN_2249-7307.

[15] National Portal of India, Smart Cities Mission, https://www.india.gov.in/spotlight/smart-cities-mission- step-towards-smart-india (25-7-2022, 20.06 p.m.).

[16] Joshi Sujata et al., "Developing Smart Cities: An Integrated Framework", Procedia Computer Science (2016), https://pdf.sciencedirectassets.com/280203/l-s2.0-S1877050916X00191/l-s2.0S1877050916315022/main.pdf?.

with new infrastructure while taking into consideration the needs of the environment.

3. Green field projects- Green-field projects, also known as brown field redevelopment, are initiatives that redevelop abandoned land into usable land in order to accommodate an increasing population in urban areas.[17]

D. Issues and Challenges

- For the first time, a competition has been used to pick cities for funding of Smart Cities Mission, while also employing a strategy of area-based development. This is a new concept in India.
- Both the state government and local government (ULBs) will play an important roles in the development of smart cities. Important aspects that will determine whether or not the mission is successful include strong leadership and vision at this level, as well as the ability to act decisively.
- To implement the ideas of retrofitting, redevelopment, and green field development, capital assistance is required. The structure for capital assistance is confusing has not been defined anywhere clearly.
- Citizen's participation is one of the most crucial issue. It requires complete data driven society, which gives rise to privacy issues.
- The introduction of Special Purpose Vehicle (SPV) tries to make the process of implementation easier but has many overlapping features with other ministries and local bodies, which gives rise to many problems.

At present, all the SCM projects has been delayed due to the pandemic. The current development, includes disbursement of twenty three percent of the allotted amount, with the central government contributing thirteen percent and state and local governments contributing ten percent, respectively, of the total amount. The amount is very low as estimated that approximately ninety four percent of the total funds released by the central government have been transferred to the SPVs but has not been utilised effectively. The state of Karnataka comes in first place with a total of eight hundred and twenty one project tenders filed, while the state of Manipur comes in last place with only seven tenders. There are only few states which is performing well which includes New Delhi, Chennai, Indore, Coimbatore, and Surat at the top, according to MOHUA whereas Puducherry, Amaravati, Bhagalpur, and Muzaffarpur and Shillong falls in the bottom five.[18]

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[17] Smart City Mission Transformation, Ministry of Urban Development, Government of India, http://164.100.161.224/upload/uploadfiles/files/NDMC_SCP.pdf (25-7-2022, 5.47 p.m.).

[18] *Supra* note 5 at 11.

i. Overview of Laws and Regulations for Smart Cities in India

Special Purpose Vehicle (SPVs) has been introduced by the MoUD, which will be regulated by the Companies Act 2013. It is the main governing body for the implementation of Smart Cities Mission. SPVs are generally formed for a specific purpose, once the purpose is fulfilled it gets dissolved. The SPVs function is to plan, appraise, approve, release funds, manage, operate and monitor the development of Smart City Projects of each city. The SPVs is a limited liability company formed through equity contributions from both the state and the central government. It is based on guidelines issued by the central government. Investment is made by the central government, state government and ULBs in the ratio of 50:50. Central government has main control over the working and management of the SPVs. PPPs or private financial institutions can act as a shareholder in the SPVs.

Each SPVs has their own management structure but generally a full time chief executive officer is appointed as the head of the SPV by the authorisation of MoUD's. In addition to the chief executive officer and other functional directors, the board of directors must have at least one person from each of the following levels of government i.e. central government, state government, ULBs, and independent directors. The Chairperson of the Special Purpose Vehicle (SPV) will be either the Divisional Commissioner, Collector, Municipal Commissioner, or Chief Executive of the Urban Development Authority. For the purposes of planning, developing, and carrying out the implementation of projects, the SPVs can appoint Project Management Consultants. The government should follow a transparent and fair procedure according to the model framework given by the MoLTD for Smart City Projects. SPVs can also seeks consultancy from a list of private firms mentioned by the MoUD.[19]

E. Corporate Governance

Evolution of SPVs

SPVs were initially developed for the purpose of financial management in the 1980s. Michael Milken and Drexel Bruham Lambert discovered SPVs. SPVs are created only for a specific purpose. It is operated on the basis of defining principles and goals, once it is accomplished, the SPVs dissolves. It can be in the form of a limited liability Partnership (LLP), trust, financial asset reconstruction company, any entity, establishment or organisations with variable functions that is registered under the Companies Act 2013. The stakeholders in an SPVs are sponsoring entities, such as government, businesses and private individuals. For the implementation of Smart Cities Mission, SPVs have

[19] Swapnil Ratnakar et al., "A Systematic Overview of India's Smart City Mission", 09, IJERT (2021), https://www.ijert.org/a-systematic-overview-of-indias-smart-city-mission.

been incorporated, it aims to enable local development and utilising technology as a means to create smart solutions for citizens. It also focuses on the economic growth and the enhancement of the quality of life of citizens in a number of specific cities according to the Smart Cities Mission Statement Guidelines 2015. It acts as a tool for city administration that the government has created as part of a strategic intervention to administer Smart Cities (Ministry of Housing and Urban Affairs, 2015). The establishment of SPV gives rise to certain valid concerns about the constitutional framework of their operations including its administrative and legal framework. SPVs are commonly formed to escape the financial liability.

F. Role of SPV's in Smart Cities Mission in India

SPVs plays the most important role in the governance of Smart Cities in India. One of the first Smart City development program in India is the Gujarat International Finance Tec (GIFT) City. It proposed to have separate SPVs for different objectives. SPVs have been established in order to implement the essential components of the utilities through the significant participation of the private sector. These SPVs include essential features like district cooling systems ltd., water infrastructure ltd., waste management services ltd., SEZ ltd., power company ltd., and ICT services ltd.. The implementation of GIFT City somehow influenced the idea behind the concept of Smart Cities Mission.

Planning Commission of India envisioned the creation of Smart Cities as a means of addressing the difficulties associated with urbanisation in India in its twelfth plan. This has moved from the phase of conceptualization towards the phase of implementation. One of the emerging problems was the limited organisational capacity of Urban Local Bodies, and it was not sufficient to face the challenges posed due to urbanisation. This made question the government own policy pointing out political economic factors and limited management capacity as the primary challenges impacting urban reform in India. Moreover, the World Economic Forum (2016) and the Brookings Institution noted that the current form of governance structure a major challenge in the establishment of Special Purpose Vehicles (SPVs). The main idea to incorporate SPVs is to achieve better management urban system and make strategic decisions.

G. Composition, Functions, Powers and Responsibilities of SPV's in India

Composition

The foundation of SPV was approved by both the apex committee and the high powered Steering Committee, both of which were established by the Central Government. These are a joint effort between the state and urban local

bodies to speed up the pace of development. However, demarcation of powers of SPVs and process and empowerment of urban local bodies have not yet been concluded. There is still confusion with regards to issues of coordination between the local governments and other agencies like SPVs.

A SPV acts as the nodal implementing agency for the management of SCM projects. A chief executive officer (CEO) oversees operations at the SPV, which is backed by a board of directors that includes representatives from the Central Government, the State Government, and the ULBs or municipalities. Generally, the structural framework is the same as mentioned below.[20]

- Chief Executive Officer
- Nominee Director for the Central Government
- Independent Directors
- Chairperson
- State Government Nominee
- Urban Local Body Nominee
- Additional and functional Directors

In addition to establishing SPVs, selected cities constitutes of Smart City Advisory Forums. It's primary objective is to balancing among the numerous stakeholders and monitoring organisations. The primary responsibility of the advisory forum is to evaluate the recommendations given by the citizens and adapt it according to the needs of the project. It also conducts routine audits for various ongoing projects.

For example, Varanasi Smart City SPVs has the nominee director and the independent directors from the Central government. Divisional Commissioner serves as the Chairperson of the SPV as well as represent the state government. There are nominees from various departments including Jal Nigam, Vidyut Vitran Nigam, Town and Country planning Organisation, etc.. The nominee directors, technical directors, additional directors and the CEO who is a Municipal Commissioner represents at the state level. The other example of a successful SPV is the city of Bhubaneswar Smart City. It has envisioned private townships and partnerships with construction companies, technology suppliers, and financial institutions. The organisational structure of the Bhubaneswar Smart City SPV is extremely different from the SCM that are

[20] Maury K., Kranti and Biswas Arindam, "The Rationale of SPV in Indian Smart City Development", 978989-758-373-5, (2019), https://www.researchgate.net/publication/333089308_The_Rationale_of^SPV_in_Indian_Smart_City_Development.

already in place. It is similar to a private company than to that of a bureaucratic board committee.[21]

H. Powers and Functions of SPV's

Powers of SPVs

- SPVs have power to make decisions while operating in an independent capacity.
- They can put their regulations into effect by implementing their own rules and procedures.
- They are incorporated with the powers and obligations of the municipalities, such as the authority to make decisions that is granted to urban local bodies under the Municipal Act.
- They have full capacity to approve or reject projects for the SCM, that are forwarded by the ULBs.
- They receive funding from the central and state government in addition to that which comes from urban local bodies. Thus, it needs to get approval from the state in various matters.
- SPVs have a greater capacity to engage with citizens through ICTs than the local governments.
- SPVs have authority to appoint Project Management Consultant for the purposes of planning, designing, developing, managing, and implementing area based projects. They can also seek assistance from any of the consulting firms that have been enlisted and approved by Ministry of Housing and Urban Affairs.
- SPVs should follow a fair and transparent procedure. They are required to adhere to the guidelines issued by MoHUA and other laws and regulations of the state which is in effect.

I. Functions of SPVs

- SPVs' primary responsibilities include the planning, appraising, designing, approving, and disbursing of funds, as well as the implementation, management, operation, monitoring, and evaluation of projects.
- The implementation of projects can be carried out in a number of different ways, including through public-private partnerships, turnkey contracts, joint ventures, and as subsidiaries.

[21] *Id.,* at 144.

- Generation of funds for SCM projects can be done in multiple ways such as collaborating with the respective local governments. SPVs can choose to work with municipal corporations as the projects implementing agency.
- The boards of the SPVs are organised in a multi-tiered framework, with members drawn from each level of India's hierarchical governance system. Even for technical assistances for designing purposes, several agencies such as foreign governments, external organisations, domestic organisations, the World Bank, the Asian Development Bank, the Japan International Cooperation Agency (JICA), and UN Habitat work together. The three tiers of government are responsible for collecting revenue in the form of taxes, surcharges, municipal bonds, pooled finance mechanisms, tax increment financing, and other mechanisms.[22]

J. Comparison between ULB's and SPVs

Urban Local Bodies has been introduced by the 74th CAA, thus it is a constitutional machinery for the city development and management. SPV is the project implementing body for the Smart Cities Mission. They work together to complete the framework of Smart Cities Mission. ULBs functioning is permanent whereas SPVs acts as an temporary body that are established by the Smart City board. ULBs have their own independent source of revenue, which comes are allotted to them by the Finance Commission and the Central Government, as well as programmes, municipal bonds, loans, and PPPs. SPVs obtain their funding from a variety of sources, including SCM, loans, bonds, project level infra bonds, taxes, share capitals, and PPPs, among others. Within the framework for governance, SPVs are governed by the Companies Act of 2013, whereas a ULBs is comprised of different departments which includes administration, engineering, health, ward offices, social welfare, revenue, emergency services, nature and environment, information technology, and so on.

The primary objective of the ULB is to provide basic services such as uninterrupted supplies of water and electricity, maintained roads, proper sewage collection and disposal, collection of parking taxes and fees, urban planning, and town planning. It also regulates lands and the construction of buildings in addition to planning for economic and social development, whereas the goal of a smart city is to provide water supply, electricity, education and health services safety and security, housing, environmental sustainability, and urban transport that are all linked to the Internet of IoTs.

When we compare the functions of the two bodies, we find that the ULB's functions include the formation of special committees or joint committees that can deal in properties. For example, these committees can sanction the

[22] *Id.,* at 146.

acceptance or acquisition of an immovable property on lease for a term that is longer than three years. In addition to this, it exercises several other functions, such as deciding the budget and determining the tax rates. On the other hand, SPVs are companies that are tasked with the responsibility of planning, managing, and operating the smart city development projects.

Thus, based on the above comparison it is clear that the, SPVs develop a very limited area for smart cities, leaving the most of the city area to be administered by the ULBs. This leaves the state government and municipalities to work to cope up the challenges raised from the urbanisation. Local government still needs empowerment for proper functioning. SPVs are governed by Smart Cities Mission Guidelines and the Companies Act, 2013. Urban Local Bodies are governed by a number of different laws and acts.

Decision making power has been shifted to the SPVs, which defeats the purpose of implementation of 74th CAA, which empowers ULBs in the city management. This has led to state government playing a bigger role in making policies, giving opportunities to the private sector. As a result of which ULBs plays no role in the developmental projects related to SCMs. Investors are not selected on the merit basis, the more the funding, the investment is given to those companies, which is not beneficial in the long run. Area based development is one of the components of Smart Cities Mission, the primary problem of allotting funds in ABD scheme for those central areas that is equipped with basic amenities and the parts of the city where the infrastructure is good were chosen to be developed. This fundamentalist approach to development prioritises the construction of larger, more expensive infrastructure over the requirements of economically disadvantaged urban populations which suffer from problems like shortage of water and electricity. There is inequality in distribution of funds. There are no set parameters that decides the allotment of funds for the development of specific region, to help the slum dwellers.

The SPV was introduced to overcome the challenges faced by municipalities and to ensure a higher level of efficacy in the design and implementation of urban development projects in smart cities. Because of the lack of clarity between the nature of the relationship between the two organisations, makes SPVs susceptible to failing. SPVs offers strong and consistent leadership with the appointment of CEOs than the ULBs, due to uncertainties of the officials holding position subject to frequent transfers at the administrative level. SPVs has power to implement new rules these help in decision-making and provide greater departmental coordination. Municipalities fails to achieve desired level of efficiency due to the size of their organisations and their inefficiency to handle their work. SPVs have the potential to carry out projects more quickly, but lacks accountability. Municipal structure in India does not have sound financial system, SPVs have capabilities to generate funding through many including

private investments. But this might affect the balance between financial stability and public service.

Therefore, the SCM gives power to the SPV to manage finances and strong framework to focus on goal oriented urban development. This will also help municipalities to work towards decentralisation responsibilities in a more effective ways. The Smart Cities Mission should work together with the urban government while maintaining accountability and transparency, then only it will have an impact on urban development.[23]

Due to lack of clarity there is overlapping of statutes in the implementation of Smart City governance. In, *Sanjay Chauhan* v. *Union of India,*[24] the question arose regarding the inclusion of Dharmshala as a smart city instead of Shimla. The court held that evaluation of High Powered Committee was arbitrary. They did not maintain transparency and accountability while selecting cities. Thus, selection of cities for development programs needs to be more transparent. In Ceigall Gawar[25] case it was held that the Request for proposal issued by one ministry will be applicable on the SPVs established for the development of a particular smart city. In ILF Consultancy[26] case there was failure to complete the construction work on time, thus the case was dealt under the Arbitration and Conciliation Act. It clearly indicates that there is lack of dispute redressal mechanism in the Smart City Governance framework.

K. Role of Stakeholders and Public Private Partnership in SCM

The United Nation Summit 2015, titled "Transforming Our World: Sustainable Development Plan 2030," gave seventeen primary goals, one of them was to build infrastructure that is resilient and supporting inclusive and sustainable industrialization and the other one was to construct and retrofit infrastructure projects with the system of public- private partnerships. To enhance the means of implementation and revive the global partnership for sustainable development.[27]

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[23] Persis Taraporevala, "How Smart Cities Mission can Help Municipalities to Improve Governance", HT (26-7-2022, 8.38 p.m.), https://www.hindustantimes.com/opinion/how-smart-cities-mission-can-help-municipalities-to-improve-govemance/story-mTV2uXW-0fuiVlgL7A9cXPK.html.

[24] *Sanjay Chauhan* v. *Union of India*, 2015 SCC OnLine HP 4051.

[25] *Ceigall Gawar (JV) A-898* v. *State of Punjab*, 2019 SCC OnLine P&H 628 LNIND (2019).

[26] *ILF Consulting Engineers Almondz Global Infra Consultant Ltd.* v. *Bhagalpur Smart City Ltd.*, 2019 SCC OnLine Pat 1124.

[27] Ahmed M. Selim and Amr Soliman El Gohary, "Public-Private Partnerships (PPPs) in Smart Infrastructure Projects: The Role of Stakeholders", HBRC (2020), https://www.researchgate.net/publication/346085668_Public-private_partnerships_PPPs_in_smart_infrastracture_projects_the_role_of_stakeholders.

The PPP model is extremely important for building infrastructure in the SCM. From the previous PPP ventures it is observed that projects which have shorter time horizons, which are technologically simple, which have specific outputs, and which have risks which are shared primarily by the public sector, such as the management of solid waste and bus shelters, appear to be successful in a large majority of cases. On the other side, projects that lacked certainty in their revenue generation, does not provide equitable access, and had greater transaction costs were unable to be successful. For example, the successful PPP models includes the construction of the Chennai Metro as a joint venture between the state and central government, while many PPP projects like construction of Coimabatore bypass road, Nagpur scheme, etc. has failed due to many reasons such as profit sharing and incorrect financial estimation. The Bangalore Metro began as a Public-Private Partnership, but it transitioned to an Engineering, Procurement, and Construction contract, which was also the model for the Delhi Metro.

The Hyderabad and Mumbai Metro Projects were both delayed as a result of difficulties in land acquisition. When compared to a contract with a private- public partnership, governments projects were opted to reduce operating costs.[28]

Stakeholders plays an important role in the Smart Cities Mission. They are the essential components of SCM. Participation of various stakeholders is absolutely necessary to look into their perspectives, issues, and requirements. Their needs should be prioritized for their development by keeping in mind the cities and its requirements. European city projects have given six characteristics for describing qualities in a smart city. They are:-

1. Competition in the economy results in innovation, productivity, entrepreneurship, and a flexible labour market. Market should have the ability to generate financial resources on its own. This is termed as Smart Economy.
2. The application of ICT solutions with the goal of improving transportation systems. Smart mobility improves the efficiency, and safety of the transportation system while making it sustainable by lowering carbon footprints.
3. Smart Environment includes utilisation of renewable energy, the utilisation of energy grids, intelligent metering, intelligent lighting, waste and water management, and so on with the help of ICT.
4. The Smart People enhances social and human capital. It underlines the fact that creative and innovative processes can be driven by the

[28] *Ibid.*

relationships between intelligent people and their willingness to collaborate and participate in a city's smart solution.

5. The Smart living enhances one's quality of life such as healthcare, safety, culture, the quality of buildings and municipal infrastructure, as well as tourism with the help of ICT.
6. Smart Governance facilitates political participation of citizens in decision making, increasing transparency, and improving the efficacy and quality of social services with the help of ICT.[29]

In India, monitoring and evaluation are both essential components in the formation of smart cities with inclusion of all the above mentioned six components. Converging the Smart Cities Mission with other government initiatives like AMRUT scheme is required in order to successfully complete the mission. Thus, Stakeholders helps to understand the problems prevailing and also helps in finding a solution to those problems.[30]

L. E-Governance and Data Protection Laws

Kevin Ashton coined the term Internet of Things. The IoE connects people, process, data, and objects to enhance network interactions and provide new opportunities and efficiency, ft's a smart device ecosystem. Most solutions are ICT-based, as a city's smartness is facilitated by growing technology. Laws related to Smart City Governance is just emerging, there are many concerns such as privacy protection, security, law enforcement, and other legal and policy challenges. Technology makes cities functional and equal, but also vulnerable. This relationship raises legal and policy difficulties. It is important to analyse technology's impact on the society. The first and foremost important thing is addressing both access to technology as a human right and human rights protection, as given by UN resolution. It should seek as a means to promote, protect, and enjoy human rights as well as how the Internet can be used as a tool to increase citizen's participation.[31]

A Smart City could be developed using physical and human sensors that generate real-time data. The city's big data is stored, processed, analysed, and used by software applications to improve resource management and socio economic decision making.[32]

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[29] Alibabar, "Smart Cities: Socio-Technical Innovation for Empowering Citizens", 87, (18-25), AQ: AIPSS (18-25), (2016), https://www.jstor.org/stable/24877697.

[30] Shrimoyee Bhattacharya and Sujaya Rathi, Reconceptualising Smart Cities: A Reference Framework For India, IIC NITI Aayog, (2015), https://www.niti.gov.in/writereaddata/files/document_publication/NITI%20Aayog%20Workshop%20020 92015%20Presentation%20by%20 CSTEP.pdf.

[31] Christian Iaione, "Legal Infrastructure and Urban Networks for Just and Democratic Smart Cities", 11 Italian J. Pub. L. 747 (2019).

[32] *Supra* note 30.

M. Right to Privacy in the Era of Smart Governance

Right to privacy has developed from series of cases through judicial pronouncements. Supreme Court decisions have historically outlined it. firstly the question was raised in *M.P. Sharma* v. *Satish Chandra,*[33] S. 96 of Cr.P.C. was questioned, which was related to the search and seizure. Eight judges bench held that the Right to Privacy is no right in police cases and it was not recognised. Later, In *Kharak Singh* v. *State of U.P.*[34] challenged police surveillance , it was held that police surveillance is valid on people who are likely to become habitual criminal. It was held that tracking a person's movements does not violate any fundamental rights. Right to Privacy was not recognised in this case also. *Govind* v. *State of M.P.,*[35] the court did not clarify on the privacy based on police regulation. *R. Rajgopal* v. State of T.N.[36] also known as Auto Shankar case, in this case, subsequently the apex court recognised the Right to Privacy. This case reached the conclusion that every citizen possesses the right to protect his or her own personal privacy and that nothing may be published in areas such as family, marriage, procreation, and education, regardless of whether the information is true or not, without the citizen's prior consent. There are two exceptions to it, firstly public records and secondly, behaviour of public officials. Finally in the case, Justice *K.S. Puttaswamy* v. *Union of India*[37] in the aadhar case, five judges bench- validity of aadhar, 4:1- Aadhar valid. Nine judge bench- Right to Privacy is a fundamental Right. The fact that the right to privacy is an essential component of the right to life is still developing further, it not the same as granted in other countries for eg- Germany.

N. Legislations on Cyber Laws

Smart cities in India should incorporate global principles for technical standards, open data, data security, and data privacy. These policies will ensure smart cities sustainability, efficiency, and individual rights. India's open data policy and data protection standards are mentioned under section 43A of the Information Technology Act, 2000, which clearly mentions that any organisation or corporate body dealing with sensitive computer data if is negligent in handling them will be liable to pay damages.[38] But parliament overlooked protection of personally identifiable information when drafting India's cyber laws, as they are not penal in nature. Section 72 of the IT Act,[39] states privacy of any electronic record, but only for acts of officials who has authority to handling them. Present needs of individuals privacy requirements and India's legal

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[33] *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300, (1978) 2 ELT J-287.
[34] *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295: (1964) 1 SCR 332.
[35] *Govind* v. *State of M.P.*, (1975) 2 SCC 148: AIR 1975 SC 1378: (1975) 3 SCR 946.
[36] R. *Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632: AIR 1995 SC 264.
[37] *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1, (Puttaswamy I).
[38] Information Technology Act, 2000, S. 43-A, No. 21, Acts of Parliament, 2000 (India).
[39] Information Technology Act, 2000, S. 72, No. 21, Acts of Parliament, 2000 (India).

protections are vastly different. The IT Act of 2000, the Telegraph Act of 1885, the Terrorism Act of 2002, mentions privacy but does not deal with specific concerns. In no statutes the government use of personal data policy hasn't been widely discussed. Introduction of smart cards, biometric id cards and the process of introduction of multipurpose biometric national id cards for smart governance will affect the privacy of citizens.

In 2003, the EU's Article N29 - Data Protection Working Party underlined the grave privacy implications of biometric systems. India's biometric system enormous volumes of personal data. The national ID pilot has legal, infrastructure, and socio-political implications. The Indian government launched this large project without any outside stakeholder input. A strong privacy laws is needed for such innovative schemes to protect the citizens both from the private as well as government sectors. Governmental operations have become increasingly automated in recent years, in Andhra Pradesh govt, launched several citizen-friendly e-governance initiatives like e-Seva, Saukaryam, MPHS, and others, which collects vast amount of personal data. This gives significant privacy concerns and the urgent need for a thorough privacy law. As a model, consider the EU Directive on Data Protection's privacy scheme. The guideline provides eight basic principles for securing personal information from collection through storage and distribution. They are:-

1. Collection limitation principle: Personal data should be collected lawfully, fairly, and with the citizen's knowledge or consent.
2. Data quality principle: Personal data should be relevant to their intended use, accurate and comprehensive.
3. Purpose specification principle: The purposes for which personal data are collected should be specified at the time of data collection.
4. Use limitation principle: Personal data should not be shared, made available, or utilised without consent or legal authority.
5. Security safeguards principle: Protect personal data from loss, unauthorised access, destruction, use, alteration, or disclosure.
6. Openness principle: Developments, practises, and policies involving personal data should be transparent.
7. Individual participation An individual should have the right to obtain from a data controller, data relating to him, within a reasonable time, at a reasonable charge, in a reasonable manner. If there is denial such denial must be challenged.

8. Accountability principle: A data controller is responsible for implementing the listed principles.[40]

Thus, as important it is to maintain data privacy, use of data in smart governance can resolve multiple problems and make living easier. Implementation of data governance system is important to accomplish the goal of smart cities mission.

Environmental Laws

Sustainable developmental Goals has been adopted in India also to make cities safe, resilient, and sustainable. SDG Goals in India is implemented through the Ministry of Statistics and Program Implementation, Niti Aayog and other ministries that help design, formulate, and monitor SDG goals.

i. National

- Centrally Sponsored Missions and Schemes
- Smart Cities Mission
- Pradhan Mantri Awas Yojana (PMAY) Housing for All (HFA)
- AMRUT
- HRIDAY
- Swachh Bharat Mission STATE

ii. State

- Vision 2030
- Infrastructure Development Plans
- Master Plans

The development of sustainability is measured through different indices such as City Prosperity Index, Education, Health, Housing and Shelter, Water & Wastewater, Solid Waste, Mobility, Safety and Security, Recreation, Economic Ability, Environment, Energy, Finance Planning, Governance, Green Building, Green Space, Ease of Living Indices and Municipal performance index.[41]

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[40] Sheetal As rani Dann, "The Right to Privacy in the Era of Smart Governance: Concerns Raised by the Introduction of Biometric-enabled National Id Cards in India", 47, ILI Journal, (2005), https://www.jstor.org/stable/43 951951.

[41] Urbanisation and SDGs, https://gender-works.giz.de/wp-content/uploads/2022/03/32_EN_APLAK_GGI_Setting-up-of-Integrated-Support-Platform-for-Women-Entrepreneurship-in-Kochi-1 .pdf (28-7-2022, 6.00 p.m.).

Sustainable Development Goal 11 regulation in India: India is witnessing urbanisation at a rapid speed. Smart Cities Mission, Jawaharlal Nehru National Urban Renewal Mission, and AMRUT are trying to improve cities. One of the main goals of India is to achieve SDG's through the vision 2030 to attain sustainable cities, They are:-

- Upgrade slums and give access to secure, affordable homes and basic services.
- Provide safe, cheap, accessible, and sustainable transport systems for all, enhancing road safety, with specific regard to the needs of the vulnerable, women, children, the disabled, and the elderly.
- Improve inclusive and sustainable urbanisation and human settlement planning and management.
- Protect cultural and natural heritage.
- Reduce the number of deaths and persons affected by catastrophes, including floods.
- Focus on safeguarding the poor and vulnerable.
- Reduce cities per capita environmental effect, focusing on air quality and waste management.
- Ensure universal access to secure, inclusive, accessible green and public places, especially for women, children, the elderly, and the disabled.
- Strengthen national and regional development planning to promote economic, social, and environmental ties between urban, and rural areas.
- Increase the number of cities and human settlements adopting and implementing integrated policies and strategies for inclusiveness, resource efficiency, climate change mitigation and adaptation, and disaster resilience, and develop and implement holistic disaster risk management at all levels.
- Help to build sustainable, resilient structures with indigenous materials, especially through financial and technical aid.[42]

II. CONCLUSION

Smart Cities Mission is an initiative taken to face the urban challenges that has occurred due to globalization. Smart City being a new concept does not have an exhaustive definition. It includes development of economy, governance, transport, ICT, people and environment with the help of internet. It has its own benefits as well as drawbacks. India as a country needs different approach to

[42] SDG 11: Sustainable Cities and Communities, https://in.one.un.org/page/sustainable-development- goals/sdg-11/ (28-7-2022, 8.45 p.m.).

deal with the smart city development due to its huge population and urban challenges. Corporate Governance plays an important role in the present governing framework of Smart Cities. SPVs has formed for the development of cities, it's functions are limited and overlapping with ULBs. It needs to be worked upon. Smart City is a concept where ICT and sustainability are the two essential components. Privacy laws in India are not designed in accordance with Smart City Governance structure, which raises red flags in the violation of personal privacy. Thus, it needs to be fixed to attain Smartness in our cities.

TECHNOLOGY, SCIENCE AND HUMAN RIGHTS

—Dr. Ajay Kumar[*]

Technology and Science offer the opportunity par excellence for generating "productive patterns of interaction among all members of the international community." Human rights is a vital field of attention in the drive to improve the human condition.[1] This vital aspect of the interaction between technological development and human rights must receive concerned attention if technology is to be used consciously for the betterment of society. The iron grip in which, from the time of the Industrial Revolution, society has been held and moulded by the demands of science and technology needs to be seen in this light if there is to be liberation and social autonomy rather than passive subjection. Also, whereas in the past human rights tended to be asserted mainly against the state and its agents, modern technology as currently used has brought The present concern for human rights and fundamental freedoms- the main formal manifestation of which is embodied in the Charter of the United Nations Organization - arose basically as a reaction against the widespread violation of human rights in our century. This genesis explains why the studies in this field have been predominantly oriented towards the definition of specific human rights, in order to make it possible to incorporate them into enforceable legal regulations.

As a result of that approach, which may be described as "defensive" or reactive, there is a strong tendency to concentrate action and studies on the possible negative impact of social activities on already defined or accepted human rights, rather than on the new opportunities and options offered by the present process of world transformation.

Science in the true sense of the term dealing with the fundamentals of reality and the universe, has always had and still has a major effect on the non-scientific social general philosophic thinking of that science's society and its leaders.[2] The spectacular advances in science and technology that have continued unabated during the past centuries have emphasized the urgency of the

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[*] Professor, Chanakya National Law University, Patna.

[1] [http://archive.unu.edu/unupress/unupbooks/uu08ie/uu08ie03.htm] (13-10-2015).

[2] [http://www.the-origin.org/Science%20and%20Society.pdf] (13-10-2015).

problems, the power of which to affect human society for better or for worse has increased with every step forward in science and technology. With every passing year that power increases and the need to use it in the interest of human rights grow correspondingly more urgent. The urgency grows on two fronts the scientific and the practical and in combination these two factors produce an exponential growth in the urgency and the magnitude of the problem.

The above approach is undoubtedly a useful and necessary one, but a study relating human rights to scientific and technological development in the context of one of the deepest crises in human history requires a somewhat wider perspective. A brief look at the past will be of assistance in understanding the present situation in the field of human rights and the type of approach required for the proposed study.

The concern for the fundamental freedoms - all human rights are ultimately dependent on the concept of fundamental freedoms - is one of the constants of history. According to Hegel the history of the world is none other than the progress of the consciousness of freedom. For other historians, freedom is not a product of history; man is born free to work out his own destiny. Whatever our starting-point, however, the political problems posed by man's freedom in society, basically the relationship of the individual to the state and to his fellow men, generate a variety of questions the relationships between freedom and equality, freedom and justice, freedom and the rights of the state, freedom and law - which have had different answers in different cultures and at different historical moments. Although the philosophical or theological conception of freedom has common roots in all cultures, the way in which that conception is translated into specific institutionalized human rights is, as we know, historically determined, and changes with the evolution of cultures and social systems.

The present conception of human rights and fundamental freedoms was originated by the Enlightenment in the seventeenth and eighteenth centuries. For the Enlightenment, all things in nature arc disposed in harmonious order, regulated by a few simple laws, in such a way that everything contributes to the equilibrium of the universe. The same rational order is the basis of the human world and manifests itself through the instincts and tendencies of men. The main obstacle to this linear unending human progress is, for the Enlightenment, ignorance, and the education of all strata of society in the light of reason and science will finally lead to a perfect and happy society. This doctrine underwent a complex evolution during the nineteenth century, but its main premises still linger at the heart of liberal sociology and free-market economics.

Together with liberalism, the most influential version in our time of the vision of history centred on progress is undoubtedly Marxism. In the Marxist

conception, the advent of the classless society, through the struggle of the proletariat, would mean the culmination of history, or perhaps more appropriately the beginning of the true history of mankind.

These interpretations of history have a central tenet in common; history is a progressive process governed by internal laws an immanent natural order, the development of the means of production - whose culmination would be the liberation of man, the creation of a society based on ‘’Rational Freedom,” the transition from the “realm of necessity to the realm of freedom.” In liberalism and Marxism the promised society is in the future and its attainment will require deep changes in present society, but these optimistic teleological views have a basic faith in mankind, in man’s capacity finally to build a free, harmonious society.

In absolute terms the gap between rich and poor - measured in terms of the material level of living - has never been as great as it is today between the developed and developing countries. As important or more important than its absolute value is the change in the character of the gap produced in the post-war period have appeared in the character of the gap which have made the economic indicators increasingly inadequate to describe it. The rich countries confront the problématique of the so-called “post-industrial” era, while the countries of the third world have not yet realized the benefits of the Industrial Revolution, with a considerable part of their population living in conditions of utter poverty. The gap, which was essentially quantitative - leaving aside the cultural differences - is being transformed into a qualitative one, with the result that communication between the two blocs into which the world is divided is becoming every day more difficult to the surface the question of human rights protection not only from the state but also from the private sector.[3]

When we speak about the relationships between technology and human rights, it is evident that we have to deal with the interrelations between some very complex phenomena: technology, science, society or systems of societies, and systems of rights of a universal nature.

There are a variety of ways to think about the intersections between science and human rights. Access to the products of scientific research might be a universal right; the same products might be threats to humanity. Scientists themselves possess human rights; they also promote them. With such broad concepts at hand, this variety of themes is inevitable and each could inspire a book in itself.[4]

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[3] Charter of United Nations.

[4] [http://www.law.harvard.edu/students/orgs/hrj/iss17/booknotes-Science.shtml] (13-10-2015).

To begin with the concept of technology, nearly all human societies have, or have had, technologies which are often very elaborate. As we know, archaeologists have used the occurrence of characteristic technologies as the basis for the classification of pre- historical societies. These classifications are largely based on artefacts left behind by the peoples who once used them. In view of the task in hand, however, we have no use for a general definition of technology which includes only artefacts or the material products of inventions. Our definition of technology must enable us to distinguish between the use of technology in pre-industrial and industrial societies and between industrial societies and post-industrial ones in terms of such factors as flexibility, rigidity, or its pervasiveness in social life.

In order to clarify the questions relating to the interactions between technology and society, we distinguish between:[5]

1. Technology as sets of physical objects, designed and constructed by man. In an industrial society this term refers especially to "artificial things, and more particularly to modern machines: artificial things that
   (a) Require engineering knowledge for their design and production; and
   (b) perform large amounts of operations themselves."

In this context the term may also be used to refer to inventions and processes with extensive potentialities for application, such as laser technology, chip technology, and DNA recombinant technology, and the applications of such technologies within existing or new machines and production processes.

2. Technology as a term which refers to human activities in connection with the utilization of artefacts. Moreover, technology implies the knowledge requisite to use these technical things. "Technological 'things' are meaningless without the 'know-how' to use them, repair them, design them and make them. As such this know-how can, partly at least, be systematized and taught, as in the various disciplines of engineering."[9]
3. Finally, "technology" may refer to a body of knowledge that is necessary to generate new rules for the design, construction, and application of technical possibilities to different types of problems (such as, for example, the control of environmental pollution). Here the term technology refers to the *theory* of the application (logia), not just to "artificial things," the ways in which they are used in practice and the transmission of this practical knowledge ("techniques": German, *die* Technic;

[5] [http://archive.unu.edu/unupress/unupbooks/uu08ie/uu08ie04.htm#1. technological impacts on human rights: models of development, science and tec] (13-10-2015).

French, *la technique)* as is emphasized in the first and second meaning of the concept "technology."

In a very broad sense the concept of technology may refer to those aspects of culture which relate to the manipulation of the natural environment by man or "that whole collection of ways in which the members of a society provide themselves with the material tools and goods of their society - the collection of artefacts and concepts used to create an advanced socio-politico-economic structure."[6]

Today, the contradiction lies between the wish to promote technological advances achievable only through research, and the wish to protect its participants. This has a direct reference to the protection of human beings and their rights against the various researches made which need their involvement and in turn prove to be derogatory to them. The technological advancements have positive as well as negative impacts but to arrive at a conclusion, human beings are made the victims to the research. Of course, many of the medical advances which now save countless lives are only possible because of medical research using human subjects. Indeed it has been said that society has a duty to engage in research. Medicines can only be released as available for general use when we are confident that they are safe to use.[7] However, on the contrary, there are more instances of misuse of the technology as well as the negative impacts they cause on mankind. On pervading ethical concern about the use of technology is the protection of confidentiality.[8]

Torture and psychiatric abuse are the important issues that confront, increasingly, physicians, lawyers, government officials and others. An important focus of concern that cannot be ignored is that health professionals- physicians, psychotherapists, and nurses- have sometimes abused medical ethics.[9]

The coming of the industrial society, based on a new division of labour and on the systematic application of new technologies, was accompanied by the advent of a new image of man and society.[10] This new image was expressed in such important documents as the Constitution of Virginia, Article I (1776), the Bill of Rights as part of the Constitution of the United States of America (1788) and the Declaration des droits de l'homme et du citoyen (1789). Those documents brought to the fore the pivotal idea of human rights as universal

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6 [http://archive.unu.edu/unupress/unupbooks/uu08ie/uu08ie04.htm](13-10-2015).

7 Jonathan Herring, *Medical Law and Ethics*, 2nd edn., p. 549.

8 Marianne Woodside, Tricia McClam, *An Introduction to Human Services,* 6th edn., p. 66.

9 Carol Corillon, Eliot Stellar, National Academy of Sciences (U.S.). Committee on Human Rights, *Science and Human Rights,* ed. 1988, p. 6.

10 Jan Beating Technological impacts on human rights: Models of development, science and technology, and human rights.

rights, grounded on the recognition of the inherent dignity of all members of the human family.[11]

During the Second World War mankind experienced extreme cruelties on a large scale, both from policies based on ideologies which emphasized the supposed inequality of "races," and from the uses of new military technologies. After the turmoil of this war the Universal Declaration of Human Rights (1'. 48) stressed that "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" (Article 1). The universality of human rights is, again, emphasized in Article 2: "Everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status."[12] Human beings, endowed with reason and conscience, are to be treated as ends in themselves, and not as passive victims of conditions and contingencies they cannot control.

Looking back on the advent of industrial society, it may come as a surprise when we see how little attention was paid, until recently, to a systematic analysis of the relationships between technological changes, on the one hand, and the development and actual implementation of human rights, on the other. We will return to this observation in the ensuing sections. In the meantime it is important to note that the question of the impact of new scientific and technological developments on human rights was brought before the United Nations in 1968 as a result of an initiative taken by the International Conference on Human Rights held in Tehran, Iran, in that year as part of the programme for the International Year for Human Rights.[13] Following the recommendations of this conference the General Assembly of the United Nations adopted a resolution inviting the Secretary-General to undertake "continuous and interdisciplinary studies, both national and international, which might serve as a basis for drawing up appropriate standards to protect human rights and fundamental freedoms." Specific attention was to be paid to developments in science and technology in relation to:

(1) Respect for the privacy of individuals and the integrity and sovereignty of nations in the light of advances in recording and other techniques.

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[11] La declaration des droits de l'homme ET du citoyen(1789). Article 1. Les hommes nascent ET demeurent libbers ET gaux en droits; les destinations socials ne preventuetre funders' quesur utility commune. Article 2. Le but de toute association politiqueest la conservation des droits natural's et imprescriptible de l'homme; cess droits vent la liberty, la propriety, la sret et la resistance oppression.

[12] Universal Declaration of Human Rights, *The International Bill of Human Rights* (United Nations, New York, 197X), p. 5.

[13] C.G. Weeramantry, ea., *Human Rights and Scientific and Technological Development* (United Nations University, Tokyo, 1990).

(2) Protection of the human personality and its physical and intellectual integrity in the light of advances in biology, medicine, and biochemistry.

(3) Uses of electronics that may affect the rights of the person and the limits that should be placed on such uses in a democratic society; and, more generally.

(4) The balance which should be established between scientific and technological progress and the intellectual, spiritual, cultural, and moral advancement of humanity.[14]

This resolution accentuates the dangers that technological developments harbour with respect to human rights and fundamental freedoms. It should be clear, however, that in many cases technological developments offer opportunities for individual and collective choices and for the enhancement of human rights.

Nevertheless, it is quite evident that present-day innovations in the domains of energy sciences, information technology, and biotechnology occur so rapidly and offer so many new choices for society that, as Weeramantry says in his seminal contribution to this subject: "Science and technology have burgeoned in the post-war years into instruments of power, control and manipulation. But the legal means of controlling them have not kept pace. Outmoded and out-manoeuvred by the headlong progress of technology, the legal principles that should control it are unresponsive and irrelevant."[15]

Most contributions dealing with the relationship between technological developments and social and cultural life analyse chiefly the negative and positive effects of technological change on society, either directly or indirectly. The only course left to society seems to be to adjust to the exigencies of science and technology, for better or for worse. In these analyses, science and technology are considered as autonomous forces over which society has no control. In consequence of the preoccupation with their impact on society, analysis of the ways in which society shapes technological developments has been neglected.

In the next sections we shall discuss the genesis of the model of development that can be considered responsible for this one-sided approach of Western technology. It is important to understand this model of development, in which deterministic ideas regarding technology play a paramount role, if we are to reconsider Western technology's role in the context of opportunities for choice regarding our social and cultural life. After presenting this "technological

[14] As above note, i.e. C.G. Weeramantry, ea., *Human Rights and Scientific and Technological Development* (United Nations University, Tokyo, 1990).

[15] C.G. Weeramantry, *The Slumbering Sentinels: Law and Human Rights in the Wake of Technology* (Penguin, 1983).

imperialistic" or "technological functionalist" model of development and discussing its main shortcomings, we shall present some other models of development which have been formulated - partly at least- as a reaction to the claims of technological imperialism. The results of this analysis will be used to elucidate and elaborate the relationship between technological changes and human rights: How can choices be made in a world of technological and social constraints? In what ways can human rights play a pivotal role in the processes of decision-making?

In this contribution much attention is given to the origin, development, and socio-cultural impacts of the Enlightenment model of development. This emphasis on this Western model of development is a deliberate choice based on the following reasons:

(a) the model elucidates the *specific* characteristics of Western technology and the impact of its diffusion throughout the world within a historical perspective;

(b) The model is still a powerful instrument in the minds and hands of innovating elites in and outside the Western world, notwithstanding its theoretical and intellectual shortcomings;

(c) The presentation of this model reveals, we hope, its strong ideological bias and the concomitant need to deconstruct it in order to find new courses of action;

(d) It is hoped that this presentation emphasizes a contrast between the "Western view" of technological development and the models implied by the case-studies in this volume.

I. NEW TECHNOLOGIES, HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

On the basis of the methodology outlined above, which attempts to define the socioeconomic and political strategy required to achieve a society compatible with the full exercise of the fundamental freedoms, we can now attempt to explore the relationship between new technologies and human rights. The full understanding of that relationship will take an effort which goes far beyond the possibilities of a single project. There are some preliminary results, however, that could help to identify lines of research which deserve further exploration.

The first one, as we have already pointed out, is that the most important social impact of the new technologies is the impact of micro-electronics - through automation and robotization - on the organization of production, the labour process, and the social division of labour. The problem is not whether or not traditional forms of work and employment will be abolished - that change

is inherent in the transformations induced by the new technologies - but rather the way in which they will be abolished.

The growing recognition that the character of present unemployment confronts the advanced countries with a problem that cannot be solved without a complete questioning of the relationships between technology, employment, and work is starting to generate a debate on the subject.

II. TECHNOLOGICAL SELF-RELIANCE AND CULTURAL FREEDOM

The main concern of this paper is with the infrastructure and social role of science and technology, with a focus on developing countries in their current efforts toward modernization and industrialization. For all the difference in emphasis and despite the distinctive traits attached to each, science and technology are closely connected on both methodological and epistemological grounds. Together they are related to social and cultural problems.[16] The nature of this interrelationship and its social implications should become increasingly clear in the course of further discussion. For analytical purposes, the two are to be treated as a single and integrated whole. Their dual functions must be examined and mutually assessed.

First, with respect to the physical world, advancement in science and technology can help bring about development in terms of increasing productive capability and greater freedom vis-à-vis the constraints of nature. Secondly, such advancement is also instrumental in producing societal change and transformation, with significant impacts on problems of human and social relations. Hence the specific human and social dimensions of science and technology need to be objectively perceived, quite apart from their technical and seemingly universal character.

It is this specific social context which, by and large, determines the course and pattern of technological development as well as its consequences. Thus the impact of science and technology has to be evaluated on account of both its cause and effect. This is all the more pertinent to the developing countries as latecomers in the field. Most, if not all of them, are somehow bent on following in the footsteps of the West in advancing from the agricultural phase into the industrial and post-industrial phases. The objective and model of development seems clear-cut, at least in the eyes of the third world's modernizing elite; that is, to accelerate economic growth through industrialization. This is their foremost priority, and it is to be achieved by riding on the waves of

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[16] Friedrich Rapp, "Philosophy of Technology, "*Contemporary Philosophy: A New Survey*, Vol. 2 (Marinus Nijhoff The Hague/Boston/London, 1982), pp. 376-378, in reference to H. Rumpf, G. Simondon, and A G. van Melsen.

technological change which the West has already survived and established within its socio-cultural context.

In a significant historical sense, this development trend is a reflection of the enigmatic impact of Western development.[17] This fact adds an international dimension to the problem of the relationship between exogenous and endogenous sources of technological capability and creativity. More often than not, the virtues of modern science and technology are simply taken for granted. They are looked upon as something of absolute value and have thus become, willy-nilly, an end in themselves, politically and ethically neutral and free from any damaging influences. This is the crux of the whole problem. It is by no means a mere question of the use or misuse of science and technology from a purely technical standpoint, but involves the whole spectrum of socio-cultural factors underlying technological growth and development.

In this continuing "dialectic of specificity and universality,"[18] to use a phrase of the noted physicist R. S. Cohen, scientific technology both offers opportunities to some and is fraught with dangers for others. This has been historically demonstrated for Western societies, and is about to take place in societies tied to the same growth model. In view of the human and social costs involved, one can no longer remain complacent about the adequacy of the overall objective of economic growth, as has hitherto been the case. This would represent only a partial appreciation of reality, one that could turn the very virtues of science and technology into a weapon against humanity.

Indeed, to guard against the adverse impact of science and technology, there is an urgent need to set the whole problématique in proper historical perspective and to deal with the specific problem of human and social relations accordingly. As R.S. Cohen again reminds us:

In the attempt to understand the social impact of scientific technology, we must proceed simultaneously in two ways: first in a far less sweeping and generalizing manner (is technology good or is technology evil?), and second, in a far more self-critical and sceptical dialectical analysis (science gives life and death). We also should recognize the historical character of our attitude towards the social and human impact of science and technology within our own century; attitudes towards technology will differ depending on whose technology it is, or which specific technological advance we evaluate, or which

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[17] A. Rahman, "The Interaction between Science, Technology and Society: Historical and Comparative Perspective," International Social Science Journal, Vol. 33, No. 3 (1981): 508-518. For a more detailed discussion of the impact of European science on South Asia, see Susantha Goonatilake, *Aborted Discovery: Science and Creativity in the Third World* (Zed Books Ltd. London, 1984), chs. 3 and 5.

[18] Robert S. Cohen, "Science and Technology in Global Perspective," International Social Science Journal, Vol. 34, No. 1. (1982): 63.

portion of humankind is speaking or is represented, which class, which race, which tribe, which generation, which sex, at which cultural place the evaluator stands.[19]

Thus, along with technological growth and development, there also emerges the problématique of rights and obligations. It is in the light of its social and historical paradigm that the status of modern science and technology needs first to be re-examined and evaluated. In the process, the concept of human rights itself, as defined under the philosophy of liberalism, needs to be clarified in its historical context. From such analyses, objective principles could hopefully be drawn, especially for developing countries, which are at the receiving end of scientific technology. The entire issue is not confined to any particular countries or groups of countries, but is fundamentally global in character. It thus involves all countries concerned in the process of giving or receiving technology, no matter at what stage of scientific and technological development they may be.

III. "LIBERALISM": A NEED OF REFORMATION

Recognition of the human and social dimensions of technology can indeed be said to constitute a major step forward from the so-called classical model of human rights development.[20] The past three centuries have already witnessed the broadening of the human rights spectrum from the conventional set of civil and political rights and liberties to the newly claimed economic, social and cultural rights. Underlying all these combined negative and positive rights, it is to be noted, is the historical and empirical process of defining the status of man and his relationship to the state. At the beginning was the eighteenth-century notion of civil liberties, whereby the status of the individual was asserted as that of a self-sufficient and self-directing agent who needed little, if any, interference from the government. Government was then at best a necessary evil.

This view was to be followed and somewhat modified in the following century by way of a more positive concept of civil and political rights. Hence legal guarantees and enforcement on the part of the government came to be required for the attainment of equal rights of civic and political participation. Then finally came the demand for economic and social rights, involving the government's positive programmes of action to provide social welfare and to meet basic human needs, especially for disadvantaged groups of people in industrial society.[21]

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[19] Cohen (note 3 above).

[20] Richard P. Claude, ea., *Comparative Human Rights* (Johns Hopkins University Press, Baltimore/London, 1976).

[21] Claude above mentioned.

Both the negative and positive aspects of human rights are obviously inter related, representing libertarian streams of thought. However, as defined specifically within the framework of industrial capitalism, the libertarian aspect naturally and conventionally takes precedence over the egalitarian side. And this, more often than not, gives rise to socio-economic imbalances within the so-called liberal democracy itself. As John Strachey once observed, there is in capitalism - which is the historical moving force of modern liberalism an "innate tendency to extreme and ever-growing inequality."[22]

To a large extent, the Western concept and practice of human rights is very far from being comprehensive and universal. As already noted elsewhere[23] this conceptual partiality is inherent in the historical notion of natural law itself, which serves as the inspirational source of today's ideal and practice of human rights. According to John Locke, the father of liberalism, freedom simply meant being free to do what one liked. Indeed, as ideology, the natural law concept had its great historical achievement in opposing political absolutism and arbitrary rule and replacing divine right with the common man as the basis of political authority. But for all its broadening world-view, the then liberal idea was preoccupied first and foremost with the security and protection of property rights.[24] In the context of the rise of the middle classes in its time. In short, it was historically, and still remains, the liberalism of the haves, and this has grown into a force against the have-nots.

Within this conceptual framework of liberalism, at least two basic human rights still remain unsatisfied. First, externally, it is far from effective with regard to the third-world countries' most pertinent issues and problems of inequality. These are inherent in their agrarian socio-economic structure, and have been worsening in the course of modernization and industrialization. We shall revert to this topic later. Secondly, it is far from comprehensive with respect to the West's own pattern and process of industrialization, where the issues and problems of transition from the agricultural phase were simply taken for granted or ignored. Here the impact of modern scientific technology, among other things, loomed very large in bringing about rural dislocation and disruption.[25] But what was a loss in terms of rural human and social costs came to be viewed as a gain in terms of so-called economic growth and the proletarian zing of the rural sector, with the resulting benefit of cheap labour

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[22] Quoted in T.B. Bottom Ore, *Elites and Society* (Basic Books, New York, 1964).

[23] Saneh Chamarik, "Buddhism and Human Rights," *Human Rights Teaching, Enesco Biannual Bulletin*, vol. 2, No. 1. (1981): 16. On the point of the conceptual shortcomings of liberalism, see C.G. Weeramantry, *Equality and Freedom: Some Third World Perspectives* (Hansa Publishers Limited, Colombo, 1976), p. 10; and FouadAjami, "Human Rights and World Order Politics," World Order Model Project, Occasional Paper no. 4 (Institute of World Order, New York, 1978).

[24] John Locke, *Two Treatises of Civil Government*, reprinted by J.M. Dent & Sons Ltd (London, 1953).

[25] Cohen (as above); Furtado (as above).

for the urban and industrial sector. Such was the price paid in the cause of so-called scientific, technological, and economic progress. Unfortunately, such is also the predominant trend of thinking and belief among the modernizing élites of most developing countries today.

For this very reason, so far as the issues and problems of human rights development are concerned, it is essential to look into the whole process of social change and transformation. It is in this sense that the social impact of technological growth and development needs to be re-examined and assessed. What happened in the Industrial Revolution of the West should be taken as a lesson to be Learned and critically evaluated, instead of a model to be literally followed in the process of modernization of today's developing countries. This is the crux of the whole problématique of economic development in the third world. And this is precisely where the issues of human rights development and technological growth come to be interwoven.

In the eyes of third-world leaders, the logic of modernization requires accelerated economic development to be associated with industrialization and hence the adoption of modern Western technology, as if it were a ready-made solution. On the face of it, this sounds reasonable enough. But on account of the structural nature of Western technology, as well as the social and economic conditions of the third world, there are still quite a few questions to be clarified. In particular, how can industrialization are brought about in an overwhelmingly agrarian setting? And how can modern scientific technology be made use of with a minimum of human and social costs? Above all, how can technological development proceed while avoiding the pitfalls of dependence and subordination? All this involves a technological and structural change with direct implications for human rights, which had been historically bypassed in the Western experience but which today's developing countries must face.

IV. TECHNOLOGICAL ADVANCEMENT: SOCIETY AND SCIENCE

Since the advent of industrialism we have witnessed a continuous conflict between the emerging new society and the "universal" values it represents on the one hand, and the varied types of social life and their values which are threatened by modernization on the other.[26]

This opposition is strongly set out in such studies, published at the end of the nineteenth century, as until the present time this opposition has been reflected and this has not yet been overcome in the rift in the West between

[26] Tonnies' Gemeinschaft und Gesellschaft (Community and Society, 1887) and Le Play' *Les Ouvriers European's* (European Workers, 1885).

positivist social sciences standing in the tradition of the Enlightenment, and the historicist tradition related to Romanticism, in which Truth is not the "work of reason emancipated from all forms of unreason like emotions and partnership," but an understanding that can be made compelling only for a time, even with the best available methods.[27] This is not to say that this rift is the only important one in the social sciences, but it is a very basic one in the context of the divide between methodological, individualistic, and structuralist approaches.[28] These oppositions have also important consequences in our time for policy implementation in the social sciences and for the interpretation of the development of human rights.

It is necessary to make the observation that the social sciences have not analysed in a serious way the development of technology since the coming of the industrial society. Within the positivist tradition the social sciences could only, logically, restrict their analyses to the social and cultural consequences of science and technology. The social sciences could not claim, and still cannot claim, within this approach to be sciences with a methodology that enables them to evaluate the rationality of the natural sciences. Nor did the social sciences which were opposing the tenets of positivist science analyse the nature of technological development as such, but restricted themselves largely to the analysis of nonindustrial ways of life, including ways of life which were being threatened by industrialism. Still another bias may be discerned within the social sciences. As a consequence of the fact that industrial development primarily touched the lives of workers and their families, an overwhelming part of the attention of the social sciences has been directed to the analysis of the impact of technological change on the division of labour in the production processes, on workers' behaviour and attitudes, and on changes in the class structure of society.

