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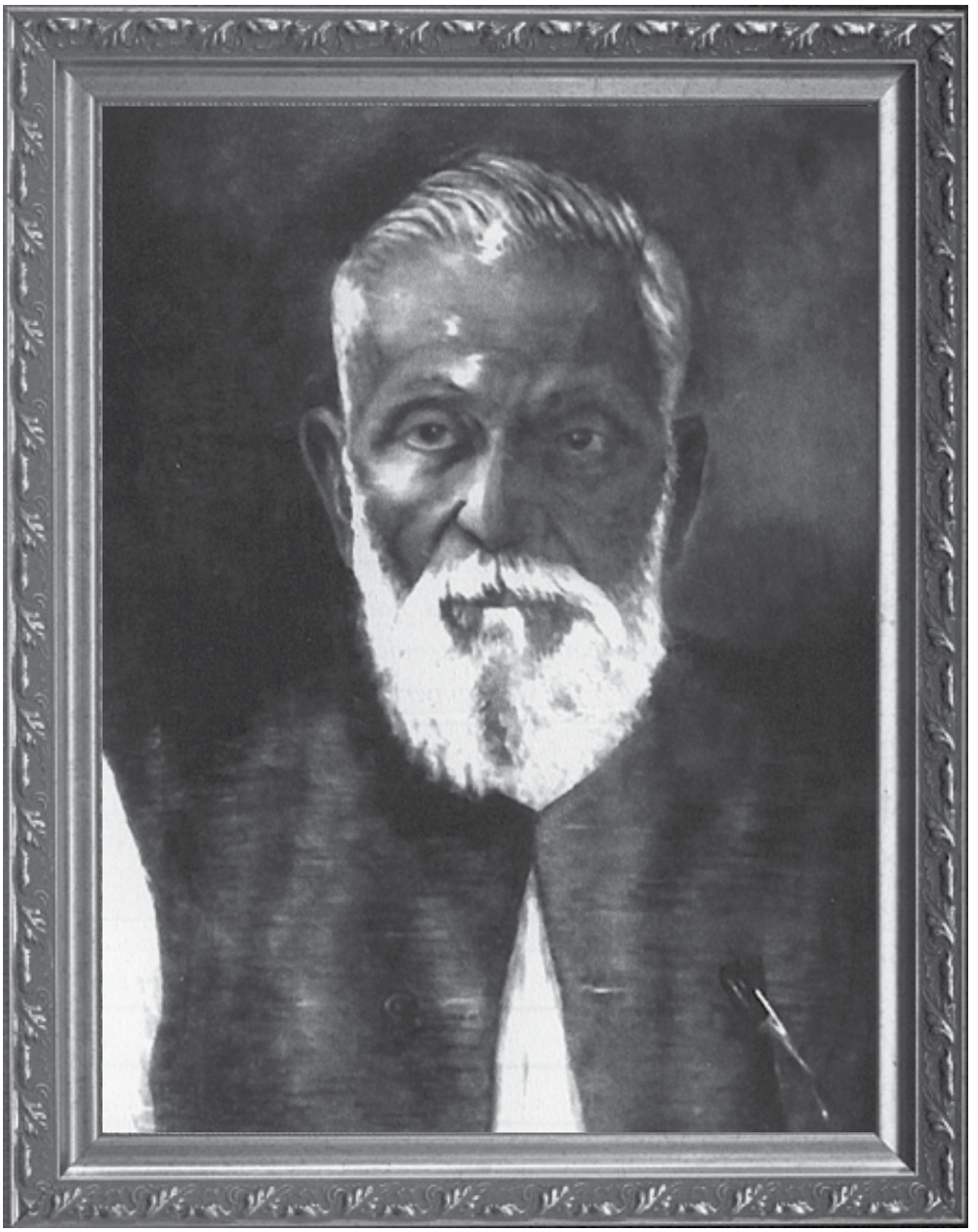

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Witness Protection: Crucial but Ignored Component of Criminal Justice System

Dr. R. K. Verma[1]*

Abstract: *A criminal case is built on the edifice of evidence. For those witnesses are required whether it is direct evidence or circumstantial evidence. So the witness protection is directly connected with the procedural aspects of due process in the criminal justice system. For the fair administration of justice the interest of the State requires that victims and witnesses depose without fear or intimidation .There are two broad aspects to the need for witness protection. The first is to ensure that evidence of witnesses that has already been collected at the stage of investigation is not allowed to be destroyed by witnesses resiling from their statements while deposing on oath before a court. This article looks into the issue of witness protection program under criminal justice system*

Keywords: Witness Protection, Criminal Justice, Evidence

1. Introduction

The criminal justice system has many elements each of them crucial and important for judicial and befitting impartment of justice under the legal system. The investigations into any crime committed or attempted have to be apt and the prosecution has to be equipped with suitable evidence and corroboration. On the basis of such investigations, the prosecution has to ensure that the justice is imparted in a legislative and juristic manner. Both the law enforcement agencies as well as the prosecution have invariably to rely on the witnesses and their statements in the case concerned to ensure unprejudiced, balanced and impartial justice or verdict.

A criminal case is built on the edifice of evidence. For those witnesses are required whether it is direct evidence or circumstantial evidence. So the witness protection is directly connected with the procedural aspects of due process in the criminal justice system. For the fair administration of justice the interest of the State requires that victims and witnesses depose without fear or intimidation .There are two broad aspects to the need for witness protection. The first is to ensure that evidence of witnesses that has already been collected at the stage of investigation is not allowed to be destroyed by witnesses resiling from their statements while deposing on oath before a court.

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1 *Associate Professor, Faculty of Law, University of Lucknow, Lucknow.

The phenomenon of witnesses turning hostile on account of the failure to protect their evidence is one aspect of the problem. The other aspect is the physical and mental vulnerability of the witness and to the taking care of his or her welfare in various respects which call for physical protection of the witness at all stages of the criminal justice process till the conclusion of the case.

While the first aspect of protecting the evidence of witnesses from the danger of their turning 'hostile' has received limited attention at the hands of Parliament in some special statutes dealing with terrorism, there is an urgent need to have a comprehensive legislative scheme dealing with the second aspect of physical protection of the witness as well.

However, there are instances where crucial witnesses, *i.e.,* key witnesses or material witnesses, disappear either before or during a trial or a witness is threatened, abducted or done away with. These incidents do not happen by accident and the inevitable consequence is that in many of these matters, the case of the prosecution fails[2]. Not only that witness is threatened, abducted, maimed, done away with or even bribed. There is no protection for him[3].As long back as 1952, the Supreme Court of India while ordering externment of the accused and directing him to be shifted to a different place observed that where 'witnesses are not willing to come forward to give evidence in public on account of apprehension for 'safety of their person or property'[4]. So for fair trial, it is necessary that witnesses should be able to give evidence without inducement or threat either from the prosecutor or the defence. If 'any conduct on the part of an accused person is likely to obstruct a fair trial, there is occasion for the exercise of the inherent power of the higher courts to secure ends of justice' to prevent suborning or intimidation of witnesses or obstruction of a fair trial.[5]

The importance of witnesses in any criminal justice system cannot be undermined or underestimated and there is always a struggle between he investigating agency and the prosecution on one hand, who want the witness to testify the truth and the accused or offender and on the other hand, who wants himself protected and saved by making the witness testifying lies or confusing statements. As such these witnesses, eyewitness or otherwise are often prove to life threats, inducements, coercion by way of offering money or under influence of power and several other illegal ways. The testifying of truth even under

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2. Associate Professor, Faculty of Law, University of Lucknow, Lucknow
Turnor Morrison & Co. v *K. N. Tapuria*, 1993 *Cr L J* 3384 Bom.

3. *Swaran Singh* v *State of Punjab*, AIR 2000 SC 2017.

4. *Gurbachan Singh* v *State of Bombay***,** AIR 1952 SC 221**.**

5. *Talab Haji Hussain* v *Madhukar Purushottam Mondka*, AIR 1958 SC 374.

these adverse conditions involves courage, strength and will to stand against intimidation, which any witness cannot do at his personal risk. That is the reason, witness protection schemes and systems as well as policies have to be designed by the law protection agencies duly supported therein by the legislation, laws and other legal support systems and plans as well as the government of the country in order to overcome and conquer the vulnerability of the witness and to provide procedural safeguards for development of a strong and sound criminal justice system.

The importance of a dynamic and forceful witness protection system is a need for every country but this aspect gains added importance in a country like India. In lack of an effective witness protection scheme and system, the fear in the witnesses specially those who need to testify against terrorists, politicians and powerful people can well be felt and made out. It is a pity that while more consideration thought and regard is needed to be given to the concept of witness protection. On the contrary our government, law enforcing agencies and legislators are not giving proper attention to this aspect and our society is also sadly ignorant about this issue and its vitality as well.

The main reasons behind the importance of inclusion of a strong witness protection law, policy and scheme under the criminal justice system in India is that witnesses play the most important and crucial part and are the most potent weapon in our fight against the rising crime rates in the country and for bringing the criminals and offenders to books. In this regard we may refer to the precious words and analysis of Gregory Lacko (Counsel for justice, Canada) who observed that those who face investigation and criminal prosecution may attempt to frustrate the administration of justice through intimidation or by causing physical or other harm to witnesses or their relatives. In the absence of any program to protect them from reprisals, witnesses may not be forth coming and the justice system may be paralysed.[6] Even the great thinker Jeremy Bentham quoted that witnesses are the eyes and ears of justice. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed and it no longer can constitute a fair trial.[7]

The concept of a fair trial was explained to mean that the trial must be fair not only to the accused but also to the victims. Protection of victims and witnesses becomes necessary in several cases[8]. A fair trial has two objectives in view *i.e.,* first, it must be fair to the accused and secondly, it must also be fair to the prosecution or the victims. Thus, it is of utmost

6. Lacko, Gregory "The Protection of Witnesses" International Cooperation Group, Department of Justice of Canada (2004), available at, publications.gc.ca/collections/Collection/J2-269-2004 E. pdf.

7. Quoted in *Zahira Habibullah Sheikh* v *State of Gujarat and Others*, (2004) 4 SCC 158.

8. *NHRC* v *State of Gujarat*, 2003 (9) SCALE 329.

importance that in a criminal trial, witnesses should be able to give evidence without any inducement, allurement or threat either from the prosecution or the defence.[9]

The right to a reasonable and fair trial is also protected under Articles14 and 21 of the Constitution of India, Article 14 of the International Covenant on Civil and Political Rights, to which India is a signatory as well as Article 6 of the European Convention for Protection of Human Rights and Fundamental Freedoms.[10] So, if the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial.[11]

Going into the needs and reasons for witness programme in India, one may refer to the significant lowering of conviction rates in heinous crimes like rape and murder *etc*. The conviction rate is going low year after year on basis of statistics supplied by governmental agencies.[12] The year 2016 saw the lowest conviction rate of 18.9% for crimes against women while the crimes against women increased by 83% as compared to 2007 in 2016.[13]According to some unofficial statistics only one in four rape cases in India ended in conviction in 2016.[14]One of the main reasons of such shocking figures is the absence of a State sponsored witness protection program, the lack of which forces lot of witnesses to turn hostile under threat, coercion and inducement. The famous Best Bakery case of 2002[15] and Jessica Lal murder case[16] of 1999 are some of the prominent examples of it. Significantly in the Jessica Lal murder case, 32 of the witnesses turned hostile in which some of them were her friends[17], while in the Varun Gandhi hate speech case 88 witnesses turned hostile.[18]

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9. *Ibid.*

10. *Ibid.*

11. 2004 (4) SCALE 394.

12. See, ncrb.nic.in/statepublications/c11/c112013/statistics2013 pdf; see also, www.livelaw.in/ what ncrb statistics says about criminal justice system in India,13th November 2015& www. deccanchronicle. com/nation/crime/070516/21-3-per-cent-is-conviction-rate-in-crimes-against-women. html, 7th May 2016.

13. See, https://the wire.in/gender/conviction-rate-crimes-women-hits-record-low.

14. See, *Hindustan Times*(e-paper, 28th August 2017).

15. *Zahira Habibullah Sheikh & Another* v *State of Gujrat & Others*, AIR 2004 SC 3467 : (2004)5 SCC 353.

16. *Manu Sharma* v *State (NCT of Delhi),* (2010)6 SCC 1.

17. See, www.the hindu.com/todays-paper/tp-national/tp-newdelhi/Court-discharges-10-hostile-witnesses-inJessica-Lal-case/article14723387.ece.

18. *Varun Gandhi* v *State of Uttar Pradesh & Others*, Criminal Misc. Writ Petition No.4950 of 2009.

Many people may argue that witnesses may have turned hostile due to greed and the court has the powers in such cases to order trial of hostile witnesses for perjury[19] but the fact is that a lot of blame of such instances factually lies in the lack of an effective and strong witness protection system under our criminal justice. The section 151 of the Indian Evidence Act, 1872 enables the court to forbid any questions or inquiries which it regards as indecent and/or scandalous and section 152 forbid any question appearing to be intended to insult or cause annoyance to the witness but these provisions cannot in any way provide needed protection for the witnesses.

It is not that the legislative body or the Governments are unaware of the want or need of a witness protection programme. The police officer or other person in authority is restricted from causing or making any inducement, threat or promise to the witnesses[20] and there are detailed provisions for recording any statement or confessions by the Judicial or the Metropolitan Magistrate.[21] The National Police Commission in its 4th Report[22]has already recommended that witness examination should take place as near as possible to the scene of the alleged offence or the home of the witness. In this report the Commission also reproduced the contents of a letter it had received from a District and Sessions Judge in which it had been commented that a prisoner suffers from some act or omission but a witness suffers for no fault of his own. All his troubles arise because he is unfortunate enough to be on the spot when the crime is being committed and at the same time foolish enough to remain there till the arrival of the police.

The Law Commission of India too from time to time in its several Reports discussed directly or indirectly witness protection schemes. In its 14th Report,[23] the Law Commission of India raised the issue of inadequate arrangements for witnesses in court and the scales of travelling allowance and daily allowance paid to them for attending the court. Further, the Law Commission of India in its 154th Report[24], referring to its 14th Report and the 4th Report of National Police Commission[25] noted that plight of witnesses appearing on behalf of State was deplorable due to lack of facilities and inconveniences and many a times they had to incur the wrath of accused. The Commission recommended for fixing

19. Section 191, Indian Penal Code, 1860 & Section 340, Criminal Procedure Code, 1973.
20. Section 163,Criminal Procedure Code, 1973.
21. *IbIbid.,* Section 164.
22. 4th Report of the National Police Commission, 1980.
23. 14th Report, Law Commission of India (1958) at pp. 776-780.
24. 154th Report of the Law Commission of India published in August 1996.
25. See, Para 28.15, 4th Report of National Police Commission at p. 16.

of allowances payable to witnesses on realistic basis and under simple procedures and the intention should be to remove all causes which contribute to anguish on their part. The Law Commission recommended for creation of necessary confidence in the minds of witnesses that they would be protected from the wrath of the accused in any eventuality.[26] Then in its 172nd Report the Law Commission of India recommended for insertion of a proviso to section 273 of the Criminal Procedure Code, 1973 providing that the evidence of a person below 16 years of age alleged to have been sexually assaulted may be recorded by the court in a manner to ensure that such person is not confronted by the accused.[27]

The 178th Report of Law Commission in 2001 dealt with prevention of witnesses turning hostile. Though this report failed to recommend any measures for protection of witnesses from the threat or coercion or inducement in any manner of the accused yet it recommended for insertion of a provision under the Code of Criminal Procedure in from of section 164A to provide for recording of statement of material witnesses in presence of Magistrates in cases of offences punishable with imprisonment of 10 years or more.[28]

The Malimath Committee Report on Reforms in the Criminal Justice System[29] referring to the recommendations of the Law Commission of India and those of the National Police Commission gave specific attention to witnesses and perjury[30]and considered witnesses as an important constituent of the administration of justice and those who perform an important public duty. The Committee vehemently observed that another major problem is about the safety of witnesses and their family members who face danger at different stages. They are often threatened and the seriousness of the threat depends upon the type of the case and the background of the accused and his family. Many a times, crucial witnesses are threatened or injured prior to their testifying in the court. If the witness is not amenable he may even be murdered. In such situations the witness will not come forward to give evidence unless he is assured of protection or is guaranteed anonymity of some form of physical disguise.[31] The Committee on the lines of specific laws in other countries, recommended for enactment of a comprehensive law in India on protection of witnesses and members of their families.

26. *Supra* note 11, Para 6, Chapter X at p.44.

27. Para 6.1, 172nd Report of Law Commission of India (2000).

28. 178th Report of Law Commission of India (2001) at pp. 122-123.

29. The Committee was formed by the Ministry of Home Affairs, Government of India on March 2003 under the Chairmanship of Justice V.S. Malimath.

30. Chapter III, the Report of the Malimath Committee on Reforms in the Criminal Justice System, 2003 at pp. 151-156.

31. *Ibi*d., Chapter III at pp. 151-152.

The significance of witness protection laws and schemes in the view of Law Commission of India is very much evident in its various references to it in its different reports over the years but the most particular one was the 198th Report of Law Commission. The process started in 2004 when paying regard to the various Supreme Court judgements in which the Court had referred to the need of witness protection and the issues of hostile witnesses, the Law Commission of India took *suo-motu* cognizance of the importance of the matter and released a Consultation Paper with 'questionnaire on witness identity protection' and 'witness protection progrmmes' inviting responses. The Commission also held Seminars in Delhi on 9th October 2004 and in Hyderabad on 22nd January 2005 for judges of High Courts, Lawyers, Police Officers and Public Prosecutors *etc.,* on the issue. The Commission in its 198th Report[32]referring to the laws in New Zealand and Portugal also recommended the need of law to balance the right of the accused against the need for fair administration of justice in which the witnesses may depose without fear or danger of their lives and properties or of their near and dear ones. Discussing and giving its views on the need for extension of 'Victim Identity Protection' in cases of serious offences and the two-way closed circuit television for examination of victim and witnesses during Sessions trial, the Commission in its 198th Report presented a Draft Bill for Witness (Identity) Protection Bill, 2006.

The importance of a comprehensive law and the urgent need for witness protection is being realized by the society and the government alike. The Bureau of Police Research and Development of the Ministry of Home affairs conducted a research in 2009 on 'Witnesses, Hostility and Problems' associated with them in which the Bureau collected relevant data from as many as 798 witnesses from Madhya Pradesh, Rajasthan, Maharashtra and Karnataka.[33] On the basis of collected data and information, the Research Committee recommended for a 'National Policy for Witness Assistance and Protection' and the setting up of a 'Victim-Witness Assistance Department' by the State Governments.[34]

In India and as well as in other western countries, the need of a effective witness protection law and policies was realized quite early but subsequently while in India the matter only remained confined to discussions and efforts to bring about the needed change, the western countries surged ahead by practically enacting the laws and laying down the required policies.

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32. The Report of the Commission made public on August 2006.

33. See, www.bprd.nic.in/WriteReadData/userfiles /files/ 2016082404/9044682521 Report.pdf.

34. *Ib*id., at p.184.

In the United States of America (hereinafter referred as USA) for example, the United States Federal Witness Protection Program[35]controlled by the US Department of Justice and operated by the United States Marshals Service is in effect and operation since 1971.[36] Since then, around 8600 witnesses and 9900 members of their families have been protected, relocated and given new identities under the program.[37] The operations are managed in such a way that when any witness wishes to enter the program for protection the US Marshals arrive at his/her home and take him away and later protect the family too. They work on changing the identity of the witness and to make a new person exist along with providing the persons and his family new identity cards and verifications. Many of the witnesses are criminals themselves and as such the Program also runs a parallel system for prisoners. This witness protection program has helped the USA to fight the mafia uprise during 1960 to 1980 immensely. Many of the famous mobsters and criminals like Henry Hill, Nicky Barnes and Frank Salemme *etc*., were taken under the wings of the witness protection programme and thereby testified against and helped in conviction of some of the most renowned criminals with whom they worked.[38]

In Australia too there is a Witness Protection Act, 1994 which came into effect from 18th April 1995 and under the Act a National Witness Protection Program has been created. Under the Act, the program is maintained by the Australian Federal Police Commissioner through the Witness Protection Committee and the Coordinator Witness Protection.[39] The Act is meant to protect and give assistance to witnesses and also others who are vulnerable to risk. There is also provision for creation of new identities of critical witnesses. As per an estimate, the Australian Federal Police spend 1.2 million dollars every year in protecting witnesses.

The United Kingdom (hereinafter referred as UK) also has a witness protection scheme maintained and run by the National Crime Agency. Under this scheme the agency gives a new identity to the important witnesses and relocates these witnesses later within the United Kingdom or even in other countries.[40]The UK Protected Persons Service of the

35. It is also known as the Witness Security Program or WITSEC.

36. It was established under the Organised Crime Control Act, 1970; See also, https:// en. wikipedia. org/ wiki/united-states-fFederal-witness-protection-programme.

37. See, https://www.usmarshals.gov/witsec.

38. See, "Famous People in the Witness Protection Program", available at, https://www.ranker.com.

39. See, the Official Website of the Australian Federal Police, available at, https://www.atp.gov.au.

40. See, "What is life like in the UK's Witness Protection Program"? *BBC News Magazine* (12th August 2015), available at, www.bbc.com/news/magazine-33863013.

National Crime Agency protects witnesses as well as wide range of people at risk of serious harm and works with Witness Protection Units and in alignment with the Units of England, Wales, Scotland and Northern Ireland *etc*., to create one United Kingdom wide service.

Noticing the rise in threat, intimidation and harassment of witnesses, the Government of New Zealand too enacted the Evidence (Witness Anonymity) Amendment Act, 1997 which allows anonymity to witnesses testifying in any case without revealing his name, address or any other particulars. Earlier, the Evidence Act of 1908 only granted anonymity to undercover police officers who had to testify in concerned cases.[41]The witness protection programmes in New Zealand are managed by the State and Territory Police Forces. According to a report, the police have spent nearly 7 million dollars between 2012 to 2015 in relocating witnesses and providing them with new identities.[42]

Canada too has a separate and comprehensive Witness Protection Program Act, 1996 under which the witness protection program is managed by the Royal Canadian Mounted Police. They have a full time Witness Protection Units spread across Canada and having Witness Program Protection Coordinators in form of trained police officers. This program focuses on ensuring the safety of witnesses, their counseling and relocation.[43]

Thus while in nearly every country around the globe[44] has an elaborate law, witness protection policies and programmes in place since long yet the real witness protection laws and schemes are to take shape in India.

Judiciary is the most important pillar of witness protection because it's the Courts who have to strike a perfect balance between right to fair trial of the accused and the protection of witnesses of the crime. The need for a detailed witness protection programme and a law on it has been emphasized by the Indian Courts in different cases from time to time. The main problem arises before the courts when the witnesses turn hostile and retract from their earlier statements under coercion, threat or intimidation of influential offenders. In *Krishna Mochi* v *State of Bihar,*[45]the Supreme Court noted that even in ordinary cases, witnesses are not inclined to depose or their evidence is not found credible by the courts and one of

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41. Section 13 A, The New Zealand's Evidence Act, 1908.

42. See, "Witness IDs Costs Steep" *New Zealand Herald* (8th March 2015), available at, www. nzherald. co.nz.

43. See, The Official Website of Royal Canadian Mounted Police, available at, www.rcmp.gc.ca.

44. See, https://en.wikipedia.org/wiki/witness-protection.

45. AIR 2002 SC 1965.

the main reasons for it is that they do not have the courage to depose against an accused because of threats to their life specially when the offenders are habitual criminals or high-ups in the Government or close to political, economic and muscle powers.[46]

The inconsistency and disparity in statements of witnesses which mainly occur when the witness is under threat or influence change the very nature of the case and affect adversely the case put up by the prosecution and in such instances the accused is benefitted and is able to escape from convictions. Thus it becomes necessary that considerable witness protection is provided to meet out ends of justice. This fact was highlighted by the Court in several cases.[47]

In 2010, a painful and deplorable incident shook the nation when some people belonging to high caste burnt several houses and huts of Dalits in Mirchpur, Haryana resulting in many deaths. The case relating to it was filed before the Supreme Court in form of a petition under Article 32 of the Constitution of India namely *Jaswant and Others* v *State of Haryana*.[48] The case and incident as usual was marred by negligent and lax investigations as well as victims and witnesses not ready to depose or forming hostile due to pressure of high caste people and their under influence and fear of economic and social boycott. In the said case the Court noting the problem of safety of victims and witnesses ordered for deployment of CRPF in the village till the time relevant witnesses are examined by the Court and the Court demanded monthly report regarding security arrangements, witness protection arrangement and preventive measures.[49]

In *National Human Rights Commission* v *State of Gujarat,*[50] the Apex Court directed the Central and the State Government to enact a suitable law for witness protection. While no action on the directions of the Court was taken by the Government the Court again in *National Human Rights Commission (II)* v *State of Gujarat,*[51]analaysed in detail the

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46. *Ibid*. See also, *State of Uttar Pradesh* v *Ram Sanjivan and Others* (2010) 1 SCC 529; *Bhagwan Singh* v *State of Haryana*, AIR 1976 SC 202; & *Ram Swaroop* v *State of Rajasthan*, 2004 *CrLJ* 5043 SC.

47. *Sucha Singh* v *State of Punjab*, (2003) 7 SCC 643; *Zahira H. Sheikh* v *State of Gujarat*, (2004) 4 SCC 158; *Gorle S. Naidu* v*State of Andhra Pradesh*, (2003) 12 SCC449; & *Syed Ibrahim* v *State of Andhra Pradesh*, (2006) 10 SCC 601.

48. Writ Petition (Civil) No. 211 of 2010.

49. Bhoi, Sarita "Mirchpur Carnage: Caste Violence in Haryana" *Socio Legal Information Center Publication* 304-305 (2011).

50. (2008) 16 SCC 497.

51. (2009) 6 SCC 767.

need of witness protection law in the country and reviewed witness protection laws of United States, UK, South Africa, Italy, Germany and Netherlands and also the various Reports of Law Commission of India and National Police Commission thereto. The Court acknowledged that protection of witness is important and it has to be provided so that he/she can depose freely in courts. The Court ever laid down some useful and essential guidelines to be followed for protection of witnesses.

The list of cases in which court has sought witness protection laws and policies in the Indian criminal justice system is endless and the judiciary is doing what it can do in this respect. However, the increasing instances of murders of major trial witnesses of high profile matters, witnesses turning hostile and retracting from their statements are a proof that the government is not taking the directions of the judiciary very seriously.[52]

2. Conclusion

In our country over the years, we have witnessed incidences of witnesses being exposed to threats and intimidation by influential and hard core criminals accused in absence of a strict or comprehensive law or policy of witness protection unlike other European and Western countries. The Jessica Lal Murder Case, Best Bakery Case, Godhara Violence Case to the recent Vyapam Scam Case and several other high profile cases are an example of it. Various countries across the globe have a well-developed and operative witness protection laws and programs.

The Indian Constitution provides for fair and unbiased trial to ensure an impartial justice system. Witness protection provision is a mandatory element of this constitutional vision but it cannot be achieved without the support of the government, police as well as the society at large. The Indian judiciary has from time to time stressed and emphasised on the need of a witness protection law and program also but little has been done in this regard either by the legislature or the executives. As such corruption in form of false and contradictory depositions by the witnesses under pressure or threat exists in its worst forms thereby resulting in a drastically low conviction rates in heinous crimes especially where the accused is an economically powerful person, influential person or a habitual criminal.

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52. See, *Madan Lal and Others* v *State of Rajasthan*, 2012 *Cr. L. J*., 1430; *Rishipal*v *State of U.P.,* Criminal Capital Appeal No. 1748 of 2008; *State of Bihar* v *Rajballav Prasad@ Rajballav,* Criminal Appeal No. 1147 of 2016; *Naresh ShridharMirajkar* v *State of Maharasthra*, AIR 1967 SC 1; *Gurbachan Singh* v *State of Bombay*, AIR 1952 SC221 ; *Neelam Katara v Union of India*, (2004) 4 SCC 187; & *Kartar Singh* v *State of Punjab*, (1994) 3 SCC 569.

These facts not only effect fair disposal of criminal cases but also undermine the image of the judiciary, executive and legislature of the country.

The various studies, Reports of Law Commission of India, Reports of National Police Commission and National Crime Research Bureau have highlighted the problems concerning witnesses of various crimes as well as given some constructive suggestions for a fruitful and effective witness protection program and laws. In most of the cases, witnesses are known to the accused and as such there is a need of law allowing for testimony of the witness in absence of the direct confrontation with the accused and/or a protection measure including change of identity and withholding of secrecy. It thus seems that it is high time when the vision of the Law Commission of India and the judiciary are given practical shape in form of witness protection law and program and the cue and motivation can be taken as well from similar laws in other countries across the world.

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A Critical Study of Scope and Ambit of Anticipatory Bail in the Light of Spirit of Bail Mechanism

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Abstract: *A criminal case is built on the edifice of evidence. For those witnesses are required whether it is direct evidence or circumstantial evidence. So the witness protection is directly connected with the procedural aspects of due process in the criminal justice system. For the fair administration of justice the interest of the State requires that victims and witnesses depose without fear or intimidation .There are two broad aspects to the need for witness protection. The first is to ensure that evidence of witnesses that has already been collected at the stage of investigation is not allowed to be destroyed by witnesses resiling from their statements while deposing on oath before a court.*

Keywords: Anticipatory Bail, Bail Mechanism, Criminal cases

1. Introduction:

Right from the beginning when the concept of bail was formed the very aim of bail has been misinterpreted and misconceived. In criminal proceedings the decision on bail represents an important stage in the prosecution process. The results of these decisions can have for reaching consequences for victims of crime and public in general. As well as the statutory provisions regarding bail is concerned, the bail is up to the discretion of the authorities in charge. It is purely a matter of discretion of authorities and the courts but in order to avoid its abuse or misuse this discretionary power, some provisions and rules in the Criminal Procedure Codes or in separate Acts for bail has been enacted.

2. The Spirit of Bail Mechanism:

The spirit of bail mechanism is well evident from the constitutional provision of Article 22 which enshrines protection against arrest and detention in certain circumstances.[1]Besides this, Article 22 (4) provides that no law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless an Advisory Board consisting of persons who, are or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention.

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. Article 22 (1) & (2), Constitution of India.

As a practice Indian law stresses on the principles of presumption of innocence. The principle embodies freedom from arbitrary detention and serves as a bulwark against punishment before conviction.[2] More importantly, it prevents the State from successfully employing its vast resources to cause greater damage to a non-convicted accused than he/she can inflict on society. While considering bail applications of the accused, courts are required to balance considerations of personal liberty with public interest.[3]

In India the general rule is 'bail not jail'. The spirit for bail in India can well be judged and is very clear from the words of Justice V. R. Krishnaiyer in the case of *Balu Sing and Others* v *The State of U.P.,*[4] where it was laid down that speedy justice is a component of social justice since the community, as a whole, is concerned in the criminal being condignly and finally punished within a reasonable time and the innocent being absolved from the inordinate or deal of criminal proceeding.[5]

The Court further said that personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognized under Article 21 that the crucial power to negate it, is a great trust exercisable, not casually but judicially with lively concern for the cost to the individual and the community. To glamorize impressionistic orders as discretionary may, on occasions, make as litigative gamble decisive of a fundamental right. After all personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by law.[6]

Presumption of innocence unless proved guilty is the key factor which should guide the bail system in India. The concept of bail has actually emerged from the restriction of liberty of a person accused of a crime and the presumption of innocence lies in his favour. But in a practical way, it is not justice if a person accused of a crime is kept under arrest with the purpose of proving his guilt in trial and punishing him because in the trial he may be acquitted and proved to be not guilty.

Legally the object of bail is to ensure that an accused person will return for trial, if he is released after arrest. If his presence at the trial could be reasonably ensured otherwise

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2. See, https://en.wikipedia.org/wiki/BailIndia

3. Vrinda, Bhandari "Inconsistent and Unclear : The Supreme Court of India on Bail" (PDF); Vol. 6 Issue 3 *NUJS Law Review* (2013).

4. AIR 1978 SC 527.

5. *Ibid.*

6. *Ibid.*

than by his arrest and detention, it would be unfair and unjust to deprive the accused of his liberty during the pendency of the proceedings against him.[7] The grant of bail is also necessary because there can be grave consequences if a person during pre-trial period is kept in long detention.[8]

In *Sanjay Chandra* v *CBI*[9] a case relating to sections 420-B, 468,471 and 109 of the Indian Penal Code and section 13(2) read with 13 (i) (d) of Prevention of Corruption Act, 1988, the Supreme Court remarked that in bail applications generally it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail.

The object of bail is neither punitive nor preventive. Deprivation of liberty must be considered as a punishment unless it can be required to ensure that accused persons will stand his trial when called upon.[10] The courts owe more than verbal respect to the principle that punishment begins after conviction and every man is deemed to be innocent until duly tried and duly found guilty. From the earliest times, it was appreciated that detention in custody and pending completion of trial could be a cause of great hardship. From time to time necessity demands have been made that some non-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases it has been observed that necessity is the operative test.[11] The Court further added that in this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter upon which, he has not been convicted.

Similarly in *Moti Ram* v *State of M.P.,*[12] the Supreme Court observed that the consequence of pre-trial detention is grave. Defendants presumed to be innocent are subjected to the psychological and physical deprivations of jail life. The burden of his detention frequently falls heavily on the innocent members of his family.[13]

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7. Kelkar, R. V., *Criminal Procedure* revised by Pillai, Dr. K. N. Chandrashekhran 282 (Eastern Book Company, Lucknow, 2008).
8. Jai, Dr. Janak Raj *Bail Law and Procedures* 6 (Universal Law Publishing Co. Pvt. Ltd., 4th Ed., 2009).
9. (2012) 1 SCC 40.
10. *Ibid.*
11. *Ibid.*
12. (1978) 4 SCC 47.
13. *IbIbid.,* at para 14.

The concept and philosophy of bail was discussed in detail by the Supreme Court in *Vaman Narain Ghiya* v *State of Rajasthan*.[14] In this case the Court remarked that bail remains an undefined term in Code of Criminal Procedure. Nowhere else the term has been statutorily defined. Conceptually, it continues to be understood as a right for assertion of freedom against the State imposed restraint. Since the UN Declaration of Human Rights, 1948 to which India is a signatory, the concept of bail has found a place within the scope of human rights.

Basically, bail serves two purposes *viz.,* first, it helps to ensure reappearance of the accused in court and secondly, it prevent persons accused from serving imprisonment unnecessarily because trials are a lengthy process. Indian law is based on the principal that a person is presumed innocent till he is proven guilty.

The object and purpose of bail has been very clearly observed by the Supreme Court in *State of Rajasthan, Jaipur* v *Balchand @ Baliay.*[15] In this case the Court remarked that the basic rule may perhaps be tersely put as bail, not jail except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like by the petitioner who seeks enlargement on bail from the court.[16]

In a landmark case of *Siddharam Satlingappa Mhetre* v *State of Maharashtra and Others,*[17] the Supreme Court has examined the concept of bail and liberty in detail. This judgement was delivered by the bench of Dalveer Bhandari and K. S. Panicker Radhakrishnan *JJ*., on 2nd December 2010. In this case the Hon'ble Court said that the society has a vital interest in grant or refusal of bail because every criminal offence is the offence against the State. The order granting or refusal of bail must reflect perfect balance between the conflicting interest, namely sanctity of individual liberty and the interest of the society.

The law of bails dovetails two conflicting interests. On the one hand, the requirements of shielding the society from the hazards of those committing crimes and potentially of repeating the same crime while on bail and on the other hand, absolute adherence of the

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14. (2009) 2 SCC 281.

15. AIR 1977 SC 2447.

16. *IbIbi*d., at para 2.

17. (2011) 1 SCC 694.

fundamental principle of criminal jurisprudence regarding presumption of innocence of an accused until he is found guilty and the sanctity of individual liberty.[18]

The Court observed that all human beings are born with some unalienable right like life, liberty and pursuit of happiness. The importance of these natural rights can be found in the fact that these are fundamental for their proper existence and no other right can be enjoyed without the presence of right to life and liberty.[19] The Apex Court observed that the life deprived of liberty would be without honour and dignity and it would lose all significance and meaning and the life itself would not be worth living. That is why liberty is called the very quintessence of a civilized existence.[20]

3. Scope & Ambit of Anticipatory Bail

One of the most distinctive and unique feature under the Indian criminal justice system in order to secure the right of personal freedom and liberty of an individual is the provision of 'anticipatory bail' under section 438 of the Code of Criminal Procedure, 1973. This provision is singular and remarkable because it is available in very few countries. The term 'anticipatory bail' has not been defined anywhere in the Code of Criminal Procedure, 1973. However, it simply means bail in anticipation of arrest. The provision for seeking such bail has been incorporated under section 438 of the Cr. P. C., 1973. This provision provides that an individual can seek bail in the expectation or anticipation of being accused or being named in the commission of a non-bailable offence.

Considering the terminology of section 438 of the Code of Criminal Procedure, 1973 the Madras High Court has remarked that from the reading of the above said provision, it is very clear that the High Courts as well as the Sessions Court are empowered to give direction that the person who is having reasonable apprehension of arrest for the accusation of a non-bailable offence be released on bail in the event of such arrest.[21]

The meaning of anticipatory bail was explained by the Constitutional Bench in the case of *Gurbaksh Singh Sibbia* v *State of Punjab*[22], wherein it was observed that an anticipatory

18. *IbIbid.,* at para 2.

19. *IbIbid.,* at para 41.

20. *IbIbid.,* at para 42.

21. *S. Swaminathan* v *The State, represented by the Inspector of Police, Vigilance and Anti-Corruption Wing, Thanjavur,* order dated 3rd December 2008 by Madras High Court in M.P. (MD) No. 8180 of 2008 at para11.

22. AIR 1980 SC 1632 .

bail is a pre-arrest legal process which direct that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail.

In the instant case the meaning of anticipatory bail was further elaborated by the Apex Court by drawing a distinction between order of ordinary bail and order of anticipatory bail, stating that ordinary bail is granted when the accused is in custody which means he shall be released from the custody of police while anticipatory bail is granted in anticipation of arrest and hence becomes effective at the moment he is arrested.[23]

Thus 'anticipatory bail' can broadly be seen as a misnomer as it is not bail presently granted in anticipation of arrest. When the court grants anticipatory bail it is in fact actually makes an order that in the event of arrest of the person in favour of whom the order has been granted, he shall be released on bail.[24]

The old Code of Criminal Procedure, 1898 did not have any provision for anticipatory bail. As such there was a sharp difference of opinions of various High Courts as to whether they had the sufficient powers to grant bail in anticipation of arrest to an individual applicant. However, the prevalent and dominating view was that the courts did not have such power.[25] For example, the Himachal Pradesh High Court in *State* v *Om Prakas*h,[26] granted bail in a case where it was pleaded that police are likely to arrest the respondent at any time in a case under sections 420, 467, 467 and 120B of the Indian Penal Code,1860. In contrast, the Madhya Pradesh High Court in *State of M.P* v *Narayan Prasad Jaiswal,*[27] observed and ruled that grant of bail means that the person is in police custody or is required to surrender and hence it is in-appropriate to grant bail to any person who is not such restrained. The Court also held that mere apprehension of arrest is not sufficient for the court to grant bail.

Similarly, the Hyderabad High Court in *Muzafuruddin* v *State of Hyderabad,*[28] and *Sunder Singh* v *State,*[29] and the Lahore High Court in *Hiddayatullah Khan* v *Crown,*[30] were also of

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23. *Ibid.* See also, *Rashmi Rekha Thatoi* v *State of Orissa,* (2012)5 SCC 690 at para 18.
24. Nath, Dr. Prem "Right to Anticipatory Bail", available at , http:// www.legalserviceindia.in.
25. *Savitri Agarwal & Others* v *State of Maharashtra*, (2009) 8 SCC 325.
26. 1973 *Cr L J* 824.
27. AIR 1963 M P 26.
28. AIR 1953 Hyd. 219.
29. AIR 1954 Hyd. 55.
30. AIR 1949 Lah. 77.

the view that bail can be granted in cases of apprehension of arrest and where the person has actually not been arrested. In *State* v *Jagan Singh,*[31] the Madhya Pradesh High Court held that a person who surrenders before the court pleading apprehension of arrest can be granted bail.

Thus from the earliest time it was the matter of question whether bail can be granted on apprehension of arrest but due to dissimilar views of different High Courts there was no specific view on this point.

For the first time, the Law Commission of India in its 41st Report[32] suggested to introduce the provision of anticipatory bail. In the said report the Law Commission of India pointed out that, "the suggestion for directing the release of a person on bail prior to his arrest (commonly known as anticipatory bail) was carefully considered by us. Though there is a conflict of judicial opinion about the power of a court to grant anticipatory bail. The majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days.

In recent time with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases , where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail.[33]

Subsequently, the Criminal Procedure Bill, 1970 was introduced for consideration before the Joint Committees of both Houses which contained this suggestion.

Again the Law Commission of India in its 48th Report[34] recommending the acceptance of suggestions for incorporation of provision of anticipatory bail in the Code of Criminal Procedure commented that the Bill introduces provision for the grant of anticipatory bail. This is substantially in accordance with the recommendations made by the previous Commission. We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised. We are further of the view

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31. 1953 *Cr L J* 74 ; see also, *Amir Chand* v *Crown,* AIR 1950 E.P. 53.

32. See, 41st Report of Law Commission of India, Vol. I (September 1969).

33. *IbIbid.,* at para 39.9, pp. 320-321.

34. See, 48th Report of Law Commission of India (July 1972).

that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for the reasons to be recorded and if the court is satisfied that such a direction is necessary in the interests of justice. It will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the Superintendent of Police forthwith.[35]

Accepting the suggestions, the provision for anticipatory bail was finally included in the Code of Criminal Procedure, 1973 by the legislation granting the High Court and Court of Sessions concurrent powers to grant of anticipatory bail.

The terminology of the provisions of anticipatory bail as laid down by the legislation empowers the High Courts as well as Court of Sessions to grant bail. These provisions are as follows:

Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, *inter alia*, the following factors,[36] namely the -

- nature and gravity of the accusation;
- antecedents of the applicant including the fact as to whether he has previously undergone imprisonment or conviction by a Court in respect of any cognizable offence;
- possibility of the applicant to flee from justice; and
- where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,

either reject the application forthwith or issue an interim order for the grant of anticipatory bail.

While the provision for 'anticipatory bail' is not applicable in Uttar Pradesh and Uttrakhand has been barred and stands omitted[37] by the State Amendment for unknown reasons yet if the same was intended for the betterment and safety of the society in general and the move seems to have backfired. The main reason for it is that while section 438 for anticipatory

35. *IbIbid.,* at para 31.

36 . Substituted by the Code of Criminal Procedure (Amendment) Act, 2005.

37 . Vide U.P., Act No.16 of 1976, *w .e .f.,* 1-5-1976.

bail under the Code of Criminal Procedure, 1973 is not available in these States, the same relief and similar consolations are being sought and being obtained as well by the petitioners by resorting for relief under section 482 of the Code of Criminal Procedure, 1973 which provides for inherent powers of the High Courts or even under Article 226 of the Constitution of India. Thus, even after omission of the said provision of anticipatory bail, the back door entries are being made in the garb of other provisions.

Moreover, while omission of section 438 in Uttar Pradesh should have work at least for minimizing the burden on already overburdened judiciary. On the contrary, it has resulted in wasting of court's valuable time and burdening themselves by increase in petition under section 482 of Criminal Procedure Code, 1973 and Article 226 of the Constitution. Hence observing the situation, the legislature cleared the Code of Criminal Procedure (Uttar Pradesh Amendment) Bill in 2010 for restoration of provision of anticipatory bail yet the bill is still pending at the President for his approval.

Under the circumstances prevailing in Indian society where the politicians, influential people with power and money in general are trying every time now and then to implicate their enemies and adversaries in false cases and offences in order to cause them under harassment and shame. Taking cognizance of these factors on the recommendations of the Law Commission of India the provision for 'anticipatory bail' was also added in the Code of Criminal Procedure, 1973.

While the provision for anticipatory bail was added to protect the innocents from being arrested unduly detained and put to shame by their adversaries or opponents with power, even this provision is often being misused by the same people with influence and political connections to get bail in anticipation of their arrest even for unlawful deeds and acts committed by them.

However, though like any other legislation even the provision of anticipatory bail may be continuing to be used by undeserving people for their selfish ends yet it cannot be ruled out that the provision is a useless one because by and large it does help the innocent and naive people being frequently implicated by their rivals for disgracing them without any due justification or cause.

While no guidelines or considerations for grant or refusal of anticipatory bail have been given by the legislation or by the Law Commission of India in 1969 when it recommended for the provision in its 41st report yet as usual the ever active judiciary by its own wisdom has given enough directions and factors to be considered in grant or refusal of anticipatory bail in its various landmark and leading judgments such as in *Gurbaksh Singh Sibbia* v

State of Punjab,[38]; *Siddharan Satlingappa Mhetre* v *State of Maharashtra,*[39]; and *Balchand Jain* v *State of Madhya Pradesh,*[40] *etc.*

While the power under this section is discretionary the expression 'reason to believe' used in section 438 (1) which clearly indicates that court grants relief only being satisfied on objective material's examination. Moreover, filing of FIR is not a condition precedent and the provision anticipatory bail apply even when there is no FIR and no case of commission of a non-bailable offence has been registered against a person. This means even where a person has 'reason to believe that he may be arrested on accusation of having committed a non-bailable offence, the section would operate.[41]

The provisions of anticipatory bail as it stands today have been amended by way of Criminal Procedure (Amendment) Act, 2005.[42] However, after the amendment, the Law Commission of India has continued to make on in-depth study of the scope and ambit of anticipatory bail. The study by the Law Commission seems necessary because of the fact that lawyers of various associations of different States across the country has objected to some of the provisions and sub-sections within section 438 as introduced in 2005. All these objections were taken into account and considered by the Law Commission of India in its 203rd Report.[43]

Regarding the efficiency of amended provisions the Madras Bar Association appointed a Committee headed by a former State Public Prosecutor to study the amendments made by the Code of Criminal Procedure (Amendment) Act, 2005 and this Committee found that the amendments made there by to in section 438 were against the public interest and would interfere with the independence of the judiciary as well as the rights of accused.

The Committee was of the view that the proviso (2) to sub-section (1) of section 438 must be deleted. The reasoning given was that the apprehension of the accused is manifold and in some case there may be no possibility of an arrest though the accused may apprehend arrest. To permit the police officer in charge to arrest without warrant the accused/applicant on the basis of the accusation apprehended in such application would defeat the purpose of

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38. (1980) 2 SCC 565.