There has been a neglect of the study of:

(1) The societal and cultural conditions of technological development and technological applications;

(2) The nature of technological development themselves, such as the analysis of the socio-political factors which impinge on the selection of technological trajectories;

(3) The nature and types of new technologies *introduced* within organizations (in which ways are new technologies selected, by whom, how are they introduced, and with what consequences?);

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[27] R. Bendix, *Force, Fate and Freedom - On Historical History* (University of California Press, Berkeley/Los Angeles/London, 1984).

[28] J. Berting, "Structures, Actors and Choices," in J. Klabbers et al., *Simulation-Gaming: On the Improvement of Competence in Dealing with Complexity, Uncertainty and Value Conflicts* (Press, Oxford, 1989), pp. 8-23.

(4) the opportunities that are provided by the different options in the process of implementation of new technologies with respect to human dignity, human rights, and collective or solidarity rights;

(5) The consequence of the contemporary *systematic* character of technological developments and the increasing intertwining of technological and societal systems;

(6) The significance of technological developments in everyday life (for example, the changing patterns of social relations in the family as a consequence of technological innovations, or how people deal with the new, often imposed, choices produced by technological change).

The rather one-sided views on the relationships between technological development and societal change, in which the problem is largely restricted to either adaptation of social life to technological exigencies or to the protection of ways of life against the attacks of an aggressive technological culture ("modernity" versus "cultural identity"), have not only hampered - and still hamper - the actual systematic analysis of technological development in the Western industrial countries, but are also clearly present in the debate on the impact of technology on developing countries. However, we must be aware of the fact that Science and technology are not independent variables in the process of development: they are part of a human, economic, social and cultural setting shaped by history. It is this setting above all which determines the chances of applying scientific knowledge that meets the real needs of the country. It is not the case that there are two systems -science and technology on one side and society on the other - held together by some magic. Rather, science and technology exist in a given society as a system that is more or less capable of osmosis, assimilation and innovation - or rejection -according to realities that are simultaneously material, historical, and cultural and political.[29]

From this statement it follows that one cannot, at the same time, introduce Western technological changes in a specific country and avoid changes in the traditional ways of life. This is impossible because technological changes are part of a technological system that includes a broad technological culture base and specific, often implicit, notions of social relations. In the context it is perhaps useful to refer to our discussion of the concept of technology that comprises artefacts, the know-how to design, use, and repair them, and the body of knowledge necessary to generate new rules for the design, construction, and application of technological potentialities in relation to different types of problems .Moreover, the increasingly global character of modern technology makes it impossible to think about these problems in terms of "nations."

[29] A. Johnston and A. Sassoon eds., *New Technologies and Development: Science and Technology as Factors of Change: Impact of Recent and Foreseeable Scientific and Technological Progress on the Evolution of Societies, Especially in the Developing Countries* (Enesco, Paris, 1986), pp. 25-26.

Technological systems are in many instances quickly developing as transnational information systems.

The conclusion must be that there is no way back on the road that has been taken by Western technologies and by the Western countries since the eighteenth century. There will not be opportunities to hide from this worldwide development and to protect such cultural diversity as still exists against technological change. But it is also true that within this general direction of development, choices can be made which may engender new types of diversity and reinterpretations of traditional cultural differences. But such a policy must be based, as we shall see, on a careful analysis of the nature of technological-social constraints in development processes and of the opportunities to choose.

The present concern for human rights and fundamental freedoms the main formal manifestation of which is embodied in the Charter of the United Nations Organization - arose basically as a reaction against the widespread violation of human rights in our century. This genesis explains why the studies in this field have been predominantly oriented towards the definition of specific human rights, in order to make it possible to incorporate them into enforceable legal regulations.

As a result of that approach, which may be described as "defensive" or reactive, there is a strong tendency to concentrate action and studies on the possible negative impact of social activities on already defined or accepted human rights, rather than on the new opportunities and options offered by the present process of world transformation.

The above approach is undoubtedly a useful and necessary one, but a study relating human rights to scientific and technological development in the context of one of the deepest crises in human history requires a somewhat wider perspective. A brief look at the past will be of assistance in understanding the present situation in the field of human rights and the type of approach required for the proposed study.

The concern for the fundamental freedoms - all human rights are ultimately dependent on the concept of fundamental freedoms - is one of the constants of history. According to Hegel the history of the world is none other than the progress of the consciousness of freedom. For other historians, freedom is not a product of history; man is born free to work out his own destiny. Whatever our starting-point, however, the political problems posed by man's freedom in society, basically the relationship of the individual to the state and to his fellow men, generate a variety of questions the relationships between freedom and equality, freedom and justice, freedom and the rights of the state, freedom and law - which have had different answers in different cultures and at different

historical moments. Although the philosophical or theological conception of freedom has common roots in all cultures, the way in which that conception is translated into specific institutionalized human rights is, as we know, historically determined, and changes with the evolution of cultures and social systems.

The present conception of human rights and fundamental freedoms was originated by the Enlightenment in the seventeenth and eighteenth centuries. For the Enlightenment, all things in nature arc disposed in harmonious order, regulated by a few simple laws, in such a way that everything contributes to the equilibrium of the universe. The same rational order is the basis of the human world and manifests itself through the instincts and tendencies of men. The main obstacle to this linear unending human progress is, for the Enlightenment, ignorance, and the education of all strata of society in the light of reason and science will finally lead to a perfect and happy society. This doctrine underwent a complex evolution during the nineteenth century, but its main premises still linger at the heart of liberal sociology and free-market economics.

Together with liberalism, the most influential version in our time of the vision of history centred on progress is undoubtedly Marxism. In the Marxist conception, the advent of the classless society, through the struggle of the proletariat, would mean the culmination of history, or perhaps more appropriately the beginning of the true history of mankind.

These interpretations of history have a central tenet in common; history is a progressive process governed by internal laws- an imminent natural order, the development of the means of production - whose culmination would be the liberation of man, the creation of a society based on ‘’Rational Freedom,” the transition from the “realm of necessity to the realm of freedom.” In liberalism and Marxism the promised society is in the future and its attainment will require deep changes in present society, but these optimistic teleological views have a basic faith in mankind, in man’s capacity finally to build a free, harmonious society.

In absolute terms the gap between rich and poor measured in terms of the material level of living has never been as great as it is today between the developed and developing countries. As important or more important than its absolute value is the change in the character of the gap produced in the postwar period have appeared in the character of the gap which have made the economic indicators increasingly inadequate to describe it. The rich countries confront the problématique of the so-called “post-industrial” era, while the countries of the third world have not yet realized the benefits of the Industrial Revolution, with a considerable part of their population living in conditions

of utter poverty. The gap, which was essentially quantitative leaving aside the cultural differences is being transformed into a qualitative one, with the result that communication between the two blocs into which the world is divided is becoming every day more difficult.

The social violence and the repressive regimes of many countries of the third world have their origin, as we all know, in the conditions of utter deprivation in which a great part of the population of those countries lives. Without ignoring the existence of internal elements which help to maintain misery and oppression, we all know that the structural cause of that situation is the asymmetric relationship between the developed and developing countries, created by a long period of political and economic domination. Consequently, the ultimate responsibility for the violation of human rights in the poor countries has its roots, not in specific traits of those countries, but rather on the central characteristics of a world order built primarily by the dominant powers.

The case of the external debt of the third world countries is just an example of that responsibility. Those debts, as is well known, were the result not only of the development needs of the poor countries but also, and in some cases primarily, of a period of rapid expansion of financial capital, that forced the central powers to make heavy investments abroad.

Now, as a consequence of the world recession, the third-world countries confront an external debt whose service imposes a crushing on their economies. On the conditions imposed by the creditors - which include heavy interest rates unilaterally determined - the debt can only be serviced at the price of imposing more sacrifices on an already deprived population. Up to now the big powers have shown a total disregard for the terrible social cost of their policies regarding such debts.

The facts that we are referring to do not include anything new, and our purpose is only to emphasize something that we tend, or wish, to forget; that the present social and international world order is, to a great extent, incompatible with the full exercise of what we consider fundamental freedoms and human rights.

V. MODELS OF DEVELOPMENT OR DESTRUCTION OF MANKIND

We have pointed out that it is necessary to “deconstruct” the deterministic models of development. All of these models imply that technology and industrial changes have an impact on social life and on the implementation of human rights. In terms downstream activities can have only weak effects on

upstream activities. This limits the debate on technology and human rights can be assessed in following ways.

(1) Questions related to the protection of individuals and groups against the impact of industrialism; and

(2) Assumptions concerning the positive contribution of industrial development as such to individual freedom by breaking traditional bonds.

This "deconstruction," as a necessary method for breaking through the limitations, is achieved by a theoretical analysis of models of development. Clearly this is not enough, because the Enlightenment model of development and related models are, as we have shown, very resistant to theoretical attacks because of their ideological nature. A good strategy to attack the "impact model" is systematically to analyse all the links between the variables of the model to use research results showing the degrees of variability, especially of upstream factors, and to engage in this type of research where data are lacking. The weakening of the "impact model" opens the road to another type of debate on human rights and technology, for example, on human rights as normative standards to be used when questions relating to choice arise.

However, it is important to note that the road between deterministic models and voluntaristic approaches is a narrow one. When we take this narrow road we have the obligation to engage in systematic, thorough analysis of the nature of the social, cultural, and technological constraints that will be encountered in specific situations, to indicate as exactly as possible opportunities for choice and the ways in which these can be used.

A promising direction for achieving this end has been outlined by Boudon, whose model seems to fit our task. It is suitable because it concentrates on the rational decisions of actors within systems of interdependencies. At the same time it extends the concept of rationality, permitting an interpretation of situations by the actors by deconstructing the concept of structure that plays such a prominent role in the deterministic models and by giving due consideration to the role of chance in processes of development.[30] There will certainly be other roads leading to a solution of these problems, some of which may prove to be successful within specific cultural and social contexts.

A major element in the course of action we have outlined in the preceding sections will be education. In the first place, education has to enlighten people with respect to consequences of the use of "deterministic" models of development. In the second place, education has to show the links between policies based on these models and human rights. This analysis of the relationship

[30] R. Boudon, *La Place Du Disorder: Critique Des Theories Du Changement Social* (Presses Universities de France Paris, 1984).

between those types of policies and their impact on human rights has to be part of both general advanced studies and professional training in "upstream" and "downstream" areas. This task cannot be left to the "upstream" interest groups, because they are too strongly embedded in the Enlightenment model of development.

Confronted with this problem, Nakayama suggests the development of a service science. As we cannot expect much from academic science as a counter-balance to the menace of incorporated industrial and defence science, we must inevitably turn to another kind of enlightenment, he remarks, namely that of service science. He suggests that the structure of this science could be rather simple, as it would involve exposing problems, solving problems, and, finally, assessment by the people. He connects this idea to the Rights of the Ignorant. Access to scientific information should, in principle, be fully guaranteed. But this right should go together with the human right not to know specific scientific facts but still not be at a disadvantage because of such ignorance.[31]

Finally. There are some strong arguments for changing organizations in such a way that jobs are enriched with more elements of a "learning to learn" strategy that may contribute to an improved use of "human capital" and to an increased respect for human dignity. The next generations must be trained in these domains in such a way that they will be in a better position than we are to understand the problems of development and choice. They must be able to organize research in these domains, not only restricted to sub-themes but also oriented towards a better understanding of global interdependencies. Such interdependencies result from the evolution of a new technological system, the characteristic features of which arc, in comparison with all previous technological systems, "a much greater complexity of conception, closer linkages with scientific institutions, greater capital intensity, more diversified location of production, greater in application and uses, more rapid achievement of global development and world markets.''[32]

VI. HUMAN RIGHTS AND NEW TECHNOLOGIES

The exploration of the possible risks and of the opportunities and options offered by the new technologies should start, in our view, from two basic premises: the first is that the impact of the new wave of innovations on society can only be properly evaluated in the context of the present world crisis, or, to put it better, of the current process of transformation. The second premise,

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[31] Shigeru Nakayama, "Human Rights and the Structure of the Scientific Enterprise," in Weeramantry, (incomplete footnote, not clear).

[32] P. Johnson and A. Sassoon, eds., *New Technologies and Development* (Unsesco and Paris, 1986), p. 21. See also the report on the Today Symposium on the "Advanced Industrial Societies in Disarray: What Are the Available Choices?" (Institute of Social Science, University of Tokyo, 1989).

closely related to the first, is that the character of the social impact is not solely determined by the nature of the technologies but also, and mainly, by the socio-economic strategy adopted to incorporate them.

In relation to the crisis, the fact that the well-known Kondratiev-Schumpeter theory which associates economic crises with waves of innovations - refers to cycles and to a recurrent phenomenon stimulates a dangerous tendency to predict the evolution of the present crisis on the basis of past experience, particularly the crisis that culminated in the 1930s. This approach does not take sufficiently into account the feet that the process of change that each crisis represents has a specificity which cannot be understood simply in terms of incremental changes in a constant set of more or less quantifiable variables. There are elements of discontinuity which, although difficult to quantify, play an essential role in the evolution of the crisis.

In our opinion, the main elements that differentiate the present crisis from the previous ones are the following.

VII. THE EMERGENCE OF THE THIRD WORLD

In the 1930s the world was broadly divided into the countries we now call developed-basically Europe, the USA, Canada and Japan - and a vast conglomerate of countries, most of them colonies, with little participation in the world structure of power, and whose economic role was basically to export raw materials, and to import manufactures from the industrial powers.

The third world - a result of the post-war reorganization - is now an active protagonist on the international scene and cannot be disregarded by the major powers. Some of the most important political events of this century, due to their short- or long-term repercussions - such as the Chinese and Cuban revolutions, and the Vietnam War - have had as protagonist's countries of the third world. Central America and the Middle East are only two examples of regions of the third world whose problems directly or indirectly affect the world power structure.

From the point of view of the world economy as well, the third world is a presence that cannot be ignored. As is well known, the enormous external debt of the developing countries is one of the determining factors of the future evolution of the international financial system.

VIII. THE EMERGENCE OF THE SOCIALIST WORLD

In the inter-war period the only socialist country was the Soviet Union, relatively isolated and with little direct influence in the world power and economic

structure. Now the post-war expansion of the socialist bloc in Europe and the presence of China - besides smaller countries such as Cuba, Ethiopia, and Viet Nam - have converted the socialist world into a critical element in the future evolution of the international system.

The recent changes in the Soviet Union and previous events in other socialist countries are clear manifestations of a process of internal evolution which is not less important because it is only sporadically visible. Besides, the growing trade relations not only with Western Europe, but also with other regions or countries, indicate that the influence of the socialist world increasingly transcends the purely political and military spheres.

IX. INVENTIONS AND INNOVATIONS

The new innovations belong to several technological fields' micro-electronics, biotechnology, materials, and energy - but what gives them the character of a "wave" is the fact that they tend to be mutually articulated into a "cluster" which defines a new global technological paradigm. The central element of the cluster, the one which determines the character of the new paradigm, is micro-electronics.

The dominant characteristic of the new wave is that its impact seems to be more important to the organization of production, the labour process and the social division of labour, than to the general profile of the productive system. The Industrial Revolution, with its first great modern wave of technological innovation and the emergence of the proletariat, consolidated the capitalist economy and changed Western society. The subsequent technological waves changed the whole profile of the productive system, but did not alter significantly the structure of capitalist society. This new wave will affect the very basis of industrial society, as can be seen by considering briefly the process of automation and robotization.

In all modern societies access to goods and services is conditioned essentially by wages in the widest sense - the remuneration of labour in any of its forms. In the future this central role of wages will decrease, firstly because one of the consequences of automation - the elimination of most jobs that do not require "non-programmable" skills or creativity - will obliterate most significant forms of hierarchy in the labour process; secondly, because direct participation in the productive system will become a diminishing fraction of total human activity, and so its importance as a determinant in the distribution of goods and services will be greatly reduced. The transition to the new "mode of production" will undoubtedly take some time to be.

X. NUCLEAR ENERGY

Nuclear policy, perhaps the most important single political issue in scientific and technological debates in the industrialized world, has had some political relevance only in some larger countries of Latin America. The Tlatelolco Treaty, agreed to by 21 countries in 1967, was the first multinational treaty renouncing the use of nuclear energy for warfare. It prohibits the development, reception, and acquisition of nuclear arms and nuclear testing in the Latin American continent, not only by the member states but also by extra-continental nuclear powers.[33] This treaty has not been signed by all Latin American countries, and according to conditions laid down by some countries, the nuclear ban will be obligatory for them only when all the governments in the continent have ratified it. Thus, for different reasons, the treaty is not in force in Brazil, Argentine, Chile, Guyana, and Cuba. The treaty, moreover, lacks penalties for violations.

Nuclear arms have not been developed in Latin America in spite of the fact that at least some countries seem to have the required know-how.[34] The military establishments in Argentina and Brazil have used each other's nuclear programmes as the threat that justifies the development of nuclear weapons.[35] Research in that field seems to have been quite advanced in both cases. However, the end of the military regimes, public opposition to the nuclear arms programmes and a marked improvement in the relations between these countries seem to have halted both programmes. An expression of this new warmth in diplomatic relations is the signing in 1985 of the Protocol of Nuclear Security and Cooperation between Brazil and Argentina.[36]

Four countries in the continent (Brazil, Argentina, Mexico, and Cuba) have developed ambitious nuclear energy plans. Mexico planned for 20 nuclear plants. Brazil signed a contract for the construction of eight nuclear plants with

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[33] Julio Cesar Pineda, "Considerations sobre el tratado de proscriptions de lasarmasnucleares en America Latina. Tratado de Tlatelolco: suaplicabilidad y eficacia" (Considerations on the Treaty Bannig Nuclea Weapons in Latin America. The Tlatelolco Treaty: Its Applicability and Efficiency) (Caracas, n.d.) (Mimeo).

[34] *Latin American Regional Reports.* Brazil (London, 1-6-1989), p. 4.

[35] *Latin American Regional Reports.* Brazil (London, 11-2-1983), p. 6. "The nuclear weapons issue surfaced - once again - in the Brazilian press. The fuss started after army minister General Leonidas Pires Goncalves reportedly said - and later denied - that he had called for the country to develop nuclear weapons to offset a possible threat from neighbouring Argentina. The threat would ostensibly be Argentina's ability to produce a nuclear bomb and its supposed claim on Rio Grande do Sul, a state on Brazil's southern border with Argentina. The controversy was not an isolated event. It came in the light of statements by Brigadier Hugo de Oliveira Paiva, director of the Centro Tecuolgico de Aeronutica (CTA) in Sao Jose dos Campos, who said that Brazil is able to build its own atomic bomb. Building a bomb, says Paiva, is an issue in the hands of the national Security Council (CSN) and 'depends only upon a political decision.'" *Latin American Regional Reports.* Brazil (London, 18-10-1985), p. 6.

[36] *Latin American Regional Reports.* Brazil (London, 18-10-1985), p. 27.

Kraftwerk Union of Germany.[37] However, these programmes met with severe political opposition as well as financial and technical difficulties. In Brazil, the military's nuclear programme met with opposition from leading industrialists and critics in and out of government for both technical and financial reasons.[38] The military objected to public debates on nuclear policy, but opposition none the less continued. Resistance to the military's nuclear plans was strengthened by the opposition victory in the elections in Sao Paulo in November 1982 where some plants were to be located. Finally, in 1983, the Figueredo government announced the indefinite postponement of the construction of two reactors that were to be built on the Sao Paulo coastline. The completion of two reactors under construction was deferred.[39] After the Chernobyl disaster public opposition to Brazil's nuclear programme increased. Important mass demonstrations against nuclear energy took place.[40] The scientific community argued that the nuclear programme was unnecessary unless the objective was the making of nuclear weapons. The only operating plant in the country (Angara I) was closed by a judge in mid-1986 until evacuation measures in the event of an accident had been widely discussed by the local community. Scientists demanded public debate of Brazil's nuclear policy and insisted that the nuclear industry should not be self-regulatory.[41] Because of public opposition, financial difficulties, foreign debt, and the end of the military regime, of the eight new nuclear reactors that were planned, six were cancelled and two were delayed.[42]

More as a result of financial difficulties than political opposition and the mass demonstrations against nuclear plants that took place in 1986, Mexico's planned 20 nuclear plants have been drastically reduced to two.[43] Likewise, in Argentina, as a consequence of the new civilian government taking office and the severe economic crisis, four programmed nuclear plants were cancelled and one under construction runs the risk of being discontinued.[44] Thus, after the spending of billions of dollars on these projects - products of the megalomania of military and technocratic elites - Latin American nuclear programmes have come practically to a standstill. Only in Cuba, where the closed nature of its political system limits public debate, does nuclear plant construction seem to continue unhindered.

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37 *Latin American Regional Reports.* Brazil (London, 11-2-1983), p. 6.
38 *Latin American Regional Reports.* Brazil (London, 11-2-1983), p. 6.
39 *Latin American Regional Reports.* Brazil (London, 11-2-1983), p. 6.
40 Christopher Flavin, *Reassessing Nuclear Power: The fallout from Chernobyl,* (Worldwatch Paper 75) (Worldwatch Institute, Washington, DC, 1987).
41 *Latin American Regional Reports.* Brazil (London, 10-7-1986).
42 Christopher Flavin, *Reassessing Nuclear Power: The fallout from Chernobyl,* (Worldwatch Paper 75) (Worldwatch Institute, Washington, DC, 1987).
43 Christopher Flavin, *Reassessing Nuclear Power: The fallout from Chernobyl,* (Worldwatch Paper 75) (Worldwatch Institute, Washington, DC, 1987).
44 Christopher Flavin, *Reassessing Nuclear Power: The fallout from Chernobyl,* (Worldwatch Paper 75) (Worldwatch Institute, Washington, DC, 1987).

XI. OTHER DEVELOPMENT

The questioning of scientific and technological decisions in Latin America is often explicitly part of a global critique of the present hegemonic style or model of economic and technological development from the perspective of an alternative model, the so-called "another development" or "Eco development." Within the context of debates on alternative styles of development, there are well-developed analyses of the relations between basic human rights (and basic human needs), and scientific-technological development. The current model of scientific and technological development is questioned as being oriented more towards profit and the imitation of the consumption patterns of industrialized countries by a small privileged minority than towards the satisfaction of the basic needs of the majority of the population.[45] Within this overall perspective, there is a wide diversity of approaches in contemporary debates, with varying degrees of criticism of Western scientific and technological development and its impact on Latin American society. Representative of current critical Latin American approaches in relation to technological development is the Technological Prospective for Latin America Project.[46] The project starts with the basic assumption that any discussion on the scientific and technological requirements of Latin American societies demands, in the first place, an explicit definition of the characteristics of the desirable society. This in turn is defined as an egalitarian, participatory, and autonomous society that is intrinsically compatible with its physical environment. Only on the basis of such a socio-economic strategy, according to this perspective, can the social requirements of science and technology and of R&D be defined. This is obviously a political conception of scientific and technological development guise distant from linear-naturalistic or market conceptions of the technological process.[47]

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[45] The following is a selection from the ample Latin American literature on this general perspective: CEPAUR, Dag Hammarskjold Foundation, Desarrollo a escalahumana: Una *opcon* para el futuro (I)development on a Human Scale: An Option for the Future), *Development Dialogue,* Special Issue (1986); Anibal Pinto, "Notes sobreestilos de desarrollo en America Latina" (Notes on Styles of Development in Latin America), *Revista de la* CEPAL, no. 1 (1976); Marshall Wolfe, "Pare 'otrodesarrollo': Requisitos y proposiciones" (For "Another I>envelopment": Requirements and Propositions), *Revista de la CEPAL,* no. 4 (1977); Gorge Graciarena, "Poder y estilos de desarrollo. Una perspective heterodoxa" (Power and Development Styles: A Heterodox Perspective), *Revista de la CEPAL,* no. 1 (1976); Enrique Oteiza, ea., *Autoafirmacioncolectiva: Unaestrategiaalternativa de desarrollo* (Collective Self-affirmation: An Alternative Development Strategy) (rondo de CulturaEconomica, Mexico City, 1983); Gonzalo Martner and Enzo Falleto, eds., *Repensar el futuro: Estilos de desarrollo* (Rethinking the Future: Styles of Development) (Nueva Sociedad, Caracas, 1986).

[46] Amilcar O. Herrera, "Science, Technology and Human Rights: A Prospective View," in Weeramantry (note 16 above); Amilcar Herrera, "Prospective cientafica y tecnologica: UN Marco de referencia" (Scientific and Technological Prospective: A Frame of Reference), *Cuadernos para a discussao*, no. 1 (1984).

[47] For further critical debates in relation to the dominant model of technological development in Latin America, see: CLACSO, *David y Goliath* (Special Issue on technology), Vol. XVII, No. 51 (1987), and Fernando Garcia Cambeiro, ea. *Identidad cultural, ciencia y tecnología*: *aportes para UN debate latinoamericano* (Cultural Identity, Science, and Technology.

Over the past few years the critique of the impact of modern technology has appeared beyond the limits of social science and has led to the emergence of a variety of grass-roots organizations. A radical critique of the hegemonic model of scientific and technological development is found in the multiple organizations and groups involved in research, experimentation and use of alternative or appropriate technologies. These groups are concerned not only with small-scale, decentralized, and democratically controlled technology, but also with an alternative to the civilizing model implied by modern large-scale technology. Technology is not assumed to be an independent or neutral variable in the construction of a desirable social order but as a tool that must be shaped according to demands that should be democratically defined according to people's needs.

Frequently, the issue of democratic control of scientific and technological decisions is not initially an explicit demand, but a by-product of debates and conflicts in relation to other issues. The questioning of specific technological decisions often leads to misgivings in relation to the legitimacy of the decision-making process in science and technology, and then to demands for other decision-making methods with increased public participation.

XII. THE ARMS INDUSTRY AND MILITARY EXPENDITURE

Military autonomy, long periods of military government, and the permanent threat of military coupe, in all but the most stable democratic societies on the continent, have made it almost impossible to carry out serious democratic debates in relation to arms expenditure or the arms industry in Latin America. Under military or civil governments, these topics are considered as strategic matters of state that should be protected from public interference. There are three main ways in which expenditure on military technology is directly related to human rights issues. The first, and most obvious, is the fact that weapons in the hands of the armed forces are almost exclusively used against their country's own population. Even if high-tech military equipment were not a necessary prerequisite for the thousands of desaparecidos in Argentina, there is no doubt that the hardware in the hands of the military proved to be much more effective against the Argentinian civilian population than against the British in the Falklands. In second place is the economic significance of arms imports in a continent facing a deep economic crisis and the impossibility of servicing its foreign debt without imposing insupportable sacrifices on most of the population by recessive economic policies?[48] In third place - and

Contributions for a Latin American Debate) (Collection Studio's Latinoamericanos, Buenos Aires, 1987).

[48] Rita McWilliams Tullberg, "*La deuda por gastos militares* en los *países en desarrollo* no petroleros, 1972-1982" (Foreign Debt Due to Military Expenditures in Non-oil-producing Developing Countries, 1972-1982), *Comercio exterior,* Vol. 37, No. 3 (1987): 196-203.

more directly related to the issue of technological alternatives or the alternative use of resources for technological development - is the significance of domestic arms production. Know-how and financial resources directed toward research and development in the arms industry are assets distracted from other potential uses. While this is not a significant issue in the smaller countries (with no arms industry), it is a particularly salient problem in Brazil, which over the last few years has developed a full-fledged defence industry and has become one the most important weapons exporters in the world.[49] The development of this arms industry clearly highlights the priorities of the Brazilian military. While most of the inhabitants of Brazil live below the so-called poverty line, the country has a US$10 to US$12 billion-dollar weapons industry,[50] and has even produced such high-tech items as a rival to the Exocet missile, a computer-guided anti-ship missile that is supposed to be almost 100 per cent accurate.[51]

It is hardly possible to separate the technological issues (R&D expenditure, national priorities in scientific and technological development, possible alternative uses of the billions of dollars spent on imports of military hardware in a situation of deep economic crisis, the relation between arms imports and foreign debt, etc.) from the more explicit and direct political issues relating not only to military expenditure, but to the role of the military in society, the precarious nature of democracy in Latin America, and the massive and generalized violation of human rights by the military in most of the continent over the past decades. The present process of democratization of the continent has only been possible as a compromise in which the military establishment is not defeated but agrees to return power to an elected civilian government in return for guarantees that it will not be held responsible for the violation of human rights during the military regimes. In addition, it preserves a major voice in such issues as military expenditure. The end of military regimes has not involved a major alteration in the relative influence of the armed forces. In some countries this amounts to a virtual power of veto in relation to main societal decisions.[52]

XIII. THE ENVIRONMENTAL LIMITS

The consciousness that natural resources and the environment constitute absolute limits to economic growth only appeared in the 1960s. We know now

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[49] "Brazil: Leading Arms Dealer", *Latin American Times* (business and financial intelligence newsletter), Vol. 8, No. 9 (1988): 1.

[50] Industry Gears Up for Arms Output. Mobilization Scheme has Already Involved 350 Firms," Latin American Regional Reports, Brazil (London, 10-1-1984), p. 7.

[51] "Preparing for a 'High-tech' Leap. Exocet has a Home-grown Rival," Latin American Regional Reports (London, 9 August 1985), p. 5.

[52] In Brazil and Chile this veto power of the military has been explicitly incorporated in the new constitutions that prepared the way for civilian Governments.

that material consumption cannot grow indefinitely without taking into consideration its effects on the equilibrium of the biosphere.

That awareness, however, is not reflected at the high levels of social decision-making, where a deep ambiguity prevails in relation to environmental policies. Never in history has mankind had the capacity to forecast the results of its actions as it has today. The enormous amount of information accumulated at world Level by national and international organizations and the modern means to process it make it possible to have, if not an accurate long-term picture, at least the general trend of some of the variables which condition our future. Yet, there has probably never been a greater inconsistency between a predicted future and the measures taken to cope rationally with it. We have become aware that the resources of the earth are finite, but we still consider - above all in the capitalist world indiscriminate economic growth to be the universal panacea for all our social and economic ills.

XIV. THE DESTRUCTIVE NUCLEAR SYSTEM

All elements of the crisis mentioned above imply the possibility of conflicts. The form and extent of those conflicts is conditioned by the fact that we have now a nuclear destructive capacity ready to be fired equivalent to about a million Hiroshimas. The crisis of the 1930s did not end due to the application of Keynesian economic measures; it ended as a consequence of the Second World War. A global war could also put an end to the present crisis, but through the destruction of mankind and of most of the biosphere in which we live. Whether the physical annihilation of our race would be complete or not does not matter very much. There may be survivors, but all we associate today with humanity and civilization would have been totally obliterated.

Besides the continuously increasing danger of collective suicide, the cost of the arms race is one of the obstacles to the solution of the problems associated with poverty that affect a great part of the world. In 1985 the global military expenditures 940 billion dollars - exceeded the total income of the poorest half of humanity.

It can be said that our civilization has become dysfunctional in the sense that it is no longer able to make adequate responses to the problems generated by its own evolution. We are facing a global crisis whose trajectory, due to its enormous and growing complexity and its lack of precedents, cannot be simply deduced from the past. Viewed as a continuous process, it has some of the characteristics of a discontinuity in the evolution of human society.

We must conclude that we are in an extremely complex situation. We are confronting a future whose evolution is very difficult to forecast and, at the

same time, we need some guidelines for action in the long term. The only solution to our present predicament is to formulate and implement alternative development strategies based on objectives more in accordance with the aspirations of the majority of the population, with the possibilities and constraints posed by the advance of our scientific and technological knowledge, and with our understanding of the physical universe in which we live.

We do not pretend, of course, that to stress the need for long-term prospective studies constitutes an original proposal; the widespread perception of the need for this type of work is demonstrated by the well-known long-term global forecasting studies initiated in the 1960s. There is, however, much less agreement about what type of prospective approach is really relevant for the present world situation and this is a central point to be discussed in connection with research in the prospective dimension.

XV. CULTURAL FREEDOM, CREATIVITY AND HUMAN RIGHTS

The observations made concerning the structural nature of modern science and technology by no means suggest an anti-Western philosophy or a policy which opposes modern scientific knowledge and its application. Neither do they imply a need or a desirability to fall back on the traditional past and to keep away from the realities of the contemporary world. That would be tantamount to compromising one's own cultural and creative potential for contributing to progress - a prerequisite for the quality of life and, even more, for freedom and creativity.

Besides, life in today's world involves ever-increasing interdependence, and interrelationships in society, both national and international, are becoming ever more frequent, more intensive and more penetrating. On their part, modern science and technology have definitely come to stay, whether one likes it or not, and they will stay as world science and world technology. Significantly, too, they are both accessible and available for creative and positive use. All this is a fact of life that one can ignore only to one's own detriment.

It is therefore important to be aware of another level of hegemonic scientific culture which comes in disguise and in the name of nation-building and national progress. Indeed, the world has gone through the stage of national self-determination, only to end up with a new breed of domination and oppression within nations. If there is to be any hope at all for progress with respect to human rights, this is the time to give due recognition to the needs and aspirations of men and women at the grass roots.

Fundamentally, the question of self-reliance in science and technology is concerned with the cultural freedom and creativity that have been lost in the process of forced industrialization. Ironically enough, both capitalism and communism, though ideologically poles apart, pose quite a comparable problématique here. In his critique of the spiritual loss during the era of collectivization in the Soviet Union, Andrei Sakharov expresses the hope that the earlier spirit that gave life its inner meaning "will be regenerated if suitable conditions arise."[53] The same problématique could also be said to arise in connection with spiritual and cultural values under the current form of capitalism. In fact, by the very same logic of technological domination, the two, as agents of industrialism under the Second Wave civilization, are not much different.[54] Each could be said to represent the consequences of its respective historical factors and conditions. The point is that neither of them can provide the answer to the question of cultural freedom if carried to extremes, as has so far been the case.

In terms of the right to development, specific attention has to be given to the rural and agricultural sector that has been neglected, even oppressed, for so long. This line of approach is most pertinent to today's developing countries, which have an agrarian background. The fact is that no agrarian societies have ever been without technical knowledge and inventiveness. They have their own traditional means of learning and skills in technological adaptation and innovation. Moreover, these traditional values and technologies do not exist in a vacuum. Underlying them is local and endogenous wisdom and a creative Learning process that has been accumulated over generations. For all their seemingly non-scientific attributes, they are directly related to people's real and relevant needs and organizational and environmental conditions.[55] And, most important of all, they are expressed through free will and with a rationale of their own. Besides, for all their tradition-bound nature, the peasants themselves are actually quite receptive to new and modern technologies introduced from outside whenever they are relevant and feasible and demonstrated to be so in practice.[56] This clearly points to the value and dynamism of traditional knowledge and creativity. However, under the existing dualistic structure, they are being left behind and allowed no chance of gaining the benefits of modern science and technology.

All this, of course, is not to be taken as a purely romantic vision. On the contrary, the intellectual limitations and constraints of rural environments have also to be recognized for what they are, especially in the face of a changing world. There is, however, a real need to ensure that receptivity and adaptability

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[53] Referred to in Donald Wilhelm, *Creative Alternatives to Communism: Guidelines for Tomorrow's World* (Macmillan, London, 1977).

[54] Alvin Toffler, *The Third Wave: The Classic Study of Tomorrow* (Bantam Books, 1981).

[55] Susantha Goonatilake, *Aborted Discovery: Science and Creativity in the Third World* (Zed Books Ltd. London, 1984), chs. 3 and 5.

[56] Alvin Toffler, *The Third Wave: The Classic Study of Tomorrow* (Bantam Books, 1981).

to modern scientific knowledge and technology do not result in social disruption. Again, from the standpoint of human and social progress, the modern and the traditional have to be looked at and acted upon as complementary to each other, not as being poles apart as has been the case up to now.

This criterion of complementarily would naturally raise the question of rights and obligations between the haves and the have-nots in such problem areas as, for instance, the right of technological choice and the right of access to technological information both within and among nations. It would also raise the question of the feasibility and desirability of a new international technological order, which has been so much talked about lately. More crucial to the issue of technological self-reliance, however, is the matter of socio-cultural adjustments within the developing countries themselves.

In any case, the most decisive factor rests, in the final analysis, with human resource development itself. For all the material and physical nature of technology, technological change and development means in essence modifying and transforming the productive forces in society. In contrast with the existing partial view of growth, the objective and principle of self-reliance takes a holistic view of human and technological development. In terms of human resource development for the purpose of technological self-reliance, this means in effect that rural human resources must be looked upon not merely as a production input, as many an expert has made them out to be, but essentially as consisting of creative beings capable of self-reliance and self-development. This is precisely what was implicit in the concept and principle of the natural and equal rights of man, but which, as mentioned earlier, has been negated under the impact of hegemonic scientific and industrial culture.

All this means that there should be no inherent incompatibility between modern and traditional technology. The contradiction has only been man-made, historically speaking, and the path of future development can be changed for the better by human intervention. In developmental terms, traditional technology needs to be upgraded to modernized intermediate technology. And in this perspective, it should be in a symbiotic relationship with exogenous sources of scientific knowledge and technology. Modern scientific technology therefore has always a great role to play, not to supplant, but to supplement indigenous technology. In short, the modernization and industrialization of developing countries could and should take their own respective routes.

UNIFORM CIVIL CODE: NEED OF THE NATION OR A THREAT TO PERSONAL LAWS

—Abhishek Panwar[*]

"Adaptability is not imitation. It means power of resistance and assimilation."

—Mahatma Gandhi

Abstract—The Directive Principles of State Policy in the Indian Constitution contains provisions for the Uniform Civil Code under Article 44, which reads, **"The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."** The provision unambiguously directs the 'State' to maintain a uniform civil code for the citizens. Still, even after more than seventy years of its application, this constitutional directive for the state has not been given a concrete effect. However, there had been multiple previous encounters and debates around this subject matter, and the recent trend in the government suggests that there are possibilities that an attempt to enact a Uniform Civil Code can be witnessed in the near future.

An attempt like this would affect a plethora of aspects and transmute the way of living of the people in the country with emphasis on the personal laws and religious beliefs of different sections of people. Before such a significant step is taken, it is vital to fathom the concept of the Uniform Civil Code, what background it possesses specifically in India, the context of this subject matter, and the overall circumstances around it. The current paper is an unbiased attempt to comprehensively look into the brief history, Constitutional position, role of the judiciary, etc., relating to the Uniform Civil Code and leave it up to the audience to conclude whether it is a national need or just a restriction to personal laws.

[*] Graduate, LL.B (Hons.), Law College Dehradun, Uttaranchal University | Email-abhishekp412@gmail.com

I. INTRODUCTION

The overall objective of the introduction of rules, laws, regulations, and orders, etc., in a civilization is to make better arrangements for people to live their life in a way that does not go beyond unanimous beliefs. We live in a society predominantly functioning on the concept of Rule of Law where the right to equality and social justice exists not because it is written on an enacted statute by minority intellectuals but because it is something we carry since birth. Uniform Civil Code is a furtherance of the principles of Rule of Law which provides for a 'common' set of rules, regulations, and provisions regarding subject matters such as property, succession, marriage, adoption, guardianship, contract, and many other such civil obligations. This code must apply to each and every citizen regardless of what their race, religion, or personal belief is.

India is a 'Secular' state having one of the world's most diversified populations with different kinds of religions, ethnicity, sub-sects, faiths, beliefs, norms, rituals, etc. Uniform Civil Code envisages to bring a system of administration and governance of people based on secular state laws. This system does not differentiate between people of different beliefs and abolishes the governance of citizens through a particular religion. At the same time, it does not prohibit or restricts anyone from following their religion.

A common code for everyone is a concept that every progressive society must implement so that there is a sense of equal treatment. But there are multiple aspects attached to it that should be taken into consideration before a mechanism of common code is executed. The Uniform Civil Code is criticized by a significant amount of people claiming that it hinders their personal laws, beliefs, and liberty.

II. EVOLUTION

In India, the concept of having a common civil code for all citizens traces back to the time when the East India Company started to build its regime in India. The first Governor-General of the Bengal, Warren Hastings, started implementing his Judicial Plan of 1772 under which 'Diwani'(Civil) Adalat and 'Faujdari' (Criminal) Adalat were established.[1] Supreme Court was also established in 1773. Criminal Courts were still administered under Muslim Shariyat Law, with the supervision of a Collector. The collector was assisted by two maulvis, one qazi, and one mufti. All civil matters were decided according to the personal laws of the parties concerned. This is because the British did

[1] William M. Morley, *The Administration of Justice in India, its Past History and Present State* 45 (Forgotten Books 2018).

not want to interfere with the personal laws of the people in India to avoid protests.[2]

In 1787, Lord Cornwallis brought reforms in his administrative plan by Judicial Regulation to make modifications in the criminal procedure as there were multiple agonizing issues with the Shariayat procedure in criminal matters. Faujdari was abolished. With the due course of time and strategic planning of the British, they were able to apply English Common Law in criminal matters in India. But still, they were hesitant to bring any changes to the personal laws.[3]

To this point, the British ruled in different provinces, having territorial limits. But with the 1833 Charter, Lord William Bentinck became the first Governor-General of India, and now the colonial laws could have had a nationwide application. Some of the first few major interventions into the personal laws in India were done by Lord William Bentinck. On recommendations given by Raja Rammohan Roy, in 1829, 'the Sati Pratha' was abolished. Further, in the same year, William Bentinck prohibited female infanticide also.

Under the same Charter of 1833, the First Law Commission was established, headed by Lord T.B. Macaulay. The report of this law commission suggested the codification of criminal law, including an Indian Penal Code and Criminal Procedure Code. Another suggestion was to enact a law for the implementation of Lex Loci for non-Hindus and Non-Muslims according to the English legal system.

The Second Law Commission was established in 1853. It suggested the codification of a uniform code for civil and criminal procedure, i.e., CPC and CrPC. On 28th June 1858, the role of East India Company ended, and India came under the rule of the Crown. Thereafter, the British started acting on the recommendations of the law commissions and enacted CPC in 1859, IPC in 1860, and CrPC in 1861.

Subsequently, under the governance of Lord Dalhousie, under the influence of Ishwar Chandra Vidyasagar, the Hindu Widow Remarriage Act, 1856[4] and Caste Disabilities Removal Act, 1850[5] were enacted, focusing on problems in the personal laws of Hindus.

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2 Mahesh Shantaram, *Role of Warren Hastings as the Governor of Bengal*, History Discussion, (June 8, 2021, 8:39 p.m.), https://www.historydiscussion.net/history-of-india/warren-hastings/role-of-warren-hastings-as-the-governor-of-bengal/5922.

3 William, *supra* note 1.

4 Act No. XV, 1856.

5 Act No. XXI, 1850.

Again, following the recommendation of the Third Law Commission, several substantial statutes were enacted, such as the Indian Evidence Act, 1872[6], the Indian Contract Act, 1872[7], the Oath Act, 1873[8], the Negotiable Instrument Act, 1881[9], the Transfer of Property Act, 1882[10], etc.

One major enactment, targeting the personal laws on the subject of marriage, was enacted on the recommendations of Sir Henry Maine. The Special Marriage Act, 1882[11] allowed two individuals from different castes or religions to get married after renouncing their religion. The nature of this Act was similar to a Uniform Civil Code, and this Act is still applicable in the form of the Special Marriage Act, 1954[12].

In the subsequent years, a number of developments took place, amending the Hindu personal laws to a great extent in order to deal with their orthodox and discriminatory provisions, especially in the case of gender inequality. The Married Women's Property Rights Act[13] was enacted for married women's rights over their 'Stridhan.' The Hindu Inheritance (Removal of Disabilities Act), 1928,[14] provided for the right to property to women for the first time. The Hindu Women's Right to Property Act, 1937[15] (also known as the Deshmukh Act) gavewomen an absolute right on their 'Stridhan,' limited rights on other property, and also provided a widow limited rights on her deceased husband's property.

It can be reasonably concluded that repeated efforts were made to codify and repair the iniquitous parts of the Hindu Personal Laws by the British regime. There were hardly any major protests against these active alterations. Instead, most of the alterations were supported, and sometimes, it was made possible because of some progressive intellectuals in the Hindu Community itself. On the other hand, the Muslim community was reluctant towards any interference with their personal laws except a few progressive members. In support of this, in 1937, the British took a counterproductive step by enacting the Muslim Personal Law (Shariat) Application Act, 1937,[16] which provided for the governance of matters of a Muslim only by the Muslim law, making it even more difficult for a possibility of improvement in the personal laws of Muslims in India.

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6 Act No. 1 of 1872.
7 Act No. 9 of 1872.
8 Act No. 10 of 1873.
9 Act No. 26 of 1881.
10 Act No. 4 of 1882.
11 Act No. 3 of 1872.
12 Act No. 43 of 1954.
13 Act No. 3 of 1874.
14 Act No. 12 of 1928.
15 Act No. 18 of 1937.
16 Act No. 26 of 1937.

A. The Hindu Code Bill

The British regime established the Hindu Law Committee in 1941 and appointed B.N Rau as its head. The committee was formed to study and understand the discrepancies created by the Hindu Women's Right to Property Act, 1937[17], and the problematic fashion of polygamy in Hindu males. The said Act was believed to have established married women's rights on the property at the cost of unmarried women's rights. It was also observed that a lot of Hindu males indulged in polygamy and often deserted their previous wives. Among other agendas, the committee was also given a task to contemplate the possibilities of creating a maintenance system for a deserted woman.[18] The Committee submitted a report in 1944, suggesting that this subject matter be given a more comprehensive thought and execution. Consequently, the committee was formed again in 1944, with B.N Rau heading it. This committee submitted its report to the Constituent Assembly in February 1947 recommending that there be a Common Civil Code and prepared a draft bill constituting provisions on the matters of Marriage, Divorce, Maintenance, Guardianship, Adoption, Succession, etc. This draft bill was named the 'Hindu Code Bill.'[19]

The Bill was favoured by B.R Ambedkar, KM Munshiji, Gopal Swamy Iyenger, Anantasayam Iyengar, Jawahar Lal Nehru, and other nationalists but was opposed by many members of the Constituent Assembly such as Vallabh Bhai Patel, Dr. Rajendra Prasad, J.B. Kriplani, etc. The Bill eventually lapsed due to substantial antagonistic criticism from the orthodox Hindu members and because the Bill stood very low in priority compared to the independence movement and Constitutional development,[20] and the objective of having a uniform civil code was narrowed down to it being a State Directive under the then Article 35[21] of the Indian Constitution.

However, after being elected in 1951, the first Prime Minister of independent India, Jawahar Lal Nehru, again made efforts towards the enactment of the Hindu Code Bill. The Bill could not be enacted in entirety but was enacted in the form of four separate legislations, i.e., The Hindu Marriage Act, 1955,[22] The Hindu Succession Act, 1956,[23] The Hindu Minority and Guardianship Act, 1956,[24] The Hindu Adoption and Maintenance Act, 1956.[25]

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17 Act No. 18 of 1937.

18 14 Vasant Moon, Dr. Babasaheb Ambedkar Writings and Speeches 5 (Dr. Ambedkar Foundation 2014).

19 Chitra Sinha, *Rhetoric, Reason and Representation: Four Narratives in the Hindu Code Bill Discourse*, Digitala Vetenskapliga Arkivet (June 8, 2021, 11.14 p.m.) https://www.diva-portal.org/smash/get/diva2:874167/FULLTEXT02.pdf.

20 *Id*., at 5.

21 Currently under Art. 44 of the Constitution of India.

22 Act No. 25 of 1955.

23 Act No. 20 of 1956.

24 Act No. 30 of 1956.

25 Act No. 78 of 1956.

III. UNIFORM CIVIL CODE UNDER THE INDIAN CONSTITUTION

As mentioned previously, the concept of the Universal Civil Code was constrained to just being under Part-IV of the Indian Constitution containing provisions for the Directive Principles of State Policy. This part of the Constitution not enforceable in a court of law, but that does not mean that it does not have any significance. On the contrary, these provisions act as the guarding light for the government and play a very significant role in developing a sense of accountability on the State. Article 44 in this part states that the state should strive to secure for the citizens a uniform civil code throughout India.

Many members in the Constituent Assembly opposed uniform civil code, with the majority of them being Muslim members. They had their own points of consideration for the personal laws of the citizens. The members in favour submitted their arguments in favour of the provision by stating that the country already had numerous laws applicable to all the citizens reflecting a state of already having a Uniform Civil Code; that a common code would bring national unity in a diversified nation; and that having a uniform code does not mean that personal laws would be abolished entirely.[26]

A. Conflict with the Fundamental Rights to Freedom of Religion

The implementation of Article 44 is debated by citing the religious freedoms guaranteed under Part-III of the Constitution. Under this freedom, Article 25 guarantees freedom of conscience and the right to profess, practise, and propagate any religion freely. It may be argued that Article 25, being a guarantee under Part-III, is supposed to supersede the directive given under Article 44. However, as held by the Court, *"the provisions of Parts III and IV are supplementary and complementary to each other and that Fundamental Rights are but a means to achieve the goal indicated in Part IV. It is also held that the Fundamental Rights must be construed in the light of the Directive Principles."*[27] In *Dalmia Cement (Bharat) Ltd.* v. *Union of India*.[28] The Supreme Court held that the Preamble, Fundamental Rights, and Directive Principles are all parts of the trinity that together form the conscience of the Constitution. In some cases, Courts have given preference to the Directive Principles over Fundamental Rights.[29]

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[26] Constituent Assembly Debates, Vol. VII 540-2.

[27] *Unni Krishnan, J.P.* v. *State of A.P.*, (1993) 1 SCC 645: AIR 1993 SC 2178, 2230.

[28] (1996) 10 SCC 104.

[29] *State of Gujarat* v. *Mirzapur Moti Kureshi Kassab Jamat*, (2005) 8 SCC 534.

Additionally, Article 25 itself contains its exception under clauses (1) and (2). Sub-clause (a) of this clause (2) permits the State to make laws regulating secular activity relating to any religious practice. Personal laws do pertain to secular activities, and by the exception under Article 25 itself, the State holds legislative power regulating personal laws.[30]

B. Doctrine of Essentiality

The right to freedom of religion under Article 25 has certain reasonable restrictions which are levied by the Courts from time to time. The doctrine of essentiality is one such reasonable restriction through which the judiciary took upon itself to determine which practices are essential and integral for a religion.

The Supreme Court, through a seven-judge bench, laid down the doctrine of essentiality for the first time in 1954 in the Shirur[31] Mutt case. Since then, the principle has been used to limit the scope of what can be termed as an essential part of religious faith. For example, in *M. Ismail Faruqui* v. *Union of India,*[32] the Court held that practising a religion is an essential and integral part of religion, but the place of worship is not. In *A.S. Narayana Deekshitulu* v. *State of A.P.,*[33] the exclusivity of appointment of a Hindu Temple's head is not an integral religious practice.

C. Other Constitutional Provisions Involved

The desire of framing a Uniform Civil Code and making the governance of personal laws under the roof of single legislation or set of legislations cannot be understood in isolation of a single Constitutional provision. Article 44 possesses great significance in terms of a common code application, but it is not the only provision based on that idea. The ideology of the framers of the Constitution would have been the same when they were drafting the fundamental rights while they were creating Article 44. Following are some Constitutional provisions and their relation to the idea of a Uniform Civil Code.

i. Article 14

Article 14 talks about two aspects, i.e., equality before the law and equal protection of laws. When we look at the evolution of the idea of a Uniform Civil Code, we observe how several attempts had been made to decrease the

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[30] M.P. Jain, *Indian Constitutional Law* 1490 (LexisNexis 2018).

[31] *Commr., Hindu Religious Endowments* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282.

[32] (1994) 6 SCC 360.

[33] (1996) 9 SCC 548: AIR 1996 SC 1765.

discrimination and other evils in the personal laws of the Hindu community. Rules for monogamy, maintenance, right to property, etc., have been provided for the uplift and dignity of women. Why would then a woman from a different religion suffer from inequality? Every woman, regardless of her gender, should receive equal protection of laws by the State.

ii. Article 15

Similar to Article 14, Article 15 also give effect to a Uniformity in laws to ensure that there is no inequality in the society only on the basis of religion, race, caste, sex, or place of birth. If there are laws in the society that permit only husbands for polygamy or to give instant divorce, the State shall make reforms in such laws as this is discrimination based only on sex. And if special provisions can be made for the betterment of women under clause (3) of the said Article, such provisions should be made for women of every religion.

iii. Article 19

The freedoms enjoyed by every citizen of India also aim to form a sense of equality in the exercise of the six freedoms enumerated under this Article. There is no elaboration anywhere in the Article that any specific freedom applies to or is restricted for a particular religion.

iv. Article 21

As held by the Supreme Court, the right to live under Article 21 is not limited to living merely existing as an animal but extends to live a dignified life. Still, a Hindu person suffers hardships in getting a marriage nullified because the religion does not believe in the concept of divorce. Also, a Muslim wife lives always with a fear that her husband might bring another wife at any time. This goes against her living a dignified life.

Further, talking about other restrictions under Article 25, under Article 25(1) itself, it has been provided that the freedom of conscience and freely profess, promote and propagate religion is subject to other provisions of Part-III. It is clear from Article 25 that freedom of religion cannot be given effect contrary to other Fundamental Rights. So, if the State endeavours to form a common code for all the citizens restricting any religious freedom to give effect to Article 14, Article 15, Article 19, Article 21, or any other Fundamental Right, it is empowered to do so.

IV. JUDICIAL DEVELOPMENT

The Indian judicial system had been functioning as a protector of individual rights in India, opposing any state action depriving personal rights and liberty.

That is why, when it comes to giving effect to something between a fundamental right or a directive principle, the Parliament preferred to prevail directive principles over fundamental rights, but the Supreme Court has favoured fundamental rights in most of its judgments.

Despite, when it comes to Article 44 or a need to implement a common code, the judiciary drew the attention of the legislature in a number of judgments towards Article 44 and its execution. At the same time, there had also been judicial observation on how the idea of a Uniform Civil Code does not conform with the nation's appetite.

A. *State of Bombay* v. *Narasu Appa Mali*[34]

Dealing with the validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946 and the situation of increasing bigamous practice among Hindus, Chief Justice M.CChagla opined that in India, the scriptural text had been the basis of origin for the personal laws. These personal laws have been influenced by religion and culture in a colossal way. The framers of the Constitution had been deliberately avoiding to interfere with the personal laws of the people because they understood that evolving a Uniform Civil Code and applying it to diversified communities would be very burdensome. That is why they decided to put this thought as a state directive under Article 44.

Further, it was held in this case that personal laws do not come under the definition of 'laws in force,' hence, the Court does not have the power to declare it unconstitutional. This judgment by the Bombay High Court came to be very pernicious for society, as it delayed the demand for justice for nearly thirty years until the case of Shah Bano.[35]

Recently, in the Sabrimala Temple Case,[36] Justice D.Y Chandrachud desired his dissatisfaction with the decision in the Narasu Appa Mali case by referring to the case as the 'Ghost of Narasu Appa Mali' which he said is stalking the Supreme Court.

B. *Mohd. Ahmed Khan* v. *Shah Bano Begum*[37]

The infamous Shah Bano case was a decision which, after so many years since the Narasu Appa Mali case, tried to interfere with the Muslim personal laws after the Muslim Personal Law (Shariat) Application Act, 1937 restricted any possibility of improvement in the personal laws of Muslims. Here, the

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34 1951 SCC OnLine Bom 72: AIR 1952 Bom 84.
35 *Mohd. Ahmed Khan* v. *Shah Bano Begum*, (1985) 2 SCC 556: AIR 1985 SC 945.
36 *Indian Young Lawyers Assn.* v. *State of Kerala*, (2019) 11 SCC 1: 2018 SCC OnLine SC 1690.
37 Supra note 32.

Court held that a Muslim woman would be entitled to maintenance under Section 125 of CrPC even after the period of 'Iddat.'

Though, after a few years, the government, under the influence of saving their vote bank, enacted the Muslim Women (Protection of Rights in Divorce) Act, 1986, which partly negated the previous decision.