39. (2011) 1 SCC 694.

40. (1977) SCR 52.

41. *Gurbaksh Singh Sibbia and Others* v *State of Punjab*, AIR 1980 SC 1632.

42. Section 438, Cr. P.C., 1973 amended by Criminal Procedure Code (Amendment) Act, 2005.

43. The 203rd Report of the Law Commission of India published in December 2007.

section 438. The sub-section would make the hearing of the bail application cumbersome also and the presence of the accused as laid down in sub-section (1- B) at the time of final hearing of the application would enable the police officer to arrest the accused if the bail is rejected. This would defeat the purpose of section 438 of the Code of Criminal Procedure altogether.[44]

The Advocates Association of High Court of Chennai also objected to the amendment of 2005 on the same grounds alleging that the proposed amendment being brought in section 438 of Code of Criminal Procedure will take away the rights of an alleged accused who may not have involved in any offence without there being any chance to get anticipatory bail without subjecting himself before the court where the anticipatory application is pending. In the event of refusal of anticipatory bail by the court, such person can straight away be arrested. This amendment provides an unexpected opportunity and embarrassment to the advocates to bring the alleged accused before the court for hearing anticipatory bail applications on an application made to the court by the Public Prosecutor and such advocates indirectly help the police to arrest such accused without there being any investigation made in the alleged offence. This amendment will take away the rights and liberty of an individual to put forth his plea before a court without getting arrested.[45]

Thus the main parts of section 438 objected were the proviso to sub-section (1) and sub-section (1B).

In the light of judgments of various courts the Law Commission of India seriously analysed these objections on connected issues specially the cases of *Rattan Kumar* v *State of Assam*[46]*; State of Assam & Another* v *R. K. Krishan Kumar &Others*[47]*; Gurubaksh Singh Sibbia* v *State of Punjab,*[48]and *Savitri Goenka* v *Kusum Lata Damant & Others,*[49]*etc.* The Commission acknowledged that the proviso to sub-section (1) of the amended section 438 the Code of Criminal Procedure, 1973 permitting the arrest in cases where the court has not passed an interim order or has rejected the application for grant of anticipatory bail would indeed cause harm and injury to the rights of the accused applicant. Coming to conclusion

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44. Clause 5.1, Chapter 5, 203rd Report, Law Commission of India (December 2007).

45. *IbIbid.,* Clause 5.2.

46. 1979 *Cr L J* NOC 143 (Gauhati).

47. AIR 1998 SC 144.

48. (1980) 2 SCC 565.

49. (2007) 12 SCALE 799.

the Law Commission relied on certain observations made by the Supreme Court in the case of *M.C. Abraham's & Another* v *State of Maharashtra & Others.*[50]

The Commission also relied on the observations of Supreme Court in *S.N. Sharma* v *Bipen Kumar Tiwari*.[51] As far as the amended section 438 sub-section (1 B) is concerned which makes the presence of person seeking anticipatory bail obligatory at the time of final hearing of application before the court, the Law Commission said that the presence of the petitioners is not necessary in all cases of final hearing of anticipatory bail. In fact it is obligatory only in cases where the application has been filed by the Public Prosecutor for the presence of the petitioner and the court considers the presence of the person necessary in the interest of justice. In this reference, the Commission also studied the cases of *Chandramohan* v *State of Kerala,*[52] and *State of Assam & Another* v *Dr. Brofen Goga & Others,*[53] as also the case of *Hajialisher* v *State of Rajasthan.*[54]

Apart from this, the Law Commission also analysed deeply the problems arising out of section 438 regarding concurrent jurisdiction of High Court and Court of Sessions. As such in its 203rd Report of 2007 the Law Commission recommended the revision of section 438 and proposed it to be included in amended version as if an application under this section has been made by any person either to the High Court or the Court of Session, no further application by the same person shall be entertained by the other of them.

Thus what the Law Commission in the recommended section 438 did was to remove the sub-section (1) proviso of section 438 and also removed sub-section (1 B). By adding sub-section (5) in the recommended section 438, the Commission removed the ambiguity of concurrent jurisdiction imparted to the High Court and the Court of Sessions. As such while vide its 203rd report, the Law Commission recommended for deletion of the amendment to section 438 of the Code of Criminal Procedure, 1973 as amended by the Code of Criminal Procedure, (Amendment) Act, 2005 but no action was taken by the legislation as of yet.

The changes required in bail system is an ever-going process and the fact that a large number of people accused are under pre-trial detention for a long period due to criminal proceedings and trials taking extensive time makes bail reforms a great necessity in today's

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50. (2003) 2 SCC 649.

51. (1970) 1 SCC653.

52. 1977 KLT 791.

53. AIR 1998 SC 143.

54. (1976) *Cr L J* 1658 (Raj.).

time. The Law Commission of India also felt that in last decades the changing patterns of crimes and arbitrariness in exercise of judicial discretion in bail matters are compelling reasons to examine bail law in our country yet again taking into consideration the changes in the crime structure and the society.

As such, the Law Commission of India after analysing and thoroughly studying the statistical information provided by the National Crime Records Bureau came to a conclusion that operations of bail system in India need a review regarding its existing system and operations. Keeping this in mind, the Commission prepared and presented a detailed report in May 2017.[55]

As far as anticipatory bail is concerned the Law Commission of India in its 268thReport has made an in-depth analysis of various leading judgements and ideas and directions given therein by the Supreme Court and High Courts. In particular, the Commission extensively and exhaustively examined and pursued the cases of *Bal Chand Jain* v *State of M.P.,*[56] *Satlingappa Mhetre* v *State of Maharashtra,*[57] and *Gurbaksh Singh Sibbia* v *State of Punjab,*[58] *etc.*, along with its own 48th Report. The Law Commission also paid attention to the observations of Supreme Court in *Sumit Mehta* v *Sate of N.C.T. of Delhi,*[59] that there must be a balance between an individual's right to freedom and personal liberty and the duty of investigation by the police.

It was also observed that section 438 does not form a part of Article 21 of the Constitution of India and it provides discretionary powers to the High Courts and the Courts of Sessions.[60] The factors and parameters given by the Supreme Court in above cases should be considered while granting anticipatory bail. Apart from this, the observation made in *Pokar Ram* v *State of Rajasthan;*[61] *Salauddin Abdul Samad Shaikh* v *State of Maharashtra;*[62] and *Parvinderjit*

55. See, "Amendments to Criminal Procedure Code, 1973 - Provisions Relating to Bail" 268th Report of Law Commission of India (May 2017).

56. *Supra* note 40

57. *Supra* note 17.

58. *Supra* note 22.

59. (2013) 15 SCC 570.

60. See, *Sheonandan Mandal* v *State of Bihar,* 1980 *BLJ* 258; *Sankaranarayanan* v *S. I. of Police*, 1983 *MLJ* (*Cr.*) 13; *T. Nadar* v *State,* 1982 *MLJ* (*Cr.*) 250; see also, clause 6.5, Chapter 6 of 268th Report of Law Commission of India (May 2017).

61. AIR 1985 SC 969.

62. AIR 1996 SC 1042.

Singh and Another v *State (U.T. of Chandigarh),*[63] in particular were also be considered by the Commission.

After a detailed study of above cases decided by the Supreme Court and High Courts of India, the Commission in the present report was of the view that the anticipatory bail must be made operational for only a limited time and that there is need to grant anticipatory bail in some offences with extreme caution.[64]

In making its recommendations the Law Commission referred to the judgements of Supreme Court in the cases of *Kumari Hema Mishra* v *State of U.P.*,[65] and *Manubhai Ratilal Patel* v *State of Gujarat.*[66] While in its earlier 203rd Report, the Law Commission of India had recommended for deletion of proviso to section 438(1) of the Code of Criminal Procedure, 1973 as amended by the Criminal Procedure Code (Amendment) Act, 2005. In the present Report the Law Commission was of the view that the said existing provisos must be retained.

The reasons given by the Commission in this regard were that where the offence is grave and non-bailable, it enables the immediate arrest of the accused person between the time such accused moves an application till the time the court has not passed any interim order or rejected the application. The Commission felt that the intention of the legislation in enacting section 438 of the Code of Criminal Procedure was to protect the innocent people from undue harassment. In contrast to this, the provision over the years has been misused to disrupt the proper investigation into the offence and to obstruct the course of justice. Besides this, it was recommended that the anticipatory bail be granted for limited time and any order passed under section 438 of the Code of Criminal Procedure must be accompanied with reasons for rejecting or grant of anticipatory bail.

In its latest report, the Law Commission has proposed and submitted 'The Code of Criminal Procedure (Amendment) Bill 2017'.[67] In this Bill the Commission has proposed that section 438 of the Code of Criminal Procedure, 1973 to be amended. Thus, according to the Law Commission of India the time duration, though left on the discretion of court must be

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63. AIR 2009 SC 502.

64. Clause 6.12, Chapter 6, 268th Report, Law Commission of India (May 2017).

65. (2014) 4 SCC 453.

66. (2013) 1 SCC 314.

67. Annexure A, 268th Report, Law Commission of India (May 2017).

specifically included in the provision itself that it must be for limited period and not in any case beyond the period of filing of the charge-sheet by the police.

This report has been presented to the present Law Minister on 23rd May 2017 by the Law Commission of India. Only time will tell what the Parliament thinks of it and whether the recommendations would be adopted by the legislation leading to amendment in the exciting law of anticipatory bail.

4. Conclusion

Bail is not a remedial measure. In fact, it is an in built mechanism of a fair criminal justice system. The basic purpose of bail is to settle the custodial arrangement between the court and the police as well as the accused thereby ensuring that the fair, justified and smooth investigation of a crime does not suffer.

The basic phenomena that the power of granting anticipatory bail is somewhat extraordinary in character and it is only in exceptional cases where it appears that a person might be falsely implicated or a frivolous case might be launched against them or there are reasonable grounds for holding that a person accused of an offence is not likely to abscond or otherwise misuse their liberty while on bail that such power is to be exercised.

However, it cannot be denied that this provision is being misused by the rich and influential people. The basic purpose of anticipatory bail on being introduced in the legislation was to protect the rightful liberty of a person who is being wrongly or for malafide purposes being implicated in commission of a non-bailable offence merely to harass him or to defame him.

It may well be asserted that the provision of section 438 of CrPC is a tricky one in so far that the court granting or refusing to grant anticipatory bail has to be very cautious. While using its judicial discretion because while on one hand, it has to keep in mind the importance and significance of personal liberty of a person as well as on the other side, it has to see that the person seeking relief is *prima facie* being unduly harassed or being unlawfully implicated in the matter merely to degrade and defame him. Besides this the court also has to see that undeserving persons do not take advantage of this relief so as to become a threat to the society at large or may not indulge in tampering with evidences or influencing witnesses. The courts cannot totally ignore or turn a blind eye to the importance and usefulness custodial investigation and the fact that in every case there must be a fair and impartial investigation which cannot be made to suffer because of anticipatory bail.

However, it is humbly submitted that some other changes in the enactment would make it fool-proof and would be very useful in the just and fair administration of justice. The courts, in grant of anticipatory bail must not be lenient and liberal because it involves lot of important and sensitive factors and must use its wide discretionary powers very wisely and cautiously so that the intention of the legislature in incorporating this section in the Code is fulfilled and achieved to the fullest.

The inclusion of the provision for bail apprehending arrest or anticipatory bail in the Code of Criminal Procedure, 1973 was a historic one. Though the provision was made inapplicable in Uttar Pradesh by way of State amendments, yet the provision can in no way be termed as unnecessary or unbeneficial one specifically in today's scenario where the politicians, the influential people and persons in general are ready to stoop to the lowest levels to implicate their rivals and adversaries in false cases and getting them detained in jail unnecessarily with the sole motive of revenge or bringing disrepute to them.

The spirit of bail mechanism clearly lay down that bail is not a fine and must not be used as a punishment. Since the grant or refusal of bail is mainly a discretionary power, it is necessary that the same be exercised judicially and fairly. This very purpose has been the advancement of concept of bail from historical times.

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The Concept of Secularism and Indian Constitution

Surendra Kumar*

Abstract: *Articles 25 to 28 of the Constitution of India give concrete shape to the concept of secularism. It is implicit in the Preamble of the Constitution which declares the resolve of the people to secure to all its citizens liberty of thought, expression, belief, faith and worship. With the 42nd Amendment Act, 1976, the word 'secular' was inserted in the Preamble with intent merely to spell out clearly the concept of secularism in the Constitution. In constitutional context, it only means that in matters of religion India as a secular State is neutral. The article analysis the concept of secularism on Indian constitution.*

Keywords: Secularism, Constitution, Preamble

1. Introduction

Secularism that was once confined to the religious rights has now started to creep even into the liberal intellectual discourse. Today, the Indian politics has been divided between State and society on this issue. Legally the word 'secular' simply recognizes the concept of secularism as manifested in the guarantee of freedom of religion as a fundamental right. These manifestations embody the principle of religious tolerance that has been the characteristic feature of the Indian civilization from the start of history. They serve to emphasize the secular nature of Indian democracy which the founding fathers considered should be the very basis of the Constitution. These rights connote a person's right to entertain beliefs and doctrines concerning matters which are regarded by him to be conducive to his spiritual wellbeing.

Articles 25 to 28 of the Constitution of India give concrete shape to this concept of secularism. It is implicit in the Preamble of the Constitution which declares the resolve of the people to secure to all its citizens liberty of thought, expression, belief, faith and worship. By the 42nd Amendment Act, 1976, the word 'secular' was inserted in the Preamble with intent merely to spell out clearly the concept of secularism in the Constitution. In constitutional context, it only means that in matters of religion India as a secular State is neutral.

For the first time while the word was used by an English writer George Jacob Holyoake in 1851. It was advanced by some prominent philosophers and thinkers like Epicurus, John Locke, James Madison, and more recently by the likes of Bertrand Russell and Christopher

Hitchens.[1] When viewed simply from a political angle, secularism separates religion from the working and policies of any government replacing policies and laws with the ones which do not discriminate on basis of religion.

Freedom to practice religion of liking without any undue interference of the government or the society with any bars on the basis of caste, creed or belief in any democratic system displays the secularism contained within. The founder of the term George Holyoake sums it up very nicely in his thoughts that secularism is a code of duty pertaining to this life, founded on considerations purely human and intended mainly for those who find theology indefinite or inadequate, unreliable or unbelievable. Its essential principles are the improvement of life by material means, that science is the available providence of man; and that it is good to do well. Whether, there be other good or not, the good of present life is good and it is good to seek that good.[2]

The statement that 'secularism' is the most misused term in the country which has led to tension in the society and his debate on why Dr. B.R. Ambedkar, the Chairman of the Drafting Committee of the Constitution did not deem fit to include word 'secular' and 'socialist' in the 'Preamble' of the Constitution[3] has put the limelight back on debate as to whether secularism exists in spirit and in letter in India and what is its concept in the present circumstances and scenario prevailing in the country.

It can be easily perceived that in ancient India while Hinduism was majorly developed as the main ideology in form of 'Sanatan Dharma', the development of *Vedas*, *Upnishads* and *Puranas* elucidate the integration of traditions and culture of all religions in the mainstream[4]. As early as in third century B.C., King Ashoka called for respect and tolerance for all religions and also preached universally that there should not be honour of one's own religion, sect and condemnation of others without any grounds.[5]

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   See, https//on.wikipedia.org/wiki/Secularism.
2. Jacob Holyoake, George *English Secularism : A Confession of Belief* 37 (The Open Court Publishing Company, Chicago, 1896).
3. See, The statement of the Home Minister of India in the Parliament initiating discussion on 'Commitment to Indian Constitution' as part of 125th birth anniversary of Dr. B.R. Ambedkar on 26th November 2015.
4. Ali, Md. Musa "Secularism in India: Concepts, Historical Perspective and Challenges" Vol. 1 *Asia Pacific Journal of Research* 120 (June 26, February 2015).
5. See, *Rock Edicts of Ashoka 250 BC*, Rock Edicts XII.

Later in the middle ages, the Sufi and other movement brought about by saints and preachers like Kabir, Khwaja Moinuddin Chisti, Meerabai and Guru Nanak *etc*., brought and preached about peace and tranquility among people of all religions. Even during the Mughal period, barring Aurangzeb who destroyed temples and had bias for Islam religion, all the rulers including Akbar treated Hindus and other sects as 'protected people' and even declared forced conversions and excess tax imposition on other sects as illegal and prohibited. Similarly Maharaja Ranjeet Singh in early 19th century had respect for members of all religions, freedom to people to practice their religion, customs and belief as well as had representatives of every religion in his court. During his period a firm secular state was established.[6]

The British period witnessed equality in terms of religion. As far as the governance was concerned though the laws of inheritance, property distribution and marriages enacted during that era were based on the traditions and belief of different religions and the governing laws under the same were different for different religions. However, this was also an integrated form of secularism prevailing in that era which satisfied the concepts of every caste and creed. Simultaneously the freedom movement generated during the British era saw the strengthening of secularism with leaders and activists of different religions, castes and creeds joining hands in seeking liberation from the tyrant British Raj.

It is significant to pursue that in 1928 on directions of Lord Birkenhead, Secretary of State a Committee headed by Pandit Jawaharlal Nehru was formed to draft the Constitution acceptable to all. The Committee submitted its Report on 10th August 1928 and recommended mainly for a secular state devoid of any discrimination on basis of religion and dissociation of religion from the State. While unfortunately the Draft Constitution was rejected by the Britishers as well as Mohammad Ali Jinnah. Though, the concept of secularism not mentioned expressly in the Constitution of India later on adopted in 1947 and was explicitly contained therein.[7] Great leaders of freedom movement have contributed largely in the development of secularism and separation of state from religion.

The 'Preamble of the Constitution' as was adopted by the Constituent Assembly on 26th November 1950 which came into *w. e. f*., 26th January 1950 declared India to be a sovereign democratic republic. The word 'secular' was not made part of the 'Preamble' even though it was proposed to be included by Professor K.T. Shah during the Constituent assembly

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6. Duggal, K. S., *Ranjit Singh :A Secular Sikh Sovereign* 129 (Abhinav Publications, 1989).

7. Chhabra, G. S., *Advance Study in the History of Modern India Vol.3: 1920-1947* 41-43(Lotus Press, 2005);see also, "Nehru Report", available at, https://www.2 the point.in/nehru-report.

Debates[8] on the basis of excesses created in the name of religion and communalism in those days. However, the proposal was rejected by Dr. B.R. Ambedkar on the grounds that the Constitution is just for the purpose of regulating work of various organs of the State and that the policy of the State. How the society be organised on economic and social matters, is for the people to decide themselves according to times and circumstances.[9]During the period of 1975 to 1977 a major amendment was made in the Constitution of India[10] which included the changes in the 'Preamble of the Constitution' declaring India to be a 'sovereign, socialist secular and democratic republic'. The term 'secular' has not been defined anywhere in the Constitution and nor the inclusion of term was necessary in the Constitution because the very concept of secularism has been embodied in the culture of the country from historical times and the essence of secularism is also included well within the fundamental rights available to the citizens of the country under the Constitution as well as in Directive Principles of State Policy.

Thus, we find that Article 15 of the Constitution itself prohibits the State to discriminate any citizen on the basis of religion, race, caste, sex or place of birth or to be subjected to any disability, liability or restriction thereof. Further, Article 16 provides for equality of opportunity in matters of employment irrespective of caste, creed, religion or race and it also enables the State to make special provisions for employment in favour of any class of citizens of India. Besides this, there is a fundamental right available under Article 25 to profess, practice and propagate religion subject to public order, morality and health of others. Moreover under Article 26, every religious denomination or section has the right to establish and maintain religious and charitable institutions and to manage its own affairs in religious matters. Under Article 27 no person can be compelled to pay taxes for promotion of any particular religion as well as under Article 28 the educational institutions are prohibited and barred from giving religious instructions.

The better demonstration of secularism can be seen in the very concept of equality of all religious and separation of religion from State which is included in the fundamental rights provided to every citizen of the country. The situation gets even better when we perceive that under Article 325 of the Constitution of India no person can be declared ineligible for inclusion in the electoral roll on grounds of religion, race or caste.

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8. See, *Constituent Assembly of India- Volume VII,* available at, parliamentofindia.nic.in/ls/ debates/vol.7 p.6.htm.

9. *Ibid.*

10. 42nd Amendment vide the 42nd Amendment Act, 1976.

When we discuss about the concept of 'secularism' being implanted without being needed to be separately mentioned under the Constitution, we not only refer to the fundamental rights but also as a principle being included under the Directive Principles of State Policy as well which defines the duties of the State to endeavour and strive to achieve the said objectives. Thus Articles 38, 39, 39A, 41 and 46 of the Constitution while providing to promote equal opportunities to all also promote the concept of secularism in each and every form. While the concept of secularism which completely separates religion from the State may not be too visible, the inception of equal treatment and equal respect for all religious is very much implanted and lodged therein.

Though the State and the religion are not clearly separated, the basic conceptualization of secularism in the country is respect and rights for every religion and freedom to practice them. Even the laws like Sharia are given equal importance under the legal system, there also exists freedom to wear 'burqua' by the Muslims, carrying of 'kirpan' by the Sikhs and other freedoms of carrying out the traditions and customs on basis of religion.[11]

However, there is political and State interventions in the matters of religion and these two are not separated expressly. The State for example provides financial support to religions institutions and extra protection is provided for minority religions along with reservations to religious minorities and other educational benefits. Special subsidies and benefits are provided to some minority religious and there are exclusive and special guidelines for operation of minority institutions and universities. The politicians tend to provide special facilities and grants for some religions in order to enrich their vote bank and many important decisions like the application of Uniform Civil Code, freedom to take out religious processions and use of loudspeakers etc., have been deferred from time to time due to religious pressures. These issues have basically abused and harmed the secularism prevailing in the country and this all can be attributed to the non-separation of State from religion. Such type of practices differentiates the Indian and western model of secularism.

There is a well-defined and established principle in the western countries that State and religion do not interfere in each other's affairs. There is no government policy on education, working, employment and other matters which are based on religion be it majority or minority. Being a homogeneous society, the western countries stress on freedom of religion and equality. Thus, if any religion does not allow a particular act or thing, State in no way interferes with it. In fact, there is little attention given to community based rights in contrast to India. In countries like France, Australia, United States and most of European

11. Parthasarthy, Suhrith "Understanding Secularism in the Indian Context" *The Hindu* (2nd January 2018), available at, www.the hindu.com/opinion/lead/the-secular-condition/article.

Countries there is a uniform civil law and specially countries like France, Belgium, Bulgaria Switzerland and Italy even have ban on wearing of 'burqua and veil'. Thus, religion in the west is entirely a private affair and States do not sponsor or discriminate on basis of religion.

Thus, it seems that the Indian model of Secularism is much more effective in developing harmony and peace and would be even more effectual if the State and politicians do not interfere much in the affairs of religion in order to exploit people for strengthening their power and vote bank.

While the word 'secular' describing the Indian democracy may have been introduced in the 'Preamble of our Constitution' in 1976, the judiciary was of the view that this is inherent in the Constitution from the time of its framing. The Supreme Court way back in 1953 in the case of *Nain Sukh Das and Another* v *State of U.P., & Others,*[12] has observed that any law which provides for elections on the basis of separate electorates for members of different religious communities offends Article 15 (1) of the Constitution and any election held in pursuance of such law would be void. Further, in the case of *Sardar Syedna Taher Saifuddin Saheb* v *State of Bombay*[13],a five judge bench of the Supreme Court severely restricting the scope of the Bombay Prevention of Excommunication Act, 1949 vehemently upholding spirit of secularism under the Constitution observed that it is well settled that the Articles 25 and 26 of the Constitution project not merely religious doctrines and beliefs but also acts done in pursuance of religion and thus guarantee rituals and observances, ceremonies and modes of worship which are integral part of religion. What is essential part of a religion or what its religious practice, has to be judged in the light of its doctrine and such practices as are regarded by the community as a part of its religion must also be included in them.[14]

From above mentioned cases, it is apparently clear that the Apex Court has tried to prevent State intervention in religion as a policy under secularism. In the latter case the Supreme Court has also pointed out that every member of the community has the right so long as he does not in any way interfere with the corresponding right of others to profess, practice and prorogate his religion.

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12. AIR 1953 SC 384 : 1953 SCR 1184.

13. AIR 1962 SC 853.

14 . *Ibid*; see also, *Venkatramana Devaru* v *State of Mysore*, (1958) SCR 895; *The Commissioner of Hindu Religious Endowments, Madras* v *Sri Lakshmindra Thirtha Swamiar of Sri Shrur Mutt*, (1954) SCR 1055& *The Dargah Committee, Ajmer* v *Syed Hussain Ali,* (1962) 1 SCR 383.

Significantly, in the landmark case of *Keshvananda Bharati* v *State of Kerala,*[15] decided by a 13 judges Constitutional Bench, Hon'ble S.M. Sikri *CJ*., established in his observations that the secular character of the Constitution was one of the basic features of the Constitution.[16]In the instant case Shehlat and A.N. Grover *jj*., also reiterated that among the basic structure of the Constitution of India, secular and federal characters stood out as vital ones[17] while Justice Jagmohan Reddy pointed out that secularism in form of liberty of belief, faith and worship cannot be amended from the Constitution as they form the basic structure of it.[18]

While earlier to 1976, the word 'secular' stood only in spirit and not explicitly in the Constitution of India, the society as well as the judiciary were free to form their own opinions of it and interpret the term variously and even conflictingly. As such barely a year after the *Keshvanandan Bharti* case,[19] a nine judge Bench of Supreme Court led by the Chief Justice A. N. Ray in the *Ahmedabad St. Xavier's College Society &Another* v *State of Gujrat and Another,*[20]expressed a contrary view to observing therein that the Constitution has not erected a rigid wall of separation between the Church and the State. It is only in a qualified sense that India can be said to be a secular state. There are provisions in the Constitution which make one hesitate to characterise our State as secular. Secularism in the context of our Constitution means only an attitude of lives and let live developing into the attitude of live and helps live.[21]

Thus, the Court laid down a different view of secularism from that in the Constitution and probably emphasized that State cannot totally be separated from religion in the Indian context. Later in another appeal relating to an election petition in *Ziyauddin Burhannudin Bukhar i*v *Brijmohan Ramdas Mehra,*[22] in which it was alleged that the appellant appealed to not vote for respondent no. 2 on the basis of religion thereby inciting enmity and hatred between different classes of citizens. The Court considering the constitutional philosophy pointed out that our Constitution makers intended to set up a secular democratic republic and our political history made it particularly necessary that the basis of religion, race, caste,

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15. (1973) 4 SCC 225.
16. *Ibid*., at para 292.
17. *Ibid.*, at para 582.
18. *Ibid.*, at para 1159.
19 . *Supra* note 15.
20. AIR 1974 SC 1398 : (1975) 1 SCR 173.
21. *Ib*id., at para 139.
22. AIR 1975 SC 1778.

community, culture, creed and language which can generate powerful emotions depriving people of rational thought and action should not be permitted to be exploited lest the imperative conditions for preservation of democratic freedoms are disturbed. The Court was probably referring to the bitter experiences and incidents of inter religion riots and unrest during partition times and thereafter. The Court also directed the State to practice impartiality in imparting benefits to people on the basis of religion.[23]

It seems that still the judiciary even has failed to define secularism in the context of the society of the country and the Constitution, as well as the extent of State intervention in matters of religion. As such in different cases, different judges of Supreme Court have given secularism a different concept and meaning. Thus be it in leading cases like a nine judges bench decision of Supreme Court in *Indra Sawhmry* v *Union of India,*[24] relating to the Mandal Commission Report and reservation of backward classes wherein it was held that while caste could be a factor to identify backward classes but reference was also made to removal of creamy layers from reservation and that caste poses a serious threat to secularism and integrity of the country or the case of *S.R. Bommai* v *Union of India,*[25] where again a nine judges bench of Supreme Court at length discussed secularism in the Indian context relating to views of Mahatma Gandhi, Radhakrishnan and Pandti Nehru and referring to Articles 25, 26, 27, 28, 29 and 30 of the Constitution and held that secularism is a basic feature of Constitution and is a positive concept of equal treatment of all religions. In the instant case, it was observed that the Constitution does not permit mixing of religion and State power and that politics and religion cannot be mixed. However, few judges were of the view that the State has power to legislate on personal laws under Article 44 of the Constitution and secular matters of temples, mosques, churches and other worship places.[26]

Apart from this, various cases[27] adjudicated by the courts directly or indirectly related to secularism till date including the recent orders of the Court to play mandatorily national anthem during screening of movies and then later directing that it is not mandatory[28]exhibit

23. *Ibid*.

24. AIR 1993 SC 477.

25. AIR 1994 SC 1918.

26. *Ibid*.

27. *Seng Khasi Mylliem*v *Shri Midnightborn Kharlukhi,* WP (C) No.134 of 2017; *R.C. Poudyal* v *Union of India*, AIR 1993 SC 1804; *Ismail Faruqui* v *Union of India*, (1994) 6 SCC 340; *Manohar Joshi* v *Nitin Bhau Rao*, ((1996) 1 SCC 169; *Ramchandra K. Kapse* v *Haribansh R. Singh*, (1996) 1 SCC 206 & *Ramesh Yashwant Prabhoo* v *Prabhakar K. Kunte*, (1996) 1 SCC 130.

28. *Shyam Narain Chouksey*v *Union of India*, Writ Petition (Civil) 855 of 2016.

the variance, from time to time in the views of the judiciary relating to what exactly and practically 'secularism' means and whether religion should be entirely free from State interference or not. However there remains no doubt that in one way or the other, the judiciary through its diverse views is ultimately converging towards prevalence of peace in respect to religion and fraternity among people of different religions and a general secular atmosphere and brotherhood between people following different religions. As a gist, the secularism in spirit and letter inspires the national feeling of Indian first and then Hindu, Muslim or Christians *etc*.

2. Conclusion

The existence of secularism in all forms has been prevailing in our country from times immemorial and the same has in spirit as well as in letter been adopted in our Constitution. However, some incidents have raised its heads majorly being the cross border and inter-country terrorism activities wrongly being attributed by the society in general to people of a particular community, the instances of torching and destruction to churches, forced and coerced conversion by people of one religion to their religion of other people, and various incident of communal riots between Hindu, Muslims, Sikhs and Christian have disrupted and are proving to be a threat to long existence of secularism in the country.

What we are observing today in the country is minority separatism which in turn is leading the country from deep rooted traditions of polytheism to monotheism. Communalism is on the rise. While, we were driving towards a more established and confirmed spirit of secularism by way of the landmark decisions of the courts. What is clearly evident from the incidences of past is that the basic threat to secularism in India is the political intervention whereby political persons aiming to enrich their vote banks and popularity are misleading, trying to tilt the balance of religions of different communities and misguiding the people of the society for their own gains.

Whether the shifting of concept of 'secularism' to that of the west where State has no power to intervene in religious matters is for the society and people of the country to decided but what seems inevitable is to bring an immediate action on control of factors proving to be a threat to the secularism in India and to guide the society towards a casteless State.

Therefore, secularism is susceptible to positive meaning that is developing, understanding and respect towards different religions. The essence of secularism is non-discrimination of people by the State on the basis of religious differences. Secularism can be practiced by adopting a complete neutral approach towards religion.

Thus, secularism is the necessity of India. The path of universal tolerance through secularism has to be accepted due to its historical and cultural background and multi-religious faith. Secularism must be nurtured and restored. To achieve this noble objective, honest self-introspection is necessary. To conclude, secularism must be practiced on the basis of judicial decisions as a way of life for brighter future of India.

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Paris Agreement on Climate Change: A Multilateral Approach towards Achieving Sustainable Development

Hrishikesh Manu*

Abstract: *One of the important principles of international environmental law is sustainable development. Like the notion of common but differentiated responsibilities and respective capabilities (CBDRRC), the concept of sustainable development is concerned with the relationship between environmental and developmental considerations. The Brundtland Commission has defined the term sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. The Rio Declaration uses the term 'sustainable development' in twelve of its twenty seven principles. But the precise content and contours of this basic concept remains elusive. Rather offer a definition, the declaration outlines various elements of sustainable development. One important element is that development, while essential, must remain within the carrying capacity of the environment and, therefore, that environmental protection must be part of development process.*

Keywords: Paris Agreement, Climate Change, Sustainable Development

1. Introduction

The year 2015 will be remembered for two landmark international events: the historic climate change agreement under the UN Framework Convention on Climate Change (UNFCCC) in Paris in December 2015 and the adoption of the Sustainable Development Goals in September 2015. The Paris Agreement on Climate Change is considered to be a 'monumental triumph' in international climate change law and policy. After nearly seventeen years of stalemate, 197 Parties to the UN Framework Convention on Climate Change concluded a new international agreement at the 21st Conference of the Parties to the UNFCCC (COP21) in Paris on 12 December 2015. The Treaty aims to strengthen the global response to the threat of climate change in the context of sustainable development. It represents a confirmation that the international community will continue to approach climate change multilaterally. One of the main focus of the agreement is to hold the increase in the global average temperature to well below 2°C above pre- industrial level and on driving efforts to limit it even further to 1.5°C. The Paris Agreement sets a roadmap for all nations in the world to take actions against climate change in the post-2020 period.

One of the important principles of international environmental law is sustainable development. Like the notion of common but differentiated responsibilities and respective

capabilities (CBDRRC), the concept of sustainable development is concerned with the relationship between environmental and developmental considerations.[1] The Brundtland Commission has defined the term sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[2] The Rio Declaration uses the term 'sustainable development' in twelve of its twenty seven principles. But the precise content and contours of this basic concept remains elusive. Rather offer a definition, the declaration outlines various elements of sustainable development. One important element is that development, while essential, must remain within the carrying capacity of the environment and, therefore, that environmental protection must be part of development process.[3]

On 25th September 2015, countries adopted a set of goals to end poverty, protect the planet and ensure prosperity for all as part of a new sustainable development agenda. Each goal has specific targets to be achieved over the next 15 years. The Millennium Development Goals (MDG) that were in place from 2000 to 2015 were replaced by the Sustainable Development Goals (SDG) with the aim of guiding the international community and national governments on a pathway towards sustainable development for the next fifteen years. A new set of 17 SDGs and 169 targets were adopted by the world governments in 2015. Goal 13 specifically provides that world community should take urgent action to combat climate change and its impacts.[4]

2. Climate Change: Greatest *threat to* Sustainable Development

Climate change is the most important challenge to achieving sustainable development, and it threatens to drag millions of people into poverty. The Intergovernmental Panel on Climate Change (IPCC) has noted, from 1880 to 2012, average global temperatures increased by 0.85°C.[5] Global emissions of carbon dioxide (CO2) have increased by almost 50 per cent

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Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law,* (Oxford University Press, 2017) pp. 53-54

2 World Commission on Environment and Development, *Our Common Future*(Oxford University Press, 1987) p. 43

3 *Supra* note 1

4 Sustainable Development Goals <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> accessed on 02 January 2018.

5 Intergovernmental Panel on Climate Change, *'Climate Change 2014 Synthesis Report'* <www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf> accessed on 3 January 2018

since 1990, and emissions grew more quickly between 2000 and 2010 than in each of the three previous decades.[6] Developing countries will suffer most from the effects of climate change. Their economies are more dependent on natural resources, such as agriculture, forestry and fisheries, and they often lack the infrastructure, the financing and capacity to adapt to a changing climate.

Climate change has been rising on the political agenda. Climate change involves all three dimensions of sustainable development: the economic, the environmental and the social dimension. Addressing this challenge demands a long term perspective on how our actions today will affect the lives of our children, and it also demands a dialogue with all stakeholders involved in order to reach viable solutions.[7] The prevention of dangerous global warming requires the reduction and limitation of emissions of greenhouse gases. The international response to climate change began at the Rio Earth Summit in 1992, where the UN Framework on Climate Change (UNFCCC) was adopted. This convention set out a framework for action aimed at stabilizing atmospheric concentrations of greenhouse gases to avoid "dangerous anthropogenic interference with the climate system." In 1997 Kyoto Protocol supplemented the framework laid out in UNFCCC, by establishing internationally negotiated, legally binding emission targets for Annex I parties.

3. Paris Agreement on Climate Change

The Paris Agreement marks a historic moment in the international climate change negotiation. It signifies that the international community will continue to approach climate change multilaterally. This universal agreement will succeed the Kyoto Protocol. Unlike the Kyoto Protocol, it provides a framework for all countries to take action against climate change. Placing emphasis on concepts like climate justice and sustainable lifestyles, the Paris Agreement for the first time brings together all nations for a common concern under the UNFCCC. The Paris Agreement sets an ambitious direction for the climate regime and it also establishes a common transparency and accountability framework. The Paris Agreement comprises of 29 Articles and it covers all the crucial areas recognized as essential for a comprehensive and balanced agreement, including mitigation, adaptation, loss and damage, finance, technology development and transfer, capacity building and transparency

6 *Ibid*

7 Keynote Speech by Angel Gurría, OECD Secretary-General, Seminar *on "Sustainable Development and Climate Change: International and National Perspectives"* < http://www.oecd.org/newsroom/seminaronsustainabledevelopmentandclimatechangeinternationalandnationalperspectives.htm/> accessed on 03 January 2018.

of action and support. The Paris Agreement provides a remarkably strong basis for future global action on climate change.

The Paris Agreement prescribes a multilateral framework for taking action on climate change in the post-2020 period. It recognizes that developed countries are responsible for the cumulative historic stock of greenhouse gases (GHGs) in the atmosphere and therefore must take the lead in climate actions and also provide financial, technological and capacity building support to developing countries with respect to both mitigation and adaptation. The imperative would be to ensure that UNFCCC and Paris Agreement continue to take cognizance of the fact that developing countries have unique vulnerabilities, special circumstances, and development priorities like eradication of poverty, food security, energy access etc.[8]

There is no question about the Paris Agreement's legal force under international law. After entry into force by 2020, the agreement will be a legally binding multilateral treaty within the meaning of the Vienna Convention on the Law of Treaties. The agreement's provisions on signature, ratification and entry into force, remove any doubt about the intent of the parties to the agreement to be bound under, and hence governed by, international law.[9]

The focus of the Paris Agreement is on a process for achieving the well below 2°C target. Key to that process is the bottom up submission by parties of "Nationally Determined Contributions" (NDCs).[10] NDCs are high level policy plans setting out what approach each country will take to reduce emissions and contribute to the global well below 2°C goal. The Paris Agreement requires that when countries submit their longer term NDCs, they ensure that the revised commitments reflect the "highest possible ambition".[11] Each NDC is also to be revised every five years "with a view to enhancing the level of ambition".[12]

4. Scope of Sustainable Development in the Paris Agreement

A promise to sustainable development is clearly reflected in the various provisions of the Paris Agreement. The Preambular recital 11 reads:

8 Climate Change, Sustainable Development and Energy, *Economic Survey 2016-17,* Volume 2, p. 119

9 Ladan, Muhammed Tawfiq, *Review of the Paris Agreement: The Heart of the Post-2020 International Legal Regime on Climate Change and its Implications for Sustainable Development Goals and the Energy Sector* < https://ssrn.com/abstract=2814652> accessed on 03 January 2018.

10 Article 4

11 Article 4(3)

12 Supra note 9

> *Climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.*

The Sustainable Development Goals (SDGs) as detailed in the UN Resolution, "Transforming our World: the 2030 Agenda for Sustainable Development"[13] and the Paris Agreement are both universal visions and are both based on being implemented from the "bottom-up", meaning that countries identify their own priorities, needs and ambitions. The 17 SDGs have 169 related targets to be achieved by 2030 and are expected to help organise and streamline development action for achievement of greater human well-being.

The principle of common but differentiated responsibilities and respective capacities is an important component of the Paris Agreement. This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.[14] Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.[15] All Parties should strive to formulate and communicate long-term low greenhouse gas emission development strategies, mindful of Article 2 taking into account their common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.[16]

In the Paris Agreement, the principle of common but differentiated responsibilities and respective capacities can also be found in the provisions related to mobilisation of financial assistance[17], assistance in adaptation efforts,[18] facilitation of technology transfer,[19]

13 UNGA Res 70/1

14 Article 2

15 Article 4.3

16 Article 4.19

17 Articles 9.1–3

18 Article 7.7(d)

19 Article 10.6

and capacity-building.[20] For developing countries to effectively implement their NDCs, industrialized countries will have to offer assistance in various forms. The basis for this obligation is traceable to Article 4 of the UNFCCC. Support to developing countries in general should come in the form of finance, technology development and transfer, as well as capacity building.

One important component of sustainable development is precautionary principle which can also be found in the Paris Agreement. The Treaty recognises an urgent 'threat' of climate change and the need to strengthen global response to the threat of climate change and to significantly reduce the risks of climate change. In essence, while references could be more explicit, the Paris Agreement and the UNFCCC are founded on the precautionary principle.[21] In order to stabilise GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system and in order to allow ecosystems to adapt naturally to climate change, so as to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner, mitigation and adaptation actions must be taken even in the event of scientific uncertainty as to the exact contours of the challenge.[22]

The principle of public participation and access to information and justice is emphasised throughout the Paris Agreement, including in provisions on mitigation,[23] adaptation[24] and on the Sustainable Development Mechanism and non-market approaches[25] which aim to enhance public and private sector participation in the implementation of NDCs. Further, Parties shall enhance education, training, public awareness, public participation and public access to information, recognising their importance in enhancing actions under the Agreement.[26] In essence, the treaty depends on public engagement, informed by the information that is made available through the national communications that are submitted to international registries, the global stock take, the peer review, and other measures, to

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20 Article 11.1–3

21 Marie-Claire Cordonier Segger, 'Advancing the Paris Agreement on Climate Change for Sustainable Development', *Cambridge Journal of International and Comparative Law*, (2016) Vol 5 Issue 2, p. 224

22 *Ibid*

23 Article 4

24 Article 7

25 Article 6

26 Article 12

assist parties progressively to intensify their contributions to mitigation, adaptation, finance and other aspects of the global response to climate change.[27]

5. Paris Agreement and Sustainable Development Goals

The Paris Agreement is a complimentary mechanism to the SDG's goals that addresses climate change. The SDGs were arrived at through a unique global process, centring on an open working group of member states and consultation with a broad range of stakeholders. The text was subsequently agreed on by all UN member states in the General Assembly in September 2015. While the 2030 Agenda is global in its ambition and universally applicable, it is up to countries to decide how to implement it, and how to prioritize goals and targets, depending on national needs and ambitions. They are free to set up their own national and sub national implementation structures and plans. Countries are also encouraged to work in partnership to learn and assist each other.[28]

The SDGs aim at tackling key systemic barriers to sustainable development, such as poverty, inequality, unsustainable consumption and production patterns, inadequate infrastructure, climate change and lack of decent jobs. The SDGs provide useful guidance for shaping law, policy and practice for implementation of effective and ambitious climate change action. Tackling climate change and fostering sustainable development are two mutually reinforcing sides of the same coin. Sustainable Development cannot be achieved without climate action, as many of the SDGs are actually addressing the core drivers of climate.[29]

The 17 SDG's are global agenda intended to guide action that balances human needs with environment protection. The problem of climate change can be addressed by SDG's and, if unaddressed, will cause new ones. The coordination between the Paris Agreement and SDG's can achieve the targets necessary to keep the global temperature low enough that society can correct the inequalities that burden our world. The Paris Agreement is an ambitious climate agreement that is critical to achieve the SDGs by 2030. It apparently provides a clear policy framework and legal basis for action on climate change.

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27 Supra note 21 pp. 224-225

28 Exploring connections between the Paris Agreement and the 2030 Agenda for Sustainable Development, Stockholm Environment Institute< https://www.sei-international.org/mediamanager/documents/Publications/SEI-PB-2017-NDC-SDG-Connections.pdf> accessed on 05 January 2018.

29 Supra note 9 p. 38

6. Conclusion

The world is facing the challenge of sustaining its economic growth while dealing with the global threat of climate change. Climate change impacts are part of the larger question of how complex social, economic, and environmental sub-systems interact and shape prospects for sustainable development. The solution to this problem lies in a multilateral action which is positive, constructive and forward looking under the United Nations Framework Convention on Climate Change. The Paris Agreement is an important step in the right direction.

The world has realized and is completely convinced that climate change is affecting global health, poverty, food security, and national and global security. The Paris agreement is a clear indication that our global policy makers and stakeholders of global sustainable development are determined to mitigate the inevitable climate disaster and accelerate sustainable development for the benefit of the people and the planet. The Paris agreement contains ambitious goals, extensive obligations and comparatively rigorous oversight. Taking into account SDG commitments can help countries to ensure that climate actions promote wider social, economic and environmental ambitions. It is now up to the individual countries to adopt concrete mitigation and adaptation measures. If all the stakeholders of global sustainable development proceed with their respective tasks for the achievement of SDGs, then we will certainly accomplish them in time which will help to improve the lives of people and to build a better and safer future with no one left behind.

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Anti-Dumping: A Developing State's Perspective

Priya Vijay *

Abstract: *The integration of the developing states with the world economy and their phenomenal growth has been a fact, though there is opportunity for the other still at lower level of development but there are still in place many barriers. It is not deniable that linkage with the world economy paves the path towards industrialisation. However, competitive advantage can be lost more easily and achieving upgrading can be challenging.*

Keywords : Dumping, International trade, free trade, WTO, General agreement on tariffs and trade (GATT)

1. Introduction

While professing trade liberalisation, it was supposed to be a precondition that trade should be fair, the unfair trade may take many forms including cartels, abuse of dominant positions, and price discriminations[1] but all such forms are not dealt within the framework of World trade organisation. Dumping is one such unfair trade practice for which WTO provides detailed rules. The rationale behind such rules is, that at least through the reaction of importing country the impact of dumping can be minimized and at times the punitive effect will curb such attempts in future.

The WTO rule mandates two preconditions before application of anti dumping in the target market. Firstly, the behaviour of dumping on the part of foreign producer is proved; and secondly, the domestic producer is able to prove injury as a result of the behaviour of foreign producer. The things are made all the more difficult because it is difficult to define injury and it provides a lot of scope for use of discretion for the national anti dumping authorities when the goods belong to different category and quality. The issues regarding conceptual ambiguity is harsh for the developing states though they have become frequent user but their national mechanism for assessment of anti dumping is still at infancy.