The Court in decision mentioned that a uniform civil code is necessary to encourage national integrity in the country and get away with so many variations in laws.

C. *Jordan Diengdeh* v. *S.S. Chopra*[38]

This case was related to the concept of marriage and the nullity of marriage. The Court, in this case, observed that laws relating to marriage, divorce, nullity of marriage, judicial separation, etc., need to be reformed, and a uniform law is applied irrespective of religion and caste. The parties in the case were tied to be married when there was no need, and the Court suggested legislative intervention to form a Uniform Code.

D. *Sarla Mudgal* v. *Union of India*[39]

The Sarla Mudgal case was yet another significant development in the Uniform Civil Code endeavours, though it could have been a much more significant development given the political pressure had not made it unnecessary.

The case involved the filing of a petition by Sarla Mudgal, citing multiple issues of Hindu husbands renouncing their religion and accepting Islam to avoid the rule of Monogamy according to Hindu Law. By converting into Islam, now the husband could divorce his previous wife through Islamic rules and continue marrying upto four wives, permissible under the Muslim Law. In one case, a husband converted to Islam and then again converted to become Hindu and married his first wife.

The Court gave a landmark decision by making it mandatory for a Hindu husband to divorce his wife first before getting into the second marriage even if he has converted into a different religion which permitted polygamy. If a husband does so, he would be liable for bigamy and hence would be punishable under Section 494 of IPC.

But, the more important point of consideration in this judgment was that the Court also said that there had been several governments in power since 1950,

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[38] (1985) 3 SCC 62: AIR 1985 SC 935.
[39] (1995) 3 SCC 635: AIR 1995 SC 1531.

but Article 44 had not been given effect till then. The Court directed the Law Secretary of the Union to enumerate all the efforts made by the government in achieving a uniform civil code by filing an affidavit and also instructed the then Prime Minister P.V. Narsimha Rao to give his attention to Article 44, which was substantial for the protection of the oppressed and helpful in national integrity.

Although, after repetitive political pressure, the Court cleared that the instructions and directions given by the Court in the judgment were part of Obiter Dicta and hence, was not binding on the government.

E. *Pannalal Bansilal Pitti* v. *State of A.P.*[40]

One contradictory statement came through this judgment which raised concerns if the country is actually adequately equipped to implement a revolutionary and influential Code. The question before the Court was related to the need to make a uniform law applying to all religious, charitable, or public institutions or endowments. The Court, while maintaining that a Uniform Code is advantageous for the society, opined that the practical aspects of its execution in one go might yield counterproductive results. The Court also held that law-making is a slow process, and there should be gradual progress in law in a country governed by the Rule of Law.

F. *Lily Thomas* v. *Union of India*[41]

In this case, where the facts of the case were similar to those of the Sarla Mudgal Case, raising questions on a husband leaving his wife after converting to Islam. One major aspect on which the Court had to go through was the desirability of a common code. The Court gave its observation by holding that even though a Uniform Civil Code is undoubtedly desirable, because of the current social inconsistency, the Code would not be fully efficient. The time for a Uniform Civil Code was not ripe, and the Law Commission should take its cognizance. The Court also suggested the leaders in the society to enlighten people towards accepting change.

G. *John Vallamattom* v. *Union of India*[42]

This case was brought forward by a Christian priest who expressed his concern about the diversified situation in the matters of personal laws, which should be treated as different from religious laws. The Court held expressed its regret that Article 44 had still not been given effect after so many since

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[40] (1996) 2 SCC 498: AIR 1996 SC 1023.
[41] (2000) 6 SCC 224: AIR 2000 SC 1650.
[42] (2003) 6 SCC 611: AIR 2003 SC 2902.

the enactment of the Constitution of India. Yet another attempt was made by the Supreme Court through this judgment to stress upon the need to have a Uniform Civil Code and the application of Article 44.

V. PROBLEMS RELATED TO UNIFORM CIVIL CODE

A. Multiplicity of Diversities

There would hardly be any country having the number of diversities that India has. The minority communities in India, although around 20% of the total population,[43] accounts for a massive number of population having different religions and sub-sects. Talking about Hindus, almost 80%[44] of the total population in India, Hindus have uncountable diversities, and there is a significant difference in personal laws according to the geographical location.

The Yajnavalkya Smriti in Hindu personal law has two interpretations, with Dayabhaga being prevalent in Bengal and Assam and Mitakshara being followed in the rest of the country. The Mitakshara school is again dissected into five sub-schools, i.e., Mithila, Benaras, Punjab, Bombay, and Dravid. In addition to that, personal laws seem to differ in different regions of the country under the same school of interpretation also. In southern India, marriage to a second cousin is permitted and preferred,[45] whereas, in northern India, it is strictly prohibited and is considered incestuous.

Various communities have expressed their views and concerns against a common code, with the larger part of criticism coming from the Muslim community. Muslims have opposed the idea of a unification of personal laws ever since it was debated in the Constituent Assembly. It is believed by them that unification would harm their freedom of religion guaranteed under Article 25. The Naga community in Nagaland has also stated that a Uniform Civil Code would bring social disorder in their community.[46]

With such deviations in the personal laws of a single religion, multiple communities under one religion, and a mixture of cultures, a Uniform Civil Code cannot be easily applied without revolt.

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[43] 2011 Census of India.

[44] 2011 Census of India.

[45] S.K. Sharma et al., *Prevalence and Determinants of Consanguineous Marriage and its Types in India: Evidence from the National Family Health Survey, 2015-2016*, JBS 53(4), 566–576 (2021), https://doi.org/10.1017/S0021932020000383.

[46] EMN, *Naga Lawyers Warn: Uniform Civil Code will Disturb Naga Ethos, Eastern Mirror* (June 9, 10.26 p.m.) https://easternmirrornagaland.com/naga-lawyers-warn-uniform-civil-code-will-disturb-naga-ethos/.

B. Lack of structure

One of the significant problems with the Uniform Civil Code is that there is no tangible structure or body of common civil code. The lawmakers to whom the task to frame a Uniform Civil Code would suffer a tremendous amount of hardship while drafting it. Because of the communal diversities, it would be laborious to take every community into consideration and make a unified provision for a subject matter.

C. Existing Unified Laws

Earlier, it has been established that a number of statutes have been enacted to make changes to the Hindu personal laws. The Hindu Marriage Act, 1955 deals with marriages in Hindus. There are enactments for the Christian and Parsi communities, such as the Indian Christian Marriage Act, 1872,[47]and the Parsi Marriage and Divorce Act, 1936.[48] A uniform code dealing also with marriage would repeal these acts and would introduce an unnecessary change.

VI. CONCLUSION AND SUGGESTIONS

The need for a Uniform Civil Code has been a longstanding desire. It is a framework that impacts a 1.3 billion population at once, and that too hitting its most sensitive subject matter, i.e., Religion and Personal Laws. It should be noted that personal laws would only be a part of the Uniform Civil Code. It may also cover matters such as Contract, Property, and Torts.

Looking at the evolution, it would be fair to conclude that the Hindu personal law has found its way close to unification as several laws have been passed governing most of the aspects of personal laws like marriage, divorce, succession, adoption, guardianship, inheritance, etc. Buddhist, Sikh, and Jain communities are also governed under the same acts as Hindus. Other communities have had minimal developments with respect to their personal laws.

The Constitutional validity of a Uniform Civil Code would be hard to challenge owing to the large amount of judicial desire for a common code. Though, it is expedient to expect protests and condemnation because of the nature and impact of Unification. But it is also empirical that whenever a huge revolution is imposed on a large population, people tend to suffer and revolt. We must take a glance at the bigger picture and accept a change that is going to unify our eternal disparities and further our national integrity. Nevertheless, the people and communities who fear and are reluctant to the implications of a

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[47] Act No. 15 of 1872.
[48] Act No. 3 of 1936.

common code should be given a chance to put their concerns, and their opinions must be respected while not compromising on an efficient unification.

It is pragmatic to contemplate an ideal form of Unification while taking into account the necessity of social equilibrium and sustainable cultural development. If we don't see Uniform Civil Code as a single structural statute, we may find that most of the personal law aspects are already governed under any statute in India, applicable to all irrespective of religion. Following are some of such aspects:

1. Marriage:[49] For Hindus, the Hindu Marriage Act, 1955[50] is a very progressive law containing similar provisions as the Special Marriage Act. As discussed earlier, under the Special Marriage Act, 1954, two persons belonging to any religion may solemnize and register their marriage under this Act, and all provisions relating to the validity of marriage, separation, divorce, alimony, maintenance under this act will be applicable to them.
2. Succession: The Indian Succession Act, 1925,[51] is the unified law applicable to everyone who solemnizes their marriage under the Special Marriage Act. For Hindus, the Hindu Succession Act[52] is applicable, having almost similar provisions.
3. Adoption: Earlier, only Hindus, including Buddhists, Jains, and Sikhs, had the right to adopt under the Hindu Adoption and Maintenance Act, 1956.[53] But after the Shabana Hashmi case,[54] now a person of any religion may adopt a child under the Juvenile Justice (Care and Protection of Children) Act, 2015.[55]

The limitation to these Acts is that most of the people are unaware of these systems, and even if they do, their religion discourages them from following them. But this gives us a picture of what form of unification is desirable in the Indian context. Instead of forming a Uniform Civil Code having unified laws for all, it would be preferable to have subject matter chaptering in the Code. For example, a separate chapter for marriage, containing some provisions applicable for all, and some other provisions for every religion, which are progressive and justified. It is important that we keep the diversities alive while leaving no space for unjustified, archaic, and unequal norms. Sustainable cultural development is as important as having social equality.

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[49] Act No. 43 of 1954.
[50] Act No. 25 of 1955.
[51] Act No. 39 of 1925.
[52] Act No. 20 of 1956.
[53] Act No. 78 of 1956.
[54] *Shabnam Hashmi* v. *Union of India*, (2014) 4 SCC 1.
[55] Act No. 2 of 2016.

CORPORATE CRIMINAL LIABILITY IN INDIA

–Dr. Manoj Kumar[*]

Abstract—In modern times economic or white-collar crimes are so serious that they not only affect the financial interests of individuals but they also have tendency to affect their lives and property too. They can also tremendously impact the policies of states regarding pollution control, maintaining and promoting competitiveness, consumer protection etc. The industrial community throughout the world is feeling the seriousness of these crimes. Corporations are legal persons and play very important roles in powerful manner at regional, national and international level as they possess enormous economic power. The principles of criminal liability are focused more on individual criminality and notion of taking corporations within the ambit of criminal liability is comparatively of recent origin. The concept of corporate criminal liability is basically a product of logical structure of criminal law. The question which the criminal jurisprudence has confronted in this respect is "whether a corporation as an artificial person is capable of committing a crime and is criminally liable under the law or not."

In this backdrop, the present paper is an attempt to explore the concept of corporate criminal liability based on Common law and various theories and to analyse the Indian perspective on it. The paper also intends to analyse the complexities of the corporate punishments which arise when criminal liability is imputed on corporations.

Key Words: Corporate, Criminal, Liability, Punishment, Vicarious, Crime.

[*] Dr. Manoj Kumar, Assistant Professor, Department of Law, Rajiv Gandhi University, Arunachal Pradesh (A Central University).

I. INTRODUCTION

In the modern era of globalization, liberalization and privatization, the economic or white-collar crimes have attracted the interests of legal luminaries. Therefore, equal attention is being paid to corporate crimes as well along with street crimes. These crimes involve huge amounts of sums. These crimes are so serious that they not only affect the financial interests of individuals but they also have tendency to affect their lives and property too. They can also impact the important policies of States related to pollution control, maintaining and promoting competitiveness, consumer protection etc. The industrial community throughout the world is feeling the seriousness of these crimes.

Corporations are legal persons and play very important roles in powerful manner at regional, national and international level as they possess enormous economic power. Since they have distinct legal personality, they can sue and be sued, hold and dispose off property and transact business and liability in their own name.[1] However, the notion to hold corporations as criminal and thereby hold them criminally liable has seen a strong resistance within the legal system. The principles of criminal liability are focused more on individual criminality and notion of taking corporations within the ambit of criminal liability is comparatively of recent origin. Renowned German Jurist Savigny has written that "Criminal law has to do with natural persons as thinking and feelings exercise their free will. A legal person, however, is not such a person, but merely a property-owning being, with its reality based on the representative will of certain individual persons, which by way of fiction, is attributed to its own will. Such a representation can be acknowledged everywhere in civil law but never in criminal law. Everything which is considered as a legal person's crime is always only the crime of its members or organs, this means, of single human being or natural person. If a legal person were to be punished for a crime, the basic principle of criminal law, the identity of the offender and of the sentenced person, would be violated."[2]

The concept of corporate criminal liability is basically a product of logical structure of criminal law. The question which the criminal jurisprudence has confronted in this respect is "whether a corporation as an artificial person is capable of committing a crime and is criminally liable under the law or not." The conventional view in this regard has been that criminal liability cannot be imposed on a corporation as it requires intention and a corporation being artificial person is devoid of having its own mind to form intention and further a corporation is a fictitious person devoid of physical existence which cannot be imprisoned. However, another view has emerged that the criminal liability

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1 David M. Walker, *The Oxford Companion to Law* 20 (Oxford University Press, Oxford, 1980).

2 F.C.V. Savigny, William Holloway, *System of the Modern Roman Law* (Hyperion Press, INC., Connecticut, 2013).

can be imposed on a corporation when the "criminal act is committed by persons in charge of the affairs of the corporation provided the act constituting the offence falls within the scope of employment and is done by them while acting in the course of their employment."

In this backdrop, the present paper is an attempt to explore the concept of corporate criminal liability based on Common law and various theories and to analyse the Indian perspective on it. The paper also intends to analyse the complexities of the corporate punishments which arise when criminal liability is imputed on corporations.

II. MEANING AND CONCEPT OF CORPORATE CRIMINAL LIABILITY

A corporate crime is defined as "any act committed by corporations that is punished by the state, regardless of whether it is punished under administrative, civil or criminal law."[3] This widens the scope of crime beyond the purview of criminal law and poses a new challenge as "a corporation cannot be jailed, although it may be fined, and thus the major penalty of imprisonment used to control individual law violators is not available in case of corporations *per se*."[4] The term corporate criminal liability refers to "criminal liability of corporate body for criminal acts committed by its officers in capacity of officer of corporate body." Corporate crime may be held as a particular type of white-collar crime which includes "occupational crime" as well as "organisational crime" both in broader perspective. Occupational crime means "criminal acts committed by respectable persons in course of their occupation." In this sense individual criminal liability arises on the part of the person who does such crime in the course of his occupation. On the other hand, corporate crime is held as "organisational crime" and it means "crime committed in collective, aggregate and organised manner for rendering profit to corporation." What distinguishes a corporate crime/ organisational crime from white- collar crime/ occupational crime is that in the former liability arises on the part of the corporation while in the later liability arises on the part of doer of the act only. It is held so because white- collar crime/occupational crime is considered as crime committed by an individual in course of his occupation whereas corporate crime is held as organised crime which is committed in organised manner by a corporation.

The crucial question for determination in this regard is who should be held criminally liable- whether the corporation or persons responsible for the affairs of the corporation or both. The corporate criminal liability is an imputed

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3 Marshall B. Clinard and Peter C. Yeager, *Corporate Crime* in A. Javier Treviño (edn.), *Classic Writings in Law and Society* 16 (Routledge, New York, 2nd edn. 2007).

4 *Ibid.*

liability and not a vicarious liability. It is well settled proposition in criminal law that a person can be held criminally liable for his own act and not for the acts of others but the rule of imputed liability is an exception. The corporation may therefore be held liable criminally for the acts of its employee. Corporate bodies are conferred with legal personality by fiction of law the object of which is to provide benefit to the society thereby they cannot be allowed to act in such a manner which is injurious to society. Imputation of criminal liability on corporations is one important method to ensure that the corporations are not acting injuriously to society.

It is very difficult to convict corporations as their affairs are conducted by professionals who are experts in their respective field and they use all technical know- how and act in organized manner. To prove *mens rea* on their part is very difficult and therefore strict liability is imposed on corporations for their crime. According to strict liability rule, presence of mental element is presumed when commission of criminal act is proved. Also, the concept of absolute liability is evolved for imputing liability on corporations. When the commission of prohibited act is proved, the burden of proof shifts from prosecution to alleged corporation, and *mens rea* is presumed on the part of corporation. In some cases, this presumption is rebuttable however in others it is conclusive presumption and accordingly "where presumption is rebuttable, nature of corporate criminal liability is strict liability and where presumption is conclusive presumption, nature of corporate criminal liability is absolute liability."

III. COMMON LAW DEVELOPMENTS OF CORPORATE CRIMINAL LIABILITY

The concept of corporate criminal liability evolved in Britain where the court applied this doctrine of liability in *R.* v. *Birmingham and Gloucester Railway Co.,*[5] and the corporate body was held liable for nonfeasance i.e. "for failing to fulfill a statutory duty." Later on, the liability was extended to cases of misfeasance also in *R.* v. *Great North of England Railway Co.*,[6] wherein "a railroad company had unlawfully destroyed a highway in the construction of its own bridge." It was held by Lord Denman that "the individuals who concurred in the vote to erect the bridge, and those who labored to put it up, might both be subject to criminal indictment." However, he held that "corporation could not be guilty of treason, felony, perjury or offences against persons."

As per the Interpretation Act, 1889, the term "person" means and "includes a body of persons corporate or incorporate, unless the contrary appears".

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5 (1842) 3 QB 223.

6 115 ER 1294 (1846).

Therefore, in cases where the offence requires the element of *mens rea,* "the state of mind of the persons in-charge of the affairs of the corporation may be considered for the same as their acts may be attributed to the corporations."[7]

The position of corporate criminal liability became further clear in 1944 when three decisions came which are considered revolutionary steps in firmly establishing the concept of corporate criminal liability in England as these decisions were inconsistent with the "two fundamental principles of English criminal law i.e. requirement of *mens rea* and that the principal or master is not criminally liable save in certain exceptional cases for offences committed by his agents or servants in the course of their employment."[8] There was another difficulty also that "a corporation could not be committed for trial on an indictment as criminal courts expected the criminal to stand at the bar and did not permit appearance by attorney" however, this requirement was done away with the Criminal Justice Act, 1925.

In *Director of Public Prosecutions* v. *Kent and Sussex Contractors Ltd.,*[9] the respondents were a company and its one employee. The charge against them was "that with intent to deceive they produced documents and furnished information for the purpose of Motor Fuel Rationing (No. 3) Order, 1941 which were false in material particulars." It was contended by the respondents "that the offence charged required for their commission an act of will or state of mind which a body corporate could not have." Rejecting the contention, it was laid down "that a body corporate is a person to whom, amongst the various attributes it may have, there would be imputed the attitude of a mind capable of knowing and forming an intention. It can only know or form an intention through its human agents, but circumstances may be such that the knowledge of the agent must be imputed to the body corporate. Thus, if a corporation desired to obtain coupons for petrol, it must furnish the information required by the appropriate authority. If the information is falsely given with intent to deceive, the corporation cannot escape the consequences which would follow in the case of an individual, by showing that they are a corporation."

In *R.* v. *I.C.R. Haulage Ltd.,*[10] the appellant company and other persons were charged with "conspiracy to defraud." It was contended by the appellant that "a company, not being a natural person, could not have a mind and, an indictment against a company for an offence involving, *mens rea* as an essential element must be bad." This contention was rejected and while imputing liability on the company it was laid down that "the criminal act of an agent, including

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7 Smith and Hogan, *Criminal Law*, (Butterworths, London, 1992).

8 *Director of Public Prosecutors* v. *Kent and Sussex Contractors Ltd.,* 1944 KB 146: (1944) 1 All ER 119; *R.* v. *I.C.R. Haulage Ltd*., 1944 KB 551: (1944) 1 All ER 691; *Moore* v. *I. Brestler Ltd*., (1944) 2 All ER 515.

9 1944 KB 146: (1944) 1 All ER 119.

10 1944 KB 551: (1944) 1 All ER 691.

his state of mind, intention, knowledge or belief, is the act of the company employing him and it depends on the nature of the charge, the relative position of the officer or agent to the company and other relevant facts and circumstances."[11] In the present case, the act of fraud committed by the managing director of the company was held to be the act of the company and the company was held liable.

In *Moore* v. *Brestler Ltd*.,[12] the facts were that "the secretary of the respondent company who was also the general manager and sales manager of a branch, sold certain company's goods with the object of defrauding the company and made certain false tax returns with intent to deceive." The company was imputed liability for the criminal act committed by its agents and it was held that "the officers were acting within the scope of their employment in making the sales and the returns and the fact that these were made with intent to defraud the company did not render the officers any less the agents of the company acting within authority."

These three judgments cast a considerable impact on the concept of corporate criminal liability. After these judgments the general rule with respect to most common law offences was established that "the law does not regard the master as having such connection with acts done by his servant as will involve him in any criminal liability for them unless he has himself authorized them or aided or abetted them". Three exceptions were also recognized to this general rule: - "public nuisance", "criminal libel" and "statutory offences". A corporation was held criminally liable on the basis of doctrine of vicarious liability "for the acts of any of its servant, provided that they fell into one of these three categories." It was specifically mentioned in *ICR Haulage case,*[13] that a corporation cannot be convicted for two categories of cases namely, "crimes which are not punishable with the infliction of fine" and "crimes which by their very nature cannot be committed by a corporation."

The principle of corporate criminal liability was therefore established by law however, another question emerged for consideration as to "whether all the employee's acts would be considered as the acts of the corporations or only those few who controlled it." This ambiguity was made clear to an extent in *TESCO Supermarkets Ltd*. v. *Nattrass,*[14] where the court held that "normally the acts of Board of Directors, Managing Director and perhaps other superior officers of the company could be held to be that of the company and where their functions have been delegated, the act of such person to whom it is delegated could be considered as the acts of the company."

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[11] *Id*. at 695.
[12] (1944) 2 All ER 515.
[13] *R.* v. *I.C.R. Haulage Ltd*., 1944 KB 551: (1944) 1 All ER 691.
[14] 1972 AC 153: (1971) 2 WLR 1166: (1971) 2 All ER 127.

Interestingly, throughout this journey of evolution of the concept of corporate criminal liability "the corporations have been exempted from liability of committing strictly personal crimes like murder, rape, and perjury" however, in *P and O Ferries case,*[15] the court held that "a company could be held liable for man-slaughter" though due to insufficient evidence the liability could not be imputed on the company. In *Seaboard Offsore Ltd.* v. *Secy. of State for Transport,*[16] the court held that "when a personal duty was imposed on an officer of the corporation then the corporation could not be held liable if the officer had himself taken all reasonable steps to avoid the criminal act."

IV. THEORIES OF CORPORATE CRIMINAL LIABILITY

The concept of corporate criminal liability has been evolved in common law system over a period of time through judicial decisions and in this process some theories of corporate criminal liability have also evolved. They are:

A. Agency Theory

The agency theory has its root in law of tort the application of which was extended to criminal law in due course. As per this theory, the acts and intents of the employees of the corporation may be imputed on corporation and accordingly the corporation may be held liable for their acts. The reason for imputing criminal liability on corporations as per this theory is that "criminal violations normally entail two elements, *actus reus* and *mens rea* and since corporations are considered to be purely incorporeal legal entities, they do not posses any mental state and the only way to impute intent to a corporation is to consider the state of mind of its employees." This theory rests on "a simple and logical method of attributing liability to a corporate offender, if corporations do not have intention, someone within the corporations must have it and the intention of this individual as part of the corporation is the intention of the corporation itself."

This theory is widely used in the United States where the courts consider three requisites in order to determine "whether a corporation will be held vicariously liable for the acts of its employees?" *Firstly*, "the employee must be acting within the scope and in the course of his employment"; *secondly*, "the employee must be acting, at least in part, for the benefit of the corporation, but it is irrelevant whether the company actually receives the benefit or whether the activity might even have been expressly prohibited"; and *thirdly*, "the act and intent must be imputable to the corporation."

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[15] (1991) Crim. L. Rev. 127.
[16] (1994) 1 WLR 541: (1994) 2 All ER 99.

The first requirement of "acting within the scope of employment" gets satisfied "if the employee has actual or apparent authority to engage oneself in the act in question."[17] The *New Hampshire* v. *Zeta Chi Fraternity,*[18] popularly known as *New York Central Railroad case*, was the first case decided by the US Supreme Court where the court imputed criminal liability on the corporation. The court found that "the corporation violated the Elkins Act where a general and an assistant traffic manager paid rebates for shipments of sugar. The agents acted within the scope of actual authority because they were authorized to set up freight rates. They acted within the scope of authority conferred upon them by the corporation." In *United States* v. *Investment Enters. Inc.,*[19] the corporation was held liable for "violating obscenity laws where the corporation's president conspired to transport obscene videos in interstate commerce. The president's unlawful acts could be imputed to the corporation because he was an undisputedly authorized agent."

A corporation may be held liable "only if acts performed by the agent fall within the agent's apparent authority."[20] However, "whether an employee acted in the scope of his or her authority depends on various factors like source of law, factual framework etc." The term "scope of employment" has very wide connotation. It has been held that "even non-employees conduct can be attributed to be as the corporation's action." In *United States* v. *Parfait Powder*,[21] the court held that "independent contractors might act for the benefit of the corporation thereby exposing it to criminal liability." The Courts in US have held that "a corporation may be liable for the actions of its agents regardless of the agent's position within the corporation." This is based on the findings that "an employee's act can bind the corporation even where the corporation has implemented policies prohibiting certain behavior. When an employee's conduct is contrary to the company's compliance policies and specific directives, the company can still be held liable."[22]

The second requisite is based on the principle of vicarious liability wherein it is seen that the company must be deriving benefits from the acts concerned. The benefit may not be real but if it is potential, that would suffice the purpose. Joseph Hall is also of the view that "for this requirement, the corporation

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17 "Actual authority" is said to be there "when a corporation knowingly and intentionally authorises an employee to act on its behalf."

18 696 A 2d 530, 535 (NH 1997).

19 *United States* v. *Investment Enter Inc*., 10 F 3d 263, 266 (5th Cir 1993).

20 "Apparent authority" means "the authority that has not been expressly conferred but can be inferred by a third party from the conduct of the agent. It is the authority which an outsider could reasonably assume that an agent would have from his position within the company, and the responsibility previously entrusted to him, and the circumstances surrounding his past conduct."

21 163 F 2d 1008, 1009-1010 (7th Cir 1947).

22 *United States* v. *Automated Medical Laboratries, Inc*., 770 F 2d 399, 407 (4th Cir 1985).

need not actually receive a benefit; the employee's mere intention to bestow a benefit suffices."[23]

In respect of the third requisite, it has been pointed out that there are certain offences which a corporation cannot commit and consequently it cannot be held liable criminally there for. For instance, perjury, rape, bigamy and others. The act or intent with respect to the same cannot be imputed to the corporation.[24]

B. Identification Theory

The doctrine of identification is also a method to impute criminal liability on corporations. This theory has emerged due to the limitations of the application of agency theory in certain offences which required proof of criminal fault for imposing criminal liability. In *Lennard's Carrying Co. Ltd.* v. *Asiatic Petroleum Co. Ltd.*,[25] Viscount Haldane J. propounded a model for imputing criminal liability on corporations for offences that require *mens rea* which was called as the identification theory. Haldane observed: "A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody, who for some purposes may be called an agent, but who is really the directing mind and will of the corporation; the very ego and centre of the personality of the corporation."

This theory also "relies on an individual's conduct to attribute liability to a corporation likewise the agency theory." The only difference being that the agency theory is simply based on the principles of torts while the identification theory is based on the reality of corporate life. Indeed, this theory personifies the corporation. According to this theory, "the solution for the problem of attributing fault to a corporation for offences that require intention was to merge the individual within the corporation with the corporation itself." In contrast to the agency theory, in this theory "the individual employee is assumed to be acting as the company and not for the company."

The main thrust of this theory is "to know the guilty mind to recognize the individual who could be identified as the company itself or its vital organ or its mind." The judgment given in *T*esco *Supermarkets Ltd.* v. *Nattrass,*[26] is a landmark on this point wherein the facts were that "the Tesco Supermarket was a large chain store which was charged with an offence against the Trade

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[23] Joseph Hall, "Corporate Criminal Liability (Thirteenth Survey of White-Collar Crime)", 35 *American Criminal Law Review* 549 at 554 (1998).

[24] *R.* v. *I.C.R. Haulage Ltd.*, 1944 KB 551: (1944) 1 All ER 691.

[25] 1915 AC 705.

[26] 1972 AC 153: (1971) 2 WLR 1166: (1971) 2 All ER 127.

Descriptions Act, 1968[27] for selling goods to consumers at a price different than that announced. The matter involved the advertisement of soap powder at a reduced price. A shop assistant had mistakenly placed normally priced soap powder on the shelf. The manager had failed to ensure that the powder was available at the advertised price." As per the Trade Descriptions Act, 1968 "there was a defence of due diligence which could be pleaded by the company, unless the manager's lack of due diligence could be attributed to the company."[28] The main question for consideration before the House of Lords was "whether the manager of the store could be identified with the company by the common law doctrine, or in other words, whether natural person or persons are to be treated as being the corporation itself." It was held that "the manager was not a person of sufficiently important stature within the corporate structure to be identified as the company for this purpose, and since there had been due diligence at the level of top management, the company could use the defence." It was observed that "A company may in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such."[29]

Lord Reid deliberated on the question as to "who could be regarded as the corporation itself for the purpose of imputing criminal liability" and observed that "normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company." According to Viscount Dilhorne "a person who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company would be the directing mind and will of the company." However, Lord Pearson observed that "the constitution of the company concerned should be taken into account in order to indicate if the person is in a position of being identifiable with the company."

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[27] The Trade Descriptions Act, 1968, S. 20(1): "Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of, … any director, manager, secretary or other similar officer of the body corporate, … he as well as the body corporate shall be guilty of that offence…".

[28] The Trade Descriptions Act, 1968, S. 24(1): "In any proceedings for an offence under this Act it shall…be a defence for the person charged to prove– (*a*) that the commission of the offence was due to…the act or default of another person; … and (*b*) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence...".

[29] *H.L. Bolton (Engg.) Co. Ltd.* v. *T.J. Graham & Sons Ltd.*, (1957) 1 QB 159, 172: (1956) 3 WLR 804.

C. Aggregation Theory

With the passage of the time there has happened a lot of change in the corporate power structure and "modern corporations have multiple power centers that control the organization and policy of the corporations." This complex situation has posed some newer challenges in relation to imputing criminal liability to corporations in modern times. Sometimes it becomes very difficult to trace the responsible individual whose intention could be held as that of the corporation. In order to address such complex situations, the aggregation or collective knowledge doctrine was developed.

In the aggregation theory, the cumulative knowledge of different officers of the corporation is taken into account for imputing criminal liability upon corporation. It is seen that "whether all the acts of relevant persons taken together and aggregate mental elements of all the relevant persons of the company would constitute the offence had they been of the one individual." As per Celia Wells, "aggregation of employees' knowledge means that corporate culpability does not have to be contingent on one individual employee's satisfying the relevant culpability criterion."[30]

This theory emerged from the decisions of the US Federal Courts. The landmark precedent is *United States* v. *Bank of New England,*[31] wherein the main question for consideration before the court was as to "whether knowledge and will could be attributed to the corporate entity." The court while affirmatively answering this question observed that "Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation."

The identification theory seems to be the combination of both the "principle of *respondeat superior"* and the "principle of presumed or deemed knowledge." Therefore, "even if no employee or agent has the requisite knowledge to satisfy a statutory requirement needed to be guilty of a crime, the aggregate knowledge and actions of several agents could satisfy the elements of the criminal offence." However, some Federal Courts in America have "distinguished collective knowledge from collective intent or collective recklessness and held that a corporation could be attributed mens rea/ intent /recklessness if there exists culpable state of mind in one of the corporation's employees." It is in

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[30] Celia Wells, *Corporations and Criminal Responsibility*, 156 (Oxford University Press, Oxford, 2001).

[31] 821 F 2d 844 (1st Cir 1987), cert. denied, 98 L Ed 2d 356: 484 US 943 (1987).

contrast to the decision given in *United States* v. *Bank of New England*.[32] In *Inland Freight Lines* v. *United States*,[33] the court held that "corporate collective knowledge and collective criminal intent do not necessarily have the same meaning." Therefore, according to American Courts, "a corporation could not be deemed to have a culpable state of mind when that state of mind is not possessed by a single employee."

V. CORPORATE CRIMINAL LIABILITY IN INDIA

In early period the view which prevailed amongst Indian jurists was that a corporation cannot be held criminally liable. The reason assigned for it was that a corporation as such cannot have *mens rea* and also that the ordinary punishment for crimes is imprisonment which cannot be imposed against a corporation.[34] However, a bare reading of sections 2 and 11 of the Indian Penal Code, 1860,[35] suggests that the corporate criminal liability has an entrenched and undisputed existence in criminal law in India. Section 2 of the IPC reads: "every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which, he shall be guilty within India". Further, section 11 of the IPC defines 'person'[36] as "the word 'person' includes any company or association or body of persons, whether incorporated or not". However, judicial approach to corporate criminal liability in India has been inconsistent.[37]

The first case involving the question of corporate criminal liability was brought before the Calcutta High Court in *Ananth Bandhu* v. *Corpn. of Calcutta,*[38] wherein the court did not allow the contention that "a limited company under Indian law cannot be prosecuted under the criminal law." The court held that "a corporation can be convicted of offences where (a) there is no requirement of *mens rea*, (b) it is physically impossible for the company to commit the offence and (c) where the corporation cannot suffer from the mandatory sentence mentioned in the statute." In this case Chunder J. though discussed the scope and application of the doctrine of corporate criminal liability in England but refused to include the offences requiring *mens rea* within the ambit of corporate criminal liability in India. Though he relied on the doctrine of corporate criminal liability but he did not give any reason for it.

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[32] 821 F 2d 844 (1st Cir 1987), cert. denied, 98 L Ed 2d 356: 484 US 943 (1987).
[33] *Inland Freight Lines* v. *United States*, 191 F 2d 313 (10th Cir 1951) at 315-316.
[34] Huda S., *The Principles of The Law of Crimes*, 20 (Eastern Book Company, Lucknow, 1982).
[35] Hereinafter referred to as IPC or the Code.
[36] The General Clauses Act, 1897, S. 3(42) also defines 'person' in the similar manner.
[37] *M.V. Javali* v. *Mahajan Borewell & Co.,* (1997) 8 SCC 72.
[38] 1952 SCC OnLine Cal 122: AIR 1952 Cal 759.

The Bombay High Court in *State of Maharashtra* v. *Syndicate Transport Co. (P) Ltd.,*[39] held that "a corporate body ought to be held liable for criminal acts or omissions of its directors, or authorized agents or servants whether they involve *mens rea* or not, provided that they have acted or have purported to act under the authority of the corporate body or in pursuance of the aims and objectives of the corporate body." But this ruling was made subject to two exceptions, one, that "a corporation cannot be held liable for certain offences" and two, that "a corporation cannot be convicted of offences which punishment it cannot mandatorily serve."[40] Here, Paranjape J. appears to subscribe to the US "aggregation model for imposing criminal liability on corporations". The judgment also seems to be progressive as it is willing to cover corporations for offences involving *mens rea* under the Indian criminal jurisprudence.

The Supreme Court faced the question of corporate criminal liability for the first time in 1970 in *Aligarh Municipal Board* v. *Ekka Tonga Mazdoor Union*,[41] wherein Dua J. observed that "a command to a corporation is in fact a command to those responsible for the conduct of its affairs. Any failure on the part of the people in command to take appropriate action would make both, them and the corporation liable for punishment." Here, it is important to note that the Supreme Court appears to subscribe to the British "identification model for imposing criminal liability on corporations" and not the "aggregation model".

While discussing the corporate criminal liability, *Union Carbide Corpn. (2)* v. *Union of India,*[42] may also be referred to which involves negligence on the part of the company and its directors. The corporation was held liable and was asked to pay $470 million as compensation to the victims. But its directors had been left scot-free dropping all the criminal charges against them. The company had been asked to close down its operations. The directors of the company had the knowledge of the malfunctioning of the reactors in their plant but failed to take action. The court in this case failed to lift the 'corporate veil' which made the directors get away with criminal charges against them. The court held that "the defects in the plant, the knowledge of the controlling officers of the same and the presence of the hazardous substances in the premises, being handled in an unsafe manner would not make the corporation liable for culpable homicide not amounting to murder as in spite of the defects of the corporation and its controlling officers, it cannot be said to have the requisite *mens rea* to cause death intentionally or having knowledge of the same, either of which are necessary constituents of section 304(2)."

It appears that the court was not called upon to decide the question of criminal liability of the corporation but one thing can be inferred from this case is

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39 1963 SCC OnLine Bom 57: AIR 1964 Bom 195.
40 *Id.* at para 17.
41 (1970) 3 SCC 98: AIR 1970 SC 1767.
42 (1990) 2 SCC 540: AIR 1990 SC 273.

that a corporation could be charged for culpable homicide with requisite *mens rea*. It seems to be a departure from the traditional approach that a corporation cannot commit homicide.[43]

The *Commr.* v. *Velliappa Textiles Ltd.*,[44] is a very interesting case relating to corporate criminal liability which involved two crucial questions. First, "whether a company can be attributed with *mens rea* on the basis that those who work or are working for it have committed a crime and can be convicted in a criminal case?" and second, "whether a company is liable for punishment of fine only where the provision of law contemplates punishment by way of imprisonment only or a minimum period of imprisonment and fine?"

The Bench consisted of three judges[45] who differed in their approach and delivered three different judgments. B.N. Srikrishna and G.P. Mathur, JJ while answering the first question in affirmative observed, "the criminal liability of a corporation arises where an offence is committed in the course of the corporation's business by a person in control of its affairs to such a degree that it may fairly be said to think and act through him so that his actions and intent are the actions and intent of the corporation" and held that "corporations are liable even where the offence requires a criminal intent." Rajendra Babu J., differed in his approach and held that "common law principle of *'alter ego'* or identification theory is applicable under the existing Indian laws to those offences where *mens rea* is not an essential requirement" and opined that "it is not possible to attribute *mens rea* to a corporation which requires positive acts of commission or omission and consequently, there cannot be conviction of a corporation in such cases."

The concurring judges on the first question differed in their approach when they came to deliberate on the second question. Mathur J. opined that "the courts would be shirking with their responsibility of imparting justice by holding that prosecution of a company is unsustainable merely on the ground that being a juristic person it cannot be sent to jail to undergo the sentence." Rajendra Babu J. affirmed the view of Srikrishna J., and they held that "corporate criminal liability cannot be imposed without making corresponding legislative changes i.e. imposition of fine in lieu of corporal punishment. To bring such a change is a legislative function and only parliament can do it."

This judgment does not seem good as it came with a split verdict on two questions of vital importance on corporate responsibility when it is submitted that "corporate criminal liability is an integral part of the criminal jurisprudence across the globe and a corporation should not go unpunished merely

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[43] *R.* v. *I.C.R. Haulage Ltd.*, 1944 KB 551: (1944) 1 All ER 691.
[44] (2003) 11 SCC 405: AIR 2004 SC 86.
[45] R. Rajendra Babu, B.N. Srikrishna and G.P. Mathur, JJ.

because the sentence is corporal in nature." A wholistic reading of this judgment gives us a view that "though a corporation is criminally liable for the criminal acts and omission of its high officials who are the controlling mind of the corporation, it would go unpunished if the legislature did not provide a punishment of fine to be imposed on the corporation or the impugned law does not confer discretion on the court to impose a punishment of fine in lieu of sentence of imprisonment."

In *Standard Chartered Bank* v. *Directorate of Enforcement,*[46] a five judge Constitution Bench[47] of the Supreme Court of India was again posed some tricky questions of corporate criminal liability to decide and it came out with 3:2 majorities. This case expressly overruled the *Commr.* v. *Velliappa Textiles Ltd.*.[48] K.G. Balakrishnan, Arun kumar and D.M. Dharmadhikari JJ. constituted the majority and observed that "if the *Velliappa decision* is accepted as correct proposition of law then in case of the offence under section 420, IPC for cheating and dishonestly inducing delivery of property, for which the punishment prescribed is imprisonment of either description for a term which may extend to seven years and shall also be liable to fine, a corporation would go unpunished while for offence under section 417 of the IPC, i.e. simple cheating, for which the punishment prescribed is imprisonment of either description for a term which may extend to one year or with fine or with both, a corporation can be punished. Here, the offence under section 417 is of minor nature whereas the offence under section 420 is of aggravated nature. As per the scheme of the various enactments and also the IPC, mandatory custodial sentence is prescribed for graver offences. If the verdict of *Velliappa case* is followed then no company or corporate body could be prosecuted for the graver offences whereas they could be prosecuted for minor offences as the sentence prescribed is imprisonment or fine. We do not think that the intention of the legislature is to give complete immunity from prosecution to the corporate bodies from the grave offences.[49] Since the company cannot be imprisoned the court cannot impose that punishment but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be imposed against the company. Such discretion is to be read into the section so far as the juristic person is concerned. Of course the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing a sentence in accordance with the law. As regards a company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a

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[46] (2005) 4 SCC 530: AIR 2005 SC 2622.

[47] The five Judges were: N. Santosh Hegde, K.G. Balakrishnan, D.M. Dharmadhikari, Arun Kumar, and B.N. Srikrishna, JJ. It is interesting to note that Srikrishna, J. was on the three-Judges Bench in the *Velliappa case* as well.

[48] (2003) 11 SCC 405: AIR 2004 SC 86.

[49] *Standard Chartered Bank* v. *Directorate of Enforcement*, (2005) 4 SCC 530: AIR 2005 SC 2622.

company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way".[50]

B.N. Srikrishna J., and N. Santosh Hegde J. expressed their dissent subscribing to the view expressed in the *Velliappa judgment* and observed that "whether a company could be convicted for an offence which mandates imposition of corporal punishment mandatorily, is not an interpretational exercise but one that calls for rectification of an irretrievable error in drafting of the concerned statute." Deliberating in detail the legislative and the judicial function, they concluded that "when a statute says the court shall impose a term of 'imprisonment and fine', there is no option left to the court to say that under certain circumstances it would not impose the mandatory term of imprisonment. The maxim '*lex non cogit ad impossibilia'* only tell us that law does not contemplate something which cannot be done. The maxim persuades the court to hold that it is impossible to send a company to prison. The maxim by itself does not empower the court to break up the section into convenient parts and apply them selectively. The maxim '*impotentia excusat legem'* apply here for the same reason. Where the mandate of the section is to impose the whole of the prescribed punishment, there is no warrant to the court for the dissecting of the section and treating only one part as capable of implementation." B.N. Srikrishna, J, in dissent, pointed out that "the judicial function is limited to finding solutions within specified parameters. Anything more than that would be judicial heroics and naked usurpation of legislative function." He further cited Kenny in "The Outlines of Criminal Law" which states that "a corporation is devoid not only of mind, but also of body; and therefore, incapable of the usual criminal punishments." On the basis of these reasons, they refused to interfere with the *Velliappa judgment*.

It appears that even the minority view was not that the corporations should be given immunity from criminal liability, but they were of the view that in the absence of a clear letter of law providing for a punishment of fine; it is not appropriate for the court to rewrite the law by imposing a punishment of fine where corporal punishment is a mandatory part of sentence. The courts have followed the majority decision of this case in subsequent cases[51] and denied any kind of immunity to the corporations from criminal liability. Even in cases where imprisonment forms mandatory part of the sentence, the courts have awarded fine in lieu of imprisonment.

In *Anil Gupta* v. *Star India (P) Ltd.*,[52] where the issue involved was concerned with dishonour of cheques,[53] the Supreme Court observed that "arraigning of a company as an accused is imperative. The other categories of

[50] *Ibid*.
[51] *Madhumilan Syntex Ltd.* v. *Union of India,* (2007) 1 SCC297: AIR 2007 SC 1481.
[52] (2014) 10 SCC 373: AIR 2014 SC 3078.
[53] The Negotiable Instruments Act, 1881, Ss. 138 and 141.

offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself."

In *Gunmala Sales (P) Ltd.* v. *Anu Mehta*,[54] the Supreme Court observed that "the vicarious liability is contemplated in the Negotiable Instruments Act, 1881 to ensure greater transparency in commercial transactions. This object has to be kept in mind while considering individual cases and hardship arising out of a particular case cannot be the basis for Directors to try to wriggle out of prosecution."

In *Aneeta Hada* v. *Godfather Travels & Tours (P) Ltd.*,[55] the Supreme Court held that "the Negotiable Instrument Act (NIA) is one where the company itself and certain categories of officers in certain circumstances are deemed to be guilty of the offence." Further, the court observed that "it is the bounden duty of the court to ascertain for what purpose the legal fiction has been created. It is also the duty of the court to imagine the fiction with all real consequences and instances unless prohibited from doing so. Section 141, NIA clearly stipulates that when a person which is a company commits an offence, then certain categories of persons in charge as well as the company would be deemed to be liable for the offence under Section 138, NIA. The word 'deemed' used in Section 141, NIA applies to the company and the persons responsible for the acts of the company. It crystallizes the corporate criminal liability and vicarious liability of a person who is in charge of the company. When a statute enacts that something shall be deemed to have been done, which, in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to."

In *Iridium India Telecom Ltd.* v. *Motorola Incorporated*,[56] wherein it has been held that "in all jurisdictions across the world governed by the rule of law, companies and corporate houses can no longer claim immunity from criminal prosecution on the ground that they are not capable of possessing the necessary *mens rea* for commission of criminal offences." It was observed that "the legal position in England and United States has now been crystallized to leave no manner of doubt that the corporation would be liable for crimes of intent." The Division Bench observed that "The courts in England have emphatically rejected the notion that a body corporate could not commit a criminal offence which was an outcome of an act of will needing a particular state of mind. The aforesaid notion has been rejected by adopting the doctrine of attribution and imputation. In other words, the criminal intent of the alter

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[54] (2015) 1 SCC 103.
[55] (2012) 5 SCC 661: AIR 2012 SC 2795.
[56] (2011) 1 SCC 74.

ego of the company/body corporate i.e. the person or group of persons that guide the business of the company, would be imputed to the corporation."

In *Sunil Bharati Mittal* v. *CBI*,[57] the Supreme Court while reiterating the *Iridium case* judgment held that "whenever person controlling the affairs of corporate body have *mens rea* and have done criminal act, it is attributed that company was also actuated with *mens rea* and it is imputed that company itself committed the criminal act." The Court further held that "in India vicarious liability rule is not applicable for imposition of criminal liability unless by specific and express provision of law vicarious liability has been imposed for crime commission."

VI. THE CONUNDRUM OF CORPORATE PUNISHMENT

Once a corporation is convicted of an offence, the quantum of punishment is to be determined which could serve as a sufficient deterrent on corporation. The criminal sentencing policy under Indian legislation is focused upon individual offenders and the same is used to punish corporate bodies as well. Therefore, the courts find considerable difficulty where the punishment provided is "imprisonment and fine". A company cannot be imprisoned as it has no body of its own therefore the fine remains the only option. This creates problem when it comes to the sentencing a corporation for such offences where statute prescribes punishment in the form of "imprisonment and fine".[58]

The Law Commission of India in its report has noted this difficulty which may be encountered while sentencing corporations and recommended some amendments for overcoming the difficulty relating to punishing corporates. In 41st report[59] it has stated that "as it is impossible to imprison a corporation practically the only punishment which can be imposed on it for committing an offence is fine. If the penal law under which a corporation is to be prosecuted does not provide for a sentence of fine, then there will be a difficulty." Therefore, the Commission has recommended amendment of section 62 of the Indian Penal Code incorporating that "In every case in which the offence is only punishable with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an association of individuals, it shall be competent for the courts to sentence such offender to fine only".

Also, the Commission in 47th report[60] has noted that **"**In many of the acts relating to economic offences, imprisonment is mandatory. Where the con-

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[57] (2015) 4 SCC 609: AIR 2015 SC 923.

[58] For example, the Penal Code, 1860, Ss. 193, 196 and 420; the Income Tax Act, 1961, Ss. 276(1) and 277; the Employee's State Insurance Act, 1948, S. 10.

[59] Law Commission of India, 41st Report, para 24.7.

[60] Law Commission of India, 47th Report, para 8.3.

victed person is a corporation, this provision becomes unworkable, and it is desirable to provide that in such cases, it shall be competent to the court to impose a fine. This difficulty can arise under the Penal Code also, but it is likely to arise more frequently in cases of economic laws." In view of this the Commission has recommended to amend the Indian Penal Code inserting Section 62 which may read as "(1) In every case in which the offence is punishable with imprisonment only or with imprisonment and fine, and the offender is a corporation, it shall be competent to the court to sentence such offender to fine only. (2) In every case in which the offence is punishable with imprisonment and any other punishment not being fine and the offender is a corporation, it shall be competent to the court to sentence such offender to fine. (3) In this section 'corporation' means an incorporated company or other body corporate, and includes a firm and other association of individuals." It may also be noted that the legislature made an effort to implement these recommendations but no fruitful result could come out.[61]

In several cases, the courts have held that "a company cannot be convicted of an offence where both 'imprisonment and fine' are the mandatory prescribed punishment on the ground that the legislature could not have contemplated a company being imprisoned on being found guilty of the offence."[62] The courts in these cases relied on the decision of the Supreme Court in *State of Maharastra* v. *Jugmandar Lal*,[63] where the court stated that "where it has been made mandatory to impose both punishments, the court is bound to award the sentence of imprisonment." The courts have denied themselves the power to impose a sentence of fine alone in these cases as this would "amount to usurpation of legislative function." However, in *MCD* v. *J.B. Bolting Co. (P) Ltd.*,[64] the Delhi High Court observed that "the company did not enjoy immunity from prosecution and in case corporal punishment is mandatory part of the sentence, the guilty company will be punished with fine only."

After a considerable period of time this controversy seems to be resolved with the final verdict of the Supreme Court in *Standard Chartered Bank* v. *Directorate of Enforcement,*[65] where it was very categorically held that "even where the statute prescribes a mandatory punishment of both 'imprisonment and fine' then also in case of a corporation only fine can be imputed because they cannot be imprisoned and the intention of the legislature has never been to provide blanket immunity to the corporations for serious crimes." The Supreme Court settled the law and held that "a company can be prosecuted and

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[61] The proposed Penal Code (Amendment) Bill, 1972, tried to implement these recommendations but it could not pass to become a law.

[62] *A.K. Khosla* v. *T.S. Venkagtesan*, 1991 SCC OnLine Cal 225: 1992 CrLJ 1448; *Adding Machines India (P) Ltd*. v. *State,* (1998) 63 Comp Cas 568.

[63] AIR 1966 SC 940.

[64] 1975 SCC OnLine Del 47: 1975 Cri LJ 1148.

[65] (2005) 4 SCC 530: AIR 2005 SC 2622.

convicted for even that offence for which minimum sentence of imprisonment is prescribed. A corporate body cannot avoid liability on the ground that punishment prescribed for offence is imprisonment and it has no body. When for any offence imprisonment and fine both are prescribed punishment, corporate entity will be inflicted with fine only. Natural persons liable for corporate crime may be punished with punishments prescribed by penal provisions."

The provisions which impose mandatory sentence of "imprisonment and fine" there seems to be an inadvertent mistake made by the legislature as the same cannot be imposed on a corporation. Therefore, these provisions may be construed by applying mischief rule of interpretation "so as to prevent the mischief and advance the remedy according to the true intention of the makers of the statute", irrespective of the consideration whether the offender is a corporation or an individual.[66]

Another rule of construction to be adopted here is that of reading conjunctive words disjunctively. The word 'and' may be read as 'or' to more accurately express and to give effect to the obvious intent of the legislature especially "where it will avoid absurd or impossible consequences, or operate to harmonize the statute and give effect to all its provisions." The substitution of the words 'and' and 'or' is also permissible in criminal statutes.[67] Therefore the word 'and' can be substituted by the word 'or' where both punishments are prescribed, and a company can be punished by fine only, as it will be in consonance of the legislative intent derived from the purpose of the statute. Thus, where the statute prescribes a mandatory sentence of both "imprisonment and fine", the courts must impose a sentence of fine on corporations.

It is the high time that the legislature also look towards new modes of sentencing designed to deter corporate offenders specifically. This would ensure that a sentence imposed on a corporation would be effectively carried out. Amongst the sentencing options available, a fine would deprive the corporation of the benefits accrued to it by its criminal conduct. Although the incidence of fine primarily falls on the shareholders, it is justified on the ground that the shareholders are beneficiaries along with company to the extent of their shareholding. Other method of sentencing is by way of imposing an "equity fine" whereby "the corporation would be forced to issue new equity securities to the state crime victim compensation fund to the extent of the fine."[68] This would result as a drop in the shareholdings of the existing shareholders and would deter the company from committing crimes. It would also benefit the victims of the corporate crimes.

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66 *Shivanarayan Kabra* v. *State of Madras,* AIR 1967 SC 986.

67 *Williams* v. *State,* 137 SW 927.

68 John Collins Coffee, Jr., "No Soul to Damn, No Body to Kick; An Unscandalised Essay on the Problem of Corporate Punishments", 79 *Mich. L. Rev.* 413 (1981).

The company can also be deterred through publicity sanctions where its conviction is widely publicized. The adverse publicity would be commensurate with the illegal gain to the company. A novel method of corporate punishment is the introduction of the interventionist sanctions where the "internal affairs of the company can be regulated by an outside director, auditor or quality control expert appointed by a court." Yet another form of sentencing suggested are self-regulation, stock dilution, probation, punitive injunctions and community care.[69]

It can also be a good policy to focus on the individuals who are in charge of the affairs of a corporation. This is necessary because deterrence will not be of any use without a human element in it. This reasoning was adopted by the court in *United States* v. *R. Park,*[70] where the chief executive officer of a corporation was convicted for an offence of the corporation as he was under a duty to ensure that measure to prevent violations of the law were implemented. This policy has been followed under the various socio-economic legislations in India.[71] The courts have also pierced the corporate veil from time to time to identify the real offender and punish him. Thus, it is important that the sentencing policy of the state in relation to the corporations ought to be focused on both, the corporations and the individuals to achieve the purpose of the punishment.

VII. CONCLUSION

Corporate crimes are done mainly for economic purposes and cast impact not only on the economic health of the state concerned but have the potential to jeopardize the interest of the world at large as the corporate bodies have larger resources, expert persons etc. It is the high time when the modern criminal justice system must ensure the efficient implementation of the concept of corporate criminal liability. In modern times there is great dependency of society on corporate bodies and their business activities. Some of the activities of these corporate bodies may be criminal activities and thereby fatal to the interest of society and may cast adverse impact on the well- being of the state as well as citizens which needs to be tackled with iron hands. However, while using this tool of corporate criminal liability a reasonable care is required to be taken to see that the liability imposed is not so onerous that it affects the corporate functioning and erodes the corporate business environment. There is a need to ensure that guilty corporations are dealt with effectively by punishing them adequately and at the same time responsible corporate business activity need not suffer.

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[69] Brent, Fisse, "Sentencing Options Against Corporations" 1 *Crim. L. Forum* 230 (1990).

[70] 1975 SCC OnLine US SC 107: 44 L Ed 2d 489: 95 S Ct 1903: 421 US 658 (1975).

[71] For example, the Essential Commodities Act, 1955, S. 10; the Employees' Provident Fund Act, 1952, S. 14(A); the Monopolies and Restrictive Trade Practices Act, 1969, S. 52.

The criminal law jurisprudence has settled the issue of criminal liability of corporations and now the position is that the corporations can be held criminally liable for crimes committed by them. But the Indian legislative effort is not in consonance with these developments. It appears from an analysis of Indian position that the Indian legislature are hesitant in making corporations criminally liable. The punishment provided by statutes are generally in the form of fine and judiciary has also not shown its activism in this respect. In addition to the imposition of fine as punishment, "winding up of the company", "temporary closure of the corporations", "heavy compensations to the victims" etc. may be considered as appropriate mode of punishments. Such type of punishment has a deterrent effect on the corporations and the object of the punishment can be attained by this.

Thus, the legal position today is that the prosecution against a corporation can be initiated and in case the corporation is being held guilty a fine can be imposed on it even when the prescribed punishment by the statute is "imprisonment and fine". But a corporation cannot be prosecuted for an offence in cases where the punishment prescribed for the offence is only in the form of corporal punishment. It is clear that the legislature have not responded well on the question of punishment regarding corporate criminal liability. The statutes in India, despite the recommendations of the 41st Law Commission Report, are not in consonance with the developments in the field of corporate criminal liability in the legal systems across the globe. Thus, it can be concluded that the corporate criminal liability arises on the part of corporations in India for all offences under the IPC except for section 303 where the punishment prescribed is death.

CYBERWARFARE – THE EMERGING THREAT TO WORLD PEACE

—Tissy Annie Thomas[*]

Abstract—The novelty of cyberwarfare, hence the absence of its mention in the laws of war, does not imply a legal conclusion as to its exclusion from the jurisdiction of international humanitarian law. In accordance with the Martens Clause; it cannot be drawn by implication, that the absence of a treaty provision forbidding a particular conduct during armed conflict means it is permitted in international law. The settled position of law is that international humanitarian law applies to all kinds of warfare and all kinds of weapons employed in an armed conflict. Recognising such a position should not be construed as encouraging the militarization of cyberspace and legitimization of cyber warfare. Conclusively, the law of armed conflict encompasses cyber warfare. However, it is important to define the contours which differentiates a cybercrime and cyber warfare. The present article attempts to apply the principles of jus in bello to cyberwar and highlights the gaps to be filled in the laws of war vis-à-vis cyberwar. The application of the traditional codified laws of war raise unique issues when applied to cyber warfare. It hence calls for revamping the law of armed conflict as per the needs of the present and the future.

I. UNDERSTANDING CYBER OPERATIONS- THE NOMENCLATURE

Cyberspace is a global domain comprising the information systems, telecommunication networks, facilitating the internet-of-things and providing a

[*] LLM, Himachal Pradesh National Law University, Shimla.

foundation for social, economic, military and other activities.[1] All activities conducted, through the means of internet, irrespective of the motive, whether political, entrepreneurial, academic, or any other, is a cyber activity. With a common means- the internet, which enables the accomplishment of varied motives, it becomes pertinent to identify and differentiate various cyber operations to deter the play of the malicious elements. Undoubtedly, the detrimental elements may be internal, committing cybercrimes, or may be external, leading to cyberwars.[2] Consequently, defining the contours differentiating cybercrime and cyber warfare is of essence for academic and practical purposes and the adversarial system. This demarcation forms the elementary premise for application of the relevant legal provisions and international conventions/ agreements.

Ordinarily, cyber-crime is defined as a crime wherein computers or networks are a tool, a target or are incidental to the crime (as traditionally understood).[3] The Convention on Cybercrime[4], the only multilateral treaty aiming to combat cybercrime by encouraging adoption of national legislation and fostering international cooperation, divides cybercrime into four broad categories- (1) offences against the confidentiality, integrity and availability of computer data and systems;[5] (2) computer-related offences (computer-related fraud and forgery);[6] (3) content-related offences (child pornography);[7] and (4) copyright infringement[8]. .As per the International Telecommunication Union, the term 'cybercrime' includes both traditional computer crimes as well as network crimes.[9] Cyber-crime essentially includes activities identified as offences under the national law, and those which should be so identified due to its potential to threaten society's ability to maintain internal order.[10] Undeniably, both individuals and organisations can become the victims of cybercrime. The 'social contract' (Hobbes) entrusts States' with the responsibility to protect the citizenry against transgressions. Thus, protecting critical information infrastructure and

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1 Japan, *National Security Strategy*, 2013, p. 9, *available at* https://www.cas.go.jp/jp/siryou/131217anzenhoshou/pamphlet_en.pdf.

2 Susan W. Brenner, "Toward A Criminal Law for Cyberspace: Distributed", 10 *Boston University Journal of Science & Technology Law* 2 (2004).

3 Marc D. Goodman, "Why the Policy Don't care About Computer Crime", *Harvard Journal of Law & Technology*, Vol. 10, No. 3; p. 469. *Available at* http://jolt.law.harvard.edu/articles/pdf/v10/10HarvJLTech465.pdf.

4 Council of Europe Convention of Cybercrime, 2004. *Available at* https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680081561.

5 *Id.,* Ch. II S. 1 Title 1.

6 *Id.,* Ch. II S. 1 Title 2.

7 *Id.,* Ch. II S. 1 Title 3.

8 *Id.,* Ch. II S. 1 Title 4.

9 International Communication Union, "Understanding Cybercrime: A Guide for Developing Countries", 2009, p. 18. Available at https://www.itu.int/ITU-D/cyb/cybersecurity/docs/itu-understanding-cybercrime-guide.pdf.

10 Susan W. Brenner, "Cybercrime, Cyberterrorism and Cyberwarfare", *Revue Internationale de Droit Penal*, 2006/3 Vol. 77). *Available at* https://www.cairn.info/revue-internationale-de-droit-penal-2006-3-page-453.htm#.

enhancing cybersecurity is becoming to be the foremost concern of nations for securing national interests- social and economic.

As opposed to a cyber-crime; wherein the accused maybe an individual(s) or an organisation, a cyberwar must, by definition, necessarily include two States. According to few academicians, events having the characteristics of a conventional war, but fought exclusively in cyberspace maybe identified as cyberwar.[11] Ordinarily, any activity or operation effected through cyberspace in order to achieve an operational advantage of military significance[12], is the set parameter to the categorisation of certain cyber operations as cyberwarfare among nations. With States investing, developing and applying their capabilities in the cyber domain for both defensive and offensive acts, deliberation on the application of International Humanitarian Law on cyber war is inevitable.

II. CYBERWARFARE- THE NEW *MODUS OPERANDI* OF FIGHTING WARS

The International Criminal Tribunal for the Former Yugoslavia in *Prosecutor* v. *Tadic* held that when States resort to armed forces or when there is protracted armed violence between governmental authorities and organized armed groups or between such groups within a State, it is called an armed conflict.[13] Therefore, not every malignant act would meet the threshold of an 'armed conflict' within the contours of international humanitarian law. Extending the given definition, the conduct of military operations through cyberspace, by States, to achieve military advantage against another State(s) is understood as cyberwarfare[14]. It may also be perceived as an extension of State policy through an action taken in cyberspace by State actors, such that they pose a significant threat to another State's security, or an action of the same kind in defence of the State's security.[15] Cyberwarfare essentially involves the manipulation or destruction of the communication, information or computer network systems in cyberspace, essential to the military operations of the enemy, thereby feeding the attacker with the vulnerabilities of the enemy, and consequently expediting the submission of the enemy.

With Russia, U.S.A., North Korea, Germany, Japan, India, Cuba and a few others rapidly developing their cyber capabilities for offence and defence

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[11] Sommer and Brown For OECD/IFP Project on Future Global Shocks – "Reducing Systemic Cybersecurity Risk", 2011, p. 6. *Available at* https://www.oecd.org/gov/risk/46889922.pdf.

[12] Italy, "2013 National Strategic Framework for Cyberspace Security, 2013", p. 13, Austria, *Austrian Cyber Security Strategy*, 2013, p. 22, East West Institute, Critical Terminology Foundations 2, 2011, p. 32.

[13] Case No. IT-94-1-A, Appeals Chamber.

[14] *Supra*.

[15] Richard Stiennon, *A Short history of Cyberwarfare*, p. 8. *Available at* http://opac.lib.idu.ac.id/unhan-ebook/assets/uploads/files/4cc80-045.cyber-warfare.pdf.

during armed conflicts, the conventional definition of war must evolve so as to include cyber-attacks/ cyberweapons as the novel modus operandi. With developed capabilities; wars will soon be fought using both conventional and cyber capabilities or entirely in the cyber front. It is thus, only logical, to dwell on the concept of cyberwarfare. A few prominent incidents which have invoked the legal fraternity and nations, generally, to deliberate and develop the jurisprudence applicable to cyber domain and frame cyber-security policies respectively; are-

- *Stuxnet Worm- Attack on Iranian Nuclear Facilities*[16]

In 2010, a technical failure in the Iranian nuclear facilities aroused suspicion about a problem in the computer system of the facilities. It was only thereafter, that malicious files- the Stuxnet worm, was discovered in the computer systems which destroyed an estimated 984 uranium centrifuges. Though the attacker, the State on whose direction the worm was launched, was not conclusively identified with concrete evidence, Stuxnet worm was discerned as a cyber weapon, designed to deter Iran's nuclear development program. Evidently, a successful attempt to hamper a country's nuclear development program is a military advantage for any State, both in time of armed conflict and otherwise.

- *DDoS attack- Estonia*[17]

In April- May 2007, there was a Distributed Denial of Service (DDoS) attack on Estonia which flooded its network and blocked data, rendering crucial government websites unusable. The first wave of DDoS attack targeted sites of the government, political parties, banks and telecommunication outlets. The second wave attacked the Estonian servers, flooding the internet with erroneous data. It forced the State to severe connections with the outside world and its largest bank was forced to shut down its online operations. This was followed by the third wave of attack where hackers posted their own messages on Estonian websites. Undoubtedly, it was a major attack on the information infrastructure of Estonia which compromised its national operations for a significant duration. The DDoS attack, followed by a pro-Russian unrest, suggested the involvement of Russia behind the attack.

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[16] Michael Holloway, "Stuxnet Worm Attack on the Iranian Nuclear Facilities", PH241 - Stanford University - Winter 2015. *Available at* http://large.stanford.edu/courses/2015/ph241/holloway1/.

[17] Michael Connell and Sarah Vogler, "Russia's Approach to Cyber Warfare", 2016. *Available at* https://apps.dtic.mil/dtic/tr/fulltext/u2/1019062.pdf.

- *DDoS attack during armed conflict- Georgia*[18]

In 2008, when Georgian and Russian armed forces confronted each other in South Ossetia, DDoS attacks were launched against Georgian information infrastructure disrupting government communications and hampering governmental websites. Services affecting the civilian population were also due to the DDoS attacks. It was found that Russian hacktivists website gave out instructions to launch DDoS attacks on Georgian information infrastructure; the day the war started. Russia, however, denied any involvement in the impugned attacks. Nevertheless, this was an event wherein the conventional war was supported by cyber operations.

Cyberwarfare is a recent development; and States are prepared to employ it in armed conflicts. To term cyber-attackswith the potential to achieve military advantage and ensure submission of a State, to the demand of an enemy State, as isolated incidents unconnected with armed conflicts; would only dispose the matter for discussion in future, by when much harm would have been done. To the credit of academicians and legal thinkers, deliberation on how the laws of war must apply to cyberwarfare has begun. The Tallinn Manual on the International Law Applicable to Cyber Warfare, written a group of international experts was one such effort. It would, however, require more than mere deliberations and binding arrangements to fix liabilities and limit the effects of cyberwarfare.

A. Cyberwarfare and operation of International Humanitarian Law

International Humanitarian Law also known as the law of war or the law of armed conflict seeks to protect persons who are not or no longer participating in hostilities, and further restricts the means and methods of warfare. A major portion of it is codified into the Geneva Conventions of 1949 and the Hague Conventions of 1899 and 1907, all of which is now recognised as customary international law.

The novelty of cyberwarfare, hence the absence of its explicit mention in the laws of war, does not imply a legal conclusion as to its exclusion from the jurisdiction of international humanitarian law.[19] To derive a conclusion to the contrary would be incompatible with the humanitarian purport of the international humanitarian law and its fundamental principles. This position is strengthened by the principle of humanity, also called the Martens Clause, according to which in situations not covered by the code of laws of war, civilians and combatants shall 'remain under the protection of international law

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[18] *Ibid*

[19] Jenny Doge, "Cyber Warfare: Challenges for the Applicability of the Traditional Laws of War Regime", p. 489. *Available at* https://www.jstor.org/stable/25782613.

as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience'.[20] The settled position of law makes international humanitarian law applicable to all kinds of warfare and all kinds of weapons employed in an armed conflict.[21] An exclusion of cyber warfare from the purview of humanitarian law would defeat the purpose and undermine the efforts of the international community which evolved international humanitarian law as we see it today.

Furthermore, common Article 2 of the Geneva Conventions 1949 states that the conventions, recognised as customary international law[22], shall apply 'in all cases of declared war or any other armed conflict', not emphasising on the method of warfare. Recognising such a position should not be construed as encouraging the militarization of cyberspace and legitimization of cyber warfare.[23] Cyber operations (attacks) during armed conflicts will be limited in the same manner as other weapons, means and methods of warfare are limited by the international humanitarian law.[24] International humanitarian law does not concern itself with the legality of application of cyberwarfare. The legality of the use of force, whether through cyber or physical means, shall be governed by the Charter of United Nations and the relevant rules of customary international law. As regards international humanitarian law, it applies on cyberwar and cyberwarfare so as to limit the ill-effects of the armed conflicts.

The Notion of attack in Cyberwarfare

While it is widely accepted that cyberwarfare is a novel mean implemented during armed conflicts, the international community has not reached to a consensus regarding the effective application of international humanitarian law on cyberwar. To develop the jurisprudence, besides acknowledging that cyberwar comes within the purview of international humanitarian law; it is pertinent to understand what constitutes an attack *vis-à-vis* cyberwar to enable the rules of IHL govern the conduct of hostilities. For as far as international humanitarian law is concerned, with regard to cyber warfare, only cyber-*attacks* carried during armed conflicts shall be governed by it.

Article 49 (1) of the Additional Protocol I to the Geneva Conventions 1949 defines 'attacks' as acts of violence against the adversary, whether in offence

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[20] Art. 1(2) of Additional Protocol I of 1977; Preamble to Hague Convention II, 1899; Preamble to Hague Convention IV, 1907.

[21] Legality of the Threat or Use of Nuclear, 1996 ICJ Rep. 1996 259.

[22] Legality of the Threat or Use of Nuclear, 1996 ICJ Rep. 1996 259, para 79.

[23] *Cyber Warfare: IHL Provides an Additional Layer of Protection*, statement delivered by Véronique Christory, Senior Arms Control Adviser for the International Committee of the Red Cross to the "Open-ended working group on developments in the field of information and telecommunications in the context of international security", 10-9-2019. *Available at* https://www.icrc.org/en/document/cyber-warfare-ihl-provides-additional-layer-protection.

[24] ICRC, International Humanitarian Law and Cyber Operations during Armed Conflicts, 2019.

or defence. Thus, as per the conventional meaning a cyber operation qualifying as 'an act of violence' would be governed by international humanitarian law. The degree of violence ensuing from an attack is not solely and necessarily adjudged by the nature of force deployed, but also by the effects such deployment has on the adversary.[25] The term 'violence' is to be understood in terms of the consequences which ensue from such violence and is not limited to violent acts. The Stuxnet worm attack on the Iranian Nuclear facilities explains the notion- a silent attack capable of plausible violent consequences. This view also finds support in Rule 92 of the Tallinn Manual 2.0 according to which a cyber operation, whether offensive or defensive, is deemed to be an attack if it is reasonably expected to cause injury or death of persons or damage or destruction to objects. To this extent the law is settled by implication- that cyber operations which cause physical damage, both in terms of loss of lives and loss of property, constitutes an attack under IHL.

Cyberwars often consist of cyber operations targeting the functionalities of the enemy State- the communication channels, the satellites and the like. While such attacks might not lead to physical destruction, they account for the destruction of the 'progressive infrastructure' of the State, essential to its civilian functioning and development in the digitalized era. What degree of loss of a functionality, effected by a cyber operation, must constitute an attack within the purview of IHL; has given rise to a debate among experts and State representatives. The Tallinn Manual 2.0 states; that where as a result of the cyber operation, the physical components of the targeted device must be replaced for the object of restoration of the functionality, such an operation is a cyber-attack governed by IHL.[26] Few other experts are of a different opinion. According to them a cyber operation is considered an attack, within the contours of IHL, the moment it disables the targeted system or infrastructure from rendering the service it was programmed to provide.[27]

Further ahead, in view of the ICRC, an operation, whether effected through kinetic or cyber means, with the aim to disable a computer or computer network constitutes an attack under IHL[28]. Infrastructure for essential services increasingly rely on digitalised systems, and the dual use of the same for both military and civilian purposes is not an unfamiliar arrangement. In light of the same, the ICRC is of the view that if the notion of attack is restricted to cyber operations which cause injury, death or physical damage, excluding cyber operations directed at civilian cyber-infrastructure (communication, electricity and the like, which do not necessarily cause physical damage) directly or incidentally, the IHL rules for protection of civilians will not be available in the latter

[25] Commentary to R. 92, para 3, Tallinn Manual 2.0.
[26] Commentary to R. 92, para 10, Tallinn Manual 2.0.
[27] ICRC, The Potential Human Cost of Cyber Operations.
[28] ICRC, Position Paper on International Humanitarian Law and Cyber Operations during Armed Conflicts.

case.[29] In face of the interconnected networks in the cyberspace, a restrictive notion of attack would be equivalent to encouraging the lust to kill and feeding it with the innocent civilian blood.

It is however pertinent to appreciate that States assert different definitions and apply different thresholds on what constitutes a cyber- attack within jus in bello, since its consequences may range from a mere nuisance to death even.[30]

III. THE PRINCIPLE OF DISTINCTION

The principle of distinction is based upon the need to protect civilians from the harms of hostilities, which among others, forms the foundation of international humanitarian law. In order to obligate States to protect civilians from the dangers of military operations, the principle of distinction, a customary rule of international law[31], requires States to distinguish between military and civilian objects. States are thereby prohibited from making civilian objects the target of their military operations. Defining military objectives as those which offer 'definite military advantage',[32] the Geneva Conventions provide that military operations may only be directed against military objectives[33].

Undoubtedly, the application of the principle of distinction, to cyber-attacks, raises certain unique challenges. The interconnectivity (of networks in cyberspace) and the dual use of a computer network system for both military and civilian objects simultaneously, is a familiar arrangement in the world community. As regards the application of the principle of distinction, this dual use and interconnectivity blur the distinction between civilian and military objectives. The indivisibility of the military and civilian objects exposes civilians to the evils of armed conflicts. The telecommunication infrastructure is the prime example of such dual-use object. When a civilian object is used for a military purpose, the conventional practise is to regard such object as a military objective.[34] Extending the practise to cyberwarfare, the widely accepted proposition is that when an object is used for both military and civilian purposes, it turns into a military objective.[35] The proposition, however, is not a straight-jacket formula. For if so taken, considering every dual-use object as a military objective would, firstly, contravene the principle of proportionality, and secondly, make civilians the necessary victims of war.

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[29] ICRC, Position Paper on International Humanitarian Law and Cyber Operations during Armed Conflicts.

[30] Fred Schreier, "On Cyberwarfare", DCAF Horizon 2015 Working Paper No. 7. P. 71.

[31] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226.

[32] Art. 52 of Additional Protocol I of 1977.

[33] Art. 48 of Additional Protocol I of 1977.

[34] Art. 21, Geneva Convention I of 1949, Art. 34 of Geneva Convention II of 1949.

[35] R. 39, Tallinn Manual, Rule 101, Tallinn Manual 2.0 and Marco Sassòli, Legitimate Targets of Attacks under International Humanitarian Law.

While finding a solution to the issue raised, due to interconnectivity and dual-use object, resort maybe had to Article 57 of the Additional Protocol I of 1977. Article 57 provides that where there are several military objectives offering a similar military advantage, the attacker must select the objective expected to cause the least danger to civilian lives and objects. That all feasible steps and precautions are to be taken to ensure that the objective is a military objective and to avoid any incidental loss, injury or damage to civilian objectives. Here again lies the danger of States relying on the civilian cyber-infrastructure for military functions to take cover under the protection granted, in order escape cyber-attacks of the enemy (though it is a prohibited act in conventional armed conflicts). Furthermore, Article 57 sets out that States must refrain from launching attacks expected to cause incidental loss, injury or damage to civilian objects, which would exceed the anticipated 'concrete and direct military advantage'.

Taking a step further, while examining the impugned principle, the International Court of Justice deduced that States must be prohibited from using the weapons incapable of distinguishing between civilian and military targets.[36] While the proposition of the International Court of Justice may seem to suffice, it would become an obsolete rule in the near future; given the ever-increasing interconnectedness and digitalization.

IV. PRINCIPLE OF PROPORTIONALITY

The principle of proportionality seeks to protect civilians from potential harm and injury during an armed conflict. While the principle of distinction prohibits States from attacking civilian objects; the principle of proportionality states that where harm or injury to civilian objects must occur, it should be proportionate to the military advantage sought to be achieved and not exceed it. The principle of proportionality, thus, requires an analysis of the harm and suffering of civilian objects versus the military advantage proportion when incidental harm to civilian objects is probable during an attack on a military object. The principle of proportionality; codified in Article 51(5)(b) and Article 57(2)(a)(iii) of the Additional Protocol I to the Geneva Conventions 1949, underpins the prohibition on indiscriminate attacks. Extending the principle to cyberwarfare, Rule 51 of the Tallinn Manual provides that States must restrain from engaging in cyber-attacks in which the harm and injury caused to civilian objects outweighs the military advantage.[37]

The interconnectivity and the dual use of a computer network system, as discussed earlier, has its repercussions when it comes to the implementation of the principles of jus in bello. A cyber-attack may turn into an indiscriminate

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[36] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226

[37] R. 51, Tallinn Manual.

attack due to the failure to distinguish between military and civilian objects, thereby violating the principle of proportionality. An 'indiscriminate attack'[38] stands in violation of the principle of proportionality, since States fail to limit the effect of the cyber-attack to military objects (as is required by the law of armed conflict), thus calling upon them to refrain from engaging in the same.[39] The States are prohibited from engaging in indiscriminate attacks by virtue of the customary international humanitarian law.[40] Therefore, States aiming to launch cyber-attacks against military objects must write virus codes which only infect the primary targets leaving the plausible secondary targets untouched. Should the State be sceptical of its ability to limit the attack to the military object, it must refrain itself from launching such a cyber-attack.[41]

Adding on, the International Group of Experts while defining an impairment of a functionality requiring replacement of physical components as an attack; couldn't conclude if reinstallation of an operating system was a sufficient impairment of functionality so as to constitute 'damage', in determining whether a cyber operation is an attack. Embracing the unresolved question, it remains unclear whether a functional impairment requiring reinstallation of the operating system would constitute collateral damage under the proportionality principle. The ambiguity with respect to the precise application of the principle of proportionality on a cyber-attack resulting in loss of functionality remains unresolved as espoused by the Tallinn Manual.[42] However, in view of the information age where the data analytics industry facilitates smooth functioning of the world economies, to exclude a cyber-attack requiring reinstallation of the operating system and not physical components; from the purview of IHL could prove to be disastrous. Appositely, resorting to a restrictive meaning of the term 'attack', in a cyberwar, makes the principle fall short of achieving the object of limiting the suffering and harm to the civilians.

V. ATTRIBUTION OF CONDUCT- IMPORTANCE AND CHALLENGES

Unlike the traditional armed conflicts, the issue of identifying the origin of an attack and attribution of actions to the commanding State poses a great challenge in a cyberwar[43]. In spite of the impossibility of attribution, unless a

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[38] R. 12 of Customary International Humanitarian Law, Art. 51(4) of Additional Protocol 1 of 1977.

[39] R. 43, Tallinn Manual.

[40] R. 71, ICRC Customary IHL Study.

[41] See Art. 57(2)(*b*) of the Additional Protocol I of 1977.

[42] CDR Peter Pascucci, "Distinction and Proportionality in Cyber War: Virtual Problems with a Real Solution", *Minnesota Journal of International Law*, Vol. 26 Issue 2 (2017), p. 448, *available at* https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1256&context=mjil, last seen on 26-4-2020.

[43] Fred Schreier, "On Cyberwarfare", DCAF Horizon 2015 Working Paper No. 7. p. 71.

State takes ownership of the action, it is an important facet of implementation of the jus in bello so that the violators can be held accountable.

There are a number of technical alternatives which enable the actors to hide or falsify their identity in cyberspace, thus proving the origin of an attack is a tough task in cyber warfare. The camouflaging techniques, which help intruding into a computer network without being detected, creation of proxy servers, fake IP addresses and routing signals through civilian or neutral networks help the intruder attack from behind a veil. Additionally, an even onerous task is establishing the connection between an individual hacker and his commanding State. The International Court of Justice has held that the actions of the citizen of a State can be attributed to it if the citizen acted on behalf of the State as per the direction of a competent authority of the State.[44] Here again, it would be difficult to identify and establish such a chain of command. Highlighting the impossibility of attribution, the former United States Deputy Secretary of Defence, William Lynn, had stated that the traditional legal regime is likely to fail.[45] Though, the problem of attribution is a technical issue[46], it has a significant bearing on the implementation of the legal regime.

There is also a risk of misattribution if the operation is so designed to lead the attacked State to other States than the attacker. One such incident was the Olympic Destroyer attack in 2018 which deleted data; thereby rendering the systems unusable. The experts opined that the attackers wanted the malware to be discovered. Additionally, the malware was created in such a way that it traced back to actors other than ones who were actually responsible for the attack. That it was the attacker's goal to cause misattribution was axiomatic.[47]

Furthermore, the failure to attribute a particular cyber operation to a State or misattribution of the operation may even raise questions as to the applicability of international humanitarian law. Since, the law of armed conflict is applicable only to armed conflicts, if the author of the cyber operation and thereby relation of the cyber operation to the armed conflict is not established, it would become difficult to ascertain the applicability of international humanitarian law.[48]

VI. CONCLUSION

The International Humanitarian Law seeks to limit the effects of armed conflicts by protecting persons who are not or are no longer participating in the

[44] United States Diplomatic and Consular Staff in Tehran, ICJ Reports 1980, pp. 3, 29.
[45] William J. Lynn, "Defending a New Domain: The Pentagon's Cyber Strategy", Foreign Affairs, Vol. 89, No. 5 (September/October 2010).
[46] Fred Schreier, "On Cyberwarfare", DCAF Horizon 2015 Working Paper No. 7. p. 72.
[47] ICRC, The Potential Human Cost of Cyber Operations.
[48] ICRC, International Humanitarian Law and Cyber Operations during Armed Conflicts, 2019.

hostilities and restricts the means and methods of warfare. That Cyberwarfare is covered under IHL is undisputable, but when the cardinal principles of IHL are applied to cyberwarfare, the inadequacies of the codified law surface. This calls for a multilateral initiative; that the States may ponder upon the shortcomings in the conventions and substitute it with adequate definitions and rules. This infant stage of cyberwarfare itself has adequately taught the world much about the potent threats a State is constantly exposed to. Evidently, the growth and fluidity of technology would soon render the international codified law and agreements obsolete. Thus, turning a blind eye to wait for a future disastrous event to evoke the passions is foolhardy and undermines the object of jus in bello.

FOREIGNERS TRIBUNAL: AN INSTITUTIONAL VIOLATION OF NATURAL JUSTICE

—Mansi Singh Tomar[*] & Kumar Mukul Choudhary[**]

Abstract—The Republic of India is not merely a state. It is a beacon of liberalism for the whole of South Asia. However, over the years regionalism and culturalism have shifted our nation away from the idea of liberalism. The chronicles of N.R.C and foreigners' tribunals in Assam supplement this view gorgeously. The F.Ts has been criticised over the years for their illegal and unethical procedures for determining the citizenship of individuals in Assam. It has been argued by many that the F.Ts are in contradiction to the principle of individual dignity and liberty established under the Indian Constitution.

In this paper, the authors will argue against the validity of F.Ts in Assam. They will argue this on the principles of administrative law. They will attempt to show why a full-fledged judicial system is necessary for determining the citizenship of the individual. Furthermore, the authors will attempt to respond to the issue raised against this view. In this paper the authors will attempt to prove that the F.Ts act in an impartial manner. The authors will compare the F.Ts with bodies similarly situated in the U.K. Thereafter the authors will give their final remark.

[*] Junior Associate E-discovery legal services at Consilio LLC.
[**] Assistant Professor, IIL S Siliguri.

I. INTRODUCTION

The chronicles of Assam are quite exotic. It has a strange history of people's movements through the international borders of India.[1] These unprecedented movements and settlements have created a threat to Assamese culture. Hence, to protect the culture from outsiders' infiltration various mechanisms have been applied in the state of Assam in the last 70 years. These mechanisms include a national register of citizens and a tribunal for the determination of foreigners.[2] But the application of NRC 2019 and its intermingling with the foreigners tribunal (hereafter F.T.) has brought a new dimension to the cultural politics of Assam. It brought complex human rights and citizenship questions before all of us. Therefore, this paper is restricted to understanding the new NRC- Foreigners tribunal regime in Assam. It will question the need and validity of F.Ts from a rights and fair trial point of view. It will bring out the unsuitable adjudication mechanism applied by the F.Ts in Assam. It will argue for change of such unfair mechanism.

The NRC of 2019 has declared 1.9 million people of Assam as illegal immigrants.[3] These people were not able to present the adequate documents of their citizenship before the NRC authority. But this doesn't mean that these people will be detained or deported. They will get another opportunity to prove their citizenship before the F.T. Either the aggrieved person himself may file an appeal against the decision of the N.R.C authority or the government may recommend the case to the F.Ts to determine the citizenship of the aggrieved person.[4] The procedure may seem simple. We may feel that having an adjudication by the tribunal will guarantee procedural fairness in the judgment. But this belief is far away from the truth. The F.Ts are established under the F.Ts order 1964.[5] This order itself originates under the foreigners Act 1946.[6] But none of these legislations provides definite procedures of adjudication by the tribunal. There remains doubt even on the power of the government to form such tribunals under the foreigners Act 1946. This paper will not deal with this issue, instead, we will show that, since the legislation does not provide any procedure for the tribunal's actions, it violates the equality clause under the Indian Constitution.[7]We will argue that the right to citizenship should not be decided by a tribunal. A court is essential for the determination of the most vital of a person's rights.

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1 Sangeeta Barooah Pisharoty, *Assam: The Accord, The Discord* (Penguin Random House India Private Limited, 2019).

2 Talha Abdul Rahman, "Identifying the 'Outsider': An Assessment of Foreigner Tribunals in the Indian State of Assam", 2 Statelessness and Citizenship Review 112, (2020).

3 *Ibid*.

4 Dharmananda Deb, "Foreigners Tribunals in Assam: Practice & Procedure" *Live Law*, (30-8-2022, 9.29 p.m.) https://www.livelaw.in/columns/foreigners-tribunals-in-assam-145611.

5 The Foreigners (Tribunals) Order, 1964, Ministry of Home Affairs, GSR 1401.

6 Foreigners Act, 1946, Act 31 of 1946 Act of Imperial Council (India).

7 India Constitution, Art. 14.

II. HISTORY OF TRIBUNALS

Tribunal is an administrative body. It has been instituted worldwide to adjudicate upon quasi-judicial matters. The institution of the tribunal originated at the beginning of the twentieth century in Britain.[8] The basic intention behind the formation of the tribunal was its effectiveness in deciding complex and technical questions. Tribunals were considered effective for three reasons. First, tribunals do their work rapidly. Secondly, tribunals are cheap and lastly, they are more cost-effective than the law courts.[9] But in a semi-legal institution merely simplicity is not sufficient. The tribunal has to act in a just and fair manner. Although tribunals are being considered quasi-judicial bodies they have to act in a judicial manner. In Britain, tribunals were developed to deal with technical aspects of adjudication.[10] Therefore, it has always been asserted that the court would remain essential in determining the basic rights of the individual. Tribunals shall never transplant court in the British legal system.

In India as well tribunals were established after several debates and dialogue. Since the 14th law commission report,[11] tribunals were viewed as the solution of pendency in the judiciary. Special committees were established to suggest the measures to establish tribunals.[12] After years of deliberation finally, tribunals were recognised as an adjudicatory institution under the Indian Constitution.[13] This led to the creation of multiple tribunals on numerous subjects. All of these tribunals were created under legislation passed by the parliament.[14] These legislations were comprehensive in nature. The legislation has expressed the power, procedure and method of appointment of members in the tribunal. These legislations have suggested the method of appeal from the judgement of the tribunal.[15] The legislations were made keeping in mind the legal responsibilities taken up by the tribunal. In the legislations the Parliament has clearly demarcated between the judicial and technical members. The judicial members shall only be appointed when they have adequate experience as a judge.

Furthermore, the appointment of technical members was made so that the tribunal can answer complex legal-technical questions. This suggests to us the parliamentary intention that, the jurisdiction of the tribunal shall not be extended to complex legal questions. The multifaceted legal questions shall

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8 Law Commission, Assessment of Statutory Frameworks of Tribunals in India (Law Com 272, 2017).
9 *Ibid*.
10 *Ibid*.
11 *Ibid*.
12 *Ibid*.
13 *Ibid*.
14 *Ibid*.
15 *Ibid*.

only be determined by the court. The tribunals were established only for economic and technical legal issues.

The experience of tribunals both in the U.K as well as India has brought before us the basic characteristics of the tribunal. What legislature expected from its formation and adjudicating authority of the tribunal. But F.Ts are very much dissimilar from the tribunals we see today. The F.Ts was established in 1964. At that time there was no administrative mechanism and experience to check the working of the tribunal. Hence, F. Ts advanced inversely different from the tribunals established in the 1980s. Due to this the F. Ts violate numerous principles of natural justice and causes severe injustice to the litigants. In next part, we will show how F.Ts is an unjust institution for a litigant. ultimately, we will argue for setting aside the F.Ts from Indian legal landscape.

III. FOREIGNERS TRIBUNAL AND NATURAL JUSTICE

There are two essential principles of natural justice. First, a litigant shall be given the opportunity of being heard. Secondly, the adjudicator shall not be biased against the litigants.[16] F.Ts violates both these principles. The tribunal is established under the order of 1964. The order does not provide the mechanism to be used while hearing a case. It only provides that the tribunal shall give equal opportunity to the parties to be heard before it.[17] This means that the tribunal can form its own procedure for hearing the cases. It may seem similar to procedures used by other tribunals. But, unlike other tribunals, the F.Ts does not have any guiding instrument either in the Act of 1946 or Order of 1964 to establish a common procedure for all the F.Ts. At present, there are 100 F.Ts,[18] which is expected to exceed further. Since there is no uniformity in the procedure, therefore, all these tribunals use their own practice in the adjudication of issues before them.[19] It increases uncertainty in the opinions of the F.Ts. This also results in violation of Article 14 rights of the litigants. In contrast, there is consistency in the procedure and working mechanism of every other tribunal established in this country. In India, there are multiple C.A.T tribunals.[20] All these tribunals follow a uniform mechanism of adjudication. This brings certainty to its decisions. Hence, F.Ts as an adjudicatory body lack significantly on the issue of equality and certainty in the application of the law. No one knows whether a particular piece of evidence considered relevant before one tribunal is relevant or not before another tribunal. Therefore, a uniform procedure should be established for the day-to-day activities of the tribunal. Otherwise, the tribunals will continue to act as an unjust institution.

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16 *Supra* note 2.
17 *Ibid*.
18 *Supra* note 4.
19 *Ibid*.
20 *Supra* note 8.

The justness and impartiality of any legal institution are dependent upon the individuals running the institution. Similar is true for F.Ts as well. In the last few years, the legitimacy of the F.Ts has been questioned on the grounds of the ambiguous process of appointment of judges and adjudicators in the tribunal. The F.T order 1964 does not make any regulation as to the eligibility of judges for appointment in the F.T. The order leaves it upon the discretion of the central government to determine the eligibility of judges to be appointed for F.Ts.[21] It fails to recognise the standing and role of judges in determining the most essential right of the individual. In one of its judgments, the Supreme Court[22] of India discussed expansively the need for judicial rigour in the members of the tribunal. The court asserted that the judicial member provides legitimacy to the tribunal. The judicial members have the responsibility to make adjudications fair. Therefore, any person cannot be appointed as a judicial member in the tribunal. The court observed that lawyers understand the law but they do not have judicial rigour and experience as judges to understand the judging mechanism.[23] Therefore, a judge who has a significant experience in adjudications can only be appointed as a legal member of the tribunal.[24] But in the case of F.Ts, this principle has not been adopted. In a recent notification issued by the Guwahati high court for the appointment of members in the F.Ts seven years of practice was considered sufficient.[25] No effort was made to appoint experienced judges as members of tribunals. No deliberation was paid to the judgment of the Supreme Court on this subject. Due to this, there remains the possibility of erroneous judgment by the F.Ts. as the members might not answer the complex legal questions inappropriate manner. Hence, an amendment is necessary for the eligibility criteria of members to be appointed to the F.Ts. This can increase the possibility of a decrease in the erroneous judgment of F.Ts.

Another reason for criticism of F.Ts. is the independence of judges. Independence of the judiciary is a basic requirement for a liberal constitution. Indian constitution being liberal asserts that the independent judiciary is the basic structure of the constitution.[26] This principle applies to tribunals of India as well. In the first judgment on the tribunal itself, the Supreme Court stated the need for tribunals to remain independent.[27] In recent years independence of tribunals has become a significant issue.[28] In Roger Mathew's judgment, the Supreme Court emphasized upon the need for an independent mechanism of appointment of members to the tribunals.[29] The court asserted the need to fix

[21] *Supra* note 5, para 2.
[22] *R.K. Jain* v. *Union of India*, (1993) 4 SCC 119.
[23] *Ibid*.
[24] *Ibid*.
[25] *Supra* note 2.
[26] *L. Chandra Kumar* v. *Union of India*, (1997) 3 SCC 261.
[27] *Ibid*.
[28] *Ibid*.
[29] *Roger Mathew* v. *South Indian Bank Ltd.*, (2020) 6 SCC 1.

the tenure of rational time for the members of the tribunal. In this judgement, the Supreme Court invalidated various sections of the Finance Act 2017. The court advised the government to amend the Act so that tribunal remains an independent institution. But the amended Act was again challenged before the Supreme Court. The central point of contention in the amended Act was the authority of the government to appoint the civil servants and members of the ministry to the tribunal. Concerns have also been raised on the issue of the experience of judicial members to be appointed to the tribunal. In this petition again the Supreme Court ordered the government to amend the rule. For the last two years, the tussle continues like this. The judiciary is adamant to ensure that the tribunal works independently and impartially for the delivery of justice.

The F.Ts. have an altogether different appointment process from the process the Supreme Court is adamant about in the tribunal's judgment. From the tribunal's judgment, it can be gathered that there are three tenets of an impartial tribunal. The first is the method of appointment. Secondly, the longevity of tenure and lastly, the possibility of reappointment of members to the tribunal. Now when we apply these three tenets of impartiality to the F.Ts. we reach a very disturbing conclusion.

On the point of the method of appointment, there is no defined process for the appointment of members in the F.Ts. The order suggests that the government may determine the method of appointment. An essential principle of administrative law is, that no one can be judge in his own case. But in the F.Ts. situation the government who is a central litigant in the matters before it will decide the eligibility and appointment method of the judges in the tribunal. It even appoints the civil servants to the tribunal in the recent tribunal's judgments of the Supreme Court and the Roger Mathew judgment,[30] the Supreme Court was quite obdurate about the selection committee for the appointment of judicial members in the tribunals. The court held that, the judiciary must have an equal stake with other institutions of state to determine the members to be appointed to the tribunal.[31] Since F.Ts are not much different from the other tribunals, therefore, there must be a mechanism of an independent selection committee to appoint the members of the tribunal. Otherwise, there is the possibility that only those persons will be appointed to the F.Ts who have favoured governments stand in their judgement.

The tenure of members of the F.Ts is of one year. After every year the tenure of a tribunal member has to be renewed. This time spam is in clear contrast to the judgment of the Supreme court. The court has held that reasonable

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[30] *Ibid*.
[31] *Ibid*.

security of tenure must be provided to the judicial member of the tribunal.[32] This will help the tribunal in remaining impartial. Similarly, on the issue of reappointment of the member, the court said that there cannot be more than one reappointment. Otherwise, the continued reappointment will make the tribunal impartial.[33] On both these issues, the F.Ts fail to comply with the judgment of the Supreme Court. This non-compliance raises concerns over the impartiality of the F.Ts. Therefore, amendment must be made in appointment procedure of members of the F.Ts.

IV. CITIZENSHIP DETERMINATION OF F.TS: A CASE OF EXCESSIVE DELEGATION

In the last part of the paper, we have discussed the scenarios were F.Ts violate the principle of natural justice. In this part, we will argue that the F.Ts are incompetent to decide questions of citizenship. We will argue this by asserting that the formation of F.Ts is a case of excessive delegation of legislative power.

F.Ts have been established under the Foreigners (Tribunals) Order, 1964.[34] The tribunal was established to decide the issues related to foreigners and whether a person is a foreigner or not.[35] The Foreigners (Tribunals) Order, 1964 is a delegated legislation. The order has been issued by the central government. The government passed this order on the basis of the parent Act i.e., the Foreigners Act of 1946.[36] The first sentence of the Foreigners (Tribunals) Order, 1964 provides that the order has been issued under section 3 of the Foreigners Act 1946. Section 3[37] of the Foreigners Act 1946 is a comprehensive provision. The section specifies the areas and the goals for whose fulfilment the government can issue orders. Most of the subsections of section 3 talks about the restraints the government may impose upon foreigners.[38] These restrictions may include the movement, travel and detention of foreigners. However, the section nowhere mentions the authority of the government to establish a tribunal to determine the nationality of the individual. Therefore, it was questionable whether the government could even establish a tribunal of this sort.

The government argues that its authority to establish the foreigners tribunal originates from section 3(1)(f) of the Foreigners Act 1946. Section 3(2)[39] is an ancillary provision. It provides that the government could do any ancillary acts to fulfil the complete application of section 3 of the Foreigners Act 1946. We do not agree with this view of the government. It is a cardinal principle of constitutional law that in the name of ancillary legislation the parliament as well as the executive cannot overreach its authority.[40] They can only pass those

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34 The Foreigners (Tribunals) Order, 1964, Ministry of Home Affairs, GSR 1401.
36 Foreigners Act, 1946, Act 31 of 1946 Act of Imperial Council (India).
40 *R. Abdul Quader & Co.* v. *STO*, AIR 1964 SC 922.

laws or issue those orders which has some clear interrelation with the powers provided to the government or the parliament.[41]

However, in the case of F.Ts the situation is pretty complex. The essential question that must be answered in regard to F.Ts is, whether the determination of citizenship is similar to regulating the rights of foreigners. Can a tribunal determine issues as complex as citizenship?

Citizenship is a complex phenomenon. It provides us with our dignity in society. We claim our rights from the state on the basis of citizenship. As Hannah Arendt puts it-

> *"The calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion – formulas which were designed to solve problems within given communities – but that they no longer belong to any community whatsoever. Their plight is not that they are not equal before the law, but that not law exists for them; not that they are oppressed but that nobody wants even to oppress them"*[42]

The essential role of citizenship is that it gives recognition to the individual. It makes his life worth living.[43] Therefore, determination of citizenship is a more significant legal issue than regulation of foreigners. Hence, a tribunal which is established for regulating the movement of foreigners, in no case can determine the issue of citizenship. As we will later on argue in this paper, the F.Ts are not equipped to answer questions as complex as citizenship. Hence, there is no ancillary relationship between the regulations of foreigners and determination of citizenship of an individual. Therefore, the government could not establish a tribunal under section 3 of the Foreigners Act 1946.

The Supreme Court in one of its initial judgments has dealt with the issue of delegated legislation.[44] In *Delhi Laws Act, In re* judgment,[45] the supreme court has to decide the validity of delegated legislation. The judges in that judgment gave their separate opinions. There may be some difference in their judgment but they all agreed on a few aspects of delegated legislation. The court held that delegated legislation is valid under the Indian Constitution.[46] However, in the name of delegated legislation, the legislature cannot create a

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41 *Ibid*.
42 Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich, 1973) 240.
43 *Ibid*.
44 *Delhi Laws Act, 1912, In re*, 1951 SCC 568: AIR 1951 SC 332.
45 *Ibid*.
46 *Ibid*.

parallel body. The Acts and policy must be determined by the legislature.[47] The executive body could make legislation relying upon the Act and the policy. The power of the delegated body must be below the legislature. The body cannot make any law the authority of which does not originate either from the Act or from the policy.

Relying on the judgment of the Supreme Court we can say that the formation of F.T is in violation of the principle of delegated legislation. The government do not have the authority to establish a tribunal to determine the citizenship of an individual under the Foreigners Act 1946. Hence, the F.Ts must either be scrapped or their jurisdiction must be brought in consonance with the Foreigners Act of 1946.

The F.Ts not only violate the principles of constitutional and administrative law, but they also contravene the provisions of international law as well. The F.Ts breach the provisions of ICCPR.[48] India being a signatory of the ICCPR is bound to follow the principles and rules of the treaty.[49] Few may argue that India follows a dualist approach. This means that unless legislation with regard to the treaty is not passed, the government is not bound by such a treaty. However, the Supreme Court has taken a contradictory view on this subject. The court has held that unless the provisions of the treaty violate any domestic law no legislation is necessary for the application of the principles of the treaty.[50]

Application of the principle of ICCPR on the workings of F.Ts won't violate any domestic law as the Indian Constitution attempts to provide justice to the citizens of this land.[51] Hence, ICCPR is in consonance with the principles of the Indian Constitution.

The F.Ts violate Article 14 of ICCPR.[52] The provisions talk about a free and fair trial. Article 14 asserts that the trial must take place in open court. The judgment must be accessible to the public. The accused must be presumed innocent till proven guilty. The trial must take place before an impartial tribunal. However, the F.Ts fail to achieve any of these goals. The hearings of F.Ts are done in absolute secrecy.[53] The judgments of F. Ts. are impossible to find.

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47 *Ibid*.

48 UN General Assembly, International Covenant on Civil and Political Rights, 16-12-1966, United Nations, Treaty Series, Vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html accessed 30-8-2022.

49 United Nations, Vienna Convention on the Law of Treaties, 23-5-1969, United Nations, Treaty Series, Vol. 1155, p. 331, available at: https://www.refworld.org/docid/3ae6b3a10.html accessed 30-8-2022.

50 *Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241.

51 India Constitution Art. 21.

52 *Supra* note 48.

53 *Supra* note 4.

Section 9 of the Act imposes a reverse burden of proof upon the accused.[54] Most significantly as we have argued in this paper, the tribunal cannot be considered as an impartial body.

Hence, the foreigners tribunal not only violates basic principles of constitutional and administrative law. It violates the principles of international law as well. Therefore, it is necessary that we attempt to find a substitute for F.Ts in Assam.

V. INABILITY OF FOREIGNERS TRIBUNAL IN DEALING WITH CITIZENSHIP

Till now we have asserted how tribunals violate the principle of natural justice. But there is another aspect of adjudication of citizenship by F.Ts that we must study. Whether the F.Ts are proficient enough to determine the citizenship of an individual. This issue is essential in light of the history of tribunalisation globally. In the U.K as well as in India tribunals have been appreciated and encouraged for their efficient and affordable adjudications. In India, tribunals were formed to deal with technical cases having little relation to legal questions. Since the technical cases were taking up too much space on the High court roster. All the law commission reports suggested that these cases can be dealt with by a quasi-judicial body as these cases have little to no legal complexity. In the light of these recommendations, tribunals were formed.

The F.Ts was established to determine the citizenship of individuals in Assam. Citizenship is the most essential of rights an individual can have in the modern nation state. It provides rights to an individual to assert himself against the might of the state.[55] On the global stage, citizenship acts as a shield against the actions of other states. Therefore, citizenship must be regarded equal to and sometimes even more important than the right provided under part three of the Indian constitution.

When Part three of the constitution was debated in the constituent assembly, it was regarded as the most important part of the constitution because of the justifiable nature of the articles.[56] The members were of the view that an independent judiciary shall with the help of these rights protect individuals from the power of the state. The members believed in the judiciary because of the impartial and elaborated procedure of adjudications applied by the Indian courts. Today we appreciate the Indian judiciary because of its approach to fundamental rights adjudications. It's elaborative approach and procedures to

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[54] *Supra* note 6.

[55] *Supra* note 2.

[56] Tripurdaman Singh, *Sixteen Stormy Days*: *The Story of the First Amendment of the Constitution of India*, (Penguin Random House India 2020).

determine the rights of the individual. At least some of us impose our faith in the Judiciary because of the intricate methods of adjudications. Therefore, a question as important as citizenship must be decided by a judicial body instead of a quasi-judicial body. A quasi-judicial body which was formed to look upon technical questions only, cannot decide on questions as important as citizenship. The tribunal do not have deep legal knowledge on complex legal questions as well as it does not sufficient methods to determine the facts. Therefore, transferring questions of citizenship from tribunal to courts will ensure a proper hearing for the litigants.

VI. TRIBUNALS ON ISSUE OF CITIZENSHIP IN UNITED KINGDOM

An argument that may contradict the views of this paper is, that tribunals are an essential part of adjudication in the United Kingdom. There too the matters of citizenship are determined by a quasi-judicial body. In the United Kingdom, the government may deprive a citizen of British nationality.[57] Under the British Nationality Act 1981, the government may do so for fraud and threats to national security.[58] Once the government revokes the citizenship the deprived person may appeal before the First-tier Tribunal (Immigration and Asylum Chamber).[59] In India as well as the U.K the issue of citizenship is determined by the tribunal. Therefore, at first sight, it may seem that there is nothing wrong with the determination of citizenship by the tribunal. However, there is something more to this than catches the eye.

In India and U.K tribunals are essential for judicial determination. However, the tribunals are pretty different in both countries. In the U.K there are clearly resolute principles for the working of the tribunal. It includes the method of hearing the cases.[60] The manner in which the evidence should be appreciated and the extent to which evidence is admissible.[61] These regulations restrict the discretion the tribunals have on matters as essential as citizenship. Furthermore, the appeal provisions are very clear in the British Tribunal system[62] in contrast to the Indian system. Another aspect which differentiates the British mechanism from the Indian mechanism is the independence of tribu-

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57 British Nationality Act, 1981, Ch. 61, 30-10-1981, available at: https://www.refworld.org/docid/3ae6b5b08.html accessed 31-7-2022.

58 *Id*., S. 40.

59 *Ibid*.

60 Chapter 2, First-tier Tribunal (Immigration and Asylum Chamber) Rules 2014, Gov.UK, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1076056/consolidated-ftt-iac-rules.pdf accessed 31-7-2022.

61 *Ibid*, S. 14.

62 Upper Tribunal Rules: Consolidated Version, Gov.UK, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/926554/consolidated-ut-rules-20200721.pdf, accessed 31-7-2022.

nals. In the United Kingdom, the members of the tribunal are appointed in a similar manner as any other judge of the British judicial system.[63] The judges in the tribunal have a fixed tenure and their reappointment shall be done in the same manner as their appointment. This makes the tribunal an independent entity.

In contrast, the Indian tribunal system is no way near to the British system. In India, the tribunals and especially the F.Ts cannot be considered an independent organization. The appointment of judges is in the hands of the executive.[64] The tenure of judges is only for the period of one year.[65] The data suggest that the tenure of only those judges renewed who declared more individuals as foreigners.[66] This tells us that even though both U.K, as well as India, use the tribunal system to determine the nationality of the individual. The tribunal system in India does not guarantee the protection of rights of individuals as does the British system.

The Indian system fails to replicate the British system on the issue of appeal too. In the U.K the tribunal system provides a comprehensive appeal mechanism. The upper tribunal hears the appeal from the first tear tribunal. Thereafter comes the High Court. however, in the case of F.Ts the possibility of appeal is minimal. The court themselves has pointed out the limited nature of an appeal from the order of the tribunal.[67]

Hence, our argument that the tribunal must not decide the issue of citizenship in India is in consonance with the view of the difference between the Indian and the British tribunal system. Therefore, merely because questions of citizenship are decided by the tribunal in the U.K won't justify the answer of similar questions by the tribunals in India.

VII. CONCLUSION

F.Ts are established in Assam to determine the citizenship of individuals in Assam. The tribunal originates from the foreigners Act 1946. In that Act the government had the power to determine the movement of foreigners.[68] But in the eyes of order regulating foreigners' entry into India and determining the citizenship of an individual is same. The order presumes both of them to

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[63] Tribunals, Courts and Enforcement Act, 2007, Legislation.gov.UK, https://www.legislation.gov.uk/ukpga/2007/15/contents accessed 31-7-2022.

[64] The Foreigners (Tribunals) Order, 1964, Ministry of Home Affairs, GSR 1401.

[65] *Ibid*.

[66] Designed to Exclude, Amnesty India, https://learn.nls.ac.in/pluginfile.php/12947/course/section/8411/Amnesty%20India%2C%20Designed%20to%20Exclude%20%282019%29.pdf accessed 31-7-2022.

[67] *State of Assam* v. *Moslem Mondal*, 2013 SCC OnLine Gau 1: (2013) 1 GLT (FB) 809.

[68] *Supra* note 6, S. 3.

be outsiders. This approach of law is wrong. Determination of citizenship is a question of entry into the group. On this question all fundamental right of part III will apply. This means it's a complex legal question which should be decided by the court, a tribunal which was formed to regulate the movement of foreigners in India cannot decide the question of citizenship of an individual.

Hence, the F. Ts. violate the basic principles of natural justice. It violates the equality of the individual and treat different individuals differently. The tribunals decide the question of life and death without having experience in law are sufficient reasons to argue that we must move away from the system of F. Ts. The tribunals do not assure and fulfil the guarantees provided to the individual by the Indian constitution. Hence, questions of citizenship must be decided by a judicial body instead of a quasi-judicial body.

ADMISSIBILITY OF SOCIAL MEDIA EVIDENCE: A COMPARATIVE CRITICAL APPRAISAL

—Abhinav Gupta[*]

Social media has arguably penetrated our daily lives and has become a part of our everyday routine. With the wide methods in which humans can now formulate such virtual communities, daily interaction and activities over such platforms is rapidly increasing. Naturally, relevant information about the wrongs, whether criminal or civil, is bound to surface over these social media sites. It is in this context that the role of evidence law appears to properly utilise such information in trial or suits. This paper focuses on the admissibility of evidence through a comparative jurisdictional approach. The paper herein also critiques the approach of the Indian court or the lack thereof in handling the social media evidence. It argues, as a whole, that the law governing the action of the human being should keep up its pace with the sociological and technological development of the human civilisation.

I. INTRODUCTION

Due to the heightened degree of pervasiveness of social media in our daily lives, the evidence drawn for the social media platforms is bound to increase. However, this increase is juxtaposed with the legitimate fear of tampering due to hacking activities and misinterpretation of such social media evidence due to lack of contextualisation. In this background, it becomes crucial for the courts to properly admit the said evidence.

The paper seeks to approach the issues with the primary focus on the Indian and the American jurisdiction. It is opined that the discussion in the Indian jurisprudence regarding evidence collected from social media is at a very nascent stage, with the discussion primarily revolving around the authentication of the content as per §65B of the Indian Evidence Act, 1872 ('IEA'). Further,

[*] The West Bengal National University of Juridical Sciences (NUJS), Kolkata, India.

evidentiary issues regarding social media are primarily raised at the pre-trial stage, thereby limiting the opportunities for the Indian courts to address the relevancy and admissibility of the content. Therefore, in this regard, focus on the American jurisprudence, which has rapidly developed over the past two decades, helps to assess where the debate before the Indian courts is likely to evolve as the law gradually develops domestically. The paper attempts to contribute to the literature by analysing the relevancy of social media facts under the IEA, as well as the test for authenticating social media facts. Thereafter it provides a critique of both the American and the Indian approach, and proposes suitable recommendations.