As stated in the latest annual report of the committee released in 2016 Nov, around 267 actions on anti dumping were filed by more than 45 states in the period of 2015 to middle of the 2016.There were 66 maximum investigations made by India, the US was found to have

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Bosh Ven Den Peter and Werner Zdouce, *The Law and Policy of the World Trade Organization*, 674 (Cambridge, Cambridge University Press, 2015)

initiated 51 actions, and Australia raised 18 complaints and Pakistan came out to investigate 18 cases of AD. It was also pointed out by the report that 151 tentative AD measures were levied in this span of the time which also involved nineteen actions by US, 14 by Mexico and ten by EU.[2]

As per the WTO data sources recently anti dumping actions taken by and against small and vulnerable economies have increased many folds as compared to developed countries , it shows that newly industrialised and developing countries are more regular users of AD measures[3]. The impact of AD is not only for the producers but also to the economy as a whole; therefore any consideration of anti dumping policy over developing states cannot overlook this fact. One more interesting fact is that increasing use of anti dumping measures by these economies may distort the benefit brought by trade liberalisation. Whereas the four "historical" developed market users of AD – the United States, European Union, Canada and Australia has been the vigorous user throughout the WTO regime, they are not the leading users as far as the previous decade of 185 to 1994 is concerned under the GATT regime.[4]

During the beginning of the 19th century dumping was described as the act of throwing down in a piece or mass , as is done from a loaded cart, and then it was but natural to describe it as clearance of refuse and to denote it as a discarding ground for the removal of left over stock. But from the starting of the 20th century dumping was described in the trade literature of English as a phenomenon in which goods are sold at very low price in foreign market and thus now it has started to be used in international market as the practice involving price discrimination in the global trade.

The act is labelled as dumping where the export of the goods takes place from one country to another and the price charged is below its normal value and thereby results into injury to the domestic producer. It is also called as an anti competitive trade practice having a adverse effect on international trade because it does not allows fair competition to prevail in the specific market. The trade defence measure of AD seeks to restore the situation caused

2 https:/ /docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009- DP.aspx? language = E&CatalogueIdList = 232568,232339 & Current Catalogue Id Index = 1 & Full Text Hash = & Has English Record = True & Has French Record = True & Has Spanish Record = True lasta ccessed on Jan 2018

3 PK M Tharakan, The Problem of anti dumping Protection and Developing Country Exports, Working paper no.198, Sep.2000, pg.6 available at https://www.wider.unu.edu/sites/default/files/wp198.pdf, last accessed on 09/06/2017

4 Bown P Chad, *The WTO and Antidumping in Developing Countries*,(2007) available at people.brandeis.edu/~cbown/papers/AD_developing.pdf, last accessed on July 2017

by dumping of goods and the effect on world trade. The WTO set up permits resort to AD actions as a method to establish fair competition. The AD duty are interpreted as a means for promoting and protecting fair trade and should not be alleged as means of protection per se for the native producers. The WTO art VI and the agreement towards its implementation known as Anti dumping agreement creates the international legal mechanism for imposing anti dumping duties.

The present paper seeks to analyse the dynamics of use of anti dumping measures by developing states, their motives, its impact and the effect on international free trade regime. The researcher has tried to shape its study through latest anti dumping measures by and against developing states. Further the paper will ponder over the relationship between anti dumping measures and consumer interest specially in developing market economies.

Laws' relating to anti dumping permits the state national authorities to levy special duties on the imports violating norms of fair trade. But the imposition of duties necessitates the government to arrive at the two conclusion before imposing the duties firstly, that the dumping of goods is taking place and at the price which is below the normal value and secondly, there is actually or threat of injury to the domestic import competing producers.

These days the WTO is not unaware of the fact of AD protectionism, the AD agreement under the aegis of WTO as drafted in 1994 as part of the Uruguay trade negotiations lays down the criteria and procedures which is mandate for each state AD regulation should adhere to. Though it is not denied that the Agreement does restricts what can be done by the member states under the aegis of AD agreement but it remains also the fact that it has been interpreted to further protectionist misuses as well. Under the WTO regime the rules of anti dumping has proved to be a major dodge in the free trade system of WTO.[5]

In order to constitute anti dumping action, mere existence of dumping is not enough to exist. Moreover, it is also to be determined by the national authorities that native industry has suffered material injury or there is threat of such injury or otherwise the industrial development has retarded due to the act of dumped import. The GATT agreement providing the framework of AD also mandates a provision for granting special and differential treatment of developing country members.

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5 Brink Lindsey and Daniel J. Ikenson , *Anti Dumping Exposed, The Devilish Details of Unfair Trade Law*, 10 (Cato Institute Washington DC)

2. Anti-dumping and the Developing states

Article 15 states about the obligation on the part of the state to keenly consider, the possibility of providing a real remedy before the action of imposing an AD measure that may cause adverse impact on the essential interest of the developing country.

There is no disagreement over the fact that special consideration is to be given by the developed states to the interest of the developing countries while deciding over the use of AD under the agreement. Thus it is accepted that all the possibilities of granting constructive remedy against AD action under AD agreement must be exhausted firstly if it has the chances to affect the market of members of developing states.[6]

It was ruled by the WTO panel in the EC PIPE Fittings and US Steel pate imported from India that no legal obligation is imposed by the Art 15 first sentence as such[7] but was observed by the EC Pipe fittings panel that, the next sentence from art 15 mandates "operational indications as to the nature of the specific action required" and that "articulates certain operational modalities of the first sentence[8].

In the EC Pipe fittings case though the argument of Brazil that required that constructive remedy has to be explored in direct contact with the exporter of developing country was rejected."The reference in Article 15 is that special regard must be given 'to the special situation of developing country Members[9]. It was the view of both the panels that the duty to exhaust constructive remedy is applicable only as a precondition before definitive measures are imposed and provisional measures are subject to it.[10]

There is no disagreement that in the last more than half century lowering of the (MFN) has been the remarkable achievement of GATT. This lowering of the MFN tariffs has not met with the same success as hoped for as a result of liberalization. The reasons for the protectionism has not disappeared but has started to appear in other different ways of protection. It is suggested by the author that in recent past AD has become a very practical means to defend the domestic producers from the scourge of foreign competition. He is of

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6 Art 15 Anti Dumping Agreement

7 Panel report EC Pipe Fittings, para 7.68, Panel Report US Steel Plate from India

8 Panel Report, EC-Pipe Fittings, para 7.68

9 Panel Report, EC-Pipe Fittings, para 7.75.

10 Panel Report, EC-Bed Linen, paras 6.231–6.232; Pane l Report, EC-Pipe Fittings, para 7.82.

the view that largely the blame lies with the WTO anti dumping rules for the trade barrier substitution[11].

It is noteworthy that creation of WTO and the free trade regime has changed the way the sovereign states can conduct their international trade and business, the obligations undertaken at WTO prohibits them to rely upon trade restricting measures, therefore reliance on anti dumping becomes an important factor which reflects how they react to industrial import. Further their additional obligations under Uruguay can be compensated through measures of anti dumping by the developing states. Some scholar[12] are of the view that anti dumping in the states of Latin America functions as run off against an overall system of trade liberalization. The scholar justifies that anti dumping actually allows impact of liberalization to sustain and enables developing countries to take more widespread measures towards trade liberalization which they otherwise will not be willing to take.[13]

3. Developing states and challenges of anti dumping

The Uruguay round of agreement tried to bring certain discipline but the developed countries have fallen in drastically in the graph of using anti dumping after 1990s.One possible reasons seems to be that they have learnt that the exercise of anti dumping was not able to fulfil their countrywide interest.

The most acceptable reasons for the developing economies seem to be the desire to imitate the developed states that have lowered their tariff and non tariff barriers and because Uruguay Round negotiations have restricted subsidies and other obvious method of trade protection, therefore the developing are resorting to the means used by developed states.

The other significant factor for the developing states is that of public interest while imposing AD measures. The scholars holding opposite opinion state that inclusion of public interest can turn the AD investigation all the more delayed, costly and burdensome[14]. The incorporation of compulsory public interest clause will result into "serious administrative resource implications," that may constitute a heavy burden for the developing countries[15].

11 Jørgen Drud Hansen, "Jørgen Ulff-Møller Nielsen, Dumping and Injury Margins in a Reciprocal Dumping Model with Horizontal as Well as Vertical Product Differentiation" available at http://www.etsg.org/ETSG2006/papers/Nielsen.pdf **la**st accessed on December 2017

12 Finger and Nogués (2005)

13 Chad P. Bown, *Department of Economics & International Business School Brandeis University, The WTO and Antidumping in Developing Countries* pg 25

14 TN/RL/M/26, p. 2 and TN/RL/W/254, p. 19

15 Paper from South Africa, 'Proposals on Issues Relating to the Anti-Dumping Agreement', TN/RL/GEN/137 dated 29 May 2006, p. 4

The political economy aspect of Anti dumping measures are also interesting, the most striking difference observed between anti dumping and erstwhile forms of trade protection is that they are levied by the government authorities and executive and legislative backing is not mandatory. This is not a guarantee to make it subject to less political pressure. Also, Anti dumping actions usually start with a complaint by an affected domestic party which the community is belonging to competing domestic producers, and they hardly pay any heed to interest of the consumers being affected by the action. All these features create a distinguished politico economic subject of study.[16]

Another question that attracts attention is that is spite of the fact that AD involves high cost it has not failed to become popular. With the progress of the states in removing non tariff barriers and reducing tariffs, import competing industries have come under immense pressure. As soon as AD is established to be applicable to cases of any troublesome imports it becomes apparent that it is attractive to both the industry seeking protection as well as the government who is more than inclined to grant protection. The other reasons for its appeal are namely:

- The expression of AD that alleges the foreign producers of unfairness or predatory pricing made to force local producers out of the industry creates a medium for preparing a political support for protection through AD.

- In reality, AD laws provide a specific mechanism which allows discrimination against foreign firms and easily permit the national authorities to establish the case for AD against foreign firms whereas similar practices by domestic firms will not be considered unfair or predatory under national competition law regime.

- The process of investigation has a tendency to limit imports. A major legal and administrative costs is tolerated by exporters and the importers are made liable to bear the uncertainty of paying backdated AD duties after the investigation comes to an end.

- The very action of AD is unilateral and a WTO/GATT rule does not mandates any compensation and thus does not permit retaliation.

- Another argument advanced is that it allows the petitioning industry to defend its own incompetence with that of foreign competitor.

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16 Bruce A. Blonigen, Thomas J. Prusa, "Dumping and Antidumping Duties", available at http://econweb.rutgers.edu/prusa/cv/blonigen-prusa%20dumping%20-%20final.pdf last accessed on Jan 12, 2017

- It also allows for the specific exporters to be picked out, as a WTO rule does not necessitate multilateral application.

The founding of WTO and its AD agreement has given more refined rules for the member states to follow and execute anti dumping laws. Firstly as AD agreement was result of single undertaking it created a basis of rules applicable to all WTO states and also bound by the Dispute settlement undertaking of WTO which is the body for enforcement. Secondly, Under GATT the WTO anti dumping agreement has made the evidentiary requirement more strict as far the government are concerned for the implementation of AD measure, though it is also to be noted they still permit a scope for the exercise of discretion by the government which are also subject to challenge from the purview of economic welfare.[17]

The measures of anti dumping are said to be a unilateral remedy used by a member after going through the process of investigation and coming to the conclusion that there is dumping of the imported product and they caused or are about to cause "material injury" for the local producers producing the similar product. The custom duty on the imported product basically become the means of application of anti dumping from particular country at rates in addition to bound rates, The price undertaking may also take the form of anti dumping duties.[18]

The significance of implications of adoption of AD law by the developing state over its endogenous trade policy cannot be ignored. The country must have in place a mature administrative set up established in order to provide anti dumping protection to its domestic producers, before any anti dumping measure could be imposed, it further requires a thorough investigation which satisfies the WTO criteria for imposition of anti dumping duties.

At the operational level also small and developing economies face several operational problems in adjusting with anti dumping cases against them, such as they are easily identified as practising dumping whereas their lower prices may be due to their comparative advantage. Usually they are proceeded against based on little evidence and the limited resources may restrain them from defending against the complain. During the process of investigation also the exported may be subjected to harassment even if the complain may not be finally successful. The developing countries risk anti dumping findings against them because the prices in home market of locally produced goods may be higher than prices

17 *Supra* note 4

18 Introduction to Antidumping in the WTO, available at https://ecampus.wto.org/admin/files/Course_385/Module_1525/ModuleDocuments/AD-L1-R1-E.pdf (last accessed on 09/06/2017)

of the product in the export market. This distortion may be due to new and small industry structure or fiscal taxes on imported materials or finished products[19].

There are cases of misuse of the agreement as well. Art 5.2 is one such provision which provides that an request for commencement of an antidumping examination may not be based on simple claim, unsupported by pertinent proof. There have been cases where the developing states were repeatedly subjected to Ad investigation for the identical products. There are also intimation of the starting of the new investigation for the similar product as soon as the previous one is completed. This is a grave area of concern for the developing states as it has a tendency to disturb their exports to their main trading partners. Many member countries from the developing world perceive that the benefit of trade liberalisation gets neutralized by such frequent initiation of anti dumping investigation.

It is the feeling of many developing states that for them the process of investigation for assessment of dumping is lengthy. It is the fact that generally the failed AD investigation creates large implied costs on trade including many legal costs and bring the arena of instability for the companies for the next a year or two. There are suggestions to simplify the agreement to check its abuse by domestic industry in the importing country as a protective cover[20].

4. Recent Complaints at WTO

In a recent complaint by Vietnam against US laws of anti dumping, administrative practices, and procedure and methods of operation as well as specific determination of anti dumping in administrative reviews on fish fillets from Vietnam[21]. WTO has initiated consultation on the same.

A complaint has also been received by WTO by UAE over film duties from Pakistan. It was requested by UAE to raise consultation with Pakistan regarding some anti dumping measures in imports by UAE of biaxially oriented polypropylene (BOPP) film. There was claim by UAE that AD measures are violative of many of the anti dumping agreement

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19 *Supra* note 9

20 C Satpathy , "WTO Agreement on Anti-Dumping: Misuse and Case for Review", 34 *Economic and Political Weekly* 32 (Aug. 7-13, 1999) at 2211.

21 United States – Anti-Dumping Measures On Fish Fillets From Viet Nam Wt/Ds536/1 G/L/1208 G/Adp/D122/1 12 January 2018

of WTO and GATT 1994.[22] These complaints are still under process and have raised the consultation at the forum but not yet decided, these are testimony to the fact of developing states involved in the anti dumping.

5. Anti-dumping as a measure of retaliation

The new trend that has emerged is that developing countries have sought to retaliate in kind: maybe the most disturbing fresh tendency is that developing countries are retaliating with anti-dumping actions of their own. Mexico. Argentina and Brazil have launched a horde of cases, many targeted at the US. So has South Africa. And Asian countries are at last hitting back. Anti-dumping actions are increasing in China and South Korea. India has established a new body to deal with rise in case[23]. Because of the rising number of cases and complexity of operational machinery in settling the disputes the role of WTO cannot very significant and WTO will find itself bogged down by the operational trivialities and thus loose much more needed global developmental perspective on trade[24].

In one of the recent committee meeting at WTO shows the instance of retaliatory exercise of anti dumping measures especially between countries such as India and chine where they already don't have very cordial relationship. India was questioned by six members of WTO with regard to its latest anti dumping actions. The concern was expressed by China about certain Indian practices including AD investigations being started against imports from China itself only in 2016. China expressed grave concern over Indian practice of complete value chains. Here as part of the investigation process all the concerned companies in the chain of export including related and unrelated have to answer to questionnaire. The several aspect of India's investigation of Japanese and Ukrainian cold rolled steel that was ended up with determination of dumping, they also said the several procedure used by India were also contrary to WTO rules. The view of Qatar was that India's ongoing process of investigation regarding benzene was against several requirements of procedure and has not been able to show injury to native industry of linear alkyl benzene in India.

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22 Pakistan-Anti-Dumping Measures On Biaxially Oriented Polypropylene Film From The United Arab Emirateswt/DS538/1 G/L/1210 G/ADP/D123/1 29 January 2018

23 Chimni B S, "India and Ongoing Review of WTO Dispute Settlement System" Economic and Political Weekly, Vol. 34, No. 5 (Jan. 30 - Feb. 5, 1999), pp. 266

24 "Dump Anti-Dumping", 34 *Economic and Political Weekly* 22, (May 29 - Jun. 4, 1999) at 1303

It was observed by EU that it was having serious doubts regarding move of India to start an Anti dumping investigation case on styrene butadiene rubber and urged it to enclose the process of investigation not even imposing any measure[25].

Anti dumping demonstrates more clearly than any other GATT –WTO measure that rational economic policy typically finishes at the water's edge. Anti dumping does not just disregard economic logic, it reverses it. Many states has used the competition policy to reduce harm to those who are asked for real or apparent discriminatory higher prices compared to other intrastate buyer. Recently as regards the talk at Doha Round anti dumping has been interpreted as mostly as issue of North South. Although anti dumping has been used extensively by northern states against each other, it has also been used by north against south, though the reverse was not found to be true. But it has turned to be true now.[26]

The Doha round was entered by the developing states with the expectation that AD will be available for their use but not against them in its strict sense.

The author says that European Union showed some willingness to consider anti dumping policy changes; while the Americans were determined that existing state of affairs cannot be much altered. The enthusiastic approach of developing states towards anti dumping while reducing it elsewhere and desire to retain their own anti dumping policies reminds us of the Robert Hudec's chief argument in 1987, which states that the GATT's existing policy of allowing more protectionism for low-income states is harming developing countries more than it is helping them[27].

6. India and Anti Dumping

Anti dumping for India brings new challenges especially after liberalisation and globalisation which has made trade and commerce all the more free than any time in the history. The creation of WTO and substantial tariff reductions has led the most countries to get all sorts of benefits possible under WTO regime to protect its indigenous industries abroad from unfair competition and save its economy.

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25 https://www.wto.org/english/news_e/news16_e/anti_01nov16_e.htm last accessed on June 30 , 2017

26 Daniel J Gifford and Robert T Kudrle, "Trade and Competition Policy in the Developing World, Is There a Role for the WTO?" available in Chantal Thomas, Joel P Trachtman(ed) *Developing Countries in the WTO legal System* Oxford, New York,Oxford University Press,2009.

27 *Ibid*.

The measures of trade defence of anti dumping along with anti subsidies and countervailing measures are levied by Director General of anti dumping and Allied duties which is an authority under Ministry of commerce and Industry led by "Designated authority" though they are limited to conduct the investigation on receiving the complaint and then come out with the recommendation to the government for levying such duties to counterbalance the consequence of dumping. The formal effect of imposition of AD Duty requires a notification from the finance Ministry. Thus, it is the ministry of commerce which after completing the investigation suggest the imposition which can be imposed by the ministry of finance[28].

India came out with first legal provision to deal with anti dumping in 1982 itself but there was not much reliance placed on till the World trade Organisation was founded , after WTO the Indian provision was made in consonance with the WTO mandate on anti dumping which is founded in Article VI of the GATT ie. Anti dumping agreement, since then India has been frequent user of the AD measures. India started with use of the measure in 1995 when it was confined to 6% only and it reached to 26% in 2011. Thus India is labelled as a proactive user of AD as well as it may also be said that competition was at the back of the that led Indian produces to avail as much benefit as possible.

Such frequent use is obvious to invite allegation of using the measure as protectionist regime for the domestic industries to dilute the impact of free trade system instead of fair and equal treatment of both the domestic industry and foreign exporter. The same opinion is held by our apex court as well. In a case[29] it was observed that "*Anti Dumping Laws is, therefore a statutory measure which prevents destruction of our industries which were built up after independence under the guidance of our patriotic, modern leaders at that time and it is the task of everyone today to see to it that there is further rapid industrialisation in our country, to make India a modern, powerful, highly industrialized nation"*.

It should not be forgotten that though the benefit is conferred upon domestic industry the object is to protect only those where nexus between product and resultant injury caused on domestic industry[30].

As per the study conducted by OECD in 2006, trade among developing states is significant, it further mentions that if developing states are willing to get best possible profit from

28 http://www.helplinelaw.com/govt-agencies-and-taxation/ADPN/laws-of-antidumping-in-india.html,last accessed on Dec 23, 2017

29 *Reliance Industries* v. *Designated Authority* (2006(10)SCC 368

30 https://www.lakshmisri.com/Uploads/MediaTypes/Documents/L&S_Indian%20Anti- dumping%20Law_2013.pdf last accessed on July 2017

multilateral trade liberalization , it is required that they focus on trade among themselves. Trade Constrains among south are much more as compared to between intra developed countries. The rising cases of Anti dumping has tendency to increase these barriers all the more and adversely affect trade of south-south. Therefore it is emphasised that there is urgent need of solemn debate on the use of anti dumping measures in India.[31]

The use of anti dumping has long been criticised as a protectionist measure by the developing states towards their vulnerable industries not capable of competition from the outside world**.** In India also the policy seems to have failed in its object. Further India being one of the most frequent users of trade defence measure of anti dumping it may appear that the jurisprudence in India is developed to a great extent but reality is far different. In India we are still struggling with complexity and immature law on this aspect. There is no denial to the fact that certain definitions aspects and concepts actually create challenge because the designated authority is also aware of the actual condition of the domestic industry, therefore they also cannot be said to be operating in complete disregard of the reality.

To counter the argument of protectionist measure also it is to be agreed that Indian law takes due care of the fundamental rationale behind anti dumping policy under GATT and seeks to do justice with the same.

Recently anti dumping has been used very frequently also by developing countries and it is no more limited to industrialised countries, they are resorting to investigations and AD measures, the developing countries are with equal effect targeting developing states as well. This author has made an endeavour to look behind the difficulties of imposing the measures by the developing states as well as the possible motives and rationale behind adopting AD. The most dominant advantage for resorting to AD seems to be the protection of domestic producers and the lack of mature system for determination of dumping which is a common phenomenon in the developing members of WTO.

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31 Aradhna Aggarwal, "Trade Effects of Anti-dumping in India: Who Benefits?", 25 *The International Trade Journal*, 152 ((2011).

Principle of Strict Liability under Criminal Law

Krishna Murari Yadav*

Abstract: *Actus non facit reum, nisi mens sit rea has universal application with certain exceptions. According to this maxim, person should not be convicted without guilty mind. But in many cases, courts had decided that this maxim can be suspended either by statute or on the basis of object of statute or its necessary implication. Definitions of many offences have been changed and some new offences have come into existence. Society and dimension of rights have also been changed. There is no colonial era. Many countries are democratic now. In this research paper, researcher will review offences already in strict liability and discuss what should be considered at the time of deciding whether an offence should be put in category of strict liability.*

Keywords: Mens Rea, Strict Liability, Common Law, Statute, Object.

1. Introduction

Actus non facit reum, nisi mens sit rea means the act itself does not make a man guilty, unless the mind is also guilty. This theory was developed by Common Law Courts. First time concept of Mens Rea was discussed by Justice Coke. In case of *Fowler* v. *Padget*[1] (1798) Lord Kenyon held that actus reus and mens rea both are essentials for commission of crime. Section 95 IPC (Indian Penal Code) creates exception. It means even any act has been done with intention or knowledge, but act is of trifling nature, the person will not be punished. His trifling act is protected under Section 95, IPC.

Sometimes offence is constituted even without guilty mind. Such offences come under 'Principle of Strict Liability'. These offences are also known as exceptions of *Actus non facit reum, nisi mens sit rea***.** Judges apply this principle only when statutory provisions are silent about mens rea of accused. One of the first cases in which a statute was interpreted as imposing strict criminal liability was *Regina* v. *Woodrow*[2]. [3] Application and non-application of this maxim depends upon sound logic and reasonable discretion of judges.

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1 *Assistant Professor, Faculty of Law, Delhi University, Delhi (1798) 7 Term Rep 509; 101 ER 1103

2 15 M. & W. 404, 153 Eng. Rep. 907 (1846).