Part II of the paper proceeds to analyse the growing relevancy of the social media content in the everyday life as well as evidence law. Herein, the paper attempts to show, through the reliance on the IEA, how social media content can be relevant under the act. Taking the discussion forward, Part III addresses the issue of admissibility which is faced by the Indian and the American courts in assessing the authenticity of social media content. Herein, the part first provides a technical view of the scope of manipulation of the data over social media. Thereafter, it proceeds to examine the test for authenticity under the Indian and the American jurisprudence, which is followed by a critique of both the approaches. The part in its conclusion recommends a middle approach wherein the courts can rely on the metadata generated on the social media platforms in order to authenticate the content over social media. Part IV of the paper offers concluding remarks.

II. RELEVANCY OF SOCIAL MEDIA COMMUNICATIONS

This part aims to understand the intersection of social media with the everyday life as well as the law of evidence. It also explores the relevancy of the social media facts under the IEA.

A. The Advent Of Social Media

The formation of the internet in the 1970s was driven by a collaborative effort of people who desired a cyberspace in order to foment technological development.[1] Such a collaboration in fact reflects a fundamental human need for togetherness.[2] This need is realised through the communication with other beings – whether in-person or virtually. Social media is arguably such a platform where humans can form "communities of interest".[3] This technological

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1 Judy Malloy, *Social Media Archeology and Poetics* (MIT Press, 2016) 3.
2 *Ibid.*
3 Malloy *supra* note 1.

version of a community enables the creation of a space that is both uniquely personal as well as collective at the same time. It is personal in the view that users have control over the content they share as well as who can view the same, while also being collective since the content can be shared with a large group of people or the public in general. Hence, it is this technological version created by social media that synthesizes people into a community, which is driven by the desire of togetherness.[4]

The first social media service developed during the end of the 20th century after the advent of web 2.0 with the creation of a short-lived site named Six Degrees in 1997.[5] The said site allowed its end-users to create a digital profile and connect with other users.[6] Thereafter, towards 1999 blogging activities gained popularity which acted as a shot in the arm for social media.[7] In the early 2000s LinkedIn, a career driven networking site,[8] and My Space, a profile-based social networking site,[9] were formed. YouTube was subsequently formed in 2005 which created a digital space for users to communicate and share through the medium of videos.[10] 2006 witnessed a significant boost in social media communications when Facebook and Twitter became available throughout the globe for users.[11] WhatsApp was later formed in 2009 with its personalised as well as group communication features. Instagram was launched in 2010 and initially acted as a photo-sharing platform, which later got expanded to video-sharing and instant messaging services.[12] Shortly thereafter, Snapchat came into the limelight in 2011 with its one-on-one image and message sharing services.[13]

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4 Lisa A. Silver, "The Unclear Picture of Social Media Evidence" (2020) 43(3) Manitoba Law Journal 111, 114.

5 Maryville University, "The Evolution of Social Media: How did it Begin and where could it go Next?" (*MU*, 13-4-2021) https://online.maryville.edu/blog/evolution-social-media/ accessed 27-10-2021.

6 Chenda Ngak,, "Then and Now: A History of Social Networking Sites" (*CBS News*, 6-6-2011) https://www.cbsnews.com/pictures/then-and-now-a-history-of-social-networking-sites/ accessed 27-10-2021.

7 WDD Staff, "A Brief History of Blogging" (*Web Designer*, 14-3-2011) https://www.webdesignerdepot.com/2011/03/a-brief-history-of-blogging/ accessed 27-10-2021.

8 Erik Gregersen, "LinkedIn" (*Britannica*, 14-9-2021) https://www.britannica.com/topic/LinkedIn accessed 27-10-2021.

9 For more information on MySpace and its history, *see* Editors of Britannica, "MySpace" (*Britannica*, 4-6-2021) https://www.britannica.com/topic/Myspace accessed 27-10-2021.

10 William L. Hosch, "YouTube" (*Britannica*, 15-9-2021) https://www.britannica.com/topic/YouTube accessed 27-10-2021.

11 Jess Bolluyt, "How Facebook and Twitter have Evolved over the Years" (*Cheat Sheet*, 15-3-2015) https://www.cheatsheet.com/technology/how-facebook-and-twitter-have-evolved-over-the-years.html/ accessed 27-10-2021.

12 Dan Blystone, "The Story of Instagram: The Rise of the #1 Photo-Sharing Application" (*Investopedia*, 6 June 2020) https://www.investopedia.com/articles/investing/102615/story-instagram-rise-1-photo0sharing-app.asp#:~:text=Instagram%20is%20a%20photo%20and,app%20was%20launched%20on%20Oct accessed 27-10-2021.

13 Brian O'Connell, "History of Snapchat: Timeline and Facts" (*The Street*, 28-2-2020) https://www.thestreet.com/technology/history-of-snapchat#:~:text=Snapchat%20was%20founded%20

To date there are numerous other virtual communities and spaces for social media communications, with many sites now linked for cross-posting services. However, suffice is to say that the aforesaid virtual platforms remain the primary mode of virtual communication for average users across the world.

With such a wide variety of services and options, social media has achieved to penetrate daily lives with billions of people communicating through at least one of these virtual communities. In a recent survey in October 2021, over 4.55 billion people were estimated to engage as end-users on a social media platform, thereby covering over 60 per cent of the global population.[14] Further, over 90 per cent of the internet users are present on a social media platform.[15] With these numbers, the annual growth rate of social media users is still high at 10 per cent, with 13 such users being added every second.[16] India alone accounts for over 500 million social media users with an average Indian spending 2.25 hours on social media every day.[17] On the other hand, in the USA, over 233 million people engage on social media platforms, roughly accounting for over 67 per cent of the population.[18]

The social media companies have also witnessed tremendous growth in users across the world. Amongst these, Facebook has emerged as the largest social media platform with a staggering 2.85 billion monthly active users worldwide in 2021.[19] Over 22.3 per cent or 290 million Indians use this platform – accounting for the largest contribution to users in the world.[20] The magnitude of penetration is even higher in the USA and the UK with over 72 per cent[21] and 66 per cent of their respective population being a Facebook user.[22]

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in%202011,all%20students%20at%20Stanford%20University.&text=In%20July%2C%20 2011%2C%20the%20co,as%20Snapchat%20in%20September%2C%202011.

14 Data Reportal, "Digital around the World" (*Digital Reportal*) https://datareportal.com/global-digital-overview accessed 27-10-2021.

15 "Global Social Media Stats" (*Digital Reportal*) https://datareportal.com/social-media-users accessed 27-10-2021.

16 *Ibid*.

17 "India Social Media Statistics 2021" The Global Statistics, https://www.theglobalstatistics.com/india-social-media-statistics/ accessed 27-10-2021.

18 Jay Baer, "Social Media Usage Statistics for 2021 Reveal Surprising Shifts" (Convince & Convert) https://www.convinceandconvert.com/social-media-research/social-media-usage-statistics/ accessed 27-10-2021.

19 Brian Dean, "Facebook Demographic Statistics: How Many People Use Facebook in 2021?" (*Blacklinko*, 10-9-2021) https://backlinko.com/facebook-users#:~:text=27-,Most%20Used%20Social%20Media%20Platforms%20Worldwide,having%20over%20a%20billion%20users. accessed 27-10-2021.

20 Isabel Baker, "30 Essential Facebook Statistics You Need to know in 2021" (The Social Shepherd, 11 August 2021) https://thesocialshepherd.com/blog/facebook-statistics-2021 accessed 27-10-2021.

21 World Population Review, "Facebook Users by Country 2021" (*WPR*) https://worldpopulationreview.com/country-rankings/facebook-users-by-country accessed 27-10-2021.

22 Baker *supra* note 20.

Instagram is another prevalent social media platform with over 1.074 billion users worldwide.[23] In India, by January 2021, there were over 144 million Instagram users,[24] compared to 140 million from the USA.[25] WhatsApp also enjoys immense penetration with over 2 billion active users worldwide.[26] India comfortably accounts for the largest contribution of 390 million users, followed by Brazil and the USA at 108 million and 75 million, respectively.[27] YouTube is another large contributor with over 2 billion active users and 42 per cent of the global population being online on the platform monthly.[28] India is again the largest contributor on YouTube with 225 million users, followed by the USA with 197 million users, and Brazil with 83 million users.[29]

LinkedIn, on the other hand, has over 740 million users on its platform,[30] with 76 million from India,[31] and 176 million from the USA.[32] Twitter boasts of over 400 million users,[33] with the largest penetration in the USA with 73 million, followed by Japan and India with 55 million and 22 million respectively.[34] Snapchat has a user base of over 280 million, with 108 million from the USA, and 74 million from India.[35] Lastly, MySpace is an American centric social

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[23] Maryam Mohsin, "10 Instagram Stats Every Marketer Should Know in 2021" (Oberlo, 16-2-2021) https://www.oberlo.com/blog/instagram-stats-every-marketer-should-know accessed 27-10-2021.

[24] Napolean Cat, "Instagram Users in India" (*NC*) https://napoleoncat.com/stats/instagram-users-in-india/2021/01/ accessed 27-10-2021.

[25] Salman Aslam, "Instagram by the Numbers: Stats, Demographics and Fun Facts" (Omnicore, 3 January 2021) https://www.omnicoreagency.com/instagram-statistics/ accessed 27-10-2021.

[26] Brian Dean, "WhatsApp 2021 User Statistics: How Many People Use WhatsApp?" (Backlinko, 19 October 2021) https://backlinko.com/whatsapp-users accessed 27-10-2021.

[27] Samidha Jain, "India Most Active on WhatsApp with 390.1 Million Monthly Active users in 2020" (*Forbes India*, 27-8-2021) https://www.forbesindia.com/article/news-by-numbers/indians-most-active-on-whatsapp-with-3901-million-monthly-active-users-in-2020/70059/1 accessed 27-10-2021.

[28] Brian Dean, "How Many People Use YouTube in 2021?" (Backlinko, 7-9-2021) https://backlinko.com/youtube-users#:~:text=YouTube%20has%20over%202%20billion,are%20YouTube%20monthly%20active%20users. accessed 27-10-2021.

[29] GMI Blogger, "Youtube User Statistics 2021" (*Global Median Insight*, 4-10-2021) https://www.globalmediainsight.com/blog/youtube-users-statistics/ accessed 27-10-2021.

[30] Ying Lin, "Marketer Should Know in 2021" (Oberlo, 14-3-2021) https://www.oberlo.in/blog/linkedin-statistics#:~:text=Here's%20a%20summary%20of%20the,30%20and%2049%20years%20old. accessed 27-10-2021.

[31] "LinkedIn Users in India" NapoleonCat, https://napoleoncat.com/stats/linkedin-users-in-india/2021/03 accessed 27-10-2021.

[32] Maddy Osman, "Mind-Blowing LinkedIn Statistics and Facts" (*Kinsta*, 20-7-2021) https://kinsta.com/blog/linkedin-statistics/ accessed 27-10-2021.

[33] Brian Dean, "How Many People Use Twitter in 2021?' (*Backlinko*, 8-10-2021) https://backlinko.com/twitter-users accessed 27-10-2021.

[34] Statista Research Department, "Countries with the most Twitter Users 2021" (*Statista*, 7-9-2021) https://www.statista.com/statistics/242606/number-of-active-twitter-users-in-selected-countries/ accessed 27-10-2021.

[35] Salman Aslam, "Snapchat by the Numbers: Stats, Demographics & Fun Facts" (Omnicore, 4-1-2021) https://www.omnicoreagency.com/snapchat-statistics/ accessed 27-10-2021.

media platform with over 50 million monthly active users, though having not much presence in India.[36]

Hence, the above statistical data highlights the deep and rapidly growing level of penetration that social media has across the globe – from developed, Western countries such as the USA to developing, third-world countries such as India. The human race, in its desire to fulfil their need for togetherness, has exploited the cyberspace in creating enormous virtual communities. Arguably, this desire has resulted in social media being a natural part and parcel of our daily lives through which humans function.

B. Establishing The Nexus Between Social Media And The Law Of Evidence

Social media, being a tool for creating a community, also has a certain level on concreteness attached to it. This nature of the social media is manifested due to its ability to be both a means for communication and a representation of the said communication.[37] This representation of a communication is manifested in the form of a social artefact which can be a WhatsApp chat, picture or video on Instagram or even an emoji on Facebook.[38] Evidently, these social media artefacts being a part of our daily life, can be a subject of a criminal or civil case as will be discussed shortly. It is in this context, that this social artefact can transform into a legal or more specifically an evidentiary artefact. The evidentiary rules are necessary since the social media communications take place outside the ambit of the courts and thus require these rules to become evidence.

The technical facts in a case such as screenshots, printouts, etc. of the social media content can be viewed to be admissible under §9 of the IEA which deals with the relevancy of the backgrounds facts that are necessary to explain or introduce a relevant fact or a fact in issue. Therefore, a printout of a WhatsApp chat can be a background fact under §9 which can help introduce a message that may be an admission. The general circumstances under criminal and civil law wherein social media artefacts become relevant are discussed below. Simultaneously, the sub-parts will also analyse the applicable provisions under the IEA which would make these facts relevant.

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[36] Craig Smith, "MySpace Statistics, User Counts and Facts" (*DMR*, 25-7-2021) https://expandedramblings.com/index.php/myspace-stats-then-now/ accessed 27-10-2021.

[37] Silver *supra* note 4.

[38] *Ibid*.

i. Criminal Cases

In criminal cases, the social media evidence can be utilised to construct a character of a defendant.[39] Under §53 of the IEA, the good character of a defendant is always relevant in criminal cases. This good character, in criminal law, can be often important to explain one's conduct as well as for judging one's innocence.[40] For instance, character evidence can be important for establishing morality in cases where a man has been accused of assaulting a person.[41] Herein, social media artefacts such as posts, profiles, even chats can highlight the moral character of a person. Similarly, the bad character of a defendant can be also established through such social media artefacts. The bad character, although not relevant under the IEA, can become relevant when the defendant provides evidence of their good character, as per §54. Therefore, from both the prosecution and the defendant's perspective, the social artefacts regarding the character of the accused can be relevant as per the given circumstances.

In certain situations, defendants have also foolishly bragged about the commission of a crime on social media platforms and the same has been used as direct evidence by prosecution to show admission or confession of the crime.[42] The same is also relevant under the provisions of the IEA as per the circumstances of the case.[43] Thus, the prosecution can use such statements to showcase the guilt of the accused.

Further, courts also utilise social media evidence to determine motive, intention, background information about the accused, the validity of an alibi, location of the accused, and establish whether the accused had opportunity to commit the crime – depending on the crime.[44] For instance, a picture uploaded on social media by a third person which shows the accused being at a different place from the scene of a stabbing can determine the validity of the alibi as well as the opportunity to commit the crime. Such facts generally fall under the category of *res gestae* under §6 to §9 of the IEA and are categorised as facts connected to the crime as part of the same transaction. Further, any fact herein which is used to showcase a contradiction to the fact in issue or relevant facts presented by the other party such as invalidity of alibi, can also

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[39] Daniel Findlay, "Tag! Now You're Really it: What Photographs on Social Networking Sites Mean for the Fourth Amendment" (2008) 10 NCJL 171.

[40] *Habeeb Mohammad* v. *State of Hyderabad*, AIR 1954 SC 51.

[41] Batuk Lal, *The Law of Evidence* (Thomas Reuters, 7th edn., 2017) Vol. 2, 1322.

[42] Emma W. Sholl, "Exhibit Facebook: The Discoverability and Admissibility of Social Media Evidence" (2013) 16 TUL. J. Tech., 207, 227.

[43] The Evidence Act, 1872, Ss.17–31.

[44] US Department of Justice, "Obtaining and Using Evidence from Social Networking Sites: Facebook, MySpace, LinkedIn and More" (*DOJ*, 3-3-2010) https://www.eff.org/files/filenode/social_network/20100303__crim_socialnetworking.pdf accessed 27-10-2021.

be relevant under §11 of the IEA.[45] §14 may also be utilised to admit relevant facts when the social artefacts are used to display motive, knowledge, or state of mind of the accused. Thus, these facts are varied and depending on the circumstances can be used by either the defendant or the prosecution to establish their respective claims.

Social media activity can also be relevant to showcase subsequent conduct and mental state of the victim in harassment cases. For instance, in *EEOC* v. *Simply Storage Management*, *LLC,*[46] the defendant sought to rely on photos posted on the Facebook page to showcase that there was no emotional distress.[47] The court herein stated that posts on profile and messages regarding any emotion or the plaintiff's mental state would be relevant.[48] The court reasoned that it is reasonable for a severe mental injury to profess over social media sites and the examination of the same would highlight the degree of duress.[49] Arguably, under the IEA, subsequent conduct of a party is relevant under §8 and, therefore, both the defendant and the prosecution would showcase or disprove the level of mental and emotional duress.

Moreover, social media content is naturally also relied upon for crimes committed online. For instance, in cases of online sexual harassment, cyberbullying, child pornography on social media platforms, the social artefact such as messages, pictures, videos itself become the basis of the crime and are therefore relevant.[50] Such facts can become relevant under *res gestae* principle of §6 wherein the medium for committing the wrong is deemed as contemporaneous to the event and thus relevant.[51]

Additionally, facts collected from social media can also be relevant for sentencing. Apart from the defendant's character, behaviour of the person after the commission of the crime which highlights the remorsefulness regarding the crime can also be exhibited from facts on social media. For instance, in one case, the accused under substance accused had crashed his car and severely injured a person.[52] Shortly thereafter the accused was seen wearing a prison jumpsuit for a Halloween party. A picture of the same was uploaded on Facebook. During sentencing the prosecution highlighted the lack of remorsefulness on behalf of the defendant. The same sentiments were echoed by the judge who also highlighted the inappropriateness of joking and mocking

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45 The Evidence Act, 1872, S. 11, Illustration (*a*).
46 270 FRD 430 (SD Ind, 2010).
47 *Id*., 434.
48 *Id*., 436.
49 *Id*., 435.
50 Jason Wadden and Sarah Stothart, "Social Media Evidence in Litigation: Finding it and Using it" (*Goodmans LLP*, 13-2-2018) https://www.goodmans.ca/files/file/docs/Social%20Media%20Evidence%20in%20Litigation.pdf accessed 27-10-2021.
51 The Evidence Act, 1872, S. 6, Illustration (*c*).
52 Sholl *supra* note 42.

about the possibility of going to prison shortly after the concerned accident. Therefore, it can be seen that social media content can also act as an aggravating or mitigating factor during sentencing.

ii. Civil Cases

Social media artefacts generally become relevant under civil cases in three situations: personal injury and family law matters.

c. Personal Injury Cases

In the cases of personal injuries, facts from social media such as photographs and video content are generally utilised to debunk the claims regarding the serious of the injuries. For instance, in *Romano* v. *Steelcase*,[53] ('Romano') the plaintiff had claimed that the injuries had resulted in the loss of enjoyment of life. However, the defendant sought information from the plaintiff's My Space and Facebook account which contained images of the plaintiff on a vacation and having an active lifestyle.[54] Notably, the plaintiff had initially claimed that the defendant was unable to engage in such activities due to the injuries she sustained, leading her to be confined to the bed.[55] Thereafter, the court ordered the production of the images and opined the facts to be relevant to the case.[56]

Another landmark case that has dealt with a similar issue is *Leduc* v. *Roman*[57] ('Leduc'). Herein, the plaintiff had demanded damages after a motorcycle accident and claimed loss of enjoyment of life.[58] However, it was later shown that the plaintiff had posted images on the Facebook account showing that he had gone for fishing and was engaging in different physical activities.[59] The court thereafter found it to be relevant.[60] Quite similarly, in *McMillen* v. *Hummingbird Speedway*,[61] ('McMillen') the plaintiff had claimed a permanent loss of impairment of their physical health and the resulting inability to enjoy a regular life.[62] However, the Facebook profile revealed that the plaintiff had attended a concert and also gone for a fishing trip.[63] Much like the previous

53 907 NYS 2d 650, 654 (NY Sup Ct 2010).
54 *Id*., 651.
55 *Id*., 654.
56 *Id*., 655.
57 308 DLR (4th) 353 (Can. Ont. Sup. Ct. J. 2009).
58 *Id*., para 2.
59 *Id*., para 9.
60 *Id*., para 36.
61 2010 WL 4403285 (Ct. Com. Pl. Jefferson Cnty. 9-9-2010).
62 *Id*., 12.
63 *Id*., 1.

cases, the court opined such facts emerging from the social media platform to be relevant.[64]

Herein under the IEA, the existence of an injury is itself a fact in issue, and therefore evidence relating to the same would be considered as per §5, wherein evidence can be directly provided without having to show them as relevant under any provision from §6 to §55.Therefore, in cases of personal injuries, social media artefacts can be utilised by the defendant to contradict the claims of the claimant and determine them as relevant. In this regard, a contradictory fact can also be relevant under §11 in cases where the plaintiff has submitted evidence which is a fact in issue or a relevant fact under the IEA. Further, when damages for the personal injury are claimed, these facts can also become relevant under §12 which deals with facts helping the court to determine damages.

d. Family Law Cases

Social media communications and other content can be pertinent in cases of cruelty claim filed by a spouse or divorces based on the ground of cruelty, which occurs online on a social media platform.[65] Evidence from social media can be produced to showcase poor character of the spouse and gain a favourable outcome. Though, under the IEA, it is noticed that character evidence is irrelevant in civil cases as per §52. However, this rule also carries exceptions. One such situation is when the character of the person is itself a fact in issue.[66] Hence, in accordance with §5, evidence regarding the same would be deemed as relevant.

Similarly, in cases of custody, the character of the parents become crucial to determine the 'best interests of the child' and parental fitness.[67] For instance, *in Dexter II* v. *Dexter*,[68] the court opined that the mother's lifestyle, religion, sexuality, and other information available on her MySpace account would bear an effect on the child and therefore, would be relevant to determine the character of the parent.[69] Such facts, as explained above, would be considered by the court as per §5, and can be used by both the defendant and the plaintiff to showcase the character of each other. Further, previous conduct can also be relevant under §8 of the IEA.

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64 *Id*., 13.

65 Lindsay M. Gladysz, "Status Update: When Social Media Enters the Courtroom" (2012) 7(3) JLP 691, 705.

66 Batuk Lal *supra* note 41, 1320.

67 *BM* v. *DM*, 927 NYS 2d 814, at 5 (NY Sup. Ct. 2011); *Maguire* v. *Sheldon*, [2011] FMCA Fam 919 (7-9-2011).

68 2007 WL 1532084, 7 (Ohio Ct. App. 2007).

69 *Id*., 4.

III. ADMISSIBILITY OF SOCIAL MEDIA FACTS

This part seeks to analyse the conundrum regarding the issue of authentication of the social media content. It critiques the current approach are being incompatible with the technological advances, and thereafter, provides a solution to remedy this issue.

A. The Problem Of Manipulation

Since the conclusion of the 2016 Presidential elections in the USA, manipulation of social media content and the resulting growing spread of fake information has stood in the limelight with heated discussions. A study by the Oxford Internet Institute highlights the increase in the spread of social media misinformation and the rise of both the private and the public actors in using automation, algorithms, and big data to formulate untrue content over social media.[70] The said study observes that since 2017 the manipulation of social media content has more than doubled in over seventy countries.[71]

Such usage of social media propaganda to spread misinformation has become mainstream across the globe. With the high volume of information that is spread across these platforms, the techniques of spreading misinformation have become a common place and in a way essential.[72] There are an increasingly number of ways in which such misinformation can be spread. Hacked accounts, fake accounts, and bot-controlled accounts are the most common ways in which misinformation is spread over social media.[73]

Hacking of a social media account can occur through gaining physical access to the devices which already have the logged-in account. On the other hand, remote hacking, which is more common, can be done through different means.[74] A hacker can operate in the middle by stealing information that passes from the user to another user. Herein, a user may even be unaware that the information is passing through the hacker, and the hacker may even

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[70] Oxford Internet Institute, Use of Social Media to Manipulate Public Opinion now a Global Problem, Says New Report (OII, 26-9-2019) https://www.oii.ox.ac.uk/news/releases/use-of-social-media-to-manipulate-public-opinion-now-a-global-problem-says-new-report/ accessed 30-10-2021.

[71] *Ibid*.

[72] Natasha Lomas, Voter Manipulation on Social Media now a Global Problem, Report Finds (*TechCrunch*, 26-9-2019) https://techcrunch.com/2019/09/26/voter-manipulation-on-social-media-now-a-global-problem-report-finds/ accessed 30-10-2021.

[73] Cyware Hacker News, "Things you Need to Know About Social Media Manipulation" (*Cyware Social*, 1-10-2019) <https://cyware.com/news/things-you-need-to-know-about-social-media-manipulation-a97083a8> accessed 30 October 2021.

[74] Ehacking Staff, "Top 5 Techniques Hackers Use to Hack Social Media Accounts" (*Ehacking*, 25-6-2020) https://www.ehacking.net/2020/06/top-5-techniques-hackers-use-to-hack-social-media-accounts.html accessed 30-10-2021.

manipulate the communication without the user's knowledge. Various tools are available for hackers such as Burp Suite, which enable them to implement this method of hacking.

The most common means is through phishing attacks wherein the hacker constructs a legitimate looking fake social media login page and shares the same with the users for logging in.[75] Thereafter, when the user enters their username and the passwords, this information is directed to the hacker's device, who can later gain access using these credentials.

The other way is through DNS spoofing wherein the hacker creates a whole new illegitimate fake web page to divert the credential to their possession.[76] Cookie hijacking is also a means to hack into one's social media accounts.[77] Cookies are a piece of data that connects the user to the server of the social media companies and thereby gives access to the users to their accounts.[78] Whenever, a user logs into their account, the server returns a session cookie and to the point that the account is logged in, the user hold that session token – which permits the usage of the concerned application. It is this server token that can be hacked into by the hackers through the introduction of malware into the user's device which steals the session cookie data.

Keylogging is another dangerous method through which hackers can gain access to social media accounts.[79] In this method, the hacker operates a software named keylogger to track the pattern of the typed keys by the user. Thereafter, the tracked pattern is generated and sent to the device of the hacker. The installation of the software can be done when a user clicks or opens an attachment in a phishing email.

Fake accounts on the other hand are fairly easy to make. There is no verification of the actual identity of the person over social media platforms. Most of the social media accounts are only authenticated with the help of email address or phone number confirmations – through which the actual identity of the user cannot be verified. Thus, fake accounts can be easily generated by a layman without any technical knowledge. The account can be uploaded with

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[75] "How to Hack Social Media Account Passwords?" (*CWatch*) https://cwatch.comodo.com/how-to-hack-social-media-passwords.php accessed 30-10-2021.

[76] "DNS Spoofing" (*Imperva*) https://www.imperva.com/learn/application-security/dns-spoofing/ accessed 30-10-2021.

[77] Mark Stone, "Cookie Hijacking: More Dangerous than it Sounds" (*Security Intelligence*, 2-4-2021) <https://securityintelligence.com/articles/guide-to-cookie-hijacking/ accessed 30-10-2021.

[78] "Social Media Cookies" (*Termy*) https://termly.io/legal-dictionary/social-media-cookies/#:~:text=Social%20media%20cookies%20definition%20(noun,%2C%20widgets%2C%20and%20sharing%20buttons. accessed 30-10-2021.

[79] "DDoSPedia - Keylogging" (Radware) https://www.radware.com/security/ddos-knowledge-center/ddospedia/keylogging/ accessed 30-10-2021.

content and information to seemingly portray the targeted person. Given this, such fake accounts are easily identifiable and can be flagged off by the target themselves.

Bot accounts are however a more complex framework that are mainly associated with spreading political propaganda, although they are used for spreading misinformation in other contexts as well.[80] Bots on social media are generally governed by an automated program in order to engage on the social media platforms. The most important factor is that they are not individually controlled by people but operate in an autonomous manner which is designed to mimic normal human behaviour.[81] Thousands and millions of bots can be remotely controlled by a hacker or a team of hackers from anywhere in the world.[82] The usage of these bots can vary but generally range to amplifying popularity of a person or any concerned movement in the political arena, influence elections through misinformation, amplify phishing attacks and spread spams, amongst other things.[83]

The most infamous example is the 2016 USA Presidential elections where bot accounts over Twitter and Facebook were utilised to spread the popularity of Donald Trump while simultaneously engaging in spreading misinformation about the rival candidate Hillary Clinton.[84] Such moves were done by operating millions of bots which retweet or like the content, or even comment in support of Trump to showcase a façade of support and amplify his popularity.[85] On the other hand, these bots were also used to spread fake information and conspiracies such as the candidate Hillary Clinton engaged in paedophile activities and worshiped Satan.[86] Thus, bot accounts can also be used to spread misinformation about popular personalities and subject them to fake news. As one scholar has observed, bots operate as a megaphone on social media.[87]

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[80] "What is a Social Media Bot?" (CloudFlare) https://www.cloudflare.com/en-in/learning/bots/what-is-a-social-media-bot/ accessed 30-10-2021.

[81] Mike Simpson, "Social Media Bots: How they Work and How to Use them" (Meltwater, 19-3-2021) https://www.meltwater.com/en/blog/social-media-bots accessed 30-10-2021.

[82] Lindsay Flanagan, "Social Media Bots: Are they all Bad?" (*MemberPress*, 18 January 2021) https://memberpress.com/blog/using-social-media-bots-the-good-and-bad/ accessed 30-10-2021.

[83] "Bots – What are Bots" (Imperva) https://www.imperva.com/learn/application-security/what-are-bots/ accessed 30-10-2021.

[84] Andrew McGill, "Have Twitter Bots Infiltrated the 2016 Election?" (*The Atlantic*, 2-6-2016) https://www.theatlantic.com/politics/archive/2016/06/have-twitter-bots-infiltrated-the-2016-election/484964/ accessed 30-10-2021.

[85] *Ibid*.

[86] Amanda Robb, "Anatomy of a Fake News Scandal" (*Rolling Stone*, 16 November 2017) https://www.rollingstone.com/feature/anatomy-of-a-fake-news-scandal-125877/ accessed 30-10-2021.

[87] Elissa Blake, "Can Bots Influence Election with the Megaphone Effect?" (*The University of Sydney*, 17-2-2021) https://www.sydney.edu.au/news-opinion/news/2021/02/17/can-bots-influence-elections-with-the-megaphone-effect.html accessed 30-10-2021.

Therefore, it is evident that the information and communications over social media are highly susceptible to manipulation by third parties and are not immune to alteration. A person can use various hacking techniques to infiltrate a social media account and gain control over it. Further, fake accounts can be easily created to impersonate a person, and lastly, millions of bot accounts can be generated over social media platforms to imitate human behaviour and spread misinformation.

B. Authentication Of Social Media Content

In the above context of manipulation of social media content, the notion of authentication of facts which are sought to be admitted becomes extremely important. The approach in India and the USA varies and is discussed separately hereinunder.

i. India

The Information Technology Act ('IT Act') was introduced, and the IEA was amended in the beginning of the 21st century by the Indian legislature in order to acknowledge the admissibility of electronic evidence under the law. Along with this amendment came the newly inserted provisions – §65A and §65B, which deal with the manner of proving and admitting an electronic record. The IT Act defines electronic record as any data, stored image or sound which is received of sent in an electronic form.[88]

The electronic record in cases of social media facts can be located in the user's computers or the servers of the respective social media company. Naturally, it is difficult to physically produce these computers before the court of law, and therefore, copies of such records are admitted as secondary evidence – primary evidence is the actual technology which contains the information.[89] Actually producing the device in case of social media evidence and viewing the evidence live has faced technical challenges in the past since a social media account can be logged in from any device.[90] Therefore, a party can change the privacy settings or even tamper with the content before the device is information is produced before the court of law.[91] Due to the threat of tampering, secondary evidence thus requires a higher threshold to admit the same before the court of law. In the context of social media evidence, the content would either be produced as printouts from the documents or as a

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88 The Information Technology Act, 2000, S. 2(1)(*t*).

89 Vijay Pal Dalmia, "Admissibility & Evidentiary Value of Electronic Records" (*Mondaq*, 12-7-2019) https://www.mondaq.com/india/court-procedure/824974/admissibility-evidentiary-value-of-electronic-records accessed 30-10-2021.

90 Wadden and Stothart *supra* note 50, 6.

91 *Ibid*.

screenshot from the relevant website as secondary evidence, unless the actual device is produced before the court of law.[92]

§65A merely stipulates that the contents of the electronic record may be proved in accordance with §65B. It is the latter provision which has remained under a shroud of controversy. §65B(1) stipulates that the electronic record on a computer shall be deemed to be a document once the conditions mentioned under this provision are satisfied. The same would render the fact as admissible without the need to produce the original primary evidence. These conditions that are to be fulfilled are further mentioned in §65B(2). *First*, the during the creation of the record, the information must be produced from a computer that was regularly used to store or process information regarding activities carried on regularly by the person who has the lawful control over the computer. In situations wherein the activities were carried on in multiple computers, such computers would be treated as a single computer as per §65B(3). *Second*, the information under the electronic record must be regularly fed into the computer in the ordinary course of conduct. *Third*, the computer should be operating properly throughout the relevant period, and if not, the malfunctioning did not affect the accuracy of the contents. *Fourth*, the information under the electronic record should be the accurate reproduction of the original data.

Further, §65B(4) stipulates the manner in which a statement in evidence can be provided for the purposes of this provision. Herein, a certificate must be produced which *first* identifies the electronic record containing the statement and describes the manner in which it is produced. *Second*, it provides the particulars of the device that is related to the production of the said record in order to show that the record is produced from the said computer. *Third*, it stipulates any of the matters relating to the conditions mentioned under §65B(2). The said certificate must be signed by the person who is occupying an official responsible position with respect to the operation of the said device or the management of the relevant activities. Further, the information stated would suffice to be at the best of the knowledge 'and' belief of the person signing the said certificate. However, as clarified in *Arjun Panditrao Khotkar* v. *Kailash Kushanrao Gorantyal*,[93] ('Arjun Panditrao') the phrase 'and' ought to be read as 'or' since a person cannot testify to the best of one's knowledge as well as belief at the same time.[94] Further, these condition under §65B(4) are rendered as cumulative in nature by the court in this case.[95]

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92 Live Law Legal Research Team, "Are WhatsApp Chats Admissible in Evidence?" (*Live Law*, 16-1-2021) https://www.livelaw.in/know-the-law/whatsapp-chats-admissible-evidence-admissibility-arnab-goswami-chats-168460 accessed 30-10-2021.

93 (2020) 7 SCC 1.

94 *Id*., 55.

95 *Id*., 27.

The compliance with the mandate of §65B has been famously under dispute for a period of time. The same is explained briefly hereinunder. While in cases such as *State (NCT of Delhi)* v. *Navjot Sandhu*,[96] and *Shafhi Mohammad* v. *State of H.P.*,[97] the courts relaxed the required and opined them as not mandatory, the position has been contradicted in other cases. In both *Anvar P.V.* v. *P.K. Basheer*,[98] and Arjun Panditrao, it was opined that such a requirement is mandatory and electronic evidence have to be certified and comply with the mandate of §65B in order to be admissible. The court in Arjun Panditrao however created an exception for situations wherein the compliance to such a mandate is impossible.[99] The case of Arjun Panditrao being the most recent decision on this matter remains the law of the land on this area.

More importantly, with respect to the requirement of §65B in cases of social media evidence, the Indian courts have made certain observations. The courts have generally focused on admissibility of WhatsApp chats in this regard. In *Ambalal Sarabhai Enterprise Ltd.* v. *KS Infraspace LLP Ltd.*,[100] the Supreme Court stated that the WhatsApp chats are a virtual verbal communication and a matter of evidence, and its contents are to be proved during the trial through evidence-in-chief and cross examination. Further, in *Rakesh Kumar Singla* v. *Union of India*,[101] the court allowed the prosecution to rely on the WhatsApp messages after complying with the mandate of §65B.In another case of *Karuna Abhushan* v. *Second Address*,[102] the Delhi court granted reliance on the WhatsApp messages for determining the conclusion of a contract after the certificate under §65B was produced. There are also reports regarding lawyers engaged in family law matters relying on evidence from the WhatsApp chats in the cases of divorce.[103]

With respect to evidence from Facebook, the Madras High Court in *VESTAS Wind Technology India (P) Ltd.* v. *Arul Prakasam*,[104] observed that evidence from Facebook must be authenticated as per the traditional rules before it can be admitted, due to the possibility of hacking.[105] Therefore, it implied that the mandate under §65B should be fulfilled in order to admitted evidence from Facebook.

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96 (2005) 11 SCC 600.
97 (2018) 2 SCC 801.
98 (2014) 10 SCC 473.
99 Arjun Panditrao *supra* note 93, 46 – 50.
100 (2020) 5 SCC 410.
101 (2021) 1 Crimes 531: (2021) 1 RCR (Cri) 704.
102 CS (Comm) No. 327/19.
103 Saswati Mukherjee, "Adultery Cases on the Rise: Chat Trails give Divorce Lawyers New-Age Ammunition" (*Times of India*, 25-6-2014) https://timesofindia.indiatimes.com/city/bengaluru/Adultery-cases-on-the-rise-Chat-trails-give-divorce-lawyers-new-age-ammunition/articleshow/37141369.cms accessed 30-10-2021.
104 2019 SCC OnLine Mad 32497.
105 *Id*., para 10.

Hence, to admit any social media evidence which is secondary in nature – the mandate of §65B would have to be fulfilled as stated in Arjun Panditrao. However, the courts have also clarified as done in the recent Aryan Khan case that such a certification under §65B is not necessary at the stage of investigation and while granting bail.[106]

ii. United States

Under the American jurisprudence, Rule 901 of the Federal Rules of Evidence, 1975, stipulates different ways in which authentication of a fact can be done. The easiest technique is to obtain a testimony from a witness who has knowledge about the veracity of the evidence.[107] A different method is to showcase the distinctive characteristics of the evidence to authenticate the said fact.[108] The person may also establish that the evidence was produced from a process that generates accurate results.[109] These are some of the ways of authentication and the said provision contains more methods. Though as a general principle there are broadly three ways to prove authenticity – direct proof, circumstantial evidence, or a combination of both.[110]

However, despite of these rules, the law regarding the authentication of the social media content is not clear with courts and scholars being divided into two broad approaches named as the Maryland approach and the Texas approach – based on the view of the courts from the respective States.[111]

c. Maryland Approach

The Maryland approach arguably stipulates a higher threshold for authentication. In the case of *Griffin* v. *State*,[112] ('Griffin') the information was downloaded by the leading investigator from the My Space account of the appellant-defendant's girlfriend charged with murder and assault.[113] The information was regarding a profile through which a post was created which threatened the witnesses. The profile had a random username, birth date of the girlfriend, referred to the defendant's nickname in one post, and also contained

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[106] Swati Deshpande, "Aryan Khan bail order: 'Certifying of Chats not Necessary at this Stage" (*Times of India*, 22-10-2021) https://timesofindia.indiatimes.com/city/mumbai/mumbai-certifying-of-chats-not-necessary-at-this-stage/articleshow/87193502.cms accessed 30-10-2021.

[107] Federal Rules of Evidence, 1975, R. 901(*b*)(1).

[108] Federal Rules of Evidence, 1975, R. 901(*b*)(4).

[109] Federal Rules of Evidence, 1975, R. 901(*b*)(9).

[110] John G. Browning, "Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites" (2011) 14(3) Science and Tech. Rev. 465, 479; Siri Carlson, "When is a Tweet not an Admissible Tweet? Closing the Authentication Gap in the Federal Rules of Evidence" (2016) Uni. Pen. L. Rev. 1033.

[111] Wendy Angus-Anderson, "Authenticity and Admissibility of Social Media Website Printouts" (2015) 14 DLTR 33, 37.

[112] 19 A 3d 415 (Md App 2011).

[113] *Id*., 418.

a profile picture of the defendant and his girlfriend embracing each other.[114] The investigator sought to argue that he was aware that the profile was of the girlfriend due to the profile picture and the written birthdate. However, the defendant objected that the investigators had failed to provide proper authentication and the downloaded printouts should not be admitted.[115]

The court highlighted that Rule 901 stipulates that circumstantial evidence such as contents, substance, internal patterns, appearance, location, or other such distinctive characters can be provided as evidence to showcase the authenticity of a fact.[116] In this regard, the court opined that birthdate, reference to nicknames, and photographs of the couples cannot be viewed as sufficiently distinctive characteristics to authenticate the said account.[117] The court stated that a third-party could have easily created or even accessed the account to upload the said post.[118]

In another case of *State* v. *Eleck*,[119] the defendant was charged with assault and sought to rely on messages over Facebook received from a witness of the prosecution, which contradicted her testimony.[120] The defendant himself testified to the authenticity of the printouts of the messages and also informed that the username belonged to the witness, the account profiled contained her image, and that he had personally downloaded the information.[121] On the other hand, the witness claimed that her account was hacked and the messages were not sent by her.

Herein, the court opined that the evidence cannot be admitted since the username and the images of the witness were neither enough to showcase a distinctive character nor eliminate the possibility of hacking.[122] It observed that even if the message were to come from a specific account, it is not enough to show that the message was actually authored by that person.[123] Further, even the messages in question did not display any distinctive character that only the witness would have known regarding the defendant.[124] Hence, the court did not admit the said evidence.

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114 *Ibid*.
115 *Id*., 417.
116 *Id*., 422.
117 *Id*., 423–424.
118 *Ibid*.
119 23 A 3d 818 (Conn. App. Ct 2011).
120 *Id*., 820.
121 *Ibid*.
122 *Id*., 822.
123 *Ibid*.
124 *Id*., 824.

Similarly, in other cases as well such as *Commonwealth* v. *Williams*,[125] the court refused to admit the evidence due to the lack of distinctiveness of the facts through circumstantial evidence.[126] The court in the said case drew an interesting analogy to phone calls. The court stated that a testimony that a person received a phone call from another person claiming to be 'A' is, without any other information, insufficient evidence to authenticate and admit the said call as a conversation with person 'A'.[127]

d. Texas Approach

The Texas approach is arguably more relaxed and less stringent. In *Tienda* v. *State*,[128] the defendant claimed that the information from the My Space account should not be admitted due to the lack of authentication. The account was linked to the email addresses belonging to the defendant, had a username based on the defendant's name, contained pictures of a person who 'resembled' like the defendant, and listed the user's location to the hometown of the defendant.[129] The court opined that the combination of the information was sufficient to be taken as a whole and reasonably conclude that the account was created and maintained by the defendant, though not deliberating on the question of the authorship of the specific social media content in question.[130]

Further, in another case of *People* v. *Clevenstine*,[131] the defendant was charged with rape and sexual abuse as well as for endangering the welfare of the child.[132] The defendant challenged that the conversations between him and the victims over MySpace and Facebook were not properly authenticated by the court of law.[133] The victims herein testified that the conversations happened between them and that the police retrieved the same directly from their computers.[134] Further, the wife of the defendant also testified that she had noticed the same abusive messages on the MySpace account of the defendant at their home computer.[135] The court deemed the said evidence as admissible. Herein, though the court acknowledged that a third person accessing the account was possible, it opined that the likelihood of the same was questionable without any proof.[136]

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125 926 NE 2d 1162 (Mass. 2010).
126 *Id*., 1172–1173.
127 *Id*., 1172.
128 358 SW 3d 633.
129 *Id*., 634.
130 *Id*., 645.
131 891 NYD 2d 511 (NY App Div 2009).
132 *Id*., 513.
133 *Ibid*.
134 *Id*., 514.
135 *Ibid*.
136 *Ibid*.

C. Critical Appraisal Of The Approaches Towards Authentication

i. Critique of the American Approach

Under the American jurisprudence, both approaches i.e. Maryland and Texas, are critiqued by scholars. The Maryland approach has been critiqued for stipulating an unnecessary burden on the parties for admitting evidence from social media.[137] Even while arguing before the courts in cases such as *Harris* v. *State*,[138] and *Sublet* v. *State*,[139] the lawyers have cited same concern of 'unnecessary high burden' to criticise this approach. In the regard, the courts have largely favoured the Texas approach and erred on the side of admissibility – highlighting a growing approach towards the same.[140]

However, Wendy Anderson on the other hand highlights the commonalities that exist between these two approaches.[141] The author states that as a matter of principle there are two broad tests that need to be fulfilled in order to deem the evidence as admissible.[142] *First*, the printouts of the web pages should accurately reflect the content that is present on the computer. *Second*, the content on the said printout should be authenticated to have been formulated by the concerned source. Thereon the author observes that the Texas approach and the Maryland approach both follow and implement the first prong of this test.[143] However, the Maryland approach also requires the satisfaction of the second prong. Thus, the approach is an example of the cases where the parties satisfy the first test but fail to address the second one. Hence, the Maryland approach does not impose a mandate on social media evidence of a standard that is higher than other form of evidence.[144] Instead, it only focuses on one of the essential conditions for observing the evidence as admissible.

The second prong becomes crucial since the scope of abuse as well as the manipulation of social media content is high and nowadays more common. The Texas approach by failing to recognise the second prong of the test shies away from observing the reality of today and the numerous ways in which

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[137] Paul W. Grimm et al., "Authentication of Social Media Evidence" (2013) 36 Am. J. Trial Advocacy 433, 441.

[138] No. 42 Slip Op. (Md. 23-4-2015).

[139] No. 59 (Md. 23-4-2015).

[140] Justin P. Murphy and Adrian Fontecilla, "Social Media Evidence in Government Investigation and Criminal Proceedings: A Frontier of New Legal Issues" (2013) 19(3) Richmond Journal of Law and Technology 1, 23; Colin Miller and Charles White, "The Social Medium: Why the Authentication Bar Should be Raised for Social Media Evidence" (2014) 87 Temple Law Review 1, 5.

[141] Angus-Anderson *supra* note 111, 44.

[142] *Id*., 44–45; *See also* Michaeal D. Dean, "Authenticating Social Media in Evidentiary Proceedings" (2014) 28 Crim. Just. 49, 50.

[143] *Id*., 45.

[144] *Ibid*.

social media accounts can be hacked – such as the ones discussed in the previous parts. Indeed, the state of the social media evidence has evolved drastically in the past few decades. For instance, a court in a decision in *St. Clair* v. *Johnny's Oyster & Shrimp, Inc*.,[145] in the 1990s went on to declare that there lies a presumption that the information over social media is inherently untrustworthy, and it is impossible to rebut the said presumption.[146] Further, it went on to even state that all evidence produced from the internet is inadequate for proving or corroborating any fact.[147] However, this scenario has now changed with the courts relying on these social media evidence in certain situations, and not rendering them completely redundant.

Both the Maryland and the Texas approach focus on the circumstantial evidence and the degree of the individualisation of the profiles over social media in order to satisfy the authenticity of the content and thereafter admit the same. However, one can observe a sense of uncertainty regarding the authenticity of such a mechanism. Hacking activities as explained earlier can be fairly intrusive with the hackers gaining full access to the accounts and all the data that flows from the social media platforms. Thus, it is almost impossible to assess and draw a line regarding the information that can be categorised to be only in the knowledge of the user. In other words, the creation of this imaginary line appears as a hoax since there is no practical method of individualising an account. It therefore implies that merely individualisation of information or content located on the account and the resulting circumstantial evidence cannot be enough to deem the content as authentic and authored by the supposed user. Hence, there is a clear need to reconceptualise the manner of authenticating the social media content from the degree of individualised information available on the account.

ii. Critique of the Indian Approach

The Indian approach has been generally criticised for the immense difficulty that is manifested in the production of the certificate under §65B(4).[148] This may especially be true for the cases where the litigant may themselves not be in possession of the said device that houses the electronic record. Herein after significant efforts, the information may not be produced even after applying to the relevant authority for the certification. In this regard, the courts have the power to order the production of any document under §165 of the IEA and Order 16, Rule 6 of the Code of Civil Procedure, 1908, as well as §91 of the

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[145] 76 F Supp 2d 773 (SD Tex. 1999).

[146] *Id*., 774–775.

[147] *Ibid*.

[148] Hasit Seth, "Impossibility Exception to the Section 65-B(4) Electronic Evidence Certificate" (SCC OnLine Blog, 5-6-2021) https://www.scconline.com/blog/post/2021/06/05/impossibility-exception-to-the-section-65-b4-electronic-evidence-certificate/#_ftn34 accessed 30-10-2021.

Criminal Procedural Code, 1973. However, in practice, the production of the documents under these provisions are difficult to implement.[149]

This situation was partially tackled by the exception of impossibility created by the court in Arjun Panditrao, as discussed before. The relevant prerequisites[150] to claim the said exception are *first*, the authority has refused or does not respond for the request to provide the certificate. *Second*, the relevant party has sought the assistance of the court of law. *Third*, the court of law has failed to grant the same, then the litigant would have been considered to have done everything necessary to obtain the certificate. Thereafter, the said party can claim the relief of impossibility.

However, even though the judgment in Arjun Panditrao may have remedied the difficulty to obtain a certificate to a certain extent, the concern still remain regarding the abuse of the powers under §65B(4) by the relevant authority. In the cases of social media evidence, the data regarding the sites, and for that matter any cloud-based networking, is in practice not stored or recorded in the user devices themselves but are located in the servers of the social media companies.[151] Thus, the social media companies become the relevant authority herein who manage the relevant activities regarding the social media evidence.[152] Naturally, being big private organisations, the concerns arise regarding the potential biasness of these organisation. For instance, if the company is an interested party in the outcome of the case or a party themselves, whether financially or otherwise, the company may simply refuse to produce the certificate. Herein, the court may compel or upon its failure the impossibility exception may be attracted.

However, the core problem arises here regarding the checks and balances for these private companies. For instance, in cases where the company is an interested party, it may even certify data that are otherwise manipulated if it goes in favour of their interests. Further, §65B(4) states that the statements made under the certificate "shall be evidence" for the concerned matter. Therefore, it raises a presumption under law to recognise the content of the certificate as admissible evidence which is mandatory for the court due to the usage of the phrase "shall". Clearly, there is a need to implement a shift from this mandatory certification regime for social media evidence.

Further, the certification process merely proves the authenticity of the process through which information is retrieved from a computer device and does

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[149] *Ibid*.

[150] Arjun Panditrao, *supra* note 93, 46.

[151] Rich Miller, "Facebook Now has 30,000 Servers" (*Data Center Knowledge*, 13-10-2009) https://www.datacenterknowledge.com/archives/2009/10/13/facebook-now-has-30000-servers accessed 30-10-2021.

[152] *Shradha Shipping Co. (P) Ltd.* v. *Adhithri Trading Co.*, 2014 SCC OnLine Bom 2273.

not focus on the question of authorship as done under the American jurisprudence. In other words, the core issue of who created the social media content still remains after the certification process.

Another major problem that is identifiable is the lack of relevance of the technological check under the §65B for social media evidence. The conditions under §65B(2) reflects a regime that is suited more towards the traditional electronically stored information than the information that is transmitted over social media. For instance, the definition of computer as expounded under the IT Act refers to any device which performs processing function and includes the different facilities which are associated to the computer system.[153] Arguably, this definition does not include the servers of the social media companies. Further, the conditions under §65B(2) are related to determining the proper operation of the computer, that the information was regularly stored or processed through the computer, and essentially ensuring that the computer and the information stored was not tampered with. Furthermore, §65B(4) also deals with certifying that the record is produced from the said computer device.

This reflects an arguably lack of understanding of the technical nuances of the social media information. As stated before, social media data is neither stored nor recorded in any user computer *per se* and is in fact under the control of the social media companies through their servers. A user may formulate and create a chat through a computer device, but these messages would reside only in the cyberspace and are not technically 'stored' in the device.[154] Further, the requirement of the operation of the device at the relevant periods of time also ignores the ephemeral nature of the evidence collected from social media. Social media, by its very nature, does not reside in a said device. For instance, a social media profile over Facebook, Instagram, or for that matter any website, can be accessed from any and multiple devices which have computational powers. Hence, the proof regarding the proper operation of a computer device which is accessed to gain the information is a poor reflection on the integrity of the evidence. Therefore, it certainly does not contribute in any manner in accurately reflecting the information to formulate the same as documentary evidence and consequently, best evidence.

Resultantly, social media does not reside in any device and is neither stored in any device; instead, it resides in the cyberspace. Further, the social media evidence can be logically created from any device. Arguably, the fulfilment of the requirements under §65B for social media evidence highlight a method of pigeonholing the technological advancements made through social media under a set of rules which were meant for traditional electronically stored

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[153] The Information Technology Act, 2000, S. 2(1)(*i*).
[154] Silver *supra* note 4, 136.

information. This is reflective of the fact that the provision was inserted in 2000, when the social media was at its inception stage. Thus, there is a clear need for re-evaluation of the approach for the authentication and admissibility of the evidence produced from social media.

D. The Way Forward

The American approach portrays a weaker approach of the courts relying on circumstantial evidence such as pictures, date of birth, nicknames, etc.[155] which can be easily gathered by hackers and are not individualised. On the other hand, the Indian courts rely on a stringent, arbitrary, and outdated method of certification which is unsuitable for social media evidence.

Arguably, the re-evaluation of the approach needs to be conducted across both jurisprudences. It is herein argued that the reliance on metadata of the social media information can act as a middle path to remedy the issue of authentication. Metadata, to put it simply, is a data which is regarding the data.[156] The social media platforms have different kinds of metadata, however generally, metadata provides information about the manner, the time, and the place where the information was uploaded over social media.[157] For example, the social media site such as Instagram collates information about the devices used to access the social media services and also the location of the device, the IP address, and the phone numbers.[158] Over Twitter, the tweets and the geo-filters over Snapchat can be relied to accurately locate the device through technical means.[159] Thereafter, these different information can be relied to technically identify the author and the person who uploads the social media content.[160] It would therefore indicate enough circumstantial evidence to showcase the authenticity of the information.

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[155] Adam Cohen, "Social Media and eDiscovery: Emerging Issues" (2012) 32 Pace L. Rev. 289, 299 – 300.

[156] Jonathan S. Landay and Lindsay Wise, "Government Could Use Metadata to Map Your Every Move" (*Miami Herald*, 20-6-2013) http://www.miamiherald.com/latest-news/article1952644.html accessed 30-10-2021.

[157] Garry Kranz, "Metadata" (*WhatIs*, July 2021) https://whatis.techtarget.com/definition/metadata accessed 30-10-2021.

[158] MySmartPrice, "Most Invasive App: Instagram Collects 79% of User's Personal Information" (*My Smart*, 23-3-2021) https://www.mysmartprice.com/gear/invasive-app-instagram-users-personal-information-collection/ accessed 30-10-2021.

[159] John Patakis and Craige, "Key Twitter Metadata Fields Lawyers and e-Discovery Professionals Need to be Aware of" (*Law and Tech Blog*, 6-10-2011) https://blog.x1discovery.com/2011/10/06/key-twitter-metadata-fields-lawyers-and-ediscovery-professionals-need-to-be-aware-of/ accessed 30-10-2021; Patrick Ciapciack, "Selfies in Court: Snapchat as Admissible Evidence" (*IPTF*, 7-2-2017) https://bciptf.org/2017/02/selfies-in-court-snapchat-as-admissible-evidence/ accessed 30-10-2021.

[160] *Ibid*.

In this context, metadata is often referred to as the 'smoking gun' for determining the veracity of the stated evidence in other forms of electronically stored information.[161] This is due to the fact that forensic experts can detect any form of manipulation that may have occurred due to hacking activities or a fake account and can even showcase deleted records.[162] Metadata can be used to identify any remote access by bad faith hackers and can trace the IP addresses of devices that routinely access the account.[163] Thus, the said data can provide sufficient information which are contextual in nature to prove or disprove the veracity of an evidence. Even in a judgment in *Lorraine* v. *Markel American Insurance Co.*,[164] the court recognised the usefulness of metadata in validating and authenticating evidence gathered from electronically stored information, through the valid and sophisticated distinctive characteristics of the data.[165]

Thus, the metadata can be sufficiently used to display distinctive characteristics to showcase the authorship of the said post – fulfilling the second prong as done by the Maryland approach, though in a more sophisticated technological manner. The simplicity of linking names, pictures, and other distinctive information on a social media account to establish authorship is contrasted with the technical requirement of metadata which establishes direct connections with the devices of the true authors. Therefore, the key judicial concern of the Maryland approach of proving the authorship is also satisfied through the reliance on metadata.