3 *Infra* note 31.

2. How to decide which offence should come under Strict Liability?

If any statute is silent about guilty mind of the accused, question arises whether person should be convicted even without guilty mind. Any judge can't put any offence arbitrarily in the category of strict liability. Sound rule had been established by Courts to decide whether any offence should come under strict liability or not. But still there are many cases in which judges have different opinion. Enacted law does not say which offence would come under strict liability. There are some cases in which method to decide strict liability had mentioned -

- In *Sherras* v. *De Rutzen*[4] Justice Wright observed, "There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the *statute creating the offence or by the subject-matter with which it deals, and both must be considered*."

- In *Brend* v. *Wood*[5], Justice Goddard, "The general rule applicable to criminal case is actus non facit reum, nisi mens sit rea…It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, *unless the statute, either clearly or by necessary implication rules out mens rea as a constituent part of a crime ....".*

- "A statutory crime may or may not contain an express definition of the necessary state of mind. A statute may require a specific intention, malice, knowledge, wilfulness or recklessness. On the other hand, it may be silent as to any requirement of mens rea, and in such a case in order to determine whether or not mens rea is an essential element of the offence, it is necessary to look at the objects and terms of the statute".[6]

- In *State of Maharashtra* v. *M.H. George*[7] Supreme Court observed, "Mens rea by necessary implication can be excluded from a statute only where it is absolutely clear that the implementation of the object of a statute would otherwise be defeated and its exclusion enables those put under strict liability by their act or omission to assist the promotion of the law".

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4 (1895) 1Q.B. 918.

5 (1946) 62T.L.R. 462-463.

6 Halsbury's Laws of England, 3rd edn. Vol. 10, in para, 508, at p. 273.

7 AIR 1965 S.C. 722.

From the above discussion, it becomes clear that if law is silent, requirement of mens rea can be excluded to achieve object and implication of the Act. There are few offences regarding which arguments have been done whether these offences should come under 'Principle of Strict Liability'. These offences are following -

(1) Waging war[8] (2) Sedition[9] (3) Selling of obscene books[10] (4) Kidnapping[11] (5) Sexual Harassment[12] (6) Rape (7) Bigamy[13] (8) Offences under FERA (Foreign Exchange and Regulation Act), 1947[14] (9) Offences under Essential Commodities Act, 1955[15] (10) Public Health (11) Sea Customs Act, 1878.[16]

(1) Waging War – Section 121, IPC provides, whoever wages war against the Government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life and shall also be liable to fine.

Object of Section 121 is to protect integrity of nation. Waging war affects sovereignty and integrity of nation. Law is silent on the point of mens rea of accused. In such offence the maxim should not be applied and accused must be convicted even without guilty mind. It is necessary to fulfill object of the Section.

(2) Sedition (Section 124A) - Section 124A, IPC provides, "Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in India, shall be punished with imprisonment for life, to

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8 Section 121 of IPC, 1860.

9 Section 124A, IPC, 1860.

10 *Ranjit D. Udeshi* v. *State of Maharashtra* , AIR 1965 SC 881.

11 *R.* v. *Prince* (1875), Section 361 and 362 of IPC.

12 Section 354A of IPC.

13 Section 494 of IPC. In the Case of *R.* v. *Tolson* British Court did not apply strict liability. But we are not bound by decision of that Court. Application of it depends upon facts and circumstances of the case.

14 *State of Maharashtra* v. *M.H. George,* AIR 1965 SC 722.

15 In the case of *Nathu Lal* v. *State of M.P*. AIR 1966 SC 43. This case was decided on March 22, 1965. Supreme Court presumed presence of mens rea. To override this judgment Essential Commodities Act, 1955 were amended in 1967. After this amendment *State of M.P.* v. *Narayan Singh* 1989 AIR 1789. This Case was decided on 25 July, 1989. Supreme Court did not apply the maxim because law was very clear.

16 *Infra* note 30.

which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

- **Argument in favour of strict Liability** - Sedition is also suitable case for application of strict liability to protect integrity of nation.

- **Argument against strict Liability** – Sedition law is threat to Indian Democracy. It is handy tool to suppress political rivals and voice of public & honest journalist. Hon'ble Chief Justice of India Mr. N.V. Ramana, asked why a colonial law used against Mr. Mahatma Gandhi and Mr. Bal Gangadhar Tilak continued to survive in the law book after 75 years of Independence. He criticized this law. There is misuse of power by executive agencies.[17] The CJI said the sweeping powers of Section 124A gives even a village police officer carte blanche to trample on the right to liberty and free speech of ordinary citizens.[18]

Many persons protesting against CAA was charged for sedition on flimsy ground. Sedition is an offence which existed in our Indian Penal Code (IPC) before we got Independence because the colonial master wished to penalise anybody who was trying to overthrow the state.[19] The Congress party manifesto for the 2019 general election promised to do away with sedition. Arrest of honest journalist Vinod Dua for sedition charge clearly shows that political parties are misusing this law. Supreme Court quashed charges against him.[20]

Principle of strict liability should not be applied in this case.

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17 Krishnadas Rajagopal, 'Why do you need the 'colonial law' of sedition after 75 years of Independence, CJI asks govt.' *The Hindu*, July 15, 2021. *Available at:* https://www.thehindu.com/news/national/is-this-law-necessary-sc-seeks-centres-response-on-pleas-challening-sedition-law/article35336402.ece (Visited on January 17, 2022).

18 *Ibid.*

19 Jayant Sriram, Should the sedition law be scrapped? *The Hindu,* March 06, 2020 . *Available at:* https://www.thehindu.com/opinion/op-ed/should-the-sedition-law-be-scrapped/article30993146.ece (Visited on January 17, 2022).

20 *Vinod Dua* v. *Union of India and Another,* Supreme Court, Date of Judgment: June 03, 2021. Available at: https://main.sci.gov.in/supremecourt/2020/12755/12755_2020_33_1501_28058_Judgement_03-Jun-2021.pdf (Visited on January 17, 2022). In this Case Supreme Court upheld the constitutional validity of Section 124A, but at the same time recognized right of freedom of speech and expression.

(3) Sale, etc., of obscene books (Section 292 of IPC) – Section 292 deals sale, etc., of obscene books, etc. In the case of *Ranjit D.Udeshi* v. *State of Maharashtra*[21] (August 19, 1964) Hon'ble Supreme Court convicted seller under section 292 for selling 'Lady Chatterley's Lover' book, although he had no knowledge of this book. The Court held that in section 292 of IPC unlike several other sections did not contain the words knowingly, or negligently etc. 'Principle of Strict Liability' was applied.

(4) Sexual Harassment (Section 354A of IPC) – 'Sexual Harassment' has been provided under section 354A which was inserted by Criminal Law (Amendment) Act, 2013. In this section nothing has been mentioned about guilty mind of accused. So in this case principle of strict liability will be applicable. Section 354A deals sexual harassment. Application of strict liability is sine qua non to fulfill the objects of Section 354A, IPC.

(5) Kidnapping from lawful guardianship (Section 361, IPC) - Section 361 IPC deals kidnapping from lawful guardianship. Mental condition of accused is immaterial. Whether accused is doing in good faith or not is wholly irrelevant.

In the case of *Regina* (R.) v. *Prince*[22] (1875) Justice Blackburn said that section 55 of the Offences Against the Persons Act, 1861 had not mentioned about mens rea. He denied applying the maxim *Actus non facit reum, nisi mens sit rea* and held that the provision did not require guilty intention or knowledge so the Court could not insert requirement of intention or knowledge only on the basis of maxim. So, Prince was convicted even without guilty mind. Principle of strict liability was followed.

(6) Rape - Section 375 defines rape. There are two parts of definition of rape namely;

(a) Prohibited act committed by accused (Section 375 (a),(b),(c) and (d), and

(b) mental condition of victim rather than accused (Section 375, Firstly to seventhly).

Rape is more heinous than murder. In *State of Punjab* v. *Gurmit Singh & Ors.* [23] Hon'ble Justice Anand observed, **"….**a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault. It is often destructive of the whole personality of the

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21 *Supra* note 10.

22 13 Cox Crim. Cas. 138.

23 AIR 1996 SC 1393. Date of Judgment: January 16, 1996.
Available at: https://main.sci.gov.in/judgment/judis/16186.pdf (Visited on April 01, 2021).

victim. *A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female."*

Section 375 is silent on the point of mental condition of accused. So in such cases accused must be convicted even without guilty mind.

(7) Bigamy (Section 494 of IPC) - Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. There are two exceptions of this section. But there are few English Cases, when women were not convicted because she had married after full inquiry with family members of her husband. Everyone told that he had died. She was not convicted for bigamy.[24]

- **Argument in favour** – Bigamy must come under strict liability. This section was enacted to protect family institution.

- **Argument against** – Marriage is solemnized for enjoyment of life and maintain peace in society. When the law was enacted in 1860, there were shortage of developed technology and communication method. At that time there were no equal rights and opportunities for development. We are living in Constitutional era. Everyone has right to choose his/her life partner. One spouse should not be compelled to wait for other for seven years. He/she should be allowed if he or she gets reasonable information that other spouse will not return within reasonable time. If he/she is getting marriage in good faith, he/she should not be convicted. *R.*v. *Tolson*[25] case also supports this argument.

My Conclusion – In case of bigamy, person must not be convicted under strict liability. He/she must be convicted by applying *Actus non facit reum, nisi mens sit rea***.**

(8) Economic offences (FERA) – Economic offences affect not only development of nation and life of citizens but also integrity and sovereignty of nation. In the case of *State of Maharashtra* v. *M. H. George*[26] majority opinion of Supreme Court observed, "The Foreign Exchange Regulation Act, 1947 is designed to safeguard and conserv foreign exchange which is essential to the economic life of a developing country. The provisions

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24 *R.* v. *Tolson,* (1889) 23 Q.B.D. 168.

25 *Ibid.*

26 *Supra* note 14.

have therefore to be stringent and so framed as to prevent unauthorized and unregulated transactions which might upset the scheme underlying the controls; and in a larger context, the penal provisions are aimed at eliminating smuggling which is a concomitant of controls over the free movement of goods or currencies." The Court further said that the very object and purpose of the Act and its effectiveness as an instrument for the prevention of smuggling would be entirely frustrated if a condition of mens rea were to be read into the plain reading of the enactment. In this case "Principle of strict liability was applied and accused was convicted.

(9) Essential Commodities Act, 1955 - Essential Commodities Act, 1955 were amended in 1967 to nullify the judgment of *Nathulal* v. *State of Madhya Pradesh*[27] . The words used in section 7 (1) are "if any person contravenes whether knowingly, intentionally or otherwise any Order made under section 3". The section is comprehensively worded so that it takes within its fold not only contraventions done knowingly or intentionally but even otherwise, i.e., done unintentionally. Principle of strict liability was applied in the case of *State of M.P.* v. *Narayan Singh*[28].

(10) Public Health – In *Pyarali K. Tejani* v. *Mahadeo Ramchandra Dange and Others*[29] Supreme Court said that it is ***trite law*** (Trite law means laws that are obvious or common knowledge) that in food offences strict liability is the rule not merely under the Indian Laws but the entire world. Nothing more than the actus reus is needed where, regulation of private activity in vulnerable areas like public health is intended. Social defence reasonably overpowers individual freedom to injure, in special situations of strict liability. Section 7 of Prevention of Food Adulteration Act, 1954 casts an absolute obligation regardless of scienter, bad faith and mens rea. If you have sold any article of food contrary to law, you are guilty. The law denies the right of a dealer to rob the health of a supari consumer.

Spreading Covid 19 is serious issue for public health and economy of nation. There is no specific law to deal this matter. This matter is being dealt by general law. If any law is enacted to deal this, and law is silent on mens rea, that law must be interpreted strictly for Covid containment zones. If someone is spreading Covid 19 even unknowingly, he or she must be convicted even without mens rea. But at the same time, few categories of persons must be excluded from wearing compulsory mask and in their case strict liability should not be applied –

- Sick person (On the prescription of doctors)

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27 *Supra* note 15.

28 1989 AIR 1789. This Case was decided on July 25, 1989.

29 AIR1974 SC 228, Date of Judgment: October 31, 1973.

- Small boy
- Persons who are not coming in containment zones,
- COVID warriors should not be compelled to wear mask in 24 hours.

American Jurisprudence - Jurisprudence of application of strict liability in adulterated food has been explained in American Jurisprudence (2d, Vol. 35, p. 864) which are following *"The distribution of impure or adulterated food for consumption is an act perilous to human life and health, hence, a dangerous act, and cannot be made innocent and harmless by the want of knowledge or by the good faith of the seller; it is the act itself, not the intent, that determines the guilt, and the actual harm to the public is the same in one case as in the other. Thus, the seller of food is under the duty of ascertaining at his peril whether the article of food conforms to the standard fixed by statute or ordinance, unless such statutes or ordinances, expressly or by implication, make intent an element of the offence*."

(11) Sea Customs Act - In *Indo-China Steam Navigation Co. Ltd.* v. *Jasjit Singh, Additional Collector of Customs, Calcutta*[30] principle of strict liability was applied. This case is related smuggling of gold bar.

Indo-China Steam Navigation Co. Ltd was carrying business of carriage of goods and passengers by sea and owns a fleet of ships for that purpose. One of its ships named Eastern Saga arrived at Calcutta and was rummaged by the Calcutta Customs Officers. In the sailors' accommodation, a hole measuring 2 1/2 x 5 1/2 was found in the wall panelling behind the back batton of a wooden seat which had been screwed to the wall. The hole was covered with a piece of wood and over-painted. The hole opened into a space and in that space, Customs Officers found 1,458 bars of gold valued at more than Rs. 23 lacs. After hearing the present appellant, custom officer passed an order for confiscation of ship. But gave the owners thereof an option to pay a fine of Rs. 25 lacs in lieu of confiscation. Appellant took the defence of mens rea. But Supreme Court rejected and said that such smuggling affects economy of the country.

Chief Justice Gajendragadkar said**,** "The intention of the legislature in providing for the prohibition prescribed by section 52 A of the Sea Customs Act, 1878 is, inter alia, to put an end to *illegal smuggling* which has the effect of disturbing very rudely the *national economy* of the country. It is well-known, for example, that smuggling of gold has become a serious problem in this country and operations of smuggling are conducted by operators who work

30 A.I.R. 1964 S.C. 1140. *Available at:* https://main.sci.gov.in/judgment/judis/3351.pdf (Visited on January 20, 2022). Date of Judgment: February 03, 1964.

on an international basis. The persons who actually carry out the physical part of smuggling gold by one means or another are generally no more than agents and presumably, behind them stands a well- knit organisation which, for motives of profit making, undertakes this activity."

3. Criticism & Seggestions

To inflict substantial punishment upon one who is morally entirely innocent, who caused injury through reasonable mistake or pure accident, would so outrage the feelings of the community as to nullify its own enforcement.[31] It is against Anglo-American, and, indeed, any civilized jurisprudence.[32] Till now there is no uniformity on the application of strict liability. It depends upon personal philosophy of judges many times.

If law is silent regarding mens rea, person must be convicted under strict liability only in those cases which are necessary to protect sovereignty and integrity of nation, economic condition of country, health & education of persons and integrity and dignity of women and suppressed class. In case of law related to family matters, strict liability should not be applied. Statute must clear about mens rea. It is best mechanism to bring uniformity in Principle of Strict Liability.

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31 Richard A. Wasserstrom, 'Strict Liability in the Criminal Law' 731, *Stanford Law Review* , Vol. 12, No. 4 (Jul., 1960).

32 *Ibid.*

Contractual Liability in Electronic Commerce: An Analysis in Indian Context

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Abstract: *E-Commerce encompasses all kinds of commercial transactions that are concluded over an electronic medium network. It is a means where transactions are conducted through electronic means. It is the Internet which has proved to be a gateway of globalizing economy. Internet technology has come into existence in 1986. It has made the life easy, be it trade or business or personal affairs. Internet is more than a collection of networks interconnected by computers. It is a global network connecting millions of computer and its applications are useful in different communications or information processing services.*

Keywords: Contractual Liability in Electronic Commerce: An Analysis in Indian Context

1. Introduction

Becoming an integral part of everyone's day to day life Electronic commerce has become a necessity for many people in most areas. E-commerce is a mode of conducting business through electronic means unlike through conventional physical means. This electronic means "include 'click and buy' methodology using computers as well as mobile devices". Electronic commerce covers all business conducted by means of computer networks which has made computer as a fundamental part of the economic infrastructure. Nowadays companies progressively are facilitating every transaction over web. The services offer the online purchase, payments delivery, service managements through looks simple but not so as involves a lot of legal issues.

E-Commerce encompasses all kinds of commercial transactions that are concluded over an electronic medium network. It is a means where transactions are conducted through electronic means. It is the Internet which has proved to be a gateway of globalizing economy. Internet technology has come into existence in 1986. It has made the life easy, be it trade or business or personal affairs. Internet is more than a collection of networks interconnected by computers. It is a global network connecting millions of computer and its applications are useful in different communications or information processing services. Internet has redefined the way to do business and communication. Access to the Internet is provided by the Internet service provider (ISP) for a monthly fee.

ISP's can be of three categories:

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(1) Backbone provider

(2) Regional provider

(3) Local provider

Local provider provides access to internet within a limited geographical area, and regional provider within a region.

2. UNCITRAL Model Law and E-Commerce

Issue of E-Commerce was raised first in the World Trade Organization (WTO) by United States in February 1998 as a market access. The Scenario of Globalization and digital economy together puts an impact in global economy.

The developing countries are affected by changes in global economy. In International Trade sector, the import and export industries have grown much faster requiring the need of E-Commerce in the Service sector. In several countries it is a particular as their worker classes are in service sectors.

After UNCITRAL a pressure was made on developing countries to introduce the new issues of contract for the future multilateral trade agenda. Now, India a developing country that has entered IT revolution years ago is emerging as a major e-commerce powerhouse in Asia. As India is signatory of UNCITRAL, It is an obligation to make the law to tackle the future problems to be arisen through e-commerce. The Constitution of India also empowers the Parliament to make law in respect of the treaty signed by India.

Information Technology Bill, 1999 introduced in parliament with effect to the resolution of the General Assembly of the United Nation for the adoption of the model law on E-commerce adopted by United Nation Commission on International Trade Law (UNCITRAL). E-Commerce an alternative to paper based methods of communication and storage of information. It was brought into existence for the development of harmonious international economic relations.

Due to inadequate or outdated communicating legislation in many countries had undertaken the need to formulate the model for its proper use and legality. The main work of UNCITRAL was to bring uniformity in rules on the issues of Digital Signature and Certification issues.

Objective of the Model was to foster economy and efficiency in International trade. It includes:

(1) Enabling the use of Electronic Commerce and

(2) Providing equal treatment to users of computer based information.

(3) To remedy the disadvantages of inadequate legislation at the national level.

(4) To remove disparities about national legal regime

(5) To interpret international conventions those are obstacle on legality of the use of e-commerce.

UNCITRAL model law extends to all communication techniques of trade related uses of electronic data interchange (EDI).Model Law is divided into two parts the one deals with the electronic commerce in general and the other in specific areas(carriage of goods).

Model law has come as a replacement to the use of traditional paper based documentation which constitutes the main obstacle to the development of means of communication. Model law relies on a new approach of "Functional equivalent approach". The purpose of basic paper based documentation i.e. 'writing', signature and 'original' is satisfied by the process of electronic communication.

The main purpose of model law is to facilitate the use of such technique and to provide certainty with the use of such techniques where obstacles could not be avoided by contractual situations. Article 5 of model law provides for the legal recognition of data messages. Chapter II deals with the enforceability of contract in law. Article 11 contains provision of formation and validity of contracts. In India E contract is included by an amendment under section 10A of the Information Technology Act, 2000 provides validity to e-contracts.

The purpose of the Model Law was to develop a secure legal environment for the electronic signature and to develop a common framework for certification practices.

3. E-Commerce and E-Contracts

E-contracts a synonym of electronic commerce are governed by the principle of Indian Contract Act, 1872 which specifies principles for valid contract i.e. contract must be with a free consent and for a lawful consideration between Parties. Both Indian Contract Act, 1872 and under section 10A of Information Technology Act, 2000 provides validity of E-contracts. Electronic Commerce is the modern way of doing business for efficient delivery of goods or services. A transaction conducted over computer networks. E-Commerce carried out over the internet is producing a wide variety of economic activities such as:

Sale or lease of goods

Provision of services

Sale or Licensing of software

Downloading entertainment

Advertisement etc.

Electronic commerce generally covers three main types of transaction i.e.

- B2C – business to consumer
- B2B – business to business
- B2G – business to government

B2C a business to consumer type of electronic contract can be seen flowing rapidly in market in every individual's life, though it's a working man, women or a house wife. This type of contract has brought revolution in the field of exchange of goods with the monetary return. Electronic Contracting has increased rapidly and is applied internationally more easily than the traditional forms of cross-border trade.

Further B2C is being classified in few basic forms that are:

1. The Click Wrap or Web Wrap agreement
2. The Shrink Wrap agreement
3. The Electronic data Interchange

In Click Wrap or Web Wrap the party indicates its assent after going through the terms and conditions mentioned by the program through the means of clicking 'I Agree'. This type of contract is generally used an Internet for many download or selling any software.

In ***Bremen V Zapata Off shore Co***[2] it was held that 'Contracted provisions' limiting the place or count where potential actions between the parties may be brought are 'Unfair and unreasonable or are affect by fraud or 'unequal bargaining power.'

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2 407 U.S 1.10
C98-20064(N.D.Ca, April 20,1998)

In ***Hotmail Corporation V Van Money Pie Incet al***[3], where the Court of Northern district of California indirectly upheld the validity of such licenses where it said that the defendant is harmed by the terms of that License as he clicked on the box containing 'I Agree'.

Shrink Wrap agreements are bit different where the terms and condition of accessing the particular software are printed on the shrink wrap cover of the CD and the Vendor after going through the same when tears the cover can find it or some additional terms are imposed and found when the CD is loaded.

Neither Shrink wrap, nor Click wrap licenses prevent consumers from inspecting the license prior to find assent to the contract and many producers voluntarily place their product licenses on their website for inspection by consumer. Hence the General Rule is "Let the Buyer Beware".

Electronic Data Interchange or EDI they are contracts used in trade transactions where the transfer of data is enabled from one computer to another in such a way that each transaction in the trading cycle can be processed with no paperwork.

E-Contracts are very similar to traditional paper based commercial contracts. Not necessary vendors show their presence but negotiation is done as the conventional method where vendors present their product, price, terms to prospective buyer. Buyers consider their options, negotiate prices and terms, place order and make payments and it ends with the delivery of product .Mail order or catalogue shopping has been in existence in the united states since 1980.This was the predecessor of online commerce, which started in India post 2000.Today the number of Internet users in the world is more than 7.1 billion. Out of this India have a total of 40.27 million wireless broadband connections including mobile and dongle connections at the end of 2013, according to latest data from TRAI. This penetration of Internet coupled with the increasing confidence of the Internet users to purchase online has led to nearly 40 % of such users.

Before Electronic commerce business transactions like orders, invoices, bill of landing were to be recorded in writing on paper as a matter of record and communication. It has to be supported by a document, writing and signature. Earlier payments are done either by cheque or cash but in E-business digital cash is used to replace paper cash in an online environment. Digital cash has proved to be boon as in reducing paper work and increasing efficiency of the banking Institutions.

4. The Information Technology Act, 2000 and Electronic Contract

3 Inserted vide Information Technology Amendment Act, 2008

A Legal framework for E-commerce has been provided by the **Information Technology Act, 2000** making India only the twelfth country worldwide which has such a comprehensive legislation for e-commerce in place. This Act has affected amendment in Indian Penal Code, Indian Evidence Act 1872, Reserve Bank of India Act 1934, Companies Act, 1956 to bring them in with the requirement of digital transactions.

5. The IT Act aims at some specific area for E-Commerce-

(a) To make possible e-commerce transactions like business to business and business to consumer

(b) To make possible government transactions through e-governance

(c) To curb cybercrime and regulate the Internet.

Chapter IV of the Information Technology Act, 2000 (amendment of 2008) contains Sections 10, 11, 12 and 13 which talks about Legal Recognition to Electronic Contracts, Attribution, Acknowledgment and Dispatch of Electronic Records.

Section 10A of the IT Act, 2000 provides that, a communication or contract shouldn't be denied or declared void merely because it's in electronic form. i.e. Every electronic contract has legal recognition same as traditional paper based contract.

This Section is based on the **United Nation's Convention on the use of Electronic Communications in International Contracts.**

Section 11:-

"**Attribution of electronic records"**,

An electronic record shall be attributed to the originator—

1. if it was sent by the originator himself;
2. by a person who had the authority to act on behalf of the originator in respect of that electronic record; or
3. by an information system programmed by or on behalf of the originator to operate automatically.

Here, **"Originator"** means **(Sec. 2(1) (za))**:-

"A person who sends, generates, stores or transmits any electronic message or causes any electronic message to be sent, generated, stored or transmitted to any other person"

Originator doesn't include **"Intermediary"**.

Section 12:-

"**Acknowledgement of receipt"**

1. Where the originator has not agreed with the addressee that the acknowledgment of receipt of electronic record be given in a particular form or by a particular method, an acknowledgment may be given by—

1. any communication by the addressee, automated or otherwise; or

2. any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received.

Here, **"Addressee"** means **(Sec. 2 (1) (b))**:-

"A person who is intended by the originator to receive the electronic record but does not include any intermediary".

1. Where the originator has stipulated that the electronic record shall be binding only on receipt of an acknowledgment of such electronic record by him, then unless acknowledgment has been so received, the electronic record shall be deemed to have been never sent by the originator.

2. Where the originator has not stipulated that the electronic record shall be binding only on receipt of such acknowledgment, and the acknowledgment has not been received by the originator within the specified time or reasonable time, then the originator may give notice to the addressee stating that no acknowledgment has been received by him and specifying a reasonable time by which the acknowledgment must be received by him. Now if no acknowledgment is received within the aforesaid time limit he may after giving notice to the addressee, treat the electronic record as though it has never been sent.

Sec. 13:-

Time and place of dispatch and receipt of electronic record

(1) Save as otherwise agreed to between the originator and the addressee, the dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator.

(2) Save as otherwise agreed between the originator and the addressee, the time of receipt of an electronic record shall be determined as follows, namely:—

1. if the addressee has designated a computer resource for the purpose of receiving electronic records,—

(i) receipt occurs at the time when the electronic record enters the designated computer resource; or

(ii) if the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee;

(b) if the addressee has not designated a computer resource along with the specified timings, if any, receipt occurs when the electronic record enters the computer resource of the addressee.

(3) Save as otherwise agreed to between the originator and the addressee, an electronic record is deemed to be dispatched at the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business.

1. The provisions of sub-section (2) shall apply notwithstanding that the place where the computer resource is located may be different from the place where the electronic record is deemed to have been received under sub-section (3).

2. For the purposes of this section,—

(a) if the originator or the addressee has more than one place of business, the principal place of business, shall be the place of business;

(b) if the originator or the addressee does not have a place of business, his usual place of residence shall be deemed to be the place of business;

(c) "usual place of residence", in relation to a body corporate, means the place where it is registered.

6. Conclusion

Electronic commerce websites lay down all production of sale in a sequence with absolute clarity, regular update and monitoring the information. The terms of agreement have been decided by the contracting parties themselves. In the Electronic age, the whole transaction can be completed in seconds, with both parties simply affixing their digital signatures to an electronic copy of contract. Delayed couriers and additional travelling cost are now seen in vain. Today, there are thousands of e- commerce websites that people can purchase items

from. Not only does electronic commerce affect the economy, but it also has a large affect on the job market as well.

Though, E-commerce has come up with advancement in upgrading impact on global economy but it is not yet untouched by the evil effects of cyber world i.e. hacking. In India hacking has proved to be a favorite crime of cyber offenders which does not let the individuals to think positively on the issue of acceptance of E-commerce. Though IT Act has led to the validity of e-contacts through validating digital signature which is the basic need for the authentication and reliability of e-contract. In most countries the testamentary documents like Wills, Registry etc. are still formed with the traditional paper based contract because of a no proper provision of digital signature in the field of contract. Cyber crime has been sprout like a disease in e-market due to which the procedure of the intellectuals started developing antivirus but it would be weird to know that this antivirus has virus ahead. It is easy to collect a lot of personal information from a consumer using an e-commerce website, sometimes too easy. Since all online transactions are recorded, it's relatively easy to create an online profile of the buyer, and use that to send targeted advertisements. Online transactions are inherently more insecure than those conducted in person because there's no way to guarantee that the person making the payment is the actual owner of the credit card used. At the same time, when the customer inputs the payment information they risk a third party intercepting it if the website doesn't comply with the adequate security measures, giving rise to credit card fraud and identity theft. Merchants need to be aware of the risks electronic transactions carry, and work towards securing the systems to the highest standards. As one can clearly see, although e-commerce was a major development for many people, there can be dangerous side effects to this business model.

Digital cash has proved to be boon as in reducing paper work and increasing efficiency of the banking Institutions. In this respect, Demonetization of currency by the Honourable Prime Minister of India instigated those people who were not using the e-cash, to use electronic money and do their monetary affairs. This step of demonetization not only prevents tax evasion in our country but also prevent fake currency. E- Commerce is environment friendly transaction and save the environment for future generation also.

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Freedom of Speech and Expression with Changing Dimensions

Swapnil Pandey* Dr. K.B. Asthana**

Asbtract: *God has gifted with brain to think and speech to express the expressions of every mankind. Human being has a very strong weapon to convey their sentiments, feelings, thoughts and expressions through speech. So it can be said that freedom of speech is a natural right of every mankind, which he acquires by birth. The primary condition for liberty is to own its freedom of speech and expression. So freedom of speech and expression is knownas the mother of all types of liberties. Through the freedom of speech and expression, a person express his own thoughts and ideas by writing, speaking, making pictures, by printing or any other method of communication. By any visible or communicable medium like[1] sighs and gesture, we can express our ideas. At present time for the free flow of democracy, the freedom of speech and expression is essential for the society. Under these fundamental rights, Article 19 is the most important and significant article related to basic freedom of citizens. Only citizen of India owned the rightto freedom of speech and expression under Article 19(1)(a) granted in the Indian Constitution, but foreign nationals have not right to freedom of speech and expression. The Article 19(1)(a) gives permission to express thoughts or views through speaking, writing, gesture or any other medium with imposed restriction.Under this Article 19(1)(a) right of communication and right to publish thoughts and opinions also guaranteedand this boost up the healthy democracy by give permission to every citizen to take participation in politicalas well as social issues of our country.*

Keywords : Freedom, Communication, Fundamental Rights, Gesture, Democracy

1. Introduction

An idea for freedom of speech and expression was introduced by the Greeks, by using the term 'Parrhesia'. The meaning for Parrhesia stands for "*free speech or to speak frankly*". In the fifth century B.C. countries like France and England had taken a long period to accept the

"*Freedom as a Right*". But English Bill of Rights, 1689 had adopted the freedom of speech as the Constitutional Rightof their citizens. In 1789, at time of French Revolution, France had also adopted the declaration of Rights as Constitutional for their citizens. 10 December 1948, UN General Assembly also adopted "Universal Declaration of Human Rights" under Article 19 as 'Freedom of speech andexpression' as a human right.

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Lowell v. Griffin, (1939) 303 US 44

John Milton said that give me the liberty to know,to argue freely and to utter according to conscience, aboveall liberties. He also explained that without the freedom, there would be impossible to achieve progress in variousfields. He admire that human freedom stands for freedom for free discussion of thoughts, opinions and expressions. In Whitney vs. California[2] case of U.S., Justice Louis Brandies gave a strong statement with the reference of freedom of speech and expression that those who won our independence, believed that courage is the secret of liberty, and liberty is the secret of happiness. These peoplebelieved that freedom to speak, freedom to think and freedom to assemble willfully for discussion, is futile and have no use. But the public discussion is a political duty, and it should be the fundamental principle of the government of America.

The Supreme Court strengthened the Article 19(1)(a) by adding some other freedoms in this article. The Supreme Court always gives safeguard to this article and protects the fundamental rights guaranteed under the part-III in the Constitution of India. Various important facts related to the freedom of speech and expression is emerged with many decisions given by the Supreme Court of India.

2. Objective of Study

The objective of this research paper is to analysis of the changing dimensions of the freedom of speech and expression guaranteed under the Article 19 (1)(a).

3. Scope/Limitations of the Study

This research paper covered the all changing dimensions of the freedom of speech and expression, in the present scenario in democratic India.

4. Method of Study

This research paper has adopted Doctrinal Method. To follow this method books, journals, various statutes, reports, newspapers, commentaries, magazines, internet surfing etc. has been referred. The author's research paper is doing an analysis of changing dimensions of freedom of speech and expression in present era, as fundamental right ofevery citizen guaranteed under the Constitution of India. so for the operation of this paper, analytical, critical and evaluative approaches are applied to examine existing freedom of speech and expression.

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2 Whitney v. California, 274 U.S. 357 (1927).

5. Importance of the Study

Through this paper, we will be able to know about the status of right to freedom of speech and expression in the democratic and developing country. This will give recommend the solutions for the betterment of this fundamental right as per the requirement of present time.

6. Changing Dimensions of Freedom of Speech and Expression

The citizen of India, have certain basic rights given under the part III of the Constitution of India. These rights are known as Fundamental rights and nobody can snatch such rights from any citizen of India. Every citizen gets these rights from their birth and hold for their whole life. Neither state nor a single person may violate these fundamental rights of anybody. These six fundamental rights reserve our rights towards; Right to freedom (Article 14-18), Right to freedom (Article 19-22), Right against exploitation (Article 23-24), Right to freedom of religion (Article 25-28), Educational and cultural right (Article 29- 30) and Right to Constitutional remedies (Article 32 and 226).

Under 44th Amendment Act, 1978, the fundamental right known as 'Right to Property' becomes legal right under Article 300. Fundamental rights make an important role to abolish untouchability and also prohibit the discrimination on the grounds of race, caste, religion, gender and birth place. Forced labour and human trafficking also forbid and treated as crime. Fundamental rights play a very importantrole in the protection of educational right and culture for religious establishments. Sardar Vallabhai Patel is knownas chief architect for the fundamental rights in the Constitution of India.

7. Right to Information

During the time of election and for casting vote to suitable candidate, the right for receiving correct and authentic information about the candidate is very necessary to maintain the democracy of the country. To ensure the correct information about the past, present and various related information included the criminal record of the candidate, is the fundamental right of the citizen of India, to securing democracy and development of the country. In the case of Association for Democratic Reforms vs. Union of India and another[3], it had been cleared that democracy of Parliament is the basic structure of the Constitution and for the survival of democracy the vote cast by the voters based upon the information and knowledge derived. Power of the ballet box decides the future of the democratic country and this power aware thevoters towards the ballet paper.

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3 A.LR. 2001 Delhi 126.

Thus the High Court directed to enforce this fundamental right to receive full information to cast valuable vote towards the security of democracy. Election Commission has directed to the candidates for election to produce all detailed information about their education, dependents and their property including spouse, if accused in any offence then details and given punishment. For the compliance of aforesaid directions, Election Commission has to issue related directives with the support of central government, state government and intelligence bureau etc to gather relevant information. The preamble of our Constitution also emanates the liberty of thoughts and expression of the citizen of India.

8. Freedom to Cast Free-Vote

The Court said in the case of P.K. Sekar Babu vs. State Election Commissioner[4] that under Article 19(1)(a) that a large number of criminals and anti social candidates are allowed to intimidate genuine to the valuable voters. For taking action against them, the writ petition underArticle 226 to the High Court make possibility to take action for anti social elements and not to allow free hand on Election Day or over powered to intimidate voters for casting their vote. So voter can only cast their vote on the basis of their identification document or voter card and rather than official vehicle, on any other vehicle should allow within the periphery of 200 meters of the polling booth.

9. Right to Worship

In the case of National Anthem[5], the Supreme Court had held that nobody can be compelled for the singing of National Anthem, if he has genuine conscientious objections related to his religious faith. K.P. Hafsath Beevi vs. State of Kerala[6], the court said that under Article 19 of the Indian Constitution, the petitioner has right to worship and as a part of peaceful assembly hasright to perpetuate his religious ideas. But State is entitled to apply reasonable restrictions on such religious activity to maintain public order, national and State security, morality and sovereignty, decency and integrity of India.

10. Right to Broadcast Film

To broadcast the film is also a type of speech and expression. This medium is perfect to steer-up the emotions of different generations rather than any other art. In K.A. Abbas vs.

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4 *AIR* 2009, Madras 28

5 Bijoe Emmanuel v. State of Kerala, (1986) 3 SCC 615

6 AIR, 2010, Ker 103

Union of India[7], the Supreme Court held that film is a very impressive medium to express our impressions. In the case of Union of India vs. Cinemart Foundation[8], the Supreme Court said that under the Article 19(1)(a) film makers have fundamental right to exhibit their films.

The Cinematography Act 1952, had given two categories of films i.e. "U" film and "A" films. Where 'U' films stand for unrestricted exhibition, while 'A' films stands for adult film. But on the basis of violation of freedom of speech and expression and the categorization was imposed as an unreasonable restriction, the categorization of the films was challenged in the case of K.A. Abbas vs. Union of India. the case was related to a documentary film named 'A tale of four cities', because the film got 'A' film certification and the appellant want to authorized with 'U' film certification for the unrestricted public restriction. So under Article 32, the appellant file a petition and also contended that besides the films there were different other forms of freedom of speech and expression and none of them were pre-censored. But the Supreme Court said that under Article 19(2), pre- censorship is justified on the ground of reasonable restrictions and the film has to treat differently from the form of expression and art. This is because the motion films are able to stir up the human emotions more effectively from any other form of the art. So the classification of films as 'A' and 'U' is totally valid.

11. Right to Telecast

In any democratic country, electronic media such as radio and television are played very important role for communication of information's. due to this reason the Supreme Court gave his historic judgment in the case of Secretary Ministry of Information and Broadcasting Government of India vs. Cricket Association of Bengal and others[9], that in the Article 19 (1)(a) the government has no monopoly on electronic media and their citizens to telecast important events through electronic media such as radio and television.

Under Article 19(1)(a) freedom of speech and expression contains the right information of any important topic and to disseminate the information. So the right to disseminate the information includes any medium i.e. television, radio, advertisement, movie, speech, article etc. Justice P.V. Savant said that broadcasting is just a means of communication, so broadcasting the information is the freedom of speech and expression. Under Article 19(1)

7 A.LR. 1971 S.C. 481 (1972) S.C.C. 780

8 This case was decided with LIC v. MD. Shah: A.LR. 1993 S.C. 171. This case is also known as Beyong Genocide case

9 A.LR. S.C. 1236; 1995 2 S.C.C. 161

(a) freedom of speech and expression contains the right information of any important topic and to disseminate the information. So the right to disseminate the information includes any medium i.e. television, radio, advertisement, movie, speech, article etc. Justice P.V. Savant said that broadcasting is just a means of communication, so broadcasting the information is the freedom of speech and expression. Hence in any democratic country neither any Government organization nor private or individual institution can claim for inclusive right over telecasting. In our Constitution the monopoly for print or electronic media is forbidden.

12. Commercial Advertisement

In the case of Hamdard Dawakhan vs. Union of India[10], the Supreme Court directed that undoubtedly an advertisement is a form of speech and expression. But when an advertisement is taken in commercial form related to trade or commerce, the commercial advertisement is not the propagation of social and political ideas, economic literature and human thoughts[11]. In this case, the court prohibited drugs and commodities as the conclusion that the sale of drug is not the interest of general public, so not be exist in the meaning of freedom of speech and expression under Article 19 (1)(a). Three Judges bench in the case of Tata Press ltd. Vs. Mahanagar Telephone Nigam Ltd. and others[12], held that commercial speech is a part of freedom of speech and expression, which is guaranteed under Article 19 (1)(a) of the Constitution of India, but every form of an advertisement is not deals with the form of speech and expression.

But in Indian Express News papers Bombay Pvt. Ltd. vs. Union of India[13], the court said that every advertisement is not dealing with the freedom of speech and expression of ideas. It is necessary to see the nature of advertisement and its activity related with the Article 19 (1)(a). As a conclusion in both cases Hamdard Dawakhan vs. Union of India and Tata Press ltd. Vs. Mahanagar Telephone Nigam Ltd. and others, it held that under Article 19 (1)(a), commercial speech cannot be denied because the both are issued as the result of business.

13. Right to Make 'Demonstration'

Demonstration is broadly known as visible manifestation of the feelings and sentiments of a group of peoples or an individual. As an Oxford Dictionary, demonstration is the

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10 A.LR, 1960 S.C. 554.

11 A.LR. 1960 S.C. 554 see at pp. 563-64.

12 A.LR. 1995 S.C. 2438; (1995) 5 S.C.C. 139.

13 A.LR. 186 S.C. 515 (1985) 25 S.C.R. 287.

outcome of feelings, an exhibition of the opinions of general public and political issues by publicmeetings or procession, mass meeting or parade. For the first time, right to make demonstration was read as the part of freedom of speech and expression under Article 19

(1)(a), in Kameshwar Prasad[14] case. The Supreme Court firmly laid down that if demonstration is peaceful and orderly protected under an Article 19 (1)(a) then demonstration is type a form of speech. But noisy and disorderly demonstration which results in the disturbance of public tranquilly may be regulated under the Article 19(2) in interest of the public order.

14. Right to Strike

In an Industrial Dispute Act, 1947, the term 'Strike' under section 2 (a) is defined as the cessation of work by the employees by concerted action in an industry. Strike is a legitimate weapon for the labour of any industry for the collective bargaining and this may restore the improvement and conditions of their employment[15]. Collectively in world and also in India, that unless strike is prohibited by the law but punishment would not be given by the State or the employer for the act of misconduct[16].

In the case of Kameshwar Prasad vs. State of Bihar, the Supreme Court clearly laid down that the prohibition of the any form of strike was not the violation of Article 19(1) (a) because resort to strike is not a fundamental right. This was also affirmed by Justice Gajendakar in the case of E.X. Joseph. However it was clarified that actively participation in the demonstration, which is preparation ofthe strike or connection with the strike, does not mean theparticipation in strike itself. So any departmentalproceeding was not justified.

Supreme Court discussed that the right to strike does not exist under Article 19 (1)(a)[17], but this right to strike has given through trade unionism by freedom of association under the Article 19 (1)(a). This has been stated in the case of All India Bank Employees vs. M.I. Tribunal[18]. Right to strike is directly not included under Article 19 (1)(a) and it can be claimed under the freedom of profession under Article 19 (1)(a), but restricted in the interest of general public and State is entitled to impose the reasonable restrictions upon the right to strike.

14 Kameshwar Prasad v. State of Bihar, A. I. R. 1962 S.C 1166 (1171).

15 Swadeshi Industries v. Workmen, AlR. 1960 S.C. 1258.

16 Crompton v. Workmen, A.LR. 1978 S.C. 1489.

17 Redhey Shyam v. P.M.G. Nagpur, A.LR. 1965.

18 A.LR. 1962 S.C. 171 (179).

15. Conclusion

Under the part III of Constitution of India, the freedom of speech and expression are guaranteed under Article 19 (1)(a) to the every citizen of India, not merely to few (non-citizen, foreigner or alien). But nobody can exercise his fundamental right in such a manner, as toviolate another's right. It is the duty of State to ensure thatthis given right is exercised by everyone in equal manner.

According to the Citizenship Act, a citizen must be natural person, not a juristic person such as incorporated bodies. So incorporation cannot claim the right to freedomos speech and expression. If the for a particular newspaper, the State invaded the freedom of expression, the newspaper cannot make a writ under Article 32 and 226 to enforce the fundamental right of expression. But the disability for the corporation if only technical, so editors, publishers, readers and share holders of the newspaper are finally free to seek relief and corporation may be presumed to join as co-petitioner. For thedemocracy the freedom of press are the pillars. Fair and free election for any society is based on the freedom of press because free and fair elections are the integral part of the democratic country.

There are both negative and positive effects of freedom of speech and expression guaranteed under Article 19 (1)(a). These fundamental freedoms of speech and expression perform three main functions; firstly this freedom ensures the opportunity for the individual and to develop personality day by day, secondly this givenfreedom demark the boundary between the individual good and social good and thirdly to maintain healthy and sound democracy in our country.

16. Suggestions

- The changing dimensions of freedom of speech and expression guaranteed under Article 19 (1)(a) in present era, have to perform so many functions.
- The legislature should have make some amendmentsin the Constitution of India and make 'Right toInformation' as the fundamental right.
- The new technology of media is more vigilant and sensitive and this becomes opportunity as well as threat to our society.
- The media has to impose self censorship before broadcasting or publishing to avoid nescience and violence in the society.
- The publication of any offensive material should bedone only in the public interest.

- Freedom of speech for press and information should work together for healthy democracy and development of the society.

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Trajectories of Contradictions: Blockchain Technology and the Right to be Forgotten

-Bhavna Jha[1]

Abstract*: The right to be forgotten guaranteed by India's proposed Personal Data Protection law could have an unprecedented adverse impact on blockchain technology. Whereas blockchains inherently safeguard privacy, transparency, and security of personal data, it is my opinion that right to be forgotten or the right to erasure being guaranteed by data protection regulations will present a crossroads to blockchain technology: either comply with data protection laws and weaken the integrity of blockchains, or persist to exist through exploiting loopholes within the law and weaken the integrity of the data privacy regime. This paper explores why umbrella legislation which is meant to apply to the conventional internet will run into contradictions with blockchain technology, which could frustrate the widespread adoption of the technology. Additionally, the paper reflects on the development of the common law jurisprudence around the right to be forgotten in India and how it has diverged from its development in the European Union and the UK. Blockchain technology presents the first of many challenges that the latest laws regulating cyber space must face.*

Keywords: Blockchains, "Right to be Forgotten", Data Privacy, Intermediaries

1. Introduction

1.1 Origin of the internet

The internet was created for persons within a network who were trustworthy.[2] The origins of the Internet are quite clearly in a background of military work by the United States of America, where all participants on a network were known to each other.[3] Even when it moved into the civil society research space, the participants in a network were all part of the same college campus, or were students, teachers and researchers are various other college campuses across the world. As a result, the foundation of the internet was set on a centralised design which allowed anonymity. This is how the internet was presented to the world. When the interests of commerce and governance started to change the nature of the internet, Lawrence Lessig pointed out in 2000 that there was no reason for the internet to remain centralised or anonymous, and that security interests of commerce and state only

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2 Lawrence Lessig, *Code: And Other Laws of Cyberspace* (2nd Revised Ed., Basic Books 2006).