However, this is not to say that metadata cannot be manipulated. In fact, the fabrication of the metadata can be done with the changes in the timestamp regarding last modified and accessed.[166] Though the forensic experts can preserve the relevant content through a specific software and even detect if any manipulation has occurred.[167] Thus, metadata due to its high volatility also provide a detailed record of the modification of any electronic document – which can be important for asserting or disproving any instance of tampering.[168] Further, the reliance can be placed on the hash values to prove the authenticity of the chain of custody.[169] The hash values are fingerprint-like unique method

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[161] Michael Hannon, "An Increasingly Important Requirement: Authentication of Digital Evidence" (2014) 70 J. Mob. 314, 318.

[162] TDC, "How Metadata can Affect a Case" (*Today's General Counsel*, 6-6-2014) <https://www.todaysgeneralcounsel.com/metadata-can-affect-case/> accessed 30-10-2021.

[163] Elizabeth Flanagan, "Authentication of Social Media Evidence in Criminal Proceedings" (2016) 61 Vill Law Review 287, 301–303.

[164] 241 FRD 534 (D. Md. 2007).

[165] *Id*., 548.

[166] Zachary Rosenberg, "Returning to Palto's Cave: Metadata's Shadows in the Courtroom" (2016) 48 Arizona State Law Journal, 439, 451; Michael D. Dean, "Authenticating Social Media in Evidentiary Proceedings" (2014) 28 Criminal Justice 49, 64.

[167] *Ibid*.

[168] Hannon *supra* note 161, 318.

[169] *Ibid*.

of identification of a digital document and contain a detailed mathematical record of the accuracy of the content.[170]

Thus, the reliance of metadata would reduce the high threshold of the strict, manipulative and outdated mandate under §65B of the IEA. Instead, it would highlight and satisfy the relevant considerations of authorship, manner of production, chain of custody, and the accuracy of the social media content. Therefore, with the increasing technological advancements, there is a need to rethink this approach and give primacy to metadata, in order to authenticate and admit social media evidence.

IV. CONCLUSION

It is noticeable that various issues can emerge from the concepts of relevancy, admissibility, access and the probative value of the evidence collected from social media. Through this paper, the author has attempted to highlight where the discussion in the Indian courts regarding social media evidence is likely to proceed in the next few decades. Concerns regarding privacy and authenticity have to be dealt with in a nuanced manner in order to properly adjudicate on the case. The paper has attempted to recommend certain approaches that can be followed by the courts to mitigate such concerns.

Social media platforms, it has to be recognised, are here to stay. Even though the companies may try to change their model, such as the recent reconceptualising of Facebook as Metaverse, the basic idea of connectivity and a virtual community are bound to carry on. With the ever-increasing penetration of such virtual spaces, it becomes highly important to properly adduce weightage and authenticate the evidentiary artefacts that are generated from it. Evidently, the same becomes a concern for every person that is engaged over such platforms – roughly 60 per cent of the whole humanity. There are arguably numerous other issues that can arise in social media evidence which could not be discussed in this paper. The paper however hopes to initiate a conversation and debate in this regard amongst the Indian legal community and ponder on the future of social media evidence in the country.

[170] Rosenberg *supra* note 166, 452.

MAKING A CASE TO INCLUDE SOCIALLY EXCLUDED GROUP IN THE FRAMEWORK OF DISCRIMINATION LAW AND TO ARGUE THEIR RIGHTS UNDER ARTICLE 14

—*Satyarth Kumar Srivastava*[*]

Abstract—It is often seen that policies framed by the government impact different strata of Indian Society, differently. There are times when the 'disadvantaged groups' expect a certain level of protection from society at large. While the Constitutional framework is narrow, Anti-Discrimination laws offer wider protection to the groups (by being applicable against both private as well as state entities). According to *Khaitan*, any anti-discrimination norm should satisfy 4 conditions.[1] The first condition is the 'personal ground condition.' The second one is the 'cognate group condition,' the third one is the 'relative disadvantage condition' and the last one is the 'eccentric distribution condition.' If a group needs protection on these grounds, then it should be given a place in the DL framework.

This protection on the socio-economic marker has been debated at large, especially after the recent EWS reservations. There is a conflicted opinion and valid criticism against the inclusion of socio-economic markers in the framework of the Discrimination law of India. This paper is an attempt to argue for the identification of a new protected group ('which the author will define as socially excluded group') in the framework of discrimination law because the flow of the 21st century mandates such protection. The characteristics of this group would be based on socio-economic markers. The author will also try to bring a framework to argue the rights of this group under article 14 until a comprehensive DL framework is not constructed.

[*] 3rd year BA LLB (Hons) NLSIU.

[1] Khaitan *Infra* note 14

Keywords: Discrimination Law, Identified Markers, Socio-Economic Disadvantage, Socially Excluded Groups, Protection, Article 14.

I. INTRODUCTION

> You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race, and then say, 'you are free to compete with all the others, and still justly believe that you have been completely fair.
>
> President Lyndon B Johnson,
> At the Howard University 1964.[2]

Consider this: the government comes up with a Covid vaccination policy and the medium to do it is through an online COWIN platform.[3] This policy is carried out in a country where the teledensity in rural areas is merely 57.13%.[4] Digital literacy is merely 38% (Fig 1) overall, with digital literacy in the rural area being only 25%.[5] Or consider this, every year, in entrance examinations such as NEET and CLAT, students who could afford to coach and are from economically well-to-do families are more likely to ace these exams.[6] The same pattern is visible in employment opportunities where employers are keener on taking employees from Tier 1-Tier 2 cities.[7]

These are the situations that compel us to accept that there was a lot of force in what President *Lydon* said decades ago (quoted above). There is some

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2 Deborah Hillmam, "Indirect Discrimination and the Duty to Avoid Compounding Injustice" in Hugh Collins and Tarunabh Khaitan, eds., *Foundations of Indirect Discrimination Law*, Hart, (2018) 105-121 https://www.law.virginia.edu/scholarship/publication/deborah-hellman/514136 accessed on 20-12-2021.

3 *Guidelines for implementation of National COVID Vaccination Program* (Ministry of Health and Family Welfare, April 2020, revised on 21-6-2021) https://www.mohfw.gov.in/pdf/RevisedVaccinationGuidelines.pdf accessed on 25-12-2021.

4 *Distribution of Essential Supplies and Services During Pandemic*, *In re*, 2021 SCC OnLine SC 339.

5 Venugopal Mothkoor, "The Digital Dream: Upskilling India for the future" (Ideas of India, 21-3-2021) <https://www.ideasforindia.in/topics/governance/the-digital-dream-upskilling-india-for-the-future.html#:~:text=Digital%20literacy%20levels%20in%20India&text=Based%20on%20the%20above%20definition,just%2025%25%20in%20rural%20areas.> accessed on 21-12-2021.

6 Poornima Murali, "Poor at a Disadvantage Only 1.6% Med Students Clear NEET without Expensive Pvt Coaching" (*News18.com*, 5-11-2019) https://www.news18.com/news/india/poor-at-a-disadvantage-only-1-6-med-students-clear-neet-without-expensive-pvt-coaching-tn-govt-data-2374803.html accessed on 18-12-2021.

7 Surbhi Soni, "An Anti-Discrimination Law for the Socio-economic Disadvantaged in India" (15-4-2021) Socio-Legal Review Online https://www.sociolegalreview.com/post/an-anti-discrimination-law-for-the-socio-economically-disadvantaged-in-india accessed on 22-12-2021.

discrimination, that is inherent in every jurisdiction that is not based on identified grounds of Discrimination law ('DL').[8] Typically, such apparent disadvantage would have been covered by the framework of 'equality clauses of the Indian Constitution i.e. Article 14, 15, 16, etc' and some provisions would have been made to rectify this disparity and disadvantage. Unfortunate as it is, as far as India is concerned, we lack a comprehensive framework of Discrimination law for those who do not fall under the categories as enunciated under Article 15 of the constitution.[9] Even though the Constitution and the legislators guarantee equality for everyone, there is still passive and latent discrimination that takes place against the people who are socially and economically deprived.[10] In recent years, there have been efforts made by people to address this situation. In 2016, *Shashi Tharoor* tried to pass Anti-Discrimination and Equality bill.[11] Recently, the Centre of Law and Policy Research center ('CLPR') tried to come up with a comprehensive 'Equality bill' in 2020.[12] Unfortunately, these efforts were not successful and the dream of comprehensive discrimination law legislation in India is still distant.

So what were these reports and bills aiming to achieve? These efforts were trying to protect disadvantaged groups who suffer discrimination on some 'protected characteristics.' These protected characteristics are extremely important for the inclusion of any group within the purview of the Discrimination law. While the Constitutional framework is narrow, Anti-Discrimination laws offer wider protection to the groups (by being applicable against both private as well as state entities).[13] The most debatable issue for including any group in the framework of discrimination law is the identification of these groups based on some grounds/traits/characteristics. This also aligns with the aim of Discrimination law which is to reduce and then eventually remove significant disadvantages a group suffers which can be done only when the traits are identified.[14]

In this background, this paper aims to: - argue for the identification of a new protected group ('which I will define as socially excluded group') in the framework of discrimination law. The characteristics of this group would be based on socio-economic markers. I have already explained that the discrimination law in India is based on and is mostly limited to equality clauses of the Constitution. I will further argue that Indian jurisprudence is not all toothless

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8 In Indian framework, that would be the six markers of Art. 15 of the Constitution of India.

9 Rajat Maloo, "Socio-Economic Disadvantaged as a Protected Characteristic in Indian Anti-Discrimination Legislation' (8-9-2020) The Journal of Indian Law and Society Blog, https://jilsblognujs.wordpress.com/2020/09/08/socio-economic-disadvantage-as-a-protected-characteristic-in-indian-anti-discrimination-legislation/ accessed on 22-12-2021.

10 Maloo *supra* note 9.

11 Anti-Discrimination and Equality Bill, 2016 [Bill 289 of 2016], Ss. 6-12 and 14.

12 The Equality Bill, 2020. S. 2(*xx*)

13 Maloo *supra* note 9.

14 Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015).

when it comes to the protection of the rights of this socially-excluded group. As an alternative, till the incorporation of the new protected group does not take place, any discriminatory policy or scheme against this group should be struck off based on Indirect Discrimination ('ID') under article 14.

The paper is divided into 4 parts. The first part defines the disadvantaged group, the second part deals with the eligibility criteria to include the group in the discrimination law, and the third part shows that the group is justified in getting inclusion based on deprivation of 4 basic goods. The last part of the paper will guide the reader that indirect discrimination under Article 14 is a good place to go for remedy till the discrimination against this group is not explicitly identified.

II. IDENTIFICATION OF THE GROUP

To recognize a group under DL, it has to be shown that the group suffers a relative group disadvantage as compared to the other group.[15] To put it simply, the group undergoes a 'pervasive' 'abiding' and 'substantial' disadvantage that the DL seeks to rectify.[16] The group I am concerned with is not as narrow as merely a socio-economic disadvantaged group (SED). Traditionally speaking, Socioeconomic disadvantage would mean a person's socio, economic and educational status.[17] But the world has moved away from this traditional understanding and so should we. A recent bill introduced by Ireland's parliament to amend the Equality act of 1998,[18] defined socio-economic status as resulting from 'poverty, income, homelessness, family background and place of residence.'[19] Similarly, the model legislation suggested by CLPR included 'homelessness, poverty, income level and the educational qualification' as an indicator of socio-economic disadvantage.[20] Along with these progressions, is another call from an eminent jurist of South-Africa *Mr. Albie Sachs*.[21] He wants to include health disadvantages as one of the markers of SED.

Now, these indicators are so entangled that jurisdictions have started aggregating them in their framework of DL. According to *Sandra Fredman*, the concept of poverty has been eclipsed by something else.[22] It has culminated

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15 *Ibid*.

16 *Ibid*.

17 American Psychological Association, "Socioeconomic Status" https://www.apa.org/topics/socioeconomic-status accessed on 22-12-2021.

18 Equality (Miscellaneous Provisions) Bill, 2017 https://data.oireachtas.ie/ie/oireachtas/bill/2017/87/eng@initiated/b8717d.pdf accessed on 23-12-2021.

19 Surbhi *supra* note 7.

20 The Equality Bill, <https://clpr.org.in/wp-content/uploads/2020/01/Equality-Bill-2020-17-Jan-2020.pdf> accessed on 23-12-2021.

21 Albie Sachs, *The Strange Alchemy of Life and Law*, (OUP, 2009).

22 Sandra Fredman, "The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty" (2011) 22 Stellenbosch Law Review 566, accessed on 23-12-2021.

into something different- a class of people who are called as **socially excluded ('SE')**. This term encompasses the wider definition of socio-economic disadvantage group. Social exclusion refers to a condition where the people are systematically removed from participating in society and from valuable work opportunities.[23] The participation here is not only in terms of the purchase of goods and tangible items or in political participation. It is something more- participation in socially and economically valuable choices and choice of free societal engagement.[24] The concept of social exclusion is closely related to disadvantages that come with living in a deprived area and entails digital illiteracy and access to good health care facilities. It is particularly important because it creates a fine line to define who is a deprived person based on newer standards of socio-economic disadvantage.[25] This view sits well with the Indian course of DL as well because in 1980, the Second Backward class commission termed 52% of Indians as 'backward' and as socio-economically disadvantaged.[26] The definition there was trying to achieve similar definition of *Sandra Fredman*. This criterion to gauge socioeconomic disadvantage has also been expanded by the *Niti Ayoga's* MDP index of 2021. This report tried to cover a wide variety of indicators such as educational qualifications to define poverty, which I propose to include in the SE class.[27]

One might criticize that while defining this 'socially excluded group (SE)', why is poverty a marker? Why cannot we define SE group as independent of poverty? The benefit to do away with this poverty marker would be that the State will lose its power to control SE group. They are the ones who come up with poverty lines and indicators of poverty and hence would be in a position to define SE group for polictical means.

I am ready to live with this criticism as well as various other criticisms because poverty provides us with one extremely important characteristic necessary for the group to be included in DL. Any group should be identifiable. We know what a caste, religion, or gender means. But without poverty and a certain poverty line, it would be difficult to identify a person in this group. The second reason is even simpler, homelessness; lesser education level etc. is experienced mostly by poor people. Hence, poverty becomes extremely important to be included in the SE term.

But this is not to say that APL (above poverty line) people would not be included in the SE group. The inclusion in the SE group will take into account

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[23] *Ibid*.
[24] *Ibid*.
[25] *Ibid*.
[26] GOI, *Report of the Backward Classes Commission* (Backward Classes Commission, 1980) 54-56.
[27] Kant, "National Multi-Dimensional Poverty Index" (Niti Ayoga, 21-9-2021) https://www.niti.gov.in/sites/default/files/2021-11/National_MPI_India-11242021.pdf accessed on 25-12-202.

the poverty level of a person but will not be the sole factor to decide the membership of the group. Poverty, homelessness, illiteracy etc. are the traits of the group or the site on which discrimination against the group takes place. Hence, the group of SE I try to define should include most or all of the factors enunciated above.

As a conclusion to this section, the disadvantaged group for the purpose of this paper is the '**socially excluded group or SE and it includes within itself the socio-economic disadvantaged (SED).**'

III. SE ARE ELIGIBLE TO BE INCLUDED IN THE FRAMEWORK OF DL

According to *Khaitan*, any anti-discrimination norm should satisfy 4 conditions.[28] The first condition is the 'personal ground condition.' The second one is the 'cognate group condition,' the third one is the 'relative disadvantage condition' and the last one is the 'eccentric distribution condition.' If a group needs protection on these grounds or suffers disadvantage on these grounds, then it should be given a place in the DL framework.

The personal ground condition means that any norm or law in question must either by omission or by act disadvantage a group based on the 'grounds.' These grounds/traits have already been identified by the author in the previous section. This can be clarified by taking some examples. As I mentioned earlier that the Second Backward class commission report noted that 52% of the Indian population is Socio-economically backward. Almost forty years have passed since then and the condition has remained more or less the same. In the survey of 2011, it was revealed that 21.9% of the Indian population still live in extreme poverty.[29] In the words of *Abhijeet Banerjee*,[30] they are ultra-poor. They earn less than Rs. 140 per day.[31] Interestingly, to get a net pack to register on CoWIN platform, the cheapest option is JIO net whose lowest package for a monthly net pack is around Rs. 150.

In the same manner, about 750 lakh people are still either homeless in India or lack decent residential facilities.[32] Even in the criminal justice system, this socio-economic disadvantage plays a huge role. In 2016, it was discovered that 74.1% of the prisoners sentenced to the death penalty were from

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[28] Khaitan *infra* note 14.

[29] The World Bank, "Poverty and Equity Portal – India" http://povertydata.worldbank.org/poverty/country/IND accessed 2-1-2022.

[30] Abhijeet V. Banerjee and Esther Duflo, *Hard Economics: A Radical Re-thinking of the Way to Fight Global Poverty* (Public Affairs 2011).

[31] *Supra* note 28.

[32] HWCF, "Global Homeless Statistics – India" https://homelessworldcup.org/homelessness-statistics/ accessed 21-12-2021.

economically disadvantaged background.[33] It is clear that the group faces grave disadvantages based on these grounds.

The second condition should also be apparent now. It is the 'cognate ground condition.' It means that a protected group has to be defined and the people should be classified in a group with like features. For each cognate group, there has to be a competitor group. This ground need not be given much attention because the previous section in the paper was dealing with defining the cognate group. The group identified was 'SE group' and the competitor group has to be a 'socially inclusive group (SI) with little or no socio-economic disadvantage.

The third condition is the most important one. The group should suffer a 'relative disadvantage' as compared to the other groups. This SE group must suffer 'substantial,' 'pervasive' and 'abiding' disadvantages. Substantial[34] in this sense would mean strong and covering a large portion of people. Pervasive means spreading to a large portion of something.[35] Abiding would mean continuing for a large period of time.[36] Now, all these factors are present in the SE group. As I have shown, these people have been disadvantaged for a long period of time, for instance, the income growth for the bottom 50% of the Indian population was merely 90% between the period 1980-2015. Whereas for the top 10%, the growth was tremendous, i.e. 435% in the same period. Here we are talking about 50% of the Indian population for a period of 35 years.[37] In the same manner, this relative disadvantage should be such is so disadvantageous that it impacts day to day activities of the group. I will revisit this because 'group disadvantage' is an essential condition to include any group in the purview of DL and needs further attention.

The last condition is the 'eccentric distribution condition.' It means that the tangible/non-tangible benefits are distributed equally to the majority of the members of the group. But does it happen for the SE disadvantaged group? I do not think so. It can again be empirically shown.

According to a report in 2019, only 1.6 % of the total students who qualified the NEET exam,[38] were those who did not take coaching. In the same manner, during 2013-2014 it was found that in the top 5 NLUS, only 5% of students belonged to the family whose annual income is less than 1 *lakh* per annum. It is a known fact that admission to top colleges provides for a better employ-

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33 NLUD, *Death Penalty India Report* (2016) 101.

34 https://www.merriam-webster.com/dictionary/substantial accessed 21-12-2021.

35 https://www.merriam-webster.com/dictionary/pervasive accessed 21-12-2021.

36 https://www.merriam-webster.com/dictionary/abiding accessed 21-12-2021.

37 Thomas Picketty and Lucas Chanel, "Indian Income Inequality, 1922-2015: From British Raj to Billionaire Raj?" (World Inequality Lab 2018) accessed on 15-1-2022.

38 Poornima *supra* note 6.

ment opportunity, which by this stat has been derived from the SE group.[39] Not only in education, but the same can be seen in the health sector. Poor housing facilities, poor water quality and lower-income results in poor nutritional intake by the children belonging to the group.[40] Children from lower strata or the SE group face malnutrition and stunted growth. The greater number of people who indulged in smoking *beedis, tobacco,* and local adulterated alcohol belong to the manual labour class of people. These people are the most susceptible to fall in the SE group.[41]

Hence, the kind of disadvantages and discrimination that an anti-discrimination law seeks to rectify is traced on these four markers. As it is apparent, the SE group suffers on all of the specified grounds that will warrant that the group is protected by the Anti-discrimination laws.

Now, there are two more conditions, which when fulfilled the group is considered to be eligible to get protection under the DL.

The first one is the 'group disadvantage condition.'[42] I have kept on highlighting these criteria time and again in my project. But it would be clearer if seen from the theories as expounded by *Sen*[43]*, and Nussbaum*.[44]

The policymakers and discriminators do not understand that people live with income and conversion handicaps.[45] The idea of providing free vaccines through the COWIN platform is good for people who have proper digital literacy (which as I have shown previously is only 38% of the total Indian household), access to the internet, and financial resources to access the platform, laptop, and computers. But it is a reality that the monthly annual income of a person in a BPL family in a rural setting is merely Rs. 836. The jio pack of the net is around Rs. 150 per month. Even if we reduce it to Rs. 75 (considering that in many families they might take a daily net pack which is cheaper), it would still be 8.3% of Rs. 836 which is quite a considerable portion of monthly income.[46] As for the onsite registration, onsite registration in rural areas was done by *Gram-Panchayats'* (GM) community centers. But a recent survey revealed that around 13000 GM do not have community centers.[47] In the same

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39 Surbhi *supra* note 7.
40 *Ibid*.
41 *Ibid*.
42 Khaitan, *infra* note 14.
43 Amartya Sen, The Idea of Justice, (The Belknap Press of Harvard University Press Cambridge, Massachusetts 2009).
44 Martha C. Nussbaum, Frontiers of Justice Disability Nationality Species Membership, Oxford University Press New Delhi (2006).
45 Sen (n 41).
46 IN RE: DISTRIBUTION OF ESSENTIAL SUPPLIES AND SERVICES DURING PANDEMIC, Suo Motu Writ Petition (Civil) No.3 of 2021.
47 *Ibid*.

manner, some elderly poor people are either living in old-age homes or independently. It seems as if the arrangements made by the government were in no manner useful to them. The government had *Rawlsian*[48] idea of giving primary goods to people thinking that they will use it to its full potential and the aimed target of reducing SE disadvantage would be achieved. But this understanding is extremely flawed. Some people are incapable of realizing their potential. If the government fails in the actual realization of rights by forgetting that there are handicaps suffered by people, there is latent, indirect discrimination is done against these people.[49] Secondary or relative deprivation means that even after providing for institutions and arrangements, these people are not able to efficiently utilise it. This is functioning handicap. Functioning handicap means how well a group is able to realise the opportunities. If the SE group were functionally handicapped, there would have been no group disadvantage.

But, I have shown that no arrangement has been put in place to assert that all these examples are mere instances of functioning handicap. *Nussbaum*[50] also expands on it to say that till there are actual opportunities and a level playing field for the people in a real sense, one group will always be disadvantaged as compared to the other. In the same manner, *Abhijeet Banerjee*[51] argues that the group with significant SED lives with a high cortisol level. A high cortisol level would mean that the people in the group suffer not only from socio-economic but also from psychological disadvantages.

The SE group is deprived of resources and hence they are disadvantaged as a group.

Now, the second criterion is the 'immutability 'of the group.[52] It means that the power to change the status and the affiliation to the group is not in the hands or under the control of the people in the group. The second condition of immutability is that the choice to be in the group was not voluntary. *Khaitan* even argues that 'effective immutability' will also suffice. Effective immutability means that there would be high personal costs imposed on the group if they try to improve their condition.[53]

The group could have had mutable characters if they could be better on the poverty front, better in educational qualifications and have had better access to resources. But this is not what is happening with the people in the group. I have previously shown that the people, who are deprived of their life choices, remain stuck in the group for generations. We have seen statistically that not

48 Sen (n 41).
49 Sen (n 41).
50 Nussbaum (n 42).
51 Abhijeet (n 28).
52 Khaitan *infra* note 14.
53 Khaitan *infra* note 14. 135.

much has changed for them over the years. The statistics of income growth rate between 1980 and 2015 depict that the SED is not only self-sustaining but also self-perpetuating. These handicaps (as enunciated by *Sen*[54]) do not allow people to get out of the trap. *Abhijeet Banerjee*[55] calls it the poverty trap; *Nussbaum*[56] calls it 'absolute and permanent deprivation.' According to them, a person who falls into this deprivation based on SE markers is at a greater risk to stay in the group because of pervasive and abiding disadvantage. Then, the group has immutable characteristics because nobody voluntarily wants to remain in deprivation. Even if they wanted to, they could not have easily left the group.

Hence, I can conclude that the SE group also satisfies all the criteria necessary to include it in the framework of DL. Few scholars criticise that the group characteristics of SE are quite fluid and the status can be changed easily. This is a valid criticism and while it can be true for a few in the group, it might not be so true for a majority of them. In recent decades, scholars like *DE Peterman*[57] have argued that groups can have some mutable traits. This is because DL is accepting quite fluid concepts such as religion, marital status, etc within its purview. Hence, even if the group cannot satisfy the criterion of immutability to its fullest, the group should still be given protection based on other identified criteria.

IV. DISCRIMINATION LAW AND THE FOUR BASIC GOODS

The broader aim of DL is to secure well being of an individual and the group.[58] The disadvantages hamper the promotion of this well-being by preventing access to 4 basic goods.[59] The first one is biological needs, the second is the negative freedom, the third one is self-respect and the fourth one is access to valuable opportunities and free choices.[60] To avoid repetition, I will not get into the question of biological needs. It should be amply clear that the basic biological needs such as nutrition, housing, and quality water are deprived for the SE group. I will show that the group is deprived of the rest 3 basic goods.

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54 Sen (n 41).
55 Abhijeet (n 28).
56 Nussbaum (n 42).
57 Daniel Evans Peterman, 'Socioeconomic Status Discrimination' (2018) Virginia Law Review Vol. 104, <https://www.virginialawreview.org/wpcontent/uploads/2020/12/Evans_Online%20Revised.pdf > accessed on 12 January 2022.
58 Khaitan *infra* note 14.
59 Khaitan *infra* note 14.
60 Khaitan *infra* note 14.

1. 'Negative freedom' in the conception of *Isaiah Berlin*[61] refers to the freedom that requires a non-interference and no obstruction by the society and state in the enjoyment of one's life by an individual. This refers to the conception of enjoyment of life by one individual in one's private sphere where the interference and obstruction by others on unjustified grounds are not allowed. The disrespect and breakage of these boundaries lead to the coercion and forced enslavement of an individual. This negative freedom must be available to all the individuals in a society irrespective of their social positions. However, when we look at the realities of people with low socio-economic backgrounds, it appears that this freedom is systematically taken from them at an institutional and societal level. In other words, they suffer interference both by the society and the state that leads to the infringement of this freedom. This usually happens through some deliberate measure or action, the impact of which is to cause interference in the life of people.

This systematic discrimination against people with low socio-economic backgrounds takes two major forms: 'direct interference' and 'indirect interference'.[62] When it comes to 'direct interference', on a theoretical plane, it refers to the precarious condition of these people to suffer repeated interference and obstruction by the state in the name of 'development'. Examples of this kind of interference can range from large-scale dam construction projects, slum rehabilitation projects, and urban redevelopment projects. The history of all these projects shows their tendency to acquire a large quantity of land which in turn leads to large-scale evictions. The victims of these development projects are none but the people from lower socio-economic strata.[63] These development projects lead to direct interference in the enjoyment of rights of these people which completely takes away their 'negative freedom'. Another example, in this regard, is this lower reporting of crimes of sexual harassment by the blue-collar victims of these crimes because of the consequences that they may face in the form of loss of jobs and livelihood.[64] These incidents not only show the severity of these intrusions but also the relative ease with which the people from high economic strata engage in such interferences with no severe consequences.

Similarly, if we look at 'indirect interference', it takes the form of certain demands imposed by the powerful groups on the people of lower socio-economic strata in return for non-discrimination. Often these imposed conditions lead to a condition wherein the person loses the freedom of manifestation and freedom of self-expression. A recent example of the 'indirect interference' can be found in the new Covid-vaccination policy of the

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[61] Isaiah Berlin, "*TWO CONCEPTS OF LIBERTY," Four Essays on Liberty*, (Oxford, England: Oxford University Press, 1969).

[62] Khaitan *infra* note 14.

[63] Surbhi *supra* note 7.

[64] *Ibid*.

government. The government has reserved about 25% of the vaccines for private hospitals.[65] On the face of it, there is a 'direct interference' involved here because those vaccines were not affordable to people of lower economic strata. However, there is also an 'indirect discrimination' involved here. This is caused majorly because of the urban-rural divide. The majority of these private hospitals are present in urban areas. Therefore, the rural population of the country is completely deprived of these vaccines. In the case of rural areas, it is not a question of economic strata because even a rich person from a rural area cannot afford to buy these vaccines without traveling a long distance. At the time of the peak of the Covid waves, the rural areas anyway do have free vaccines and this policy has deprived them of paid vaccines as well. Hence, this policy has caused an 'indirect' interference in the enjoyment of the right of health in the life of the rural population. The entire policy was made by the *haves* to benefit themselves but came at the cost of discrimination against the *have-nots*. The policy obstructed the decision-making sphere of the *have-nots* and caused a major impediment in their lives by depriving them of doing the things that they would have otherwise done.

2. SELF-RESPECT[66]

There are certain social prejudices and biases that are attached to the people of lower SES by the upper strata of the society. There is a phenomenon of 'essentialism' observed here where people of lower SES are termed as lazy and do not make any efforts to overcome their poverty.[67] The popular culture narrative further augments this point which happens with the help of certain films and concepts like 'poverty tourism'.[68] In the movies, the concept of poverty is often shown out of context wherein certain poor people are portrayed as thefts or Phishers. In addition, certain movies and web series show how poor youths can easily come out of the poverty trap through hard work, perseverance, and ingenuity (*Slumdog Millionaire*). All these films often forget the context and politics within which the concept of poverty operates. However, the impact of these factors is that the people from lower socioeconomic strata often lose their self-esteem and confidence. It must be noticed that most of these claims about low SES people are completely misplaced and highly biased. A study conducted by Professor *Hernando de Soto*[69] on the poor people from developing countries shows that most of these people are equally hardworking or even more hardworking than the people from higher economic strata. However, despite all this hard work and ingenuity, these people were not able to move

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[65] *Supra* note (n 44).

[66] Khaitan *infra* note 14.

[67] Surbhi *supra* note 7.

[68] Melissa Nisbett, "Empowering the Empowered? Slum Tourism and the Depoliticization of Poverty" (2017) 85 Geoforum 42.

[69] Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books 2000).

up in the economic strata not because of incompetence but because of the flawed legal system that only works in the favor of people of upper SES and systematically deprives these people. However, these studies were deliberately ignored by the powerful people and they never really reach the people from lower SES. Therefore, the flawed narratives about them continue which further discourages them and makes them lose their self-esteem.[70]

3. Now, the last one is the obstruction in following valuable choices and opportunities.[71] The aggregation of all the disadvantages mentioned above culminates in the handicaps. People belonging to this group are not able to follow valuable opportunities. As an example, it has been observed that employers use region and place of residence to segregate employees and screen them out.[72] There is also the marginalization of people in urban settings and a kind of residential segregation that keeps capable people belonging to a particular caste, religion, and a SED background away from employment.[73]

Looking at all these reasons, again, SED/SE are justified in getting included because they fulfill all the criteria that have been popularly accepted by the scholars to label any group as a 'protected group.'

V. ALTERNATIVE FRAMEWORK

Now as an add on to this discussion, it has to be kept in mind that this is not the only framework according to which the SE group can be roped into the framework of DL. Prof. *Madhav Menon's* report[74] came out in 2008 proposed to establish an EOC (Equal Opportunity Commission). According to the report, there was to be a deprived group, and legislation for this deprived group was based on the deprivation index. They accepted that the deprivation can be temporary but even these temporary things demand protection. Hence, the strict requirements of *Khaitan's* framework can be bypassed through the framework suggested by Prof. *Madhav Menon*. The inclusion of the SE group can be easily done on the deprivation index as I have shown that the group suffers a great deal of deprivation, be it any trait-economic, social or cultural.

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70 *Ibid*.

71 Khaitan *infra* note 14.

72 "Engineers are Facing High Level of Biases at Work Survey Shows" (*The Economics Times*, 8-1-2019) <https://economictimes.indiatimes.com/jobs/engineers-face-high-level-of-biases-at-work-survey/articleshow/67429806.cms> accessed.

73 Naveen Bharti, "Resisential Segregation in Urbn India and Persistence of Caste" (Ideas for India, 1-7-2020) https://www.ideasforindia.in/topics/urbanisation/residential-segregation-in-urban-india-and-persistence-of-caste-i.html accessed on 22-1-2022.

74 Tarunabh Khaitan, "Transcending Reservations: A Paradigm Shift in the Debate on Equality" (EPW, 20-9-2008) Vol. 43, Issue 38 https://www.epw.in/journal/2008/38/commentary/transcending-reservations-paradigm-shift-debate-equality.html accessed on 23-1-2022.

VI. INDIRECT DISCRIMINATION UNDER ARTICLE 14

As I have mentioned earlier, the Constitutional framework for a DL in India is narrower than in various other jurisdictions. It seems as if a proper framework to grant protection to the SE group would take time to come. There should be some protection accorded to the group meanwhile the jurisprudence develops. Fortunately, the Indian Constitution and the judicial system are not toothless in this regard. Recently, various HC and SC decisions have identified indirect discrimination under article 14 as well as article 15.[75] Indirect Discrimination is said to occur when a person adopts a facially neutral worded policy that seems to apply equally to all but has a disadvantageous effect on a certain group of people. In this section, I will argue that policies that have an adverse impact on SE groups should be struck off using ID under article 14. It has to keep in mind that policies like education policy or vaccination policies are so neutral on the face of it and do not directly discriminate. But as I have shown time and again in this paper, these policies have a disparate impact on one group.

As I have mentioned earlier as well, SE means a Socially-excluded group suffering disadvantage on the Socio-economic front. The very term is a concoction of two distinct parameters (Social and economic) which are not given explicitly in the five straight-jacketed markers under Art.15. To substantiate, when the first backward class commission was set up in 1953 under the chairmen ship of Kaka *Kelkar* he emphasized that reservations for the backward classes be based on, inadequate or no representations in government service, inadequate representation in trade and commerce, lack of general educational advancements etc. The report urged that looking merely at caste can be erroneous.

But even the commission did not contemplate achieving its goal via the article 15 route.

So it is implied from the above that though not explicitly but ultimately socio-economic disadvantage was recognized as a form of discrimination that found its place not only in the first commission of backward classes but also in successive commissions to come (recent EWS debates).

There have been myriad attempts to bring about a change in the Discrimination laws, from the introduction of the Anti-Discrimination and Equality bill in 2016, which *Shashi Tharoor* tried to pass but which never

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[75] Dhruva Gandhi, "Locating Indirect Discrimination In India: A Case For Rigorous Review Under Article 14" (2020) 13 NUJS L. Rev. 4, http://nujslawreview.org/2020/12/19/locating-indirect-discrimination-in-india-a-case-for-rigorous-review-under-article-14/ accessed on 23-12-2021.

came to fruition. A more recent, 'Equality bill' which the Centre of Law and Policy Research tried to come up with in 2020, but also never saw the light of the day.

Though it seems that it is a hard path for DLs; coming to fruition of these laws is a distant dream and therefore the SED has no protection. This would have been the fate, had our constitution not been drafted in such an erudite manner as it is because it has every might to safeguard the rights of SEDs with the help of articles like article 14. This ensures a remedial action against a multitude of discriminations that one could face.

On perusal of Art.15 it is evident that indirect discrimination is allowed and SC has time and again iterated its position on the same, In SC in *Navtej Singh Johar* v. *Union of India ('Navtej Johar'*[76]*)* which was welcomed for bringing indirect discrimination within the fold of Article 15(1). Chandrachud J. opined,

"If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex (emphasis added)."[77]

But as the DL jurisprudence has evolved, many high courts have started to take a different stance because they did not want to limit themselves by a closed list of article 15 (1), as an add-on to the markers which Art.15 allows. In *T. Sareetha* v. *T. Venakata Subbaiah*,[78] when the Andhra Pradesh High Court found a legislative measure to be struck off for being indirectly discriminatory, it did so under Article 14. Similarly, the Supreme Court has even explicitly refused to find a breach under Article 15(1) for indirect discrimination.[79] *Amit Bhagat* v. *State (NCT of Delhi) ('Amit Bhagat')*,[80] the Delhi High Court was faced with a clause in the Delhi Motor Vehicles Rules which exempted Sikh women from mandatory wearing a helmet. The court was hesitant in striking the provision down under article 15 (1). Time and again, it has been seen that the court restricts itself to only the protected markers making the article 15(1) a closed list.

Seeing the absolute nature of the markers and insufficiency of protection under art.15 one has every option for a remedy under art.14 which also allows for indirect discrimination[81] and the markers are not absolute, unlike Art.15. As there are no straight-jacketed or absolute markers in art.14, therefoare, the

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76 (2018) 10 SCC 1.
77 *Ibid*.
78 1983 SCC Online AP 90.
79 Dhruva *supra* note 75.
80 2014 SCC Online Del 7020.
81 Dhruva *supra* note 75.

inclusion of SEDs is permissible and any policy which is antithetical to the interest of SEDs could be struck-off under art.14. Now the question arises, how can it be done?

The test has been laid down in *Lt. Col. Nitisha*[82] case and a practical application of the same would clarify my argument. The two-step test was- the group has been disadvantaged disproportionately and the policy had the effect of 'exacerbating' the disadvantage suffered by the group, which can be socio-economic exclusion. In my opinion, both these prongs are satisfied by the disadvantage suffered by the SE group and I have sufficiently shown this in my paper.

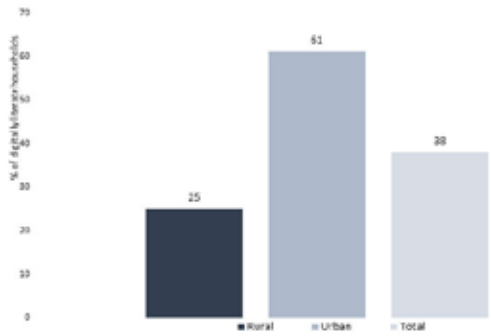
VII. CONCLUSION

In this paper I have tried to make a case for the inclusion of SE group under the framework of Indian DL. Ensuring that the group is protected is the duty of the State, especially when it is known that they face quite a grave adverse impact. It is high time that they are given their due.

Till then, the article 14 framework should be used and any discriminatory policy based on SE disadvantage should be struck off.

ANNEXURE

FIG 1



DECLARATION

I, Satyarth Kumar Srivastava, hereby declare that the content in the article is mine and original. Due credit has been given via citation. This paper is not under-consideration in any journal for the time being.

[82] *Nitisha* v. *Union of India*, 2021 SCC OnLine SC 261.

TRADING INTERESTS: LOCATING THE SECURITY EXCEPTION WITHIN THE FRAMEWORK OF SANCTIONS PLACED ON RUSSIA

—*Ahan Gadkari*[*]

Abstract—The Russian invasion of Ukraine has had significant cross-border humanitarian and economic impacts, on the parties involved in the conflict as well as the global economy in general. The detrimental economic impacts have been countered by States taking actions against Russia through economic routes, mainly sanctions. This paper analyses the effect of the setrade-related coercive measures employed by States against Russia, and the way they can be situated in international trade law regimes. The paper explores the essential security needs exception within the framework of GATT and GATS, and after analysing relevant case laws and disputes, establishes the way in which the exception can be applied in the present case of sanctions against Russia.

I. INTRODUCTION

The conflict between the Russian Federation and Ukraine increases day by day in intensity and, with it, the already heavy toll in terms of victims, missing persons, and displaced persons seeking refuge in neighbouring countries grows. This *piece* will not deal with humanitarian issues or the qualification of the Russian military intervention in the light of international law, so please

[*] JGLS' 23 Research Assistant, UN International Law Commission Young-OGEMID Rapporteur for India Managing Editor - IJLSA.

refer to the contributions of other scholars published,[1] but rather the negative implications of the same on financial markets and the world economy. War, geopolitical instability, and the risk of a nuclear escalation, have in fact introduced numerous unknowns for global trade, for multinational companies, for capital markets and for national economies themselves.

Economically, the first and perhaps most obvious effect of the Russian-Ukrainian conflict was a general **increase in the prices** of raw materials and food. The Russian Federation is among the main exporters of hydrocarbons, as well as of numerous metal alloys (such as aluminium, titanium, nickel and palladium) essential for the steel, chemical and petrochemical, pharmaceutical and major engineering sectors. The instability generated by the conflict and the consequent trade restrictions has caused a very strong rise in energy prices, as evidenced by the current price of natural gas, which has practically doubled compared to a year ago. Taken together, moreover, the Russian Federation and Ukraine account for over a quarter of the world trade in wheat: tensions in Eastern Europe threaten to curb grain shipments around the world, increasing the costs of producing bread and pasta. The gravity of the situation was underlined by the Director-General of the World Trade Organization (WTO), Ngozi Okonjo-Iweala, in a recent statement.[2]

The effects of the conflict are also having significant impacts on global supply chains: commercial companies are struggling to find easy merchant routes, with the closure of Ukrainian ports, the **risks for navigation** in the Black and Azov seas, theatres of the conflict, and restrictions on transit in the Bosporus, where Turkey has already announced its intention to implement the provisions of the Montreux Convention[3] that allow it to restrict navigation, in particular warships, through the Dardanelles. Following the decisions of the European Union, the United States and other countries, to close their airspace to aircrafts flying the Russian flag - and the reciprocal measures adopted by the Russian government - trade is further restricted also by air.

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1 Ahan Gadkari and Tushar Rajput, "A Leopard Never Changes its Spots - Legal Validity of Russia's Use of Force Against Ukraine", Berkeley Journal of International Law (April 26, 2022), at https://www.berkeleyjournalofinternationallaw.com/post/a-leopard-never-changes-its-spots-legal-validity-of-russia-s-use-of-force-against-ukraine; Andrea Spagnolo, "First Considerations on Russia's Attempt to Justify Armed Intervention in Ukraine", SIDIBlog (February 25, 2022), at http://www.sidiblog.org/2022/02/25/prime-considerazioni-sul-tentativo-della-russia-di-giustificare-lintervento-armato-in-ucraina/; Federica Favuzza, "Is Russia Occupying Ukraine?", SIDIBlog (March 4, 2022), at http://www.sidiblog.org/2022/03/04/is-russia-occupying-ukraine/; Marco Fasciglione, "Russia's Armed Intervention in Ukraine, Private Sector Complication and Guiding Principles on Business and Human Rights", SIDIBlog (March 6, 2022), at http://www.sidiblog.org/2022/03/06/lintervento-armato-della-russia-in-ucraina-complicita-del-settore-privato-e-principi-guida-su-imprese-e-diritti-umani/.

2 "DG Okonjo-Iweala Issues Statement on Ukraine" (March 2, 2022), at https://www.wto.org/english/news_e/spno_e/spno23_e.htm.

3 The Convention Regarding the Regime of the Straits, July 20, 1936, vol. CLXXIII.

If the effects of the conflict have and will have global repercussions, the "price" that the Russian Federation risks paying could be very high. The **condemnation of the conflict**, in the foregone paralysis of the United Nations Security Council, came almost unanimously from the United Nations General Assembly which, with a resolution adopted on 2 March 2022,[4] requested the Russian Federation to "*immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders*". Several *like-minded states* (including Australia[5], Canada[6], South Korea[7], Japan[8], United Kingdom[9], Singapore[10], United States of America[11], Switzerland[12], among others) and the European Union[13], have responded to the heavy mobilization of troops with the employment of all its economic strength, implementing numerous unilateral measures - but certainly "agreed" - in reaction to the blatant violation of art. 2.4 of the United Nations Charter,[14] and the previous Soviet recognition of the separatist republics of Luhansk and Donetsk. Many of these **coercive measures** (commonly - and improperly - known as "sanctions") have also been extended to subjects and entities of Belarusian nationality, due to the complicity of the Lukashenko regime in military intervention alongside the Russian Federation.[15] Clearly, these measures are aimed at isolating the Russian state and evaporating the economic resources necessary for the conduct of the war.

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4 GA Res. A/ES-11/L.1 (March 3, 2022).

5 "Russia Sanctions Regime", at https://www.dfat.gov.au/international-relations/security/sanctions/sanctions-regimes/russia-sanctions-regime#:~:text=Australia%20imposes%20autonomous%20sanctions%20in,extended%20in%202015%20and%202022.

6 "Canadian Sanctions Related to Russia", at https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/russia-russie.aspx?lang=eng.

7 Hyonhee Shin and Cynthia Kim, "South Korea Bans Exports of Strategic Items to Russia, Joins SWIFT Sanctions", *Reuters* (February 28, 2022), at https://www.reuters.com/business/aerospace-defense/skorea-bans-exports-strategic-items-russia-join-swift-sanctions-2022-02-28/.

8 "Japan Targets Banks, Military Groups in New Sanctions on Russia", Kyodo News (February 26, 2022), at https://english.kyodonews.net/news/2022/02/55c29691cc52-urgent-japan-pm-announces-more-sanctions-on-russia-after-attack-on-ukraine.html.

9 "UK Sanctions Relating to Russia", (April 15, 2022), at https://www.gov.uk/government/collections/uk-sanctions-on-russia.

10 "Sanctions and Restrictions Against Russia in Response to its Invasion of Ukraine", (March 5, 2022), at https://www.mfa.gov.sg/Newsroom/Press-Statements-Transcripts-and-Photos/2022/03/20220305-sanctions.

11 "Treasury Sanctions Russians Bankrolling Putin and Russia-Backed Influence Actors", (March 3, 2022), at https://home.treasury.gov/news/press-releases/jy0628.

12 Michael Shields and Silke Koltrowitz, "Neutral Swiss Join EU Sanctions against Russia in Break with Past", *Reuters* (March 1, 2022), at https://www.reuters.com/world/europe/neutral-swiss-adopt-sanctions-against-russia-2022-02-28/.

13 "EU Restrictive Measures against Russia Over Ukraine", at https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/.

14 Marko Milanovic, "What is Russia's Legal Justification for Using Force against Ukraine?", EJIL Talk (February 24, 2022), at https://www.ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine/.

15 Niklas Reetz, *Belarus is Complicit in Russia's War of Aggression*, EJIL Talk (March 1, 2022), at https://www.ejiltalk.org/belarus-is-complicit-in-russias-war-of-aggression/.

Chapter I understands the effects of the sanctions in Russia and globally, and Chapter II peruses the numerous measures which can and are being used for economic coercion. Chapter III introduces the international trade law angle to coercive actions, understanding how embargoes, boycotts, quotas, quantitative restrictions, and non-tariff barriers might violate the GATT and GATS. This section also analyses if these actions against Russia can fall within the essential security needs exception, in Article XXI of GATT and Article XIV of GATS. Chapter IV probes the relevant past disputes, such as the 2017 Qatar-Saudi Arabia dispute and the 2016 Russia-Ukraine dispute. The paper concludes that based on the analysis made, the essential security needs exception might apply in the present scenario.

II. ECONOMIC COERCIVE MEASURES IN QUESTION

The measures adopted include the freezing of assets of individuals and commercial companies, the limit on bank deposits and access to bank credit, the prohibition of bargaining for industries operating in the defence sector, the imposition of duties, restrictions on the access to the market and commercial measures such as the withdrawal of concessions and the blocking of exports (of arms, *first of all*, together with products, systems and technologies susceptible of so-called *dual use*). The *assets* of the Russian central bank in the territory of the EU and the United States have been blocked, as have those of the main Russian and Belarusian banks, whose "operation" was severely limited by disconnection[16] from the SWIFT system (*Society for Worldwide Interbank Financial Telecommunication*), which made payments of a transnational nature connected to trade and financial activities substantially more complex, articulated, and lengthy.[17] In total, some 700 people and 60 entities are now subject to sanctions, including President Putin, ministers and senior officials of the Russian administrative apparatus, 351 deputies of the Duma and well-known personalities of the Russian financial elite, including billionaires Alexei Mordashov, Vladimir Lisin and Alisher Usmanov, considered to be very close to the Russian President, whose assets have also been subject to seizure orders[18] in Italy. These measures, which are already quite incisive in themselves, have been accompanied by provisions that impose a ban on the stay and movement of affected individuals on the territory of the states that impose the sanction (*travel ban*) and blockades of air and naval traffic. In addition, the main international *clearing systems*, Euroclear and Clear stream, have decided to refuse transactions in Roubles, as well as several commercial banks have

[16] Tony Czuczka, "Western Allies Agree to Disconnect Some Russian Banks From SWIFT", *Bloomberg* (February 27, 2022), at https://www.bloomberg.com/news/articles/2022-02-26/eu-u-s-agree-to-disconnect-some-russian-banks-from-swift#xj4y7vzkg.

[17] Richard L. Kilpatrick, "Blocking SWIFT in Russia", Opinio Juris (March 4, 2022), at http://opiniojuris.org/2022/03/04/blocking-swift-in-russia/.

[18] "The Assets Seized by Italy from the Russian Oligarchs", ILPOST (March 5, 2022), at https://www.ilpost.it/2022/03/05/italia-sequestri-oligarchi-russi/.

temporarily suspended the sale and purchase of the currency, the value of which has fallen by more than 40%. Other global financial players, such as major payment and credit card networks, have suspended their operations in Russia and Belarus. Many multinational companies,[19] including the so-called big-tech, have suspended sales of their products and services in Russia.

III. INTERNATIONAL INSTRUMENTS

All the instruments listed (without any claim to be exhaustive) have been adopted unilaterally by the States and by the European Union or voluntarily by private subjects. As regards the measures adopted by the States and the Union, it should be emphasized that these coercive measures were implemented in the absence of a decision by the United Nations Security Council pursuant to art. 41 of the United Nations Charter[20] which, as is well known, allows for the adoption of measures not involving the use of force when one of the situations envisaged by art. 39 of the United Nations Charter.[21] The **legitimacy** of the countermeasures adopted by States not particularly harmed by an international offense is still today the subject of a wide debate on the level of general international law (on this point, it is permissible to refer to the considerations of Gadkari and Chowksey[22] regarding the sanctions on Russia's sovereign debt market; De Sena and Gradoni[23] regarding the measures adopted in 2014 in the to the Russian Federation and, more generally, to the studies of Asada[24]; Dawidowicz[25]; Hofer[26]; Silingardi[27]; Sossai[28]; and Ronzitti[29]).However, it is clear that some measures can be framed in specific regulatory regimes: in particular, this practice appears questionable in the light of **international trade law**.

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[19] Sophie Mellor and Erin Prater, *Netflix, China-based TikTok join Google, Apple, other Companies Cutting Ties with Russia*, *Fortune* (March 7, 2022), at https://fortune.com/2022/03/06/business-sanctions-russia-ukraine-invasion-google-daimler-meta-fifa/.

[20] U.N. Charter art. 41.

[21] Alain Pellet and Alina Miron, *Sanctions,* Max Planck Encyclopedia of Public International Law (2013).

[22] Ahan Gadkari and Amogh Chouksey, *Should States Use Unilateral Coercive Measures as a means of Economic and Political Compulsion?*, JFIEL (November 20, 2021), at https://www.jindalsocietyofinternationallaw.com/post/should-states-use-unilateral-coercive-measures-as-a-means-of-economic-and-political-compulsion.

[23] Pasquale De Sena and Lorenzo Gradoni, *Crimea: The Reasons for the Wrong (Russian) and the Wrong for the (Western) Reasons*, SIDIBlog (March 21, 2014), at http://www.sidiblog.org/2014/03/21/crimea-le-ragioni-del-torto-russo-e-il-torto-delle-ragioni-occidentali/.

[24] Masahiko Asada, *Economic Sanctions in International Law and Practice* (2021).

[25] Martin Dawidowicz, *Third-Party Countermeasures in International Law* (2017).

[26] Alexandra Hofer, *The 'Curiouser and Curiouser' Legal Nature of Non-UN Sanctions: The Case of the US Sanctions against Russia*, 23 J. Confl. Secur. Law 1 (2018).

[27] Silingardi Stefano, *Unilateral Sanctions and Sanctions with Extraterritorial Application in International Law* (2020).

[28] Mirko Sossai, *Sanzioni Delle Nazioni Unite E Organizzazioni Regionali* (2020).

[29] Natalino Ronzitti, *Coercive Diplomacy, Sanctions and International Law* (2016).

The tools most often used by governments for sanctions include embargoes, boycotts or the imposition of quantitative restrictions on trade, as well as the creation of non-tariff barriers, such as prescribing specific licensing or packaging requirements. Such measures could violate various clauses of the WTO agreements, in particular the *General Agreement on Tariffs and Trade* (GATT) and the *General Agreement on Trade in Services* (GATS), whose founding principles are reciprocity and non-discrimination in commercial relations, the latter expressed by the well-known *standards* of national treatment and **most favoured nation** (MFN). In particular, Article I, paragraph 1, of the GATT (as well as Article II of the GATS) provides for equal treatment with respect to similar products originating in or destined for the territories of all the other Contracting Parties: some countries, such as Canada, have already withdrawn[30] this privilege with regard to goods from the Russian Federation and Belarus, while legislative proposals[31] to this effect have been introduced at the US Congress. On 15 March 2022, the President of the European Commission announced[32] that this measure will also be implemented by the European Union and its Members within the framework of the World Trade Organization.

As a result of these decisions, goods and services from the Russian Federation could incur much higher tariffs. Furthermore, the unilateral measures implemented so far have established quantitative restrictions on the export of various categories of goods, which could constitute a violation of art. IX of the GATT, which prescribes the elimination of the so-called quotas, as well as the limitations imposed on air, sea and land transport, could result in a violation of the rule that requires the free transit of goods and services in the territories of the Contracting Parties (art. V GATT). In addition, it should be noted that art. 23 of the *Understanding on Dispute Settlement*[33] (DSU) prohibits the use of unilateral *self-help measures*, establishing the obligation to resort to the dispute resolution system provided for by the Agreement: this interpretation has been confirmed by various *panels*, including those set up in cases *US-Shrimp* (par. 7.43)[34] and *Canada - Aircraft Credits and Guarantees* (par. 7.170),[35] which have clearly identified as "prohibited" the measures taken individually by States outside the procedural framework managed by the

[30] Canada cuts Russia and Belarus from Most-Favoured-Nation Tariff Treatment, (March 3, 2022), at https://www.canada.ca/en/department-finance/news/2022/03/canada-cuts-russia-and-belarus-from-most-favoured-nation-tariff-treatment.html.

[31] Simon Lester, *Senators Brown and Cassidy Introduce no Most Favored Nation Trading with Russia Act*, International Economic Law and Policy Blog (March 3, 2022), at https://ielp.worldtradelaw.net/2022/03/senators-cassidy-and-brown-introduce-.html.

[32] *Ukraine: EU agrees Fourth Package of Restrictive Measures against Russia,* (March 15, 2022), at https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1761.

[33] Annex. 2 of the WTO Agreement, *Understanding on Rules and Procedures Governing the Settlement of Disputes* (1994).

[34] World Trade Organization, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/R (May 15, 1998).

[35] World Trade Organization, *Canada – Export Credits and Loan Guarantees for Regional Aircraft,* WTO Doc. WT/DS222/R (Jan. 28, 2002).

Dispute Settlement Body. These and other provisions, therefore, would render illegitimate any unilateral coercive measure of a commercial nature adopted by one Member State against another.

However, the WTO agreements also include clauses of exception to the general regime of trade liberalization, allowing that - in the presence of specific requirements - Member States can adopt measures that have the effect of restricting commercial traffic in order to protect values and non-economic needs. Specifically, while art. XX of the GATT (and art. XIV of the GATS) outline a series of general exceptions,[36] art. XXI of the GATT and XIVbis of the GATS (as well as Article 73 of the agreement relating to the Trade Related Aspects of International Property Rights[37] - TRIPS) instead offer the opportunity to use measures based on **essential security needs**. Such clauses have very rarely been invoked in WTO practice.[38]

As dictated by the letter of art. XXI of the GATT, however, this security exception is directly linked to the objectives of peace protection and maintenance of international security professed by the United Nations Charter, as well as letter (b) of the same provision prescribes that such measures can be decided in a period of war or emergency in international relations. By invoking this provision, Ukraine has decided to apply a full embargo to products originating from the Russian Federation and not to apply the WTO agreements with the same state, as summarized in a letter[39] addressed to the *Chairman* of the General Council of the WTO. It is questionable, however, whether the coercive measures adopted by Ukraine and other states against the Russian Federation and Belarus are legitimate and therefore can fall within the exception clause.

IV. WTO JURISPRUDENCE

Two recent cases in the WTO may come in support, as the use of unilateral economic measures was specifically considered in them. In 2017, Qatar had resorted to the WTO dispute settlement body because of the actions of four states - Bahrain, Egypt, Saudi Arabia and the United Arab Emirates (UAE) - arguing that the coercive economic measures taken by those states constituted a violation of the Organization's rules, impeding the freedom of transit of goods and frustrating most of the commercial exchanges between the two

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[36] Ilaria Espa, Export Restrictions on Critical Minerals and Metals: Testing the Adequacy of WTO Disciplines 193-228 (2015); Mauro Maria Rosaria, Diritto Internazionale Dell'economia: Teoria E Prassi Delle Relazioni Economiche Internazionali 159-162 (2019).

[37] Annex. 1-C of the Marrakesh Agreement Establishing the World Trade Organization, *Agreement on Trade-Related Aspects of Intellectual Property Rights*, (January 1, 1995).

[38] Petros Mavroidis et al., *The Law of the World Trade Organization (WTO): Documents, Cases, and Analysis* 684- 786 (2010).

[39] Yevheniia Filipenko, Letter dated March 2, 2022, from Permanent Mission of Ukraine addressed to the Chairman, WTO General Council U.N. Doc. 80/017 (March 2, 2022).

countries. However, although the *panel* established in the dispute between Qatar and Saudi Arabia had recognized the existence of a state of "tension" and the breakdown of diplomatic relations between the two countries, in the decision only some measures adopted by the Saudi government had been deemed justified by security reasons: rather surprisingly, however, there was no elaboration or analysis in the report about the nature of the emergency situation that would have justified trade restrictive measures.[40] A previous case between Ukraine and Russia, opened in 2016, instead resulted in a decision in 2019 that provides a more complete interpretation of the security exception under Article XXI.[41] As is well known, the dispute arose following the serious deterioration of relations between the two countries in February 2014, a situation that had led the Russian Federation to limit the transit through its territory of Ukrainian goods destined for Central Asian markets. Ukraine had challenged these restrictions before the WTO bodies as contrary to Article V of the GATT as well as to various trade commitments under the Protocol of Accession of the Russian Federation to the Organization. Russia replied by invoking Article XXI (b) (iii) of the GATT, which as mentioned provides that a member of the WTO can take any action "*which it considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations.*"[42] The *panel* then considered[43] that Russia had satisfied the requirements to invoke the exception and had interpreted the requirement of emergency in international relations as a "*situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.*"[44] Consequently, the situation between these two states could well be considered an emergency in international relations, justifying the restrictive measures adopted against Ukrainian goods pursuant to Article XXI (b) (iii) of the GATT.[45] According to the panellists, in fact, there was evidence that relations between Ukraine and the Russian Federation had deteriorated to the point of causing concern for the

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[40] World Trade Organization, *Saudi Arabia – Measures Concerning The Protection Of Intellectual Property Rights,* WTO Doc. WT/DS567/R (June 16, 2020), para 7.257; Caroline Glöckle, *The Second Chapter on a National Security Exception in WTO Law: The Panel Report in Saudi Arabia – Protection of IPR*, EJIL Talk (July 22, 2020), at https://www.ejiltalk.org/the-second-chapter-on-a-national-security-exception-in-wto-law-the-panel-report-in-saudi-arabia-protection-of-ipr/.

[41] World Trade Organization, *Russia - Measures Concerning Traffic In Transit,* WTO Doc. WT/DS512/R (Apr. 5, 2019); Loris Marotti and Giovanna Adinolfi, *WTO security exceptions: A landmark Panel Report in Times of Crisis*, QIL-QDI (May 12, 2020), at http://www.qil-qdi.org/wto-security-exceptions-a-landmark-panel-report-in-times-of-crisis/; Tania Voon, *Russia—Measures Concerning Traffic in Transit*, 114 AJIL 1, (2020).

[42] World Trade Organization, *Russia— Measures Concerning Traffic in Transit,* WTO Doc. WT/DS512/R (April 5, 2019), para 7.34.

[43] *Ibid*.

[44] *Id*., paras 7.75 and 7.76.

[45] *Id*., para 7.5.7; Rostam J. Neuwirth and Alexandr Svetlicinii, *The Economic Sanctions over the Ukraine Conflict and the WTO: 'Catch-XXI' and the Revival of the Debate on Security Exceptions*, 49 J. World Trade 5 (2015).

entire international community, in light of the recognition of the situation by the United Nations General Assembly and the protests and unilateral measures adopted by numerous governments.

In light of the previous - albeit sparse - case law related to the security exception, a first assessment of the coercive measures implemented against the Russian Federation and Belarus in February / March 2022 can therefore be proposed. First of all, there seems to be no doubt about the fact that the current conflict can be considered a situation of "war or emergency in international relations" which makes art. XXI - and the relevant provisions contained in the other agreements - and consequently possible the non -application of the WTO rules by Ukraine vis-à-vis the Russian Federation. However, it has to be ascertained whether the Ukrainian state can also disregard the obligations arising from agreements that are not strictly "commercial": the Ukrainian diplomatic note, in fact, speaks in a generic way of "*WTO Agreements*", also including other annexes to the WTO Agreement, such as the DSU and the Agreement relating to periodic *review* of commercial policies.[46] The exception clauses for security reasons, on the other hand, refer exclusively to the obligations present in the agreements in which they are contained and could therefore be invoked only in reference to obligations under the GATT, GATS and TRIPS. This circumstance was underlined by the Russian Federation itself in its diplomatic reply note.[47]

Secondly, in relation to the measures implemented by third countries, such as Canada, and by the European Union, it seems that the exception clause can still apply: the text of art. XXI of the GATT, in fact, does not contain any reference to emergency situations that directly involve the State invoking the exception, but refers to generic "essential interests" of security, which, in the opinion of the authors, may well include compliance with the principle of the prohibition of using force in international relations, the safeguarding of the territorial integrity and political independence of other States and the obligation to resolve disputes peacefully. Nor do the cited clauses limit their scope of application to purely national situations: for example, letter (c) of art. XXI of the GATT makes a clear reference to the Charter of the United Nations and the obligations related to the maintenance of international peace and security, allowing WTO Members to disregard *ex* GATT obligations in order to implement the coercive measures decided by the Security Council on the basis of articles 39 and 41 of the Charter.[48] Based on these considerations, the

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[46] Wortd Trade Organization, *Trade Policy Review Mechanism as Amended by the General Council* (January 1, 2019).

[47] D. Lyakishev, Letter dated March 7, 2022, from Permanent Mission of The Russian Federation addressed to the Chairman, WTO General Council U.N. Doc. 17/756/95 (March 7, 2022).

[48] Peter Van Den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization* 622-623 (2017).

suspension of commercial obligations would also be allowed by countries not directly involved in the Russian-Ukrainian conflict.

Finally, however, it should be remembered that the predominant interpretation of the exceptions in question recognizes the power of states to *self-determine*, in a completely subjective way: which situations jeopardize their national security and what actions are necessary to deal with this emergency. Consequently, this assessment is beyond the control of any bodies responsible for establishing the legitimacy of such measures in the framework of the WTO dispute settlement system.[49] However, the invocation of art. XXI (b) of the GATT is not completely non-justiciable: the panel and the eventual WTO Appellate Body will in any case have to assess that the appeal to the exception is made in good faith.[50]

The art. XXI of the GATT and the "sister" provisions contained in the other WTO agreements, therefore, could offer a certain margin of manoeuvre to **justify** coercive measures of a unilateral nature which in principle would be prohibited by the DSU and contrary to various provisions of the WTO agreements. It is clearly necessary to objectively demonstrate the existence of an exceptional situation for international relations and, furthermore, that the measure was undertaken reasonably and without abuses. If not, there appears to be no justification in the WTO special regime for such measures. Certainly, the Organization's dispute resolution system may soon have to confront this issue again, by virtue of the many measures adopted against the Russian Federation and, to a lesser extent, Belarus, by other states in response to the conflict.

V. CONCLUSION

This paper has firstly discussed the negative implications of the Russian invasion on the world economy, and how sanctions are being used to economically isolate Russia. The paper also discussed the numerous measures that can be employed as economic coercion, and the vast extent of sanctions upon Russian businesses, including their impact such as the fall in the Russian Rouble and the withdrawal of big-tech and financial companies. The paper goes on to delve into actions such as embargoes, boycotts, quantitative restrictions, quotas, and restrictions on free transit, and acknowledges that these might violate GATT or GATS, but analyses these measures from the lens of the essential security needs exception provided within GATT and GATS. The paper then looked at the Qatar-Saudi Arabia dispute (2017) and the Russia-Ukraine dispute (2016). Finally, the paper concludes that the essential security

[49] World Trade Organization, *Russia— Measures Concerning Traffic In Transit,* WTO Doc. WT/DS512/R (Apr. 5, 2019), paras 7.102 and 7.103.

[50] Stephan Schill and Robyn Briese, *"If the State Considers": Self-Judging Clauses in International Dispute Settlement*, Max Planck UNYB 13 106-110 (2009).

needs exception should apply in the given scenario, and notes that the WTO should asses if the self-determination of situations affecting national security are in good faith or not.

The coercive measures employed by Ukraine and other countries against Russia are likely to survive the test of legality on the basis of the analysis provided above. Since there is no sufficient literature or precedent on the essential security exception, it is uncertain whether these justifications would work or not. It is important to analyse the effect of the coercive measures employed by different countries, and whether they would help the countries achieve their goal. The Russian economy was hit by these measures, having significant economic impacts such as the crash of the Rouble and the stock market, however, the Russian Central Bank was able to counteract this by increasing interest rates and implementing capital controls. Furthermore, Russia is still able to export one of its most precious commodities-oil-to European nations. Lastly, the effect of the coercive measures would be felt by countries imposing them too, as numerous countries depend on Russia for grains, fertilisers, and arms.

RELEVANCY OF THE NDPS ACT, 1985 AND USE OF PALLIATIVE CARE IN INDIA- AN ANALYSIS

—Rishav Das[*]

Abstract—There are certain diseases and ailments which are still not completely curable by modern medicine and healthcare treatments. These incurable diseases include a variety of diseases including terminal diseases as well. In cases of such diseases, the patient has to suffer for a prolonged time period in an excruciating pain until his natural death, since there are still majority of the Nations which do not support or promote the concept of Euthanasia. India is one such country which does not support active euthanasia and regulate passive euthanasia under certain strict conditions. Nonetheless, majority of the nations around the globe have the concept of palliative care for the ease of the excruciating pain and suffering of the patients who suffer from incurable diseases, however, India is a country which still has some stringent laws in force which punishes the prolonged use of palliative care drugs such as morphine and Opioids. Recently, although the NDPS Act, 1985 has been amended, but it still has not decriminalized the prolonged use or purchase of palliative care drugs for patients. This has led to the question, that what is the remedy for such patients and is the application of legislations such as the NDPS Act, 1985 is creating an undignified life for the patients suffering from terminal illness. This paper therefore, aims to look upon the relevancy of the NDPS Act, 1985 and use of palliative care medications in India.

Keywords: Palliative Care, Dignity, Terminal illness, Ethical Dilemma, NDPS Act, 1985.

[*] Assistant Professor of Law, Indian Institute of Legal Studies, Siliguri; LL.M (Constitutional and Administrative Law) Christ (Deemed to be University), Bangalore; B.A. LL.B (Indian Institute of Legal Studies) Email: rishavroyal3@gmail.com.

I. INTRODUCTION

Palliative care is a health-care specialty that encompasses both a philosophy of care and a well-organized, highly structured system for providing care to people with life-threatening or debilitating illnesses from diagnosis until death, as well as family grief support. Palliative care improves health care quality in three ways: it relieves physical and emotional suffering, it improves and strengthens the patient–physician communication and decision-making process, and it ensures coordinated continuity of care across multiple healthcare settings (hospital, home, hospice, and long-term care). Palliative care, according to the World Health Organization, is ***"an approach that improves the quality of life of patients and their families facing problems associated with life-threatening illness by preventing and alleviating suffering through early identification and impeccable assessment and treatment of pain and other physical, psychosocial, and spiritual problems."*** Because of this, the purpose of palliative care is to promote the overall health, well-being, and quality of life of patients and their families by alleviating pain and other painful medical symptoms while also providing nursing care and psycho-social and spiritual assistance. Therefore, it is best given by a multidisciplinary, multidimensional team comprised of doctors, nurses, counsellors and social workers in addition to volunteer health care providers.[1]

India is classified as a developing country; nonetheless, during the past 20 years, there has been an increase in the ageing population as well as an increase in the prevalence of advanced cancer. The country, together with China, has the world's second-largest population behind the United States. Annually in India, it is projected that one million new instances of cancer are diagnosed. Of these, more than 80 percent are diagnosed at stages III and IV. In India, there is an enormous demand for palliative care.[2]

The rising demand for palliative care is only limited to India, but majorly all the developing nations around the globe for the very reason that the number of terminally ill or people with irretrievable diseases are more in number. The causes of these diseases is a result of multi-dimensional factor ranging from choice of work, consumption or intake of tobacco or hereditary. In this regard it is interesting to note that majority of these diseases are tightly related to the population belonging to the lower strata of the society and to the rural population who do not have the means to afford high-priced prolonged treatment or surgeries. Thereafter, the need for alternative measures arises including palliative care. Nevertheless, palliative care in India and other developing Nations,

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[1] Geneva: World Health Organization; WHO Definition of Palliative Care" (17-4-2022, 10.43 p.m.) available from: http://www.who.int/cancer/palliative/definition/en. (Google Scholar) 2.

[2] Seamark D., Ajithakumari K., Burn G., Saraswalthi Devi P., Koshy R., Seamark C. "Palliative Care in India", 93. J. R. Soc. Med., 292–295.2000, (PMC free article) (PubMed) (17-4-2022, 7.16 p.m.) (Google Scholar).

have various roadblocks starting from its knowledge to its distribution, regulations and prolonged and extensive use.

II. HISTORICAL JOURNEY OF PALLIATIVE CARE IN INDIA

Palliative care is a notion that has just recently been introduced in India, having first appeared in the country in the mid-1980s. As a result of the efforts of dedicated individuals, including Indian health professionals and volunteers, as well as foreign organisations and individuals from other nations, hospice and palliative care services have grown in India and across the world. The Government of India launched a National Cancer Control Program in 1975, which continues to this day. It was not until 1984 that this plan was revised to include pain management as one of the essential services to be provided at the primary health care level. Unfortunately, this approach did not result in a significant increase in service availability. The hospice and palliative care movement in India began slowly and steadily in the mid-1980s, and it has steadily grown over the course of the previous twenty years.[3]

Many cancer centers in India were built in the late 1980s and early 1990s, and some of the first institutions to provide palliative care were located in cities like Ahmedabad and Bangalore, as well as Mumbai and Trivandrum, as well as Delhi. A pain clinic and palliative care service were established at the Gujarat Cancer and Research Institute (GCandRI), a Regional Cancer Center in Western India, in the 1980s. This was the first time that palliative care was offered in the state of Gujarat. One of the most significant milestones in the history of palliative care development in India was also taken from this location; the formation of the Indian Association of Palliative Care was one of these stages (IAPC).[4] Professor D'Souza founded the first hospice, Shanti Avedna Ashram, in Mumbai, Maharashtra, India, in 1986. It was the first hospice in the world. The Regional Cancer Centre in Trivandrum, Kerala, with the support of a WHO subsidy, and the Kidwai Memorial Institute of Oncology in Bangalore, Karnataka, both opened pain clinics around the same time period. From the 1990s onward, there has been a considerable increase in the velocity of development in the field of hospice and palliative care. This was evidenced by the increase of the amount of services available, as well as through other significant events and programmes. It was started in Delhi in 1997 to give the first free palliative care home care support service in North India. 'CanSupport' was the first such service in the country. The 'Cipla Cancer

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[3] *Ibid*.

[4] Guidelines for Home based Palliative Care, IAPC and CanSupport, New Delhi. Developed under the Government of India, World Health Organisation Collaborative Programme 2006-2007, Ishtihaar.

Palliative Care Center' was created in Pune, Maharashtra, in the heart of India's central region.[5]

In March 1994, the IAPC was registered as a Public Trust and Society in Ahmedabad. In January 1994, the IAPC had its first international conference in Varanasi, where it approved a constitution with the help of WHO and the Indian government. The IAPC formed a Palliative Care Drugs Committee and an Educational Task Force the following year, and conducted its Second International Conference in Ahmedabad, which drew 180 attendees.[6]

The supply of morphine was a significant issue in the provision of hospice and palliative care. The Narcotic Substances and Psychotropic Substances (NDPS) Act of India, which was passed in 1985, made obtaining morphine extremely difficult and had such a negative impact that morphine use in India plummeted in subsequent years. To enhance access to opioids, the WHO Collaborating Center in Madison, Wisconsin, has been collaborating with Indian palliative care advocates. In 1998, the Indian government issued directives to all state governments to streamline their narcotics policies. However, the state government's response was so bad that seminars were held in a number of states in try to rectify the issue.

III. 'HUMAN DIGNITY' IS FUNDAMENTAL RATHER THAN OPTIONAL

Human right incorporates in itself a plethora of basic rights with cannot be stripped off from a human being. Although not expressly mentioned but a core concept which always attaches itself to the concept of rights is the Human dignity and worth. It is undeniable that human dignity or worth must be protected in order to validate all other human rights. This dignity of human beings creates a necessity in order for man to exercise all his other rights in accordance to his abilities and desires. In view of Ronald Dworkin, the concept of dignity is inseparable and means respecting one's own intrinsic value. Dworkin further adds that the term "right to dignity" is drawn on various moral and political philosophy in heterogeneity of interpretations bearing various meanings.[7] It can for illustration, apply to the capacity to survive and strive in conditions promoting self-respect, regardless of extraneous factors. It can also mean the duty on others not to ridicule or defame the name or value of man in the society. On another popular belief, it is believed that humans have the right to not be treated indecently and live a life of dignity and decency in the society. Every

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5 *Ibid*.

6 Guidelines for Home based Palliative Care, IAPC and CanSupport, New Delhi. Developed under the Government of India, World Health Organisation Collaborative Programme 2006-2007, Ishtihaar.

7 Ronald Dworkin, Life's Dominion, 238, Vintage; Reprint edition (1994).

civilised culture has its own set of rules and customs that characterize these humiliations, which vary depending on place and period.[8]

Human dignity is indeed a dynamic notion that dates back to the dawn of time. Its meaning and interpretation in legal philosophy changed throughout time, reflecting developed awareness and consciousness about man's wants and ambitions in the civilization of the moment. The idea as a concept is conscientious in substance, expressing first of all and primarily in mutual trust and respect among all of the fellow human beings, since the widely acknowledged actuality and significance of global fraternity is firmly rooted in human conscience.[9]

Because of his higher sense of human dignity, Immanuel Kant placed the person above the power of the state. Kant felt that a human may I live a genuine existence, (ii) have a coherent will, and (iii) choose his own choices. In opposition to Bentham's famous idea of 'maximum pleasure for the largest amount of people,' Kant considered man's perfection and growth as the state's purpose. Some privileges to the growth of a person's identity as a dignified human being must be granted by the state.[10] According to a synthesis of all of these points of view, there is one common and essential idea of human dignity and worth, as expressed in the opening paragraph of the Universal Declaration of Human Rights.[11]

IV. RELEVANCY OF NDPS ACT, 1985 AND THE USE OF PALLIATIVE CARE

In an obviously misguided attempt to control the maltreatment and abuse of opiates, the Narcotic Drugs and Psychotropic Substances (NDPS) Act of 1985 procured preposterous approving philosophy for getting to opiate analgesics. Each state had different rules and in each state, ordinarily four to five unmistakable licenses were normal before morphine could be obtained and controlled to patients. These licenses required the synchronization of various government divisions and all ought to have been significant at the same time. Additionally, the Act constrained extraordinarily strong disciplines, some of them suitable to even minor bumbles in bookkeeping. The result was that after the section of the Act, the usage of morphine in the country dropped from 573 kg in 1985, which was by then extraordinarily low, to 17 kg in 1997. A survey by the Economist Intelligence Unit and Lien Foundation has seen that India positions

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8 S.R.S. Bedi, "Grundnorm of Human Dignity as a Judicial Ideology", 35 and 36 Ban. L.J. 16-51 at 22 (2006-2007).

9 *Ibid*.

10 I. Kam, J. Ladd, (tr). The Metaphysical Elements of Justice, 43-44 (1965).

11 United Nations, Universal Declaration of Human Rights,(18-4-2022, 7.27 a.m.) available at https://nhrc.nic.in/sites/default/files/UDHR_Eng_0.pdf.

a frightening 67th among 80 countries. Without even a hint of palliative thought, the completion of life ends up being particularly anguishing in India.[12]

In 2007, the palliative consideration local area moved toward the Supreme Court of India fighting that forswearing of admittance to palliative consideration disregarded the right to life with nobility and requesting focal and state palliative consideration arrangements, regulation to ease accessibility of narcotics for relief from discomfort, and incorporation of palliative consideration in clinical and nursing instruction. A public interest prosecution in the Supreme Court could be an over the top expensive undertaking, however Mr Ashok Chitale, a senior legal counselor and a legal administrator of Pallium India, and his associate, MrNiraj Sharma, willingly volunteered to offer their types of assistance free, and the case was documented at for all intents and purposes no expense and enlisted by the Supreme Court in 2008. However the last hearing is yet to happen, the inquiries that the Supreme Court has posed to the administrative organizations during the periodical hearings have gone about as an impetus for the further development of palliative consideration.[13]

The NDPS Act, 1985 has been amended in the year 2014, making the licensing for the essential drugs under the hands of Central Government only, and there is no need for dual licensing. However, the existence of Section 27 makes the prolonged use of drugs practically impossible as the Punishment for the use of those palliative drugs is still prevalent.[14] Section 27 of the Act reads as:

> *"Punishment for consumption of any narcotic drug or psychotropic substance.—Whoever, consumes any narcotic drug or psychotropic substance shall be punishable,— (a) where the narcotic drug or psychotropic substance consumed is cocaine, morphine, diacetylmorphine or any other narcotic drug or any psychotropic substance as may be specified in this behalf by the Central Government by notification in the Official Gazette, with rigorous imprisonment for a term which may extend to one year, or with fine which may extend to twenty thousand rupees; or with both; and (b) where the narcotic drug or psychotropic substance consumed is other than those specified in or under clause (a), with imprisonment for*

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[12] Department of Pharmaceuticals, Government of India. National List of Essential Medicines of India, (16-4-2022, 10.30 a.m.) available from: http://pharmaceuticals.gov.in/pdf/NLEM.pdf.

[13] Rajagopal MR. "The Current Status of Palliative Care in India" in Cancer Control, (27-4-2022, 9.48 a.m.) available from: http://www.cancercontrol.info/wp-content/uploads/2015/07/57-62-MR-Rajagopal-.pdf.

[14] *Ibid.*

> *a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both."*[15]

The simple perusing of the section clarifies that the utilization of any kinds of medications referenced in the above section or some other medications, as culpable. Presently, the inquiry emerges is that, when the utilization of palliative consideration drugs, for example, Opioids and Morphine which was at that point insignificant in India, the inconvenience of discipline for delayed utilize such medications is even conceivable? The response is in negative because of two significant reasons; first and foremost, the absence of information and appropriate framework to utilize palliative consideration prescriptions by the patients as well as the specialists, and furthermore, the belonging, delayed use and continuation of purpose of these medications is culpable and regardless of whether it isn't rebuffed, prompts provocation of the client or the purchaser by the policing. There is another issue that, only one out of every odd patient possesses the ability to manage the cost of palliative consideration drugs from unique sources because of monetary requirements, along these lines, falling back on elective sources, making it significantly more culpable under the said Act.

Today, there is what is happening in India, where the poppy is developed under permit and the nation has been the world's biggest exporter of legitimate opium for clinical purposes, however denies narcotics to over close to 100% of its penniless residents.[16]

V. OBSTACLES TO USE OF PALLIATIVE CARE IN INDIA

There are various obstacles that lurk around in the Indian scenario in regards to the use and implementation of palliative care in India. One such has been discussed in the above segment that is the existence and penalization nature of the Section 27 of the NDPS Act, 1985. This particular piece of legislation although, amended and licensing facilities have been centralized, nonetheless, the legislation still criminalizes the prolonged use of palliative care drugs such as morphine and Opioids.

Oncology was the primary focus of the majority of India's early palliative care services. Other illnesses that frequently resulted in as great as or worse misery went mostly unnoticed. As part of its National Cancer Control

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[15] S. 27, Narcotic Drugs and Psychotropic Substances Act, 1985, No. 61 Act of Parliament 1985 (India) (28-4-2022, 9.40 a.m.) available at https://legislative.gov.in/sites/default/files/A1985-61.pdf.

[16] Namisango E., Harding R., Atuhaire L., Ddungu H., Katabira E., Muwanika F.R., Powell R.A., "Pain among Ambulatory HIV/AIDS Patients: Multicenter Study of Prevalence, Intensity, Associated Factors, and Effect"., 13(7) J Pain 704-13, 2012.

Program, India's government has embraced palliative care. In the latter stages of cancer, palliative care has been integrated with cancer treatment as a supporting intervention. For individuals with nonmalignant chronic pain syndromes, there is no alternative chronic pain service in the health care system to address their needs. This has resulted in the somewhat negligence of palliative care in India in reference to other diseases, and also the treatment has been allowed only in the final stages of cancer resulting in much ineffectiveness.[17]

Another, obstacle which is created related to the above issue is that, the very few number of authorized palliative care centers are so busy in dealing with the vast majority of the onco-patients in their last stages, that there is absolutely no scope of further research and education on the use, advantages, disadvantages and patient centric approach of palliative care in India. This has further resulted into the decline in the prominence of the use and implementation of palliative care in India.

Step 2 of the World Health Organization's analgesic ladders lists dextropropoxyphene, codeine, pentazocine, tramadol, and sublingual buprenorphine as the least powerful and active oral Opioids available in India. Morphine and codeine are produced in India, but codeine production is so low that it has to be imported. This means that codeine is costly. Patients and physicians alike are prescribing pentazocine, a medicine that is normally deemed unsuitable for patients with advanced cancer pain, despite the fact that it is commonly prescribed and widely taken. Dextropropoxyphene and paracetomol are available in combination (acetaminophen).[18]

In spite of its higher cost, propoxyphene continues to be the most affordable weak Opioids in America. Tramadol is frequently prescribed and actively advertised. Despite the fact that this painkiller is frequently helpful in relieving patients' physical pain, it is so costly that it leaves patients' families with little money to buy food.[19]

VI. DILEMMA IN THE USE OF PALLIATIVE CARE IN INDIA

The use of palliative care as has been discussed in the previous parts involves the use of certain kinds of morphine and opioids to relax the excruciating pain and suffering that a patient is going through for a prolonged period. Nevertheless, in India, the NDPS Act is primarily responsible for creating a

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[17] Sureshkumar R., Rajagopal M.R. "Palliative Care in Kerala. Problems at Presentation in 440 Patients with Advanced Cancer in a South Indian State", 10 Palliat Med, 293-298, 1996.

[18] Rajagopal M.R., Sureshkumar K. "A Model for Delivery of Palliative Care in India–- The Calicut Experiment", 11. J. Palliat Care, 451-54, 1999.

[19] *Ibid*.

hurdle for the easy use and administration of palliative care drugs for a prolonged period of time albeit the need for palliative care is amongst the highest in the World as the number of Indians suffering from terminal illness is one of the highest in the world.[20]

According to a report published by Economist Intelligence Unit (EIU) tiled "The quality of Death: Ranking end-of-life care across the World" in 2010, India is ranked as last amongst the participating 40 countries in parameters such as Availability of end-of-life care, cost of end-of-life care, and also the quality of end-of-life care. According to the report, Indians suffering from end of life diseases suffer a "bad death" and without "Dignity". At this point it is pertinent to ask the question, why is the situation such grim? The answer to this question, apart from the role played by the NDPS Act, also lies in the ethical dilemma for the use of palliative care in India. The first and foremost dilemma is that the access of edible morphine for pain management is frequently constrained in underdeveloped nations due to the onerous rules put in place to avoid their abuse and diversion. As a result, while opioid availability is severely constrained, there are also a variety of societal attitudes and ideas towards opiate use.[21] Numerous opiate and pain myths are just as common—if not more so—than in other nations. Therefore, individuals with cancer pain suffer as a result of limitations and legal difficulties in the supply and dispensing of opiates. It is challenging to attain the best symptom control because individuals don't take their prescribed medications as directed and because of family members' opposition.[22] Despite the fact that accessibility is probably a little easier or more inexpensive for the wealthier and more educated, there is little literature to show that this would be a caste issue. Unremitting pain in cancer and other terminal diseases is caused by a lack of consciousness among patients, physicians, nurses, and other medical professionals.[23]

Another dilemma is that the the patient's desire to pass away from the world or in a hospice presents a frequent moral and ethical conundrum. On so one hand, taking care of the patient at home requires the doctors to "give up," but on the other, it means getting ready for a dignified death in a comfortable environment. Patients, family members, and doctors may all have different preferences. However, not receiving care or dying in the intended location is a universal issue and is not specific to impoverished nations. It is challenging to decide whether to return home, where medical treatment might not be available, or stay in the hospice for the best symptom control.[24] Even

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[20] *Ibid*.

[21] S.K. Chaturvedi, "Perception and knowledge about Narcotics among Nurses", Indian Journal of Palliative Care, 78, 2003.

[22] *Ibid*.

[23] *Ibid*.

[24] S.K. Chaturvedi, R. Akhileswaran, et al., "Caring at Home: Frequently asked Questions by Persons with Advanced Cancers and their Caregivers. PaCE Series 1", BHT Centre for

though it is well known that addressing palliative care requirements can lead to a successful therapeutic efficacy and a decent degree of patient and physician satisfaction, the majority of hospitals and cancer treatment facilities in developing nations do not have a specialised palliative care setup. Numerous factors contribute to the dearth of palliative care services, including a shortage of specialised and qualified experts, unfair funding distributions (which favour curative and high-tech therapies), and smaller allocations to defense than to health (and education).[25]

VII. CONCLUSION AND SUGGESTIONS

Palliative care treatments can prove to be very effective and useful for patients who are suffering from incurable diseases or are terminally ill, in relieving the excruciating pain that the patients suffer and providing some level of comfort to the patients and the next-friend, or family. There are some countries which recognise the concept of "Dying with dignity" in such cases where the patient suffer from terminal illness, not only limited to cancer but other incurable diseases such as HIV/AIDS as well, however such means are expressedly communicated to the patients or their representatives. Nonetheless, India does not fall into the list of the above described Countries, and strictly regulate the concept of "Passive Euthanasia" due to its Pro-life approach. However, as the discussion is made above, India is also not a country which supports or actively promotes the concept of palliative care. The penalizing nature of Sec. 27 of NDPS Act, 1985 prima facie obstructs the prolonged use of palliative care drugs and in case of medical usage, the patients have to go through a lot of physical as well as financial strain to obtain a license. Several other factors such as confinement of palliative care treatment to the last stages of cancer only in extreme cases, and neglecting other terminal diseases has also created a lack of communication to the patients and also psychological support to the ones in need of the pain relief treatment. India therefore, remains a constrained and backward Nation in terms of use of palliative care although being the top exporter of Opioids for palliative care for the world. Nevertheless, the changing dynamics of the Indian society and the faith in Judiciary still gives a hope that palliative care will be recognized as a primary pain relieving treatment in India for patients suffering from terminal diseases and also the way of acquiring the palliative drugs will be made flexible.

Based on the above discussion, the following suggestions can be made:

1. Change the penalizing nature of Sec. 27 NDPS Act, 1985 and make the modes of acquiring palliative care drugs flexible to patients through various licensed institutions.

Palliative Care Education, Bangalore (1999).

[25] *Ibid.*

2. Communication has to be made by the physicians and such palliative care has to be made an option to the patients suffering from excruciating pain for their treatment including diseases other than cancer too such as HIV/AIDS.
3. Educate and sensitize the general masses regarding palliative care to see it as a treatment and not an addiction or abuse and create sensitization programs in order to take palliative care to the decentralized masses.

A SENTENCING JUDGE'S DILEMMA – JUXTAPOSITION OF JUST DESERT AND INDIVIDUALIZATION OF PUNISHMENT

—*Sushmita Singh*[*]

Abstract—Sentencing is the most important phase of a criminal trial and must be governed by the facts and circumstances of the case, the character and antecedents of the convict, the presence or absence of moral turpitude, his personal situation in life and other like considerations. In India it is a common belief that punishment should suit both the crime as well as the criminal. A high degree of discretion is vested in the courts which must be exercised with utmost precision by the sentencing judges. Therefore, the task of a sentencing judge is the most difficult one, for if he gives more importance to the crime then punishment has to be tailored on the principles of retributive justice so as to achieve deterrence and if punishment is to suit the personality of the offender then it has to be lenient so as to achieve the ends of rehabilitation. The unduly lenient sentence may provoke the aggrieved victim to wreak vengeance as the victims of crime may not share the philosophy of reformation beyond justifiable limits. At the same time, if punishment is unduly harsh it would push the society back to the practices of the ancient barbaric times and would remain devoid of the humanitarian approach. Thus, we find that in the absence of any uniform sentencing policy in India, the dilemma of the sentencing judge gets aggravated. This article is an attempt to find out how the principles of just desert and individualization of punishment are poised against each other in the absence of policy and guidelines concerning sentencing in India and to look into the ways in which a balance in this regard can be achieved.

[*] Teacher Associate, Chanakya National Law University, Patna. E-mail – sushmitasingh@cnlu.ac.in.

I. INTRODUCTION

Crime is an act of violence which shakes the societal conscience and creates an alarming fear amongst its stakeholders. There are certain behaviours which the society considers to be intrinsically dangerous and it becomes pertinent to curb them either by dealing with them stringently or classifying them as outlaws.[1] The problem of criminality persists in different forms in every society thus making it inevitable and universal in existence. In fact some sociologists have also pointed out the paradoxical relationship between crime and society stating that the existence of crime in the society promotes social solidarity amongst its members.[2] The general perception of the public is anger and hatred towards the perpetrators of crime and they share unified sentiments of compassion and pity towards the victim.

The criminal justice system is predominately an instrument of social control which aims to provide an efficient, accountable, transparent, equitable and fair justice for all. Its primary objective is to maintain law and order in the society and to prevent the occurrence of crime. It also seeks to punish the guilty, to rehabilitate the offenders and to make efforts to prevent recidivism. The criminal justice system comprises of governmental agencies whose functions revolve around law enforcement, adjudication of crime and providing correctional facilities for criminal conduct.

There are mainly three significant pillars of criminal justice system i.e., the police or law enforcement agencies, judiciary, and correctional institutions. Each of the component operates by exercising discretion within the parameters set by law and works towards ensuring society's quest for justice and safety.[3] The administration of criminal justice is a complex issue and requires all its components to exercise its powers and discharge its duties within the circumscribed limit set by law. In order to ensure an effective delivery of justice, it is necessary that the three limbs of criminal justice system work in tandem with one another.

The criminal justice system sets in motion with the registration of the first information report and ends with sentencing of the court. Sentencing is the last stage of the criminal justice system where the actual punishment of the accused is decided by the court. 'Giving punishment to the wrongdoer is at the heart of the criminal justice delivery, but in our country, it is the weakest part

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1 Speech delivered by Hon'ble Mr Justice D. Murugesan, Judge High Court Madras at South Zone Regional Judicial Conference on Enhancing Timely Justice: Strengthening Criminal Justice Administration on 29-11-2009, available at http://tnsja.tn.gov.in/article/Safeguarding%20by%20DMJ.pdf (last visited on 1-4-2022).

2 S.M. Afzal Qadri, *Ahmad Siddique's Criminology Penology and Victimology* (7th edn.).

3 *Supra* note 1.

of the administration of criminal justice'.[4] Sentencing closely follows the stage of conviction and penalizing the accused is the ultimate goal of any criminal justice system. However, it is found that there are no guidelines or policies, either by legislature or judiciary, to assist the court in imposing just punishment to him.[5] The lack of sentencing guidelines provides wide discretionary power to the court contributing to the uncertainties of sentencing.

Section 53[6] of the IPC lays down the various kinds of punishment which can be given by the courts upon conviction for commission of an offence. It includes death, life imprisonment, rigorous imprisonment or simple imprisonment, forfeiture of property, fine etc. The underlying objective of any criminal justice system can be determined by looking at how it penalizes any criminal conduct. In an adversarial system like ours where there is involvement of several actors apart from accused and victim, it is not possible for all of them to react in the same manner to a criminal act. The victim might express stronger emotions against the criminal conduct and the accused might believe that his act was justified given the facts and circumstances of the case. The judge and other paraphernalia are appointed to reach to a consensus in determining the question whether any wrongful act was committed and more importantly what measures must be taken to undo the wrong. A victim centric approach would be restoration of the victim to the same position in which he/she was before the causation of harm. This principle can be applied in cases of economic crimes and tortious acts but in cases where the victim has suffered physical, emotional and psychological harm the application of this principle may not be possible. In such cases retribution, rehabilitation and deterrence seem to be viable options.[7]

Retribution solely aims at penalizing for commission of crime and revolves around the principle, 'an eye for an eye and a tooth for a tooth'. It roughly means that people ought to get what they truly deserve. There are mainly two expectations in a just desert model of justice (a) the punishment should fit the crime and should be in proportion to what one deserves; and (b) punishment should be meted out impartially. Rehabilitation aims at reclaiming the accused person back to the mainstream of the society. Deterrence theory of punishment aims to punish the offenders with an objective of deterring potential offenders. It is notable that deterrence is used in two ways (a) punishing the offender to

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4 *Soman* v. *State of Kerela*, (2013) 11 SCC 382.

5 "Sentencing and Punishment Policy in India", available at https://www.probono-india.in/blog-detail.php?id=152 (last visited on 1-4-2022).

6 Penal Code, 1860, §53, Acts of Parliament, 1860 (India).

7 R. Niruphama, "Need for Sentencing Policy in India", *Calcutta Research Group*, www.mcrg.ac.in/Spheres/Niruphama.doc.

deter others from committing the same offence and (b) to deter the guilty from committing further crimes.[8] Beccaria[9] has famously said –

> The purpose of punishment is none other than to prevent the criminal from doing fresh harm to fellow citizens and to deter others from doing the same. Therefore, punishments and the method of inflicting them must be chosen such that, in keeping with proportionality, they will make the most efficacious and lasting impression on the minds of men with the least torment to the body of the condemned.[10]

In an adversarial criminal justice dispensation system like that of India, the accused is presumed to be innocent until proven guilty. The burden of proving the guilt beyond reasonable doubt rests entirely upon the prosecution and benefit of doubt, if any, tilts the balance of justice in favour of the accused. There are several rights which are conferred upon the accused, namely, the right to remain silent, not to be a witness in his own case, etc. Adversarial system believes that truth shall emerge upon the production of facts presented by prosecution and defence before a neutral judge. The trial is oral, continuous and confrontational. In order to undermine the opposing party and to discover the facts which have not been disclosed by the other party the court allows for cross examination of the witnesses. In an adversarial system the judge plays a passive role as no positive duty is imposed upon him to discover the truth. Thus, we find that the system is heavily loaded in the favour of the accused and is less sensitive to the plight of the victim.[11]

The just desert model of punishment looks back and focuses on the crime committed and the need to assuage and heal the wounds the victim. It primarily aims to punish the wrongdoer. The principle of individualization of punishment is forward looking and is based upon the doctrine of utilitarianism.[12] The principle of proportionality is the central consideration in setting the levels of penalty in both the models of punishments.

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8 MHRD Government of India, e-content for Post Graduate Courses, http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/S001608/P001739/M022054/ET/1520919223Etext.pdf (last visited on 4-4-2022).

9 Cesare Beccaria is considered as Father of Modern Criminology.

10 Cesare Beccaria, *On Crimes and Punishments and Other Writings*, 26 Richard Bellamy edn., Richard Davies, Virginia Cox, (Cambridge University Press, 1995).

11 Government of India, Report: Committee on Reforms of Criminal Justice System, p. 24 https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf (last visited on 11-3-2022).

12 The philosophy of utilitarianism was propounded by Jeremy Bentham. It suggests that punishment should be proportional to the offence. According to this philosophy, punishment has a deterrent effect by imposition of pain, restraint and penalty.

II. PRINCIPLE OF JUST DESERT

T. M. Scanlon has characterized the principle of just desert as, "the idea that when a person has done something that is morally wrong, it is morally better that he or she should suffer some loss in consequence."[13] He suggests that when a person has done some criminal conduct he deserves to suffer some loss and it is the function of the system to impose punishment upon him for the loss or harm so caused. It is the function of the system of punishment to ensure that suffering is imposed upon the offender. The supporters of the just desert principle argue that external stimuli like socio-economic factors do not have any role to play in shaping the conduct of an individual and hence they do not have any faith in restorative approaches of criminal justice system like reformation or rehabilitation of the offenders.

There are three justification underlying the 'just desert' principle – morally deserved argument, fair play argument and censure argument. According to Moore, "we ought to punish offenders because, and only because, they deserve to be punished. Punishment is justified for a retributivist, solely by the fact that those receiving it, deserve it."[14] This is the core premise on which the morally deserved argument is based. On the other hand, the 'fair play' argument is based on the premise that in a just society the benefits and burdens are uniformly distributed and the criminal disturbs this equilibrium and thus needs to be rectified. The criminal deserves punishment because he free rides on the willingness of others to constraint the pursuit of their interest. Another reasoning underlying the justification of punishment is the fact that moral wrongdoings deserve to be 'censured'. The censure argument takes into consideration the wronged status of the victim and the impact of the criminal conduct upon the society. Censure is owed to the offender as an honest response to his criminal conduct. Thus, we find that just desert theory of criminal punishment not only proposes reduced judicial discretion but also promotes specific criminal sentencing without any regard to the individuality of the offender. It simply connotes that an offender should receive appropriate punishment on the grounds of what he/she deserves and this deservedness is not founded on the principle of retribution i.e. 'an eye for an eye and a tooth for a tooth' but is rather based upon the principles of 'equality, fair play and censure'.[15]

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[13] T. M. Scanlon, *What We Owe Each Other* (Harvard University Press, 1998).

[14] M. Moore, "The Moral Worth of Retribution", in Ferdinand Shoemann (edn.) *Responsibility, Character and the Emotions* (Cambridge University Press, 1987).

[15] R. A. Duff, *Trials and Punishments* (Cambridge University Press, 1986).

III. PRINCIPLE OF INDIVIDUALIZATION OF PUNISHMENT

Bentham proposed that punishment should be proportional to the offence. His philosophy of utilitarianism suggests that people tend to pursue happiness or pleasure and are deterred by the imposition of pain or restraint. While speaking of the common good, he refers to the sum total of all individuals' interests. For Bentham, laws are about promoting happiness. But laws also involve punishment, which is in itself an unhappiness. This is the reason why, prima facie, Utilitarians have a difficult time justifying punishment. Thus, the two questions Bentham wishes to apply utilitarian moral theory to answer are – When are we justified in punishing, and what are the limits of just punishment?[16]

To answer the first question, Utilitarians believe that we are justified in punishing when the cost of punishment in terms of utility is outweighed by its gains, advantages and utility. This can be interpreted in the following ways[17]–

1. At times locking up a violent criminal may seem necessary to protect the society from any further violence. In such a case the benefits of removing him from the community far exceeds the price paid by him.
2. It is common human tendency to look for the consequences of our actions. Punishments are also tailored to deter criminal conducts. Utilitarians believe that imposition of minimum or proportional punishment can help reduce criminal acts.
3. Rehabilitation is favoured by Utilitarians because it saves a person from becoming a criminal and transforms him into law-abiding productive citizen. Even though deterrence and rehabilitation may have similar effects but the motive behind these principles is entirely different. Individual deterrence means that a criminal is afraid to commit the crime whereas rehabilitation means that the criminal shall no longer want to commit the crime.

Bentham has also given the limits of punishment and has said that punishment becomes futile and useless when it is groundless, inefficacious, unprofitable and needless.

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[16] Punishment – Retribution, Rehabilitation and Deterrence, https://web.uncg.edu/dcl/courses/viceCrime/pdf/m7.pdf (last visited on 19-8-2022).

[17] *Ibid*.

IV. JUST DESERT AND INDIVIDUALIZATION OF PUNISHMENT : A JUXTAPOSITION

The just desert theory of retribution looks back and primarily focuses on the crime committed. It aims to punish the offender with an objective to deter future criminal minds and to pacify or assuage the victim. On the other hand, the theory of individualization of punishment is based on the principle of utilitarianism.[18] It looks forward and considers incapacitation, deterrence and reformation as the goals of punishment. The rehabilitative approach aims to reform the convicted person within the four walls of the prison so that he may return to the mainstream society as a useful member of the community. The sentencing discretion vested in the judges gives them the power to individualize the punishment depending upon the facts and circumstances of the case. The Supreme Court has time and again reiterated that punishment should fit the crime. However, it has not been made clear whether the measure of proportionality is to be based upon retributive or utilitarian principle. Generally, both the principles of just desert and individualization of punishment are taken into consideration while deciding the quantum of punishment especially in aggravated offences. The utilitarian approach even with its varying dimension of incapacitation, deterrence and rehabilitation has failed to reduce crime effectively as a result of which retribution has gained dominance as a viable justification of punishment. For this reason, a regime of fixed penalties has been adopted for certain offences in America. As the name suggests fixed penalties leave no scope for discretionary practices of judiciary and its implementation is done purely on pre-identifiable criterion of proportionality of sentence and principle of just desert. It is yet to be seen how the fusion of these principles help in reducing the level of crime and ensuring a society free from criminalities.[19]

V. THE LEGISLATIVE FRAMEWORK OF THE INDIAN CRIMINAL JUSTICE SYSTEM

The Indian Penal Code, 1860, the Criminal Procedure Code, 1973, and the Indian Evidence Act, 1872, form the bulk of the criminal law in India. The Indian Penal Code, 1860 is also supplemented by a number of special and local laws consisting of Prevention of Corruption Act,1986, Prevention of Food Adulteration Act,1954, Narcotic Drugs and Psychotropic Substances Act, 1985, Sexual Harassment (Prevention, Protection and Rehabilitation) Act,2013 to name a few. However, the effectiveness of the substantive penal laws depends

[18] The theory of utilitarianism was given by Bentham. It states that punishment should be proportional to the offence. It revolves around the notion that people will pursue pleasure or happiness and be deterred by the imposition of pain or restraint.

[19] Dr Anju Vali Tikko, "Individualisation of Punishment, Just Desert and Indian Supreme Court Decisions: Some Reflections", Vol. II ILI Law Review, 2017.

upon the efficiency of the procedural laws enforcing them. This is the essence of any criminal justice system.[20]

The Indian Penal Code under Chapter III Section 53[21] prescribes five types of punishments – death sentence, life imprisonment, simple and rigorous imprisonment, forfeiture of property and fine. Solitary confinement is defined in Section 73.[22] Section 54[23] and Section 55[24] deals with commutation of sentence of death and commutation of sentence of life imprisonment respectively. Section 57[25] states that life imprisonment shall be construed as an imprisonment for a period of 20 years. The Criminal Law Amendment Act, 2013 under Sections 376A,[26] 376D[27] and 376E[28] has changed the dimension of life imprisonment to mean an imprisonment of not less than twenty years but which may extend to imprisonment for the remainder of a person's natural life.

VI. PROCEDURE OF SENTENCING UNDER CODE OF CRIMINAL PROCEDURE, 1973

The Code of Criminal Procedure (herein after CrPC) clearly prescribes the power and authority of the subordinate judiciary to try cases and award

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20 *Supra* note 11.

21 *Supra* note 6.

22 Penal Code, 1860, §73, Acts of Parliament, 1860 (India).
Under S. 73 IPC the Court has power to sentence the accused to rigorous imprisonment. The court may, by its sentence, order that the offender shall be kept in solitary confinement for any portion or portions of the imprisonment to which he is sentenced, not exceeding three months in the whole.

23 Penal Code, 1860, §54, Acts of Parliament, 1860 (India).
Under S. 54 IPC the appropriate Government may, without the consent of the offender, commute the punishment for any other punishment provided by this Code.

24 Penal Code, 1860, §55, Acts of Parliament, 1860 (India).
Under S. 55 IPC the appropriate Government may, without the consent of the offender, commute the punishment of life imprisonment for imprisonment of either description for a term not exceeding fourteen years.

25 Penal Code, 1860, §57, Acts of Parliament, 1860 (India).
S. 57 of the IPC states that life imprisonment shall be reckoned as equivalent to imprisonment for twenty years.

26 Penal Code, 1860, §376-A, Acts of Parliament, 1860 (India).
As per S. 376-A IPC if a person commits an offence punishable under S. 367(1) or S. 367(2) and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative State, he shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death.

27 Penal Code, 1860, §376-D, Acts of Parliament, 1860 (India).
S. 376-D IPC provides punishment for gang rape and provides that each of the persons committing gang rape shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine.

28 Penal Code, 1860, §376-E, Acts of Parliament, 1860 (India).
S. 376-E IPC provides punishment for repeat offenders.

punishments accordingly. The High Court and the Sessions Court are empowered to award any sentence. However, the death sentence awarded by Sessions Court must be confirmed by the High Court of the State.

VII. THE LEGISLATIVE SCHEME OF INDIVIDUALIZATION OF PUNISHMENT

The laws dealing with crime including the IPC and the other special laws provide for a discretionary paradigm of sentencing. Even though the code prescribes the maximum sentence to be awarded to the accused person upon conviction but the authority to determine the quantum of sentence has been vested in the judiciary. The Law Commission of India in its 47th report has made the following observation with respect to the ascertainment measure of sentence –

> A proper sentence is a composite of many factors, including the nature of offence, the circumstances-extenuating or aggravating- of the offense, the prior criminal record, if any, of the offender, the age of the offender, the professional or social record of the offender, the background of the offender with reference to the education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospect for the rehabilitation of the offender, the possibility of a return of the offender to normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by this offender, or by others, and the present community need, if any, of such a deterrent in respect to the particular type of offense involved.[29]

The CrPC envisages a separate phase of sentencing process for determination of sentencing post-conviction under Sections 235(2),[30] 248(2)[31] and 255(2).[32] After a person is convicted of an offence, a separate date is fixed for hear-

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[29] 47th Report Law Commission of India, https://lawcommissionofindia.nic.in/1-50/Report47.pdf (last visited on 30-5-2022).

[30] Code of Criminal Procedure, 1973, §235, Acts of Parliament, 1973 (India).
S. 235(2) CrPC provides that if the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of S. 360, hear the accused on the questions of sentence, and then pass sentence on him according to law.

[31] Code of Criminal Procedure, 1973, §248, Acts of Parliament, 1973 (India).
S. 248(2) CrPC provides that if the Magistrate finds the accused guilty, but does not proceed in accordance with the provisions of S. 325 or S. 360, he shall, after hearing the accused on the question of sentence, pass sentence upon him according to law.

[32] Code of Criminal Procedure, 1973, §255, Acts of Parliament, 1973 (India).
S. 255(2) CrPC provides that if the Magistrate does not proceed in accordance with the provisions of S. 325 or S. 360, he shall, if he finds the accused guilty, pass sentence upon him according to law.

ing both the parties on the quantum of punishment. The hearing on sentence is mandatory and if punishment is pronounced without giving an opportunity of hearing on sentence the same shall be quashed in an appeal. The primary objective of this section is to give an insight of the social and personal details of the convict to the judge which might have an effect upon his sentence. At the end of the hearing, the final judgment is given signifying the conclusion of trial. A sentence given by the court may be in the form of capital punishment, imprisonment, fine or compensation but it must be a reasoned order.[33] Under the provisions of CrPC and Probation of Offenders Act, 1958, the court has the power to release a person on probation of good conduct or after admonition. The CrPC empowers the appropriate government to suspend,[34] remit[35] or commute[36] either whole or any part of the sentence of a convict. The life imprisonment of a convict can also be commuted to an imprisonment for a period not exceeding 14 years.[37] Thus, it is quite clear that judiciary in India has an important role in the process of sentencing and their unrestrained discretionary power must be exercised with utmost care and precaution. Sentencing in India is a judge centric process rather than a principled sentence centric function and the same gets further substantiated by an analysis of the following decisions of the Supreme Court of India.

VIII. LIFE IMPRISONMENT AND DEATH PENALTY: LEGISLATIVE SCHEME UNDER THE CRPC

In order to understand the legislative scheme relating to life imprisonment and death sentence it is important to understand the significant shift in the sentencing framework preceding the years of *Bachan Singh* v. *State of Punjab*.[38] In the Code of Criminal Procedure, 1898 death sentence was the default punishment for murder and sentencing judges were required to give reasons if they wanted to impose the life imprisonment instead of death sentence. Later in 1955, an amendment was made to the provision of 1898 which removed the

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[33] Code of Criminal Procedure, 1973, §354, Acts of Parliament, 1973 (India).

[34] Code of Criminal Procedure, 1973, §432, Acts of Parliament, 1973 (India).
S. 432(1) CrPC provides that when any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

[35] Ibid.

[36] Code of Criminal Procedure, 1973, 433, Acts of Parliament, 1973 (India).
S. 433 CrPC provides that the appropriate Government may, without the consent of the person sentenced, commute— (*a*) a sentence of death, for any other punishment provided by the Penal Code; (*b*) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine; (*c*) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine; (*d*) a sentence of simple imprisonment, for fine.

[37] *Ibid*.

[38] *Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684.

requirement of written reasons for not imposing death penalty, thus, reflecting no legislative preference between the two punishments. A significant shift in the legislative policy was brought in the CrPC through inclusion of Section 354(3) which made life imprisonment as the rule and death sentence as an exception. Now sentencing judges were required to provide special reasons for imposing death sentence. Nevertheless, the Code did not give any indication to reflect what those special reasons can be.[39]

This lacuna in the system was filled by Bachan Singh[40] and a sentencing framework applicable to Section 354(3) of CrPC, 1973 was developed which created a space for the principle of individualization of sentencing in capital offences. The sentencing framework proposed in Bachan Singh's[41] case was meant to provide guidance to the sentencing judges in discharge of their duties under Section 354(3) of the CrPC while choosing between punishment of death penalty and life imprisonment. The judgment of Bachan Singh[42] required the courts to consider all the aggravating and mitigating circumstances relating to both the offence and the offender with utmost care, thus directing the focus on individualized sentencing. Therefore, for a case to be eligible for a sentence of death the factors aggravating the offence must outweigh the mitigating factors. In cases where death penalty has to be imposed under Section 354(3) then special reasons for imparting the same must be recorded and Bachan Singh[43] also required the sentencing judges to conclusively establish that the alternative option of imprisonment for life under Section 302 IPC was undeniably foreclosed.[44]

IX. ANALYSIS OF THE PROCESSES OF JUDICIAL SENTENCING AND DISCRETION IN INDIA: SUPREME COURT DECISIONS

Bachan Singh was tried, convicted and sentenced to death under Section 302 IPC by the trial court for killing three persons. The three murders were described as extremely heinous and inhuman. The matter went in an appeal to the High Court where the death sentence was confirmed and the appeal was dismissed. He further approached the Supreme Court. The question before the Supreme Court's constitutional bench was, inter alia, the sentencing procedure contained in Section 354(3) of the CrPC. The Supreme Court while delivering

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[39] Anup Surendranath, Neetika Vishwanath and Preeti Pratishruti Dash, "The Enduring Gaps and Errors in Capital Sentencing in India", Project 39-A (31-5-2022, 4.15 p.m.), https://www.project39a.com/op-eds/the-enduring-gaps-and-errors-in-capital-sentencing-in-india.

[40] *Supra* note 38.

[41] *Ibid*.

[42] *Supra* note 38.

[43] *Ibid*.

[44] *Supra* note 39.

the landmark judgment relied upon Jagmohan Singh v. *State of U.P*[45] to confirm the constitutionality of death sentence. It also tried to draw a paradigm shift by considering what is relevant not only to the crime that is the past act but also factors attending to the criminal. The Supreme Court categorically stated that death penalty shall be imposed for murder considering the manner and motive of commission of murder, anti-social or socially abhorrent nature of the crime, magnitude of the crime and personality of the victim of murder. Thus, Bachan Singh[46] marks a watershed in death penalty jurisprudence in India. These steps therefore form the premise of any conclusion to be reached in each and every case.

In the Bachan Singh's[47] case, the Supreme Court noted that the prosecution i.e. the State has discharged its burden of proof on why the judgment of the lower court should be sustained. To make its case strong the prosecution tendered to the 35th Law Commission Report of India, the judgments of the Supreme Court, the Jagmohan Singh's case[48] as well as other similar cases. The pieces of evidence further support the State's contention that death penalty serves as a deterrent against criminal conducts. Having accepted the prosecution's submission, the court shifted the burden on the petitioner's to prove and establish that the death sentence for murder was so outrageous, unusual or excessive as to be devoid of any rational nexus with the purpose and object of legislation. While strongly condemning the action of the appellant and the wave of heinous criminal activity in India, the court by the majority judgment rejected both the challenges to the constitutionality of the death sentencing procedure and death penalty provided under section 354(3) of the CrPC as well as Section 302 IPC.

In the year 1983 in *Machhi Singh* v. *State of Punjab,*[49] it was felt that the rarest of rare doctrine enunciated by Bachan Singh's case[50] needed some kind of precision. One of the issues which gained the attention of the court in *Machhi Singh* v. *State of Punjab*[51] was the main guidelines to be followed in the application of the aforementioned doctrine. A violent dispute between two families resulted in loss of seventeen lives. The appellant and his associates were tried by the Sessions Court and at the conclusion of their prosecution the appellant was among four that were sentenced to death. His death penalty was confirmed by the Punjab High Court which further necessitated an appeal to the Supreme Court. While hearing the appeal the Supreme Court adhered to

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45 *Jagmohan Singh* v. *State of U.P.*, (1973) 1 SCC 20.
46 *Supra* note 38.
47 *Ibid*.
48 *Supra* note 45.
49 *Machhi Singh* v. *State of Punjab*, (1983) 3 SCC 470.
50 *Supra* note 38.
51 *Supra* note 49.

the doctrine of rarest of the rare cases from Bachan Singh's case[52] and further refined the guidelines.

The court felt that the extreme penalty of capital sentence need not be inflicted otherwise than in the gravest cases of extreme culpability. The challenge which is being faced by the lower courts, the researchers and the academia as a whole, is how to specifically determine and point out the ingredients of what amounts to the gravest cases of extreme culpability. In what can be understood as the Supreme Court's response to the problem at hand, it has been stated by the Supreme Court that before opting for the penalty of death sentence, along with the circumstances of the crime, the circumstances of the offender should also be taken into consideration.

Thus, we find that two considerations are extremely important – the criminal record or antecedents of the offender and the facts and circumstances leading to the commission of the crime of the murder. Thus, if the offender is a first time offender with no previous criminal record then, irrespective of the crime committed, he has a good chance of being sentenced to life imprisonment instead of death. The attention of the court in such cases goes away from the criminal act and the victim and focus shifts leniently on the personality of the offender.

Now the question before us is that, whether it is the most appropriate and objective reasoning to be prioritized? If so, then how can a balance be maintained between the proportionality of sentence awarded to the convict and the right of the victim and his family and that of the larger society? Also is there a limit to the number of times a person should commit crime before he will be adjudged as a danger to the lives of others? In order to restore public confidence in the criminal justice system these questions need to be taken into consideration and must be answered keeping in mind the interest of the victim.

The Supreme Court, from the reasoning of the learned justices, seems to have one answer for the aforementioned questions – ***life imprisonment is the rule and death sentence is an exception***. Thus, death penalty will be imposed only when it appears that life imprisonment shall be an altogether an inadequate punishment. Along with that, relevant circumstances of the crime must such that having regard to the all of them, an option to impose sentence of life imprisonment cannot be conscientiously exercised. These lines of reasoning of the Supreme Court further intensify the deadlock.

Those lines of reasoning are governed by one word and it is the discretionary power vested in the judges and the matters of discretion cannot have an end-to-end formula. Furthermore, if a strict interpretation is given to the principle, 'life imprisonment is the rule and death sentence is an exception',

[52] *Supra* note 38.

it would completely jeopardize the retributive and deterrent theories of punishment. Whether a prospective offender who can rationalize on the principle that life imprisonment is the rule and death sentence is an exception, be still deterred from furthering his criminal plans? Murderous criminal may reduce the level of brutality and extremism and thus take advantage of it. It may act as an escape route for them and if that happens, the objective of the sentence will not stand served. The Supreme Court has held that the balance sheet of aggravating and mitigating factors has to be drawn up and the mitigating circumstances have to be given full weightage and before exercising the option a just balance has to be struck between the aggravating and mitigating circumstances. The prioritization of restorative and rehabilitative theories of punishment, only benefits the offender and leaves the victim unattended. Justice cannot be delivered in isolation and must be served to all. It must look retrospectively and address the grievance of the victim and at the same time be prospective enough to ensure that the convict does not become a burden upon the society.

X. CONCLUSION

Crime and punishment are the two sides of the same coin. Since times immemorial crime and punishment have been a subject of debate and difference of opinion. In India, there are no statutory guidelines to regulate punishment and in practice there is a lot of variance and disparity in matters of sentencing. There is no statutory sentencing policy in India unlike several other countries around the world where sentencing guidelines have been prescribed by law.

The Indian Penal Code, 1860 (herein after IPC) only prescribes the maximum and minimum sentences for offences. Consequently within the statutory limits of maximum and minimum punishment, wide discretionary power has been vested in the judges. The task of deciding the quantum of punishment is extremely difficult and must be exercised cautiously after hearing both the parties and upon evaluation of the evidence adduced. The discretion of the judge prevails in the absence of statutory guidelines. The major challenge lies in ensuring uniformity, consistency, logicality, regularity, stability and reliability on judgments. The judges are under a pressure to be more consistent and determinate and this makes the function of sentencing quite demanding, challenging and onerous. Notwithstanding the fact that the end result of all criminal conduct is one and the same, one can find numerous cases where lighter and different sentences may have been passed between similar cases in India. Some intervening circumstances like nature of crime, the age, personality, past criminal antecedents of the offender, the method of committing the crime, aggravating and mitigating factors, whether the convict is a social menace or is there any possibility of reform, etc., are some of the indeterminate

factors which sway the minds of the judges in one direction or the other. It was observed by the Supreme Court in Bachan Singh's case that–

> "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society."[53]

The court further noted that for a person convicted of the offence of murder, life imprisonment is the rule and death sentence is an exception. The dignity of human life can only be taken through the instrumentality of law when all the alternative options are unquestionably closed i.e. in the rarest of rare cases. In the area of death penalty the scope of mitigating factors need not be given an expansive or liberal interpretation as it would lead to the deepening of the dilemma of the individualization of sentencing adding to the detriment of the society at large.

In India, neither the legislature nor the judiciary has issued any provision for structured guidelines on sentencing. The legislative provision under section 354(3) CrPC only serves as the foundation until a more robust and comprehensive sentencing guideline is formulated. After the conviction of an offender under section 235(2) of the CrPC he is given an opportunity to show cause why the maximum penalty should not be imposed upon him. This provision of hearing on sentence is more of a mercy plea where the convict may make submissions outside the facts in issue.

The Supreme Court has provided judicial guidance in the form of factors and principles that lower courts must take into consideration while exercising judicial discretion. However, this is not enough as far as determining proper sentence is concerned because individualization of sentencing creates a lot of uncertainties with respect to the quantum of punishments awarded by courts in almost similar set of facts.

Indian judiciary has attained a level of maturity and deserves an appropriate sentencing policy. To leave the sentencing system open to the judge's discretion cannot be regarded as an ideal criminal administrative policy. The absence of statutory sentencing guidelines has left a wide gap in the justice dispensation system of India. The principle of individualization of sentencing, non-uniform and random sentencing status in India needs to be aborted for inclusion of uniformity, certainty and logicality in sentencing. It will help the court respond to the cries and yearnings of the community for justice. The presence of sentencing guidelines will not only bring to the forefront the retributive and just desert theories of punishments but also help minimize the uncertainty surrounding the award of sentence by addressing the principle of individualization of sentence.

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[53] *Ibid.*

"COMPARATIVE ANALYSIS OF INFORMATION LAWS: INDIA AND THE USA"

—*Sarakshie Sonawane*[*]

Abstract—Sentencing is the most important phase of a criminal trial and must be governed by the facts and circumstances of the case, the character and antecedents of the convict, the presence or absence of moral turpitude, his personal situation in life and other like considerations. In India it is a common belief that punishment should suit both the crime as well as the criminal. A high degree of discretion is vested in the courts which must be exercised with utmost precision by the sentencing judges. Therefore, the task of a sentencing judge is the most difficult one, for if he gives more importance to the crime then punishment has to be tailored on the principles of retributive justice so as to achieve deterrence and if punishment is to suit the personality of the offender then it has to be lenient so as to achieve the ends of rehabilitation. The unduly lenient sentence may provoke the aggrieved victim to wreak vengeance as the victims of crime may not share the philosophy of reformation beyond justifiable limits. At the same time, if punishment is unduly harsh it would push the society back to the practices of the ancient barbaric times and would remain devoid of the humanitarian approach. Thus, we find that in the absence of any uniform sentencing policy in India, the dilemma of the sentencing judge gets aggravated. This article is an attempt to find out how the principles of just desert and individualization of punishment are poised against each other in the absence of policy and guidelines concerning sentencing in India and to look into the ways in which a balance in this regard can be achieved.

[*] 3rd Year BB.A. LL.B. (Hons.) Symbiosis Law School.

I. INTRODUCTION

The basis of any law in a country is its Constitution which establishes the freedom of speech and expression as a vital aspect of fundamental rights, extending to written or expressed information. Freedom of Information is perceived as a very essential component of a democratic and sovereign government that is accountable for its actions. For the very same reason, the information laws provide access to the information in the public domain by setting a practice regime, to promote transparency and accountability in the governance and at the same time protecting certain sensitive or confidential information which cannot be let out in public. Sweden is the first country to implement the ombudsman following which many other countries including India have introduced the right to information laws.[1] Although the Right to Information lies in conflict with the Right to Privacy which is also a fundamental right interpreted by the courts. But the former is superseded by the latter as determined by the usefulness of the information in the interest of the welfare state.

II. JUDICIAL PRONOUNCEMENTS

The concept of data protection is a set of policies and procedures that ensure privacy at the same time availability and integrity of data or information privacy. To address these comprehensive data protection laws there have been discussions through the Personal Data Protection Bill of 2019. In a democratic country like India, the *"Right to Information Act, 2005"*[2] is an important tool for accountability mismanagement, transparency countering abuse, avoiding corruption and enforcing the ascensions of social rights. It deals with the disclosure of information for the needs of the community and public interest and also provides for the appointment of designated officers for proactive disclosure of the data that is held by the government to protect the privacy of both the citizens and the public officials. This repealed the former legislation of the *"Freedom of Information Act of 2002"*.[3] In *"Bennett Coleman & Co.* v. *Union of India"*,[4] the right to information was held to be included in the freedom of speech and expression that is guaranteed by the Constitution in its Article 19 (1) (a).[5] Followed by which, *"S.P. Gupta* v. *Union of India"*,[6] was a matter in which, it was observed that being accountable for public activities and the details of such a public transaction is the right of people to know.

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1 "History of Right of Access to Information", Access Info, (17-1-2006) https://www.access-info.org/2009-07-25/history-of-right-of-access-to-information/#:~:text=1766%20%E2%80%93%20Sweden%20adopts%20world's%20first,government%2C%20courts%2C%20and%20parliament.

2 Right to Information Act, 2005, No. 22, Acts of Parliament, 2005 (India).

3 Freedom of Information Act, 2002, No. 5, Acts of Parliament, 2002 (India).

4 *Bennett Coleman & Co.* v. *Union of India*, (1972) 2 SCC 788: AIR 1973 SC 106.

5 Constitution of India, Art. 19 (1)(*a*).

6 *S.P. Gupta* v. *Union of India*, 1981 Supp SCC 87: AIR 1982 SC 149.

Similarly, the "*Freedom of Information Act (FOIA)"*[7] 1967, is a piece of legislation providing the public with the right to request access and records of any federal or government agency of the United States of America. The enactment runs back to 1946 for further classification from each document to executive branches for the smooth functioning of this statute.[8] The *"*Cross *The People's Right to Know: Legal Access to Public Records and Proceedings 1953"* in the *"American Society of Newspaper Editors Committee Report",* served as a resource to write the Freedom of Information Act.

This also follows the constitutional right of freedom to information except when it falls under the right to privacy domain of nine exempted categories like national security, law enforcement etc. Under this legislation of the United States, there is a requirement for the federal agencies to provide the fullest possible disclosure of data and information to the public domain. For the protection of these upon non-disclosure, certain judicial remedies and administrative remedies are also available to the ones denied access to such information from the executive agencies.[9]

III. COMPARATIVE & ANALYTICAL STUDY

A. India

In India, the essential machinery to exercise the fundamental right of knowing has been effectuated by the *"Right to Information Act"* that gives access to such machinery by simply laying down the process to apply for information and other guidelines as to where to apply and so on. The main aim is to empower the citizens by bringing about certain accountability and transparency in the working of the government actions to make the democracy work for the people. Under the definition clause of Section 2[10] of the Act, information is interpreted to include any record, model contracts data material held in electronic form and so on. Public authority includes any authority or body constituted under the constitution, by any other parliamentary law by any other state law or any notification by an appropriate government. It includes both government and non-government organizations that are substantially financed by the government. The right to information includes inspection of work taking notes certified samples of material obtaining information of certified copies tapes videos etc.

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7 The Freedom of Information Act, 5 U.S.C. § 552, Public Law Nos. 104-231, 110 Stat. 3048, 114-185 (1966).

8 "Freedom of Information Act (FOIA)", the U.S. National Archives and Records Administration, https://www.archives.gov/foia.

9 Freedom of Information Act, U.S. Department of the Treasury, https://home.treasury.gov/footer/freedom-of-information-act.

10 Right to Information Act, 2005, §2, No. 22, Acts of Parliament, 2005 (India).

Section 4 of the Act imposes certain obligations on the public authorities for maintenance of records and duly cataloguing and indexing which facilitates the right to information. A desirous person to obtain any such information can request to the central or Public Information Officer specifying the details needed by him without any reason as to why the information is being requested as per the provision of Section 6.

Furthermore, Section 7 requires the public information officer to reject or accept the request and identify the *malafide* intent for denying any request or knowingly giving incorrect or misleading information which has been destroyed or requested to be obstructed in the manner of giving such information. Section 8 stipulates it within 30 days of such an application of the request by highlighting the subject information that is not open. Section 9 lays down the grounds for rejection and Section 10 provides for rejecting the application on the grounds of exemption of disclosure on the reasons being in the interest of the country itself. Section 12 provides for the establishment of a Central Information Commissioner and similarly the State Information Commission as provided in Section 15. Section 20 empowers the Commission to impose a certain penalty on the officer when the application is refused without a reasonable cause. There is a provision for exclusion of subjects under Section 21 and Section 22 is a non-obstante clause that gives an overriding effect to the provisions of the Act and Section 25 mandates the preparation of a report every year to implement the provisions of the Act to keep the government in the loop.

B. USA

Within the definition clause of FOIA, agencies of the federal government, offices within the executive office and authorities derived and independent from the executive organ (the President)[11] are all subject to FIOA, such as also been held in *"Citizens for Responsibility and Ethics in Washington* v. *US Department of Justice"*.[12] Moreover, in *"Forsham* v. *Harris",*[13] the SCOTUS held that private agencies even if receiving federal finance are not subject to FIOA. The records or information include all documentary materials, papers, maps, documentary materials etc, films, and audiotapes.[14] The meaning of *'search'* for these records is determined by the appropriateness of the method which is judged by the *'reasonability test'* on a case-to-case basis.

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[11] *Hogan & Pickert* v. *National Railroad Passenger Corpn*., 376 F 3d 1270, 1277 (2004).

[12] *Citizens for Responsibility and Ethics in Washington* v. *US Department of Justice*, 566 F 3d 219, 222-23 (2012).

[13] *Forsham* v. *Harris*, 1980 SCC OnLine US SC 43: 63 LEd 2d 293: 445 US 169, 179-80 (1980).

[14] *New York Times Co.* v. *National Aeronautics & Space Admn.*, 920 F 2d 1002, 1005 (1991).

As per Section 6 (A),[15] the time for determining the request is 20 days as opposed to 30 days in India. Sub Clause (B) provides for the appointment of a Public Liaison to aid the information requestor to assist any resolution process between the agency and the requestor and Section 7 provides for the allotting of a tracking number to assign the request. The demonstration of *'compelling need'* is also provided to expedite the process which can be requested within 10 days. The *'exceptional circumstances'* under this section have been elaborated upon to further information requests. The Chief FOIA Officer is the supervisory agency officer to whom the requests and their progress are reported, as per the hierarchy. They shoulder the responsibility for increased transparency, assistance in the resolution of disputes etc.

IV. FREEDOM OF INFORMATION: 'AN INTERNATIONAL PERSPECTIVE'

Other than India and the United States of America, France in its French Constitution also establishes Article 21, as a declaration of human and civil rights to assert a right of access to information that is right to know. In the *"United Nations General Assembly Resolution 59 (1)"*, the Freedom of Information is touched upon as a fundamental right which implies a right to gather transmit and publish any information as an essential factor to promote peace and progress in the world.[16] It is a piece of human rights that has been universally recognised under the *"Universal Declaration of Human Rights"*[17] as a right to seek to know. Even Article 19 of the *"International Covenant on Civil and Political Rights"*, provides for the right to know.[18] The Council of Europe also adopts recommendations for member states on the right of access to information that is held by the public authorities and judicial bodies. It reflects the trend in Europe to identify the right to access to information for the improvement of relations between the administration and the public. The Netherlands also has a loan openness of the administration which was brought about in 1978 to give effect to this right to know.[19]

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[15] The Freedom of Information Act, 5 U.S.C. § 552, Public Law Nos. 104-231, § 6, 110 Stat. 3048, 114-185 (1966).

[16] "History of Right of Access to Information", Access Info, (17-1-2006) https://www.access-info.org/2009-07-25/history-of-right-of-access-to-information/#:~:text=1766%20%E2%80%93%20Sweden%20adopts%20world's%20first,government%2C%20courts%2C%20and%20parliament.

[17] Universal Declaration of Human Rights (UDHR), UNGA Res. 217 A, 10-12-1948.

[18] International Covenant on Civil and Political Rights (ICCPR), UNGA Res. 2200-A (XXI), 16-12-1966.

[19] "History of Right of Access to Information", Access Info, (17-1-2006) https://www.access-info.org/2009-07-25/history-of-right-of-access-to-information/#:~:text=1766%20%E2%80%93%20Sweden%20adopts%20world's%20first,government%2C%20courts%2C%20and%20parliament.

V. CRITICAL ANALYSIS

Transparency is vital for checking corruption and holding the government liable for their actions and keeping a conscious check on the uncontrolled revelation of information while at the same time preserving the confidentiality of sensitive information. Balancing and harmonising these conflicts preserve the paramount democratic idea which is set out by the act as a practical regime under the control of public authorities for the working of public authorities.

Firstly, there is a stark division between the provisions under chapters for better understanding as followed in the Indian law for Information disclosure which is missing in the law of the USA. The word *'agency record'* articulates a varied definition by different interpretations hinging upon the actual control of agency under the purview of the word *'record'* which is embarked upon in "*United States Department of Justice* v. *Tax Analysts*",[20] as described as in the RTI, 2005. The records or information in the FOIA run parallel to the Indian provisions in RTI, as they include all documentary materials, papers, maps, documentary materials, films, and audiotapes.[21]

One factor missing in the Indian legislation is a reasonable request for asking for information, as the FOIA specifies requirements to reasonably ascertain which records are being requested for within a *'reasonable amount of effort'*.[22] The exceptions to the information disclosure have also been laid down very briefly in both laws. Certain precedents have also clarified the position of a fiduciary relationship between agencies as an exception as ruled in *"CBSE* v. *Aditya Bandopadhyay"*.[23] Privacy overriding the public interest is an exceptional outcome of these acts which legalise the demand for public information as both the statutes have demarcated and embarked upon the boundaries of *personal information*.[24] The President has been directly brought under the ambit of FIOA, but in India, the court has interpreted a similar stance indirectly.

Similar to Indian law, operational intelligence agencies are not within the purview of the information law of the States.[25] As opposed to a Chief Information Officer and Information Officer, the USA law provides for the appointment of a Chief FOIA Officer and Public Liaison respectively. Terms of tenure of the CIA are proposed for amendment by the *"Right to Information (Amendment) Bill, 2019"*. The provision of tracking the request is much more

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[20] *United States Department of Justice* v. *Tax Analysts*, 1989 SCC OnLine US SC 142: 16 LEd 2d 112 : 492 US 136, 144-45 (1989).

[21] *New York Times Co.* v. *National Aeronautics & Space Admn.*, 920 F 2d 1002, 1005 (1991).

[22] *Truitt* v. *Department of State*, 897 F 2d 540, 544-45 (1990).

[23] *CBSE* v. *Aditya Bandopadhyay*, (2011) 8 SCC 497.

[24] *Girish Ramchandra Deshpande* v. *Central Information Commr.*, (2013) 1 SCC 212.

[25] *Porup* v. *CIA*, No. 17-0072, WL 1244928 (2020).

detailed in the USA legislation as opposed to the Indian one, with a lesser number of days i.e., 20 to process the request aiming at quicker disposal of issue. Moreover, the private agencies even if receiving federal finance are not subjected to FIOA, this is contrary to Indian law of RTI. The need of the hour stance, as held in *"Ashwini Kumar Upadhyay* v. *Union of India",*[26] is suggestive of the importance of the law at the highest pedestal and the need for it to be effective in implementing the right to information to achieve the foreseen objectives.

VI. CONCLUSION AND SUGGESTIONS

An informed citizen would be better equipped to keep a necessary vigil and check on the instruments of the government by being aware of what is happening and making the government more accountable for what is done to govern the citizens. The scope and application of the Freedom of Information act differ from nation to nation. There has to be an efficient adjudicator, for example, the court tribunal or a commissioner or an ombudsman with the power and requirement to recommend the release of information upon public demand. Countries need to borrow each other's experience through legislation and its implementation. It is a distrust as often bureaucracy and the struggle for freedom of the press for different reasons act as an indicative pattern for local political struggles and the objectives of the legislators engaged in these laws.

Access to this information that is held especially by the bodies in the governance of a country and the right of its citizens to demand information held by these government bodies is the right such information which is a human right throughout the world. Although the general law states that public rights will always overpower private rights but there is no such straight jacket formula when it comes to the information laws although the objectives are to be the pillar of good governance and to promote accountability in the nation. Although there is no universal template for the freedom of information acts, each country shapes its tools for a particular objective and crafts the laws in accordance with the local problems and requirements of a growing nation.

[26] *Ashwini Kumar Upadhyay* v. *Union of India*, 2019 SCC OnLine Mad 5623.

SYED MAHMOOD COLONIAL INDIA'S DISSENTING JUDGE (2022)

By Mohammad Nasir and Samreen Ahmed, Bloomsbury India, New Delhi. Pp. 236, Price INR 496

—Salman Qasmi[*]

IN THE administration of justice, an opinion is the judge's or court's stance on a particular legal question, along with an explanation of the rationale behind the stance in an ongoing case. The majority opinion in a case forms the court's decision.[1] The minority opinion, also known as the dissenting opinion or dissenting vote, is the opinion given in the case by one judge or jointly by a number of judges who disapprove of the majority's conclusion. These opinions are given after the majority opinion.[2] Such a separately expressed opinion may differ from the consensus opinion in terms of its justification and conclusion.

The dissenting opinion serves as a clear demonstration of the fact that judges have differing viewpoints regarding the interpretation of law. It serves as a guarantor of the judiciary's independence.[3] Dissenting opinions have great value. Huges J. opines "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may correct the error into which the dissenting judge believes the court to have been betrayed".[4]

Just as majority opinions set the legal framework, dissenting opinions lay the groundwork for the evolution of law. For the proper functioning of a judicial system, talking points must keep emerging and the law must keep breaking new grounds. A key characteristic of a dissenting opinion is that it points

[*] Ph.D. Scholar, Indian Law Institute, New Delhi.

1 Julia Laffranque, "Dissenting Opinion and Judicial Independence" 8 *Juridica International* 163 (2003).

2 S. Sivakumar, "Judgment or Judicial Opinion: How to Read and Analyse", 58 *Journal of Indian Law Institute* 292 (2016).

3 William O. Douglas, "The Dissenting Opinion" 8 *Lawyers Guild Review* 469 (1948).

4 Bernard L. Shientag, "The Opinions and Writings of Judge Benjamin N. Cardozo" 30 *Columbia Law Review* 607 (1930).

out potential flaws in the conclusions of the majority opinion and makes a strong case for the devil's advocate.[5]

A dissent, therefore, is a valuable tool that develops the law. Often, a minority opinion in one case becomes the majority opinion in another. For instance, the dissenting opinion of Fazl Ali J. in *A.K. Gopalan* v. *State of Madras*,[6] was adopted later in *Maneka Gandhi* v. *Union of India*.[7] The decision in the former case was overruled and the dissent of Fazl Ali J. led to the adoption of a procedure that must be "just, fair and reasonable".[8]

Presently, the book which is under review is "Syed Mahmood Colonial India's Dissenting Judge" published by Bloomsbury Publishing house India. The authors of the biography offer it as neither a hagiography or as an apologia. The book is a piece of narration of Syed Mahmood's life and his contribution. The book starts with an introduction and is divided into six chapters.

The book seeks to apprise readers with Syed Mahmood's persona as a dissenting judge. The ***First Chapter*** deals with the early childhood, educational journey and the family background of Syed Mahmood. Born on May 24, 1850, Syed Mahmood's initial education started around the first war of independence in 1857 and it impacted his course of education as it was the post 1857 revolt which made Syed Ahmed khan (Syed Mahmood's Father) realise the importance of learning English. Due to the transferable job of his father, Syed Mahmood had the opportunity of studying at different educational places and from different private tutors. Having moved to Banaras in 1868, Syed Mahmood was admitted to Queens' College, which was widely reputed at the time as a seminary of English language and literature.

The Chapter highlights the academic excellence of Syed Mahmood as a student at the Christ College of Cambridge University, London and also his return to India as a barrister. Syed Mahmood's interest in nurturing young minds and his experiments in doing the same also finds mention in the first chapter. The personal life of Syed Mahmood is highlighted with a brief mention of his marriage and family including a short introduction of his son Ross Masood's childhood and education.

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5 Chinmoy Pradip Sharma, "The Voice of Dissent: Contribution of Dissenting Opinions in Constitutional Law Cases", *Bar and Bench*, May 24, 2019, available at: https://www.barandbench.com/columns/contribution-of- dissenting-opinions-in-constitutional-law-cases (last visited on 21-8-2022).

6 1950 SCC 228: AIR 1950 SC 27.

7 (1978) 1 SCC 248: AIR 1978 SC 597.

8 Raj Shekhar and Mohd Rameez Raza, "The Value of Dissent in Supreme Court Judgments" *The Leaflet*, 28-9-2020, available at: https://theleaflet.in/dissent-judgments-supreme-court/ (last visited on 6-8-2022).

The ***Second Chapter*** talks about the contributions of Syed Mahmood in the foundation of the M.A.O. College,[9] which ultimately transformed into Aligarh Muslim University.[10] Syed Mahmood's excellence in English language coupled with his dedication to the quest for educational empowerment in India led to the actualization of Aligarh Muslim University.[11]

Having been appointed as a High Court judge at the age of thirty-two years and permanent judge at thirty-six,[12] the chapter goes into giving a fleeting account of Syed Mahmood's idea and vision for the educational development of Indians. The Chapter also goes on to trace Syed Mahmood's vision for Education and how it resonates with the National Education Policy 2020. Syed Mahmood's contribution to the administration of the MAO College and the sociocultural life at MAO College are also briefly highlighted.

The peculiar interests of Syed Mahmood for the development of legal education at AMU is traceable form the novel initiatives undertaken by him for the same. He got himself involved in the administrative actions and the appointment of teachers at the law department. Syed Mahmood himself delivered lectures at the law department at MAO College is comprehensively illuminated.[13]

Chapter Three provides readers an account of Syed Mahmood's career in law and as a Judge of the Allahabad High Court. There were various other contributing factors apart from the talent and achievements of Syed Mahmood which lead to his appointment as a Judge of the Allahabad High Court. The atmosphere created post 1857 revolt, where the Colonial government due to circumstances created post revolt inclined towards appointment of native Judges to enhance the legitimacy of the colonial legal institutions. All this coupled with the affinity which Syed Mahmood laboured for the colonial government in India after his appointment to the Civil services, all the events played key chain role in the finality of the result and his appointment.

The popularity Syed Mahmood earned after the judgment of *Dy. Commr.* v. *Lal Rampal Singh*.[14] The 46 page judgment delivered by Syed Mahmood, when went into appeal before the Judicial Committee of the Privy Council. It much struck the eyes of its members, that they while expressing their concurrence

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[9] The Aligarh Muslim University, "The AMU Gazette Centenary Special Issue, 2020" (December, 2020).

[10] The Aligarh Muslim University Act, 1920 (Act 40 of 1920).

[11] Sanjay Barolia, "Aligarh Movement: an Instrument for Transformation in Muslims" 5 *International Journal of Multidisciplinary Educational Research* 112 (2016).

[12] K.L. Mishra, "Justice Mahmood– A Tribute Allahabad High Court", *available at*: https://www.allahabadhighcourt.in/event/JusticeMahmoodATributeKLMisra.pdf (last visited on 16-9-2022).

[13] Faculty of Law, Aligarh Muslim University, "Placement Brochure" 9 (2014).

[14] 1884 SCC OnLine PC 20.

his opinion in their judgment were said to have conveyed to the Secretary of State of India their view that so talented a person should not be wasted in the subordinate judiciary.[15]

Syed Mahmood being a man of cross cultural education had delivered a judgment which has earned him a reputation as a scholarly judge. Syed Mahmood's judgments highlighted his liberal interpretation of law and played a key role in furthering the principle of "justice, equity, and good conscience"[16]. He transformed himself into a litigant-friendly judge by considering the genuine problems of the lawyers.[17]

The chapter also discusses the differences between Syed Mahmood and Sir John Edge, the then Chief Justice of Allahabad High Court were largely due to variance of opinion on the working of the courts and his dissenting opinions and the stand of Syed Mahmood for independence of judges and equality of them. As a dissenting judge, Syed Mahmood could not accept the dictatorial and superior attitude of Sir John Edge and judgeship being dependent on the "frowns and smiles" of the Chief Justice, thus Syed Mahmood resigned from the Allahabad High Court as a judge in 1893.[18]

Chapter Four elaborately deals with the landmark judgments delivered by Syed Mahmood. His decisions are remembered because they are marked by diligence, learning, a sense of righteousness and independence, and they lack the tiresome dogmatism and repetitious clinches that are so prevalent in today's writing.[19] The judgment delivered by Syed Mahmood covered various domains of law not just confining to Muslim law. The major judgments he delivered covered Procedural law, Guardianship of Minors, Adoption, Land laws, Hindu law, Law of Evidence, Transfer of Property, succession law, equity, *etc*.[20]

Syed Mahmood recognized the importance of "fair trial" as a crucial component of the legal justice system for defending the rights of the accused when

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[15] Sri Gur Dayal Srivastava, "Mr Justice Mahmood Allahabad High Court"*, available at*: https://www.allahabadhighcourt.in/event/MrJusticeMahmoodGDSrivastava.odt (last visited on 20-8-2022).

[16] *Ishri* v. *Gopalsaran*, 1884 SCC OnLine All 31: ILR (1884) 6 All 351; *Lalli* v. *Ram Prasad*, 1886 SCC OnLin All 107: ILR (1886) 9 All 74; *Montgomery Bell* v. *James Morrison*, 7 L Ed 174: 26 US 351 (1828).

[17] Justice M. Hidayatullah, "Justice Syed Mahmood Allahabad High Court"*, available at*: *https://www.allahabadhighcourt.in/event/Justice_Syed_Mahmood_M_Hidayatullah.pdf* (last visited on 20-8-2022).

[18] Abdul Shahid, "Justice Syed Mahmood-A Jurist-Ahead of Its Times- Greatness & Relevance" District Court of India, available at: https://districts.ecourts.gov.in/sites/default/files/A%20JURIST-AHEAD%20OF%20ITS%20TIMES-%20GREATNESS%20%26%20RELEVANCE.pdf (last visited on 20-8-2022).

[19] *Supra* note 17.

[20] A.G. Noorani, "He Stood Tall" *Frontline*, January 6, 2017, available at: https://frontline.thehindu.com/the- nation/he-stood-tall/article9436074.ece (last visited on 20-8-2022).

they were not physically present in court or represented by an attorney.[21] In *Queen-Empress* v. *Pohpi*,[22] Syed Mahmood held that "an appeal under section 420 of the Code of Criminal Procedure could not be disposed of in the absence of the accused and the appellant must be heard in person".[23] The Doctrine of "*audi alteram partem* and *ubi jus ibi remedium*" was also recognized Syed by Mahmood.[24] His dissent in *Queen-Empress* v. *Babu Lal (5)*,[25] stressed on the rights of prisoners and how the extraction of evidence through third degree methods is in violation of their personal rights.

The judgment delivered in *Jafri Begum* v. *Amir Muhammad Khan*,[26] is a breakthrough in Muslim law regarding the question of inheritance. The main question referred to the full bench was "whether upon the death of a Mohammadan intestate who leaves unpaid debts with reference to the value of his estate, does the owner of such estate devolve immediately on his heirs" or such devolution is contingent upon and suspended till payment of such debts". Syed Mahmood brilliantly answered this by holding that debt did not affect devolution by proceeding upon the works of "*Baizawi*" (the greatest commentator of Quran). He explained that "*Alsirajiyyah and Hedaya*", belongs more to the realm of a treatise than a mere pronouncement. As a piece of historical investigation, the judgment stands supreme for it illumines many dark corners of the Mohammadan law.[27]

Syed Mahmood's decision in *Gobind Dayal* v. *Inayatullah*,[28] is considered to be the most authoritative exposition on the concept of pre-emption. It was held that pre-emption is simply a right of substitutions and it pertinently explored the rights and obligations of the vendee.[29] Syed Mahmood's decision in *Gobind Dayal* v. *Inayatullah*,[30] was recently affirmed by the Supreme Court of India in the judgment of *Raghunath* v. *Radha Mohan*.[31]

In the 2017 landmark judgment of *Shayara Bano* v. *Union of India*,[32] wherein Supreme Court termed the practice of "triple talaq" unconstitutional, Rohinton Nariman J. quoted Syed Mahmod's observation in the decision of

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21 *Supra* note 18 at 2.
22 1891 SCC OnLine All 1: (1891) ILR 13 All 171.
23 *Supra* note 17 at 5.
24 *Ibid*.
25 1884 SCC OnLine All 97: ILR (1884) 6 All 509.
26 1885 SCC OnLine All 127: ILR (1885) 7 All 822.
27 Vishwanth Prasa, "Some Leading Judicial Precedents of Our Court", Allahabad High Court, available at: https://www.allahabadhighcourt.in/event/SomeLeadingJudicialPrecedentsOurCourtVPrasad.html (last visited on 20-8-2022).
28 1885 SCC OnLine All 123: ILR (1885) 7 All 775.
29 V.P. Bhartiya, *Syed Khalid Rashid's Muslim Law* 305 (Eastern Book Company, Lucknow, 5th edn., 2017).
30 *Supra* note 28.
31 (2021) 12 SCC 501: AIR 2020 SC 5026.
32 (2017) 9 SCC 1.

Gobind Dayal v. *Inayatullah*,[33] and pointed "it is to be remembered that Hindu and Muhammadan laws are so intimately connected with religion that they cannot be readily be dissevered from each other".[34]

In *Jangu* v. *Ahmad Ullah*,[35] delivered by a five-judge bench, "wherein the case related to the question of whether a public mosque is open for worship to all Muslims irrespective of the difference in the manner of the offering of Namaz in different sects". Syed Mahmood referred to the decision he delivered in *Queen Empress* v. *Ramzan (5)*,[36] wherein it was held that that the ownership of a mosque vests in God, and not in any individual.

Syed Mahmood's judgment in *Indur Kaur* v. *Lalta Prasad Singh*,[37] had a progressive approach and led to the extension of the rights of a Hindu widow concerning her share of the deceased husband's immovable property and the power of alienation of the same. Syed Mahmood read down the limitation to the power of alienation of a Hindu Widow concerning the property inherited by her upon the death of her husband by applying a harmonious reading of the "Shastras*"* and the "principles of equity".

The judgments delivered by Syed Mahmood in *Ganga Sahain* v. *Lekhraj Singh*,[38] and *Beni Prasad* v. *Hardai Bibi*,[39] have proved to be a breakthrough regarding the provisions on adoption as provided in the Hindu law. This is pertinently so because the judgment founding support from the Hindu religious text's interpretation has eased the restrictions on the adoption of sons.

Syed Mahmood's dissenting opinion in *Kandhiya Lal* v. *Chandar*,[40] on the issue of the intersection of the law of contract and the Hindu law of inheritance is important. While answering the question on the competence of a shareholder to sue for the recovery of the entire amount due on the bond owned by several shareholders, he ruled that a shareholder could not be sued for more than what is his share in the bond.

Syed Mahmood's decision in *Narsingh Das* v. *Mangal Dubey (5)*,[41] has been credited for widening the scope of the procedural laws with the acceptance of the principle that every procedure is to be understood as permissible unless it is shown to be prohibited by the law.[42] The relevance of the observations

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33 *Supra* note 28.
34 *Ibid*.
35 1889 SCC OnLine All 62: ILR (1891) 13 All 419.
36 1885 SCC OnLine All 71: ILR (1891) 7 All 461.
37 1882 SCC OnLine All 118: ILR (1882) 4 All 532.
38 1886 SCC OnLine All 136: ILR (1886) 9 All 253.
39 1892 SCC OnLine All 2: ILR (1892) 14 All 67.
40 1884 SCC OnLine All 132: ILR (1885) 7 All 313.
41 1882 SCC OnLine All 7: ILR (1883) 5 All 163.
42 *Supra* note 18 at 5.

made by Syed Mahmood can be understood by the fact that his observation in *Palakhdari Singh* v. *Collector (4)*,[43] finds mention in the 69th report of the Law Commission of India.[44]

Syed Mahmood's dissenting opinion on the applicability of the doctrine of *res judicata* in *Lutfunnissa* v. *Jamiatunnissa* still holds significance. While dissenting with the majority opinion, Mahmood held that the doctrine of res judicata bars the registration of issues just as it bars the trial of the suits, with the illustration of the reason located in the maxim "*nemo debet bis vexari pro eadem causa*". Syed Mahmood's opinion resulted in the minimization of the harassment of litigants as the opinion limited the scope of the registration of issues already adjudicated.

Chapter Five goes on to explore post-resignation phase of Syed Mahmood's life. After resigning from the judgeship he went on to fulfil his father's expectations by actively engaging in the academic and administrative affairs of M.A.O College. After the establishment of the All India Muhammadan Education Conference by Sir Syed Ahmed Khan in 1886,[45] Syed Mahmood took active participation in its proceedings by delivering lecture series.

Syed Mahmood stressed on giving equal importance to English and oriental education for the holistic development of both Hindus and Muslims. He attributed the educational backwardness of Muslims to their apathy and unwillingness to read beyond their literature and oriental subjects. Syed Mahmood's contributions as a member of Hunter's commission on Education speak out his vision and concerns about the educational advancement and welfare of Muslims in India. All the eighteen recommendations made by Hunter commission with Mahmood as its member stated that all the mentioned principles should also be applied to other communities that are facing conditions similar to those of Muslims. Mahmood also significantly contributed towards the drafting of the "Munsifs bill".

Chapter Six talks about the interfaith aspects. Syed Mahmood's educational background coupled with his father Sir Syed Ahmad Khan's social engagements helped him to attain a composite knowledge of Sanskrit, Arabic, Persian and English languages. Syed Mahmood had exposure to cross-cultural education as his education starting from a "Maktab" eventually took him to "Cambridge". Syed Mahmood's father's social engagements and inter-religion relations contributed to Mahmood's liberal and progressive approach focused on mutual coexistence among Hindus, Muslims, Christian all other religions.

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43 1892 SCC OnLine PC 31: (1890) ILR All 1.

44 Law Commission of India, "69th Report on the Indian Evidence Act, 1872" (May 1977).

45 Gulshan Zubair, "Muhammadan Educational Conference: It's Impact on the Development of Modern Education for Muslim Community in Rajasthan During 20th Century" 19 *IOSR Journal of Humanities and Social Science* 74 (2014).

Syed Mahmood gave equal importance to the study of all oriental languages. As a man of composite culture Syed Mahmood admires the teachings of Dara Shikoh, the eldest son of the Mughal Prince of Akbar, who was murdered by his brother Aurangzeb. He referred to the famous work of Dara Shikoh which explored the similarities and strengthen the inter-faith dialogue for his two books on Muslim law. The Aligarh Muslim University has carried on the legacy left behind by founder Sir Syed Ahmed Khan and has established the Dara Shikoh Centre for inter-faith understanding and dialogue[46] in its 100th year for strengthening the philosophy of national integration through peaceful coexistence.

As the first Muslim native and first North Indian native judge to be appointed as a judge of the Allahabad High Court at the age of 32 years, Syed Mahmood still holds the record of being the youngest ever to be appointed as a High Court judge. As an Indian-born jurist who was well ahead of his time, many of his dissents were later upheld by the courts and are still considered to be the law of the land. Syed Mahmood's enduring brilliance emanates from the intellectual integrity he never wavered even in phases of strong opposition from his contemporaries.

The significance of the dissenting opinion of H.R. Khana J. in *ADM* v. *Shivakant Shukla*[47] is realized today. The dissent by Khana J. was in true allegiance with his oath taken under Schedule- III of the Constitution of India. As a foresighted judge, the dissenting opinion of Syed Mahmood becomes way more important in today's scenario where we have an independent judicial system. As a judge in the precolonial era where the judges were appointed at the mercy of the Colonial government, it requires great courage and willpower to take a stand against the majority opinion and express dissent.

The present book categorically covers the contribution of Syed Mahmood in Indian legal history. It emphasises his dissenting judgments and how his opinions helped in expanding jurisprudence on Muslim law, Hindu Law, Civil Law, Inheritance, *etc*. It is a successful attempt tracing Mahmood's contribution to education in general and legal education in particular, by sharing insights on his efforts in the administration and working of M.A.O college and his contributions as a member of the Hunter Commission on education in colonial India. His pertinent interventions in shaping the interfaith dialogue and contributions to further communal harmony and mutual coexistence finds relevance even now and carries his legacy forward.

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[46] Aligarh Muslim University, Dara Shikoh Centre for Inter-faith understanding and Dialogue, *available at*: https://www.amu.ac.in/centres/dara-shikoh-centre-for-inter-faith-understanding-and-dialogue/home-page (last visited on 21-8-2022).

[47] (1976) 2 SCC 521: AIR 1976 SC 1207.

The authors have attempted to portray a balanced biography of Syed Mahmood by referring to Syed Mahmood's judgments and scholarly works without turning it into an eulogy. The authors have been successful in bringing out vivid details of Syed Mahmood's multifaceted personality. The personal lapses of Syed Mahmood including alcoholism, breakdown of family are also discussed at length. However, the authors were able to cover only a few judgments out of the 300 available judgments of Syed Mahmood in the Indian Law reports.

The simple and lucid language used by the authors gives a refreshing outlook to the book. The book is definitely a value addition to the readers interested in legal and colonial history. Syed Mahmood passed away in 1905. It took almost two hundred years for a biography to release in his name covering his legal accomplishments and scholarship. The authors have successfully unearthed a seminal character from the dust of history, and exhibited how the history still lingers to voice issues in the contemporary era. This book will be an enriching experience for the lawyers, judges, academicians and scholars who are interested in studying colonial Indian Legal History.

Review By Alok Prasanna Kumar ECONOMIC & POLITICAL WEEKLY Vol. 57, Issue No. 30, 23 Jul, 2022 Of Judicial Courage In Testing Times

With respect to the independence of the judiciary, there is a tendency to conflate the independence of the institution with that of the individual in the institution. An independent judiciary requires not only systems and norms designed to prevent interference but also individuals prepared to uphold such independence at great cost. One such individual was Justice Syed Mahmood who served in the Allahabad High Court during British Rule.

When speaking of judicial courage, members of the legal fraternity generally point to Justice H R Khanna, the former judge of the Supreme Court of India who penned a brave dissent in the ADM Jabalpur case—a dissent that cost him his chance of becoming the Chief Justice of India (Diwan 2008; Narrain 2022). The *New York Times* (1976), at that time, famously said,

If India ever finds its way back to the freedom and democracy that were proud hallmarks of its first 18 years as an independent nation, someone will surely erect a monument to Justice H R Khanna of the Supreme Court.

Years after the Emergency was lifted and India found its way to a measure of freedom and democracy, we still await that monument to Justice Khanna. (I am discounting the rather terrible portrait of his that hangs in courtroom 1 of the Supreme Court of India.)

Justice Khanna is particularly appreciated for sticking to his stand on rights and the rule of law even though it went against the government of the day which had just imposed an Emergency, suspending fundamental rights. He seems to have been aware even prior to his dissenting opinion becoming public that he was going to pay a price for it (Khanna 1985). Nonetheless, he took the position that he did in the context of the ADM Jabalpur case (ADM v. *Shivakant Shukla* 1976).

Judicial courage is at the heart of what constitutes judicial independence. It is a willingness to stick to principles and act in the interests of the institution, the Constitution, and the public even when it might result in adverse consequences. While institutions and systems in the Constitution can, to some extent, prevent institutional interference in the work of a judge, they will be rendered irrelevant if judges themselves do not show a modicum of personal independence and courage in taking the positions that they should take.

The recent weeks have seen an unusual but welcome assertion of judicial independence and display of judicial courage. Justice H.P. Sandesh of the Karnataka High Court made a startling observation in open court that he had been indirectly threatened with transfer for having taken on the Additional Director General of Police (ADGP) in charge of the Anti-Corruption Bureau (ACB) in Karnataka. Justice Sandesh had made harsh observations about the conduct and investigations of the ACB in several corruption cases that had come before him. What was perhaps most startling about his revelation was the fact that the indirect threat of transfer came from a fellow sitting judge of the Karnataka High Court (Ambarish 2022).

Justice Sandesh was not content with just stating this in open court. He even recorded it, in an order, as well spelling out exactly the circumstances and nature of the "threat" he received (Sarda 2022). As on date, the ADGP and the Indian Administrative Service (IAS) officer indicted, both have approached the Supreme Court through a special leave petition and the directions seeking their service records, B Summary Reports have been stayed (Rajagopal 2022).

Justice Sandesh's experience also highlights that the pressure can come from within the institution to conform. It is not just the political executive that wants the judiciary to conform but there may be an eager willingness within the judiciary to do so and ensure conformity with the executive's desires. Even as judges look to favour the union government to get favourable post-retirement positions and the collegium watches silently as the centre discards established law and procedure in the appointment process (Kumar 2022), it is refreshing to see at least one judge refusing to go with the tide.

Showing judicial courage by going against the tide is one of the themes of a recent book authored by Mohammad Nasir and Samreen Ahmed about the first great dissenter of the Indian judiciary—Justice Syed Mahmood (Nasir and Ahmed 2022).

I. INDIA'S FIRST DISSENTING JUDGE

While he's been nearly forgotten outside of the Allahabad High Court, Justice Mahmood was a remarkable individual, not just because of the times he lived in but because of his achievements. He was the first native Indian judge on the bench of the Allahabad High Court during British rule. Along with his father, Syed Ahmed Khan, he co-founded the institution that is now known as the Aligarh Muslim University (AMU). He was one of the rare Indians in those times to have obtained a foreign degree from Cambridge University and called to the Bar from Lincoln's Inn (Nasir and Ahmed 2022).

In the book, the authors cover both his contribution to the development of what is now the AMU and his six years as a judge of the Allahabad High Court. His contribution to the setting up and nurturing of AMU in its early days is a must-read for anyone thinking about the state of education in India today. His judgments, even the dissenting ones, continue to be cited with favour by the Supreme Court as recently as 2020 (*Raghunath* v. *Radha Mohan*). However, for the purposes of this column, I will focus only on his dissents and the cause of his eventual resignation from the high court, only six years into his term.

While Justice Mahmood's dissents cover several areas of law, one of the most important here is perhaps *Queen Empress* v. *Pohpi* [ILR (1891) 13 All 171] given its implications on criminal justice. In this case, Justice Mahmood, in a powerful dissent, read into the then Code of Criminal Procedure, the right to be heard by an advocate in a criminal appeal before the high court. While the majority of the bench held that when an accused or their lawyer did not appear in court for appeal hearing, the court was justified in proceeding with the matter without them. Justice Mahmood relied on the basic principles of natural justice to hold that a provision could not be interpreted as to deny a prisoner their right of being heard in appeal. His position is now the law, as it stands, showing the far-sightedness of his thinking.

Perhaps unsurprisingly, his dissents did not go down well with the establishment, not least of all, the Chief Justice of Allahabad, John Edge. He was on the bench when Mahmood dissented in the Queen Express case and after his dissent stopped assigning criminal cases to him (Nasir and Ahmed 2022: 114). The Chief Justice's unhappiness with Justice Mahmood ranged from his personal habits (alcoholism and smoking) all the way to interfering unnecessarily

in the administration of the high court (Nasir and Ahmed 2022: 87–88). Justice Mahmood did not back down. He alleged that Edge's attitude to running the court was monarchical and did not treat fellow judges with the respect they deserved (Nasir and Ahmed 2022: 89–92). In responding to the allegations relating to personal habits and laziness, Justice Mahmood responded with a chart outlining the number of hours of work that he had put in as a high court judge and how he was better than others with a comparable term on the bench.

Needless to say, this did not soothe any tempers, and though he planned to litigate against Chief Justice Edge's accusations against him, Justice Mahmood preferred to resign. This, he believed, was the only way to assert his dignity and independence in the face of what he perceived as tyranny within the judiciary. In his resignation letter, he states that he would rather not continue being a judge in a set-up where one's career depends on the "frowns and smiles" of the Chief Justice (Nasir and Ahmed 2022: 100).

II. CONCLUSIONS

Nasir and Ahmed's book on Justice Mahmood draws a neat line between his dissents and his eventual falling out with Chief Justice Edge. While the questions that arose before the Allahabad High Court in those days were not the kinds of constitutional and political questions that arise today, they were nonetheless important questions of civil liberties. While the Constitution undoubtedly expanded upon the civil liberties that Indians enjoy, even the earliest versions of the Code of Criminal Procedure guaranteed certain civil liberties to Indians and remedy against their violation. Justice Mahmood, in his own way, and wherever possible, expanded the scope of such civil liberties and his dissents have, in fact, become law through subsequent amendments to the Code of Criminal Procedure.

Even as discussions about the independence of the judiciary continue, it is helpful to remember that as much as systems are designed to prevent structural interference in the working of the judiciary, they will fail if a judge lacks the independence of spirit and personal attributes necessary to function in an independent manner. The examples of Justice Mahmood, Justice Khanna and, now, Justice Sandesh show that even as systems fail and conformism prevails, a streak of independence and integrity has run through the judiciary in India no matter what the surrounding circumstances are.

REFERENCES

Ambarish, B. (2022): "Karnataka HC Judge Receives 'Transfer Threat' for Remark against ACB Official," Deccan Herald, 4 July, viewed on

20-7-2022, https://www.deccanherald.com/state/top-karnataka-stories/karnataka-hc-judge-receives-transfer-threat-for-remark-against-acb-official-1123779.html.

Diwan, Anil (2008): "A Profile in Judicial Courage," Hindu, 7 March, viewed on 20-7-2022, https://indialawyers.wordpress.com/2010/02/01/a-profile-in-judicial-courage/.

Khanna, Hans Raj (1985): *Neither Roses Nor Thorns*, Lucknow: Eastern Book Company.

Kumar, Alok Prasanna (2022): "Appointing High Court Judges–II," *Economic & Political Weekly,* Vol. 57, No 8, pp. 10–12.

Narrain, Arvind (2022): "The Contemporary Relevance of Internal Emergency 1975–77," Leaflet, 25 June, viewed on 20-7-2022, https://theleaflet.in/the-contemporary-relevance-of-internal-emergency-1975-77/.

Nasir, M. and Ahmed S. (2022): *Syed Mahmood: Colonial India's Dissenting Judge*, New Delhi: Bloomsbury India.

New York Times (1976): "Fading Hope in India," 30 April, viewed on 12-7-2022, https://www.nytimes.com/1976/04/30/archives/fading-hope-in-india.html?.

Rajagopal, Krishnadas (2022): "Supreme Court Stays orders by Karnataka HC against ACB in Bail Plea Hearing, Calls Them 'Unconnected,' 'Irrelevant'," Hindu, 18 July, viewed on 20-7-2022, https://www.thehindu.com/news/national/sc-stays-orders-passed-by-karnataka-hc-judge-against-acb-in-bail-plea-hearing-calls-it-unconnected-irrelevant/article65653632.ece.

Sarda, Kanu (2022): "Karnataka Judge Records Transfer Threats over Remarks against ACB in Official Order," India Today, 13 July, viewed on 20-7-2022, https://www.indiatoday.in/law/story/karnataka-judge-records-transfer-threats-over-remarks-against-acb-in-official-order-1974905-2022-07-13.

CASES CITED

ADM v. *Shivakant Shukla,* (1976) 2 SCC 521: AIR 1976 SC 1207.

Queen Empress v *Pohpi,* 1891 SCC OnLine All 1: ILR (1891) 13 All 171.

Raghunath v. *Radha Mohan*, (2021) 12 SCC 501: 2020 SCC Online SC 828.

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(See Rule 8)

1.	Place of Publication :	:	Chanakya National Law University, Nyaya Nagar, Mithapur, Patna-800001
2.	Periodicity of Publication	:	Yearly
3.	Printer's Name	:	Registrar, Chanakya National Law University
	Nationality	:	Indian
	Address	:	Nyaya Nagar, Mithapur, Patna-800001
4.	Publisher's Name	:	Registrar, Chanakya National Law University
	Nationality	:	Indian
	Address	:	Nyaya Nagar, Mithapur, Patna-800001
5.	Editor's Name	:	Hon'ble Justice Smt. Mridula Mishra (Retd.)
	Nationality	:	Indian
	Address	:	Chanakya National Law University, Nyaya Nagar, Mithapur, Patna-800001
6.	Ownership	:	Chanakya National Law University, Nyaya Nagar, Mithapur, Patna-800001

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