3 Roy Rosenzweig, 'Wizards, Bureaucrats, Warriors, and Hackers: Writing the History of the Internet' (1998) 103 The American Historical Review 1539.

needed to add layers over non-anonymising technology on to the existing internet for it to cease to be anonymous.[4] This change to de-anonymise interactions on the internet did take place, partly driven by the interest of ecommerce to secure transactions, but it happened largely by the push by social media networks like Facebook who based their platform on networks of identified, trusted persons from the real world who could now interact in the virtual space also. Perhaps the believers in the utopian internet of the post-Cold War era, exemplified by John Perry Barlow's Manifesto for democratic internet,[5] would nary believe this could be, but the internet through Facebook is again fulfilling its original intention of connecting persons who are verified to be trustworthy by a centralised platform.

2. Privacy-by-design

Legislations and privacy experts suggest multiple modes of protection of privacy, one of which privacy-by-design solution. Privacy-by-design solutions can be subdivided into three aspects: privacy-by-control, privacy-as-confidentiality, and privacy-as-practice.[6] Privacy-by-control is features such as privacy settings which offer users a modicum of control over what data they shall allow the technology service to use. Privacy-as-confidentiality are anonymity preserving techniques, privacy enhancing technologies, such as anonymous authentication by servers[7], private information retrieval or anonymous communication networks. Privacy-as-practice is about keeping users continuously informed about the uses to which their information is being put.

3. Perpetual Memory and the Right to be Forgotten

Viktor Mayer-Schonberger has proposed an apparently simple solution to the problem of perpetual, ubiquitous memory that the information age has created. He suggests that regulations should insist that all data gathered should be deleted after a specified time instead of retaining it forever. Mayer-Schonberger's suggestion is radical in being a simple solution that takes little legislative innovation and follows a privacy-by-design philosophy by integrating privacy laws within technology to protect the right to be forgotten. Unfortunately, his solution falls short of the technological limitations created by emerging technological realities (for example, Blockchains). This gives rise to a legitimate concern

4 Lessig (n 1).

5 John Perry Barlow, 'A Declaration of the Independence of Cyberspace' (*Electronic Frontier Foundation*, 20 January 2016) <https://www.eff.org/cyberspace-independence> accessed 5 July 2018.

6 Susan Perry and Claudia Roda, *Human Rights and Digital Technology- Digital Tightrope* (Palgrave Macmillan 2017).

7 Servers usually use cookies to verify the identity of users.

that playing catch-up with technological innovation shall lead to myopic legal regulations which will be incompatible with the evolution of technology.

4. Blockchains as a privacy-by-design solution

Technology is transforming humanity, and every aspect of human life. Laws, addressing the widespread applications of the internet and lawmakers are struggling with addressing the needs of newer, game-changing technology. The emerging threats of this era, such as technologically enhanced mass surveillance, hacking, unauthorised uses of personal information, etc., have stayed in the focus the right to privacy across the world. Even so, technological solutions form a part of responses that have emerged to counteract these threats to privacy. Blockchains are one such emerging mechanism of providing a privacy-by-design solution to many of these problems. Even so, their use is raising different questions, one of which relates to the curious case of the "Right to be Forgotten" and, for instance, the unmodifiable nature of blockchain technology itself. Whereas blockchains resolve the privacy-as-confidentiality concerns through a privacy-by-design solution (by ensuring trustworthiness of persons on a network without compromising on anonymity), blockchain technology may not be compliant with the data protection regimes we are choosing to create, especially the right to be forgotten. We shall therefore use this technology as a metaphorical guinea pig for providing us with some insights into how existing data privacy norms in the EU and UK, and emerging norms in India, will interact with futuristic technology.

5. The Emergence of Blockchains

When "Satoshi Nagamoto" released his Whitepaper on Bitcoins[8], the cryptocurrency, he probably did not anticipate the kind of interest in Blockchains, the technology he based Bitcoins on, that would accrue.[9] Blockchains are being used in various sectors, ranging from health to finance to education and beyond.[10] It is a new model for data protection by design. Blockchains are built on the idea of consensus shown by proof-of-work. Despite being fully transparent, information stored as Blockchains are practically impossible to tamper with. Blockchain uses a peer to peer network where exchanges are time-stamped and hashed into an ongoing chain of hash-based, proof of work records that cannot be changed without redoing the proof-of-work. Therefore, the longest unbroken chain is the

8 Satoshi Nakamoto, 'Bitcoin P2P E-Cash Paper' (*Satoshi Nakamoto Institute*, 31 October 2008) <https://satoshi.nakamotoinstitute.org/emails/cryptography/1/> accessed 8 August 2018.

9 Take for example the emergence of 'Blockstack' <https://blockstack.org/> accessed 6 July 2017.

10 Tom Simonite, 'The Decentralized Internet Is Here, With Some Glitches' [2018] *Wired* <https://www.wired.com/story/the-decentralized-internet-is-here-with-some-glitches/> accessed 29 August 2018.

authentic proof of exchanges. Once information has been transmitted via Blockchains, it cannot be removed since its reflects publicly in the ledgers of all the users on a Blockchain network. This is why Blockchain technology can have an unfortunate and ironic run in against Data Protection laws. Specifically, Blockchain technology appears prima facie to be incompatible with one of the GDPR protections to personal data which is generally referred to as the Right to be Forgotten.

6. The Right to be Forgotten

The "right to be forgotten" is a protection guaranteed by the General Data Protection Regulation (hereinafter "GDPR"), and is also present in India's Personal Data Protection Bill, 2018. So-called by the media covering the *Google Spain v AEPD and Mario Costeja Gonzales* case wherein Mr. Costeja demanded that Google remove from its search results links to newspaper coverage of a 1998 event where his assets had been foreclosed as a result of non-payment of debts. The European Court of Justice ruled in favour of Mr Costeja. Since then similar cases have shown up in the Indian jurisdiction,[11] the recent Right to Privacy judgment, *Puttuswamy v. UoI*,[12] has mentioned it in those terms, the White Paper has sought opinions on the nature of a "right to be forgotten" and the Srikrishna Committee has included it in their proposed Data Protection Bill.

7. Emergence of the Right to be Forgotten

The Right to be forgotten is a right that has emanated from the jurisprudence of the European Court of Justice. It was a media created nomenclature given to the demand of users to have information about them on the internet to be removed, be made less accessible.

The European Union's Data Protection Directive 1995 has led to the most interesting jurisprudence in the area of an individual's right to privacy in cyberspace. In *Google Spain and ors v. Agencie Espanola de Proteccion de Datos (AEPD)* the European Court ruled that the data "controller" search engine is obliged to remove links to pages containing the complainant's name. Upholding the right to be forgotten, it held that the fundamental rights of the "data subject" override the economic interests of the search engine operator as well

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11 'Right to Be Forgotten: A Tale of Two Judgements' (*The Centre for Internet and Society*, 7 April 2017) <https://cis-india.org/internet-governance/blog/right-to-be-forgotten-a-tale-of-two-judgments> accessed 11 April 2018.

12 'In India's Right to Privacy, a Glimpse of a Right to Be Forgotten' (*The Wire*, 24 August 2017) <https://thewire.in/171290/right-to-privacy-a-glimpse-of-a-right-to-be-forgotten/> accessed 11 April 2018.

as the interests of the general public which would otherwise have access to such no longer relevant data.

8. Google Spain v AEPD and Mario Costeja Gonzales

A multitude of fascinating questions are being thrown up in this discourse one of which is the focus of this enquiry called the "right to be forgotten". So called by the media covering the *Google Spain v AEPD and Mario Costeja Gonzales* case wherein Mr. Costeja demanded that Google remove from its search results links to newspaper coverage of a 1998 event where his assets had been foreclosed as a result of non-payment of debts. This was not a question of defamation, nor was it false information, the Court of Justice of the European Union did not demand that Mr Costeja show that any harm had been suffered to him as a result of these (true) articles showing up on Google searches of his name. Yet, the Court of Justice ruled in favour of Mr Costeja.

9. NT1 & NT2 v Google LLC, [2018] EWHC 799 (QB)

The issue is of two persons "right to be forgotten" by specifically delisting their information, or having their information deindexed, by the operators of Internet Search Engines. The basis for the claims is the data protection law and the English tort law on the misuse of private information. Whereas in Google Spain the judgment in the claimant's favour had ironically catapulted Costeja into memory, the claimants have been kept anonymous in this case so as to prevent their victory from being self-defeating.

The legal framework relies on a variety of legislative provisions, including the Data Protection Act 1998 (due to the applicability of EU directives in the UK), the Rehabilitation of Offenders Act 1974, the Google Spain case, the EU charter of Fundamental Rights creating a "right to be forgotten", and the tort of misuse of private information recognized in *Campbell v MGN* [2004] UKHL 22.

Whereas NT1's right to be forgotten was not upheld, NT2's was. NT1's claims were rejected on the grounds that: the information is about a business crime, its prosecution and punishment; the information when published was related to his business life, not his personal life; it has not been shown to be inaccurate; he has refused to accept his guilt, has misled the Court and the public, and demonstrates no remorse; he remains in business and the information serves the purpose of minimising the risk that he will continue to mislead.

It is important to note that NT2's right to be forgotten is upheld in the light of *Google Spain* because 1) the conviction was for conspiracy to carry out surveillance which attracted a 6

month's imprisonment that had been borne out; 2) that the conviction was not one involving dishonesty, and indeed was based on NT2's plea of guilt, so there was no moral turpitude that NT2 could be faulted for; 3) and since NT2 has frankly acknowledged his guilt and expressed sincere remorse; showing a clarity in conscience, which possibly demonstrates that NT2 was no longer the same person who carried out the actions, in a manner of speaking. All of this is extremely pertinent for us to recognize that there is emerging certain criteria for what constitutes a valid exercise of the right to oblivion.

10. The EU General Data Protection Regulation

Shortly after the UK case, the time came for the enforcement of the European General Data Protection Regulation, on 25th May, 2018. The law came into existence two years before this date, giving data collectors and member countries of the EU the interim time to prepare for its implementation. Yet, given the frenzy which was caused by the GDPR coming into force, the flurry of emails around the time notifying changes to privacy policies, and even causing multiple websites to block access to them by European users, websites seemed dramatically underprepared for the enforcement of the GDPR.[13]

Article 17 of the GDPR deals with the right to erasure ('right to be forgotten') which provides for the data subject (i.e. the identified or identifiable natural person that the information is related to) to demand the removal, deletion or erasure of personal data concerning them. This has to be done "without undue delay". There are some conditions which the exercise of this right needs to be fulfill, such as: the data is not necessary anymore for the purpose it was collected, consent for the processing has been revoked by the data subject, processing has been objected to due to proof of profiling and direct marketing by profiling of the data subject and there's no legitimate grounds for overriding the revocation of such consent for processing, unlawful or illegal processing, requirement of erasure can be raised by a law in a specific member state of the EU, data collected in relation to a minor for online services need to deleted if consent given by guardians is revoked by the minor on attaining adulthood.

In all of the cases outlined above, personal data will have to be erased from public memory as per the GDPR.

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13 Alex Hern and Jim Waterson, 'Sites Block Users, Shut down Activities and Flood Inboxes as GDPR Rules Loom | Technology | The Guardian' *The Guardian* (24 May 2018) <https://www.theguardian.com/technology/2018/may/24/sites-block-eu-users-before-gdpr-takes-effect> accessed 23 August 2018.

The Second clause does offer some respite by providing reservations in cases where factors such as cost of implementation, and availability of technology can be taken into consideration. It allows data controller to take reasonable steps, including technical measures, to remove the data and links to and copies of the same, from public view. All of this would be great news for Blockchains based services if only the data controller could be easily identified. A controller, per the GDPR, can be a natural or legal person, or public authority, agency or other body, whose job is to figure out the purpose for which data is being processed and the way it shall be processed.

By virtue of it being decentralised, in a Blockchain network every person who is part of the network will jointly be the data controller for that network. Erasing the data though will not be a simple process in case a demand is made to erase particular information or a transaction from the memory of a Blockchain network. It will demand the mobilization of a majority of the participants on that network to participate in the modification, which will need the deletion of an entire node and all other information stored in it in order to remove the requested information from the shared/distributed memory of the Blockchain network.

11. Introducing the Right to be Forgotten in the Indian Jurisdiction

The issue of a right to be forgotten has been raised on a few occasions in Indian courts.

In *Dharamraj Bhanushkar Dave versus the State of Gujarat* (Special Civil Application No 1854 of 2015) delivered on 19/01/2017 the contention of the complainant was that a website (Indiankanoon) and Google had published an unreportable judgment without seeking proper authorization from the Registrar of the Court. The complainant had approached the websites to request the removal of the judgement from public access, but to no avail, and so had approached the Hon'ble High Court. The High Court took a stance that the word "reportable" in the High Court Rules in relation to a judgement is only limited to its being reportable in a law reporter; it does not cover websites run by third parties. The Court's decision seems to be based upon the failure of the complainants to produce substantiation of their contention such as any provision in law whereby Indiankanoon or Google can be restrained by the Court from publication of the said judgment.[14] The wisdom of the court eking out such a restrictive meaning of the word "reportable" is unclear, since the setting of precedent in judicial function does not find its limits within law reporters[15]. Nevertheless,

14 'Gujarat HC Rejects Plea To Restrain Websites From Publishing "Non-Reportable" Judgment [Read Order]' (*Live Law*, 23 January 2017) <https://www.livelaw.in/gujarat-hc-rejects-plea-restrain-websites-publishing-non-reportable-judgment/> accessed 24 August 2018.

15 'Right to Be Forgotten: A Tale of Two Judgements' (n 5).

the argument of the petition to attempting to make out an Article 21 case is rejected by the court. Since this decision, the Puttuswamy judgment was given, and it would be interesting to observe if similar cases would have better success since the Supreme Court's clarification on the presence of a Right to Privacy under Art 21.

In *K. S. Puttuswamy, J. v Union of India*, (Writ Petition (Civil) No 494 of 2012) delivered on 24th August 2017, Kaul, J. in his separate opinion has expressed serious concern over the ubiquitousness of the memory in the digital age. He dwells at great length on the importance of mistakes and forgetting those mistakes in the development and growth of an individual as he discusses "the comfort" of knowing that their mistake will be typically forgotten after some time. This comfort is no longer present in the digital age, since "preservation is the norm and forgetting is a struggle". Interestingly, Victor-Meyer-Schoenberger had over a decade ago pressed on the importance of creating timelines for the storage of data sets, and not let them linger on in perpetuity, to make deletion after some specified time a default, either through design of the technology itself or through its implementation.[16]

Meanwhile, a petition has been presented before the Delhi High Court which seeks to put into place a legal framework for the "right to be forgotten" and its application in cyberspace.[17] The petition avers that since "privacy is a recognized fundamental right in India, and based on the above-mentioned Provisions of Information Technology Act and Rules, the Petitioner has submitted that in a similar situation, Indian courts should also follow the line of thinking followed by the EU Court in the above referred judgment. Once the Hon'ble Court recognizes this right, Individuals will get the right to seek removal of irrelevant and incorrect personal data from the search results." The Petition relies upon Rule 3(2) of the Intermediaries Guidelines Rules, 2011, which requires that the intermediary observe due diligence while discharging his duties. They seek to activate the rule making power provided by the safe harbour provision in Section 79 of the IT Act to incorporate the rule that intermediaries should inform users of a computer resource should not host, display, upload, modify, publish, transmit, update, or share any information that "is invasive of another's privacy."

It is clear that the right to be forgotten is itself being introduced as a new right in Indian law, and it will take on uniquely Indian characteristics as it develops. One aspect of the

16 Viktor Mayer-Schoenberger, 'Useful Void: The Art of Forgetting in the Age of Ubiquitous Computing' (Social Science Research Network 2007) SSRN Scholarly Paper ID 976541 <https://papers.ssrn.com/abstract=976541> accessed 3 July 2018.

17 'Delhi HC Hearing NRI's Plea For "Right To Be Forgotten"' (*Live Law*, 5 February 2017) <https://www.livelaw.in/delhi-hc-hearing-nris-plea-right-forgotten-read-petition/> accessed 24 August 2018.

right to be forgotten is its enforcement, which must be done at the first instance by the data fiduciaries/processors. There is a large overlap in the role of data processors with online intermediaries. Intermediaries, like data processors, are defined by their role of processing data on behalf of a third party. It might therefore be illuminating to see whether and how intermediaries have in the past complied with legal requirements of taking down information. Intermediary liability and its contours can provide an insight into how risk prone or risk averse intermediaries are while balancing interests of certain kinds of speech *vis a vis* the risk of them losing safe harbour protections, and what that bodes for data processors in their turn of complying with the exercise of right to be forgotten.

12. Intermediary Liability and the Responsibility to Forget

There is a lot we can learn about future patterns of behaviour regarding the right to be forgotten, now that it has been more clearly encapsulated under the Puttaswamy judgments and the draft Data Privacy Bill, by taking a look at intermediary guidelines. Intermediary liability has seen a lot of play in the Indian jurisdiction with regard to taking down content found objectionable as copyright violations, defamatory or hateful by either third parties or the State. The Information Technology Act defines intermediaries as any entities that store, process, transmit, etc., electronic records on behalf of another person. Intermediaries are defined broadly in order to cover telecom service providers, ISPs, search engines, blogging platforms, social media platforms, cyber cafes, among other things. Intermediaries cover just about anyone and anything. Intermediary liability is a means for allocating some degree of responsibility over intermediaries in order to curb illegal activities on the internet. Section 79 of the Information Technology Act 2000 provides a safe harbour clause vide which intermediaries can be excused from liability on fulfilling the requirements of due diligence and absence of actual knowledge of infringement or illegality.

Since the Shreya Singhal (2015) decision, immunity to intermediaries has been strengthened by reading down 79(3)(b) to instances where Intermediaries "obtain actual knowledge of a court order" asking them to disable access to certain materials.[18]

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18 'Shreya Singhal vs U.O.I on 24 March, 2015' <https://indiankanoon.org/doc/110813550/> accessed 20 August 2017; 'The Supreme Court Judgment in Shreya Singhal and What It Does for Intermediary Liability in India?' (*The Centre for Internet and Society*) <https://cis-india.org/internet-governance/blog/sc-judgment-in-shreya-singhal-what-it-means-for-intermediary-liability> accessed 19 August 2017. Further, the IT (Intermediaries guidelines) Rules, 2011, has imposed a due diligence consideration on intermediaries, such as entering into User Agreements.

The Shreya Singhal judgment also instructed courts to not exceed Art 19(2) restrictions while interpreting exceptions for immunity under Section 79. On the other hand, Kamlesh Vaswani's petition demanding the take down of pornographic websites reopens these settled issues, arguing that all pornography falls under the Art 19(2) restriction of information against the interests of 'public order', 'decency or morality', bringing the conversation back to where it was before the Bazee case.[19]

It reflects a lack of understanding of the workings of the internet to hold disinterested intermediaries (like ISPs, Web-hosting services, Network Service Providers) as criminally liable for sharing unlawful materials, even though it seems convenient to the Government to do so.[20] Intermediaries are usually unaware of the content passing through their systems. In practice, ISPs overcomply with blocking orders because they have little to immediately lose by not protecting free speech, and much to lose by allowing access to unlawful content.[21] Indeed, it appears that the ability to reject a take down request is inversely proportional to the depth of the intermediary's pockets.[22] Smaller companies have a greater tendency to act in risk averse ways.[23]

Intermediaries are also governed by the Intermediary Guidelines (Rules) framed under Sections 87 (which gives power to the Central Government to make rules) and 79 of the Information Technology Act. The existing Guidelines were put into place in 2011, and they are an expansion of the safe harbour provision under section 79. Under Rule 3, the Guidelines provides an expansion of the way due diligence is to be observed by intermediaries. As the law stands today, intermediaries must take down infringing content only pursuant to having "actual knowledge" of the unlawful nature of the data or information passing through a resource controlled by it. Since the Shreya Singhal judgment in 2015, actual knowledge

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19 Chinmayi Arun, 'Gatekeeper Liability and Article 19 (1)(A) of the Constitution of India' (2014) 7 NUJS L. Rev. 73.

20 Chinmayi Arun and Sarvjeet Singh, 'Online Intermediaries in India' (Social Science Research Network 2015) SSRN Scholarly Paper ID 2566952 <https://papers.ssrn.com/abstract=2566952> accessed 15 August 2017.

21 Rishabh Dara, 'Intermediary Liability in India: Chilling Effects on Free Expression on the Internet 2011' <cis-india.org/internet-governance/intermediary-liability-in-india.pdf>.

22 Daphne Keller, 'Empirical Evidence of "Over-Removal" by Internet Companies under Intermediary Liability Laws' (*Center for Internet and Society at Stanford Law School*, 12 October 2015) <http://cyberlaw.stanford.edu/blog/2015/10/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws>.

23 Ibid.

has meant knowledge of a court order or government notification requiring takedown of the content. Whereas, between 2011 and 2015, there was a period of uncertainty regarding the extent of liability of intermediaries. This was due to the Single judge bench decision of Delhi High Court in Super Cassettes v. My Space.[24]

The *Super Cassettes* decision caused shock waves across the information technology industry, since it set a precedent for prosecuting intermediaries as primary infringers by making the safe harbour provisions under section 79 inapplicable to cases of copyright infringement. The judgment was concerning to platforms since it made mySpace liable despite demonstrating that it did not know and could not have known about each instance of infringement, that it ensured that all instances of infringement that were brought to its attention through merely a complaint (not even waiting for a court order for "actual knowledge") were removed from its platform, and that despite their offer to super cassettes to include their songs to their database which would make it easier for their algorithms to identify and remove infringing material from their platform, super cassettes refused to do so.[25] Nonetheless, for 6 years, the enforcement of these guidelines were put to peril within the jurisdiction of the Delhi High Court. More importantly, in the absence of any guidelines, where there is no legal requirement of giving out reasons for taking down of content, intermediaries were given overbroad powers of decision-making that could infringe upon free speech rights of citizens. Implementing copyright laws requires an understanding of what constitutes infringement and what comes under fair use under section 52. Fair use laws are quite complex and present difficulties even to courts enforcing these rights. The act of enforcing intellectual property rights requires having to balance constitutional morality vis a vis private interests vis a vis public policy.[26] Such broad powers should not have been entrusted to platforms who take such decisions behind closed doors, especially when their decisions have such a massive impact on what constitutes free speech.

It was finally in 2016 that the appeal of mySpace against the single bench decision found a decision by a division bench of the High Court of Delhi overturned the upheaval caused by this judgment. In mySpace v Super Cassettes, 2016, the division bench constituted by

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24 2011 (48) PTC 49 (Del)

25 https://cis-india.org/a2k/blogs/super-cassettes-v-my-space

26 Shamnad Basheer, 'Breaking News: John Doe Denied For Dishoom!' (*SpicyIP*, 23 July 2016) <https://spicyip.com/2016/07/breaking-news-john-doe-denied-for-dishoom.html>. As Patel, J., said in Court, "I understand that the Plaintiffs are anxious to protect their copyright. As against that, there are other public law rights of wider import that Courts must protect. I have very little doubt as to which is the more important."

Justices Ravindra Bhat and Deepa Sharma, found that the single bench had not engaged with the Intermediary Guidelines Rules which came out in 2011. The interpretation of "knowledge" test by the single bench was found to be not proper. Addition or modification of content by adding advertisements to the uploaded videos was done by an automated process which could not discern the lawfulness of the content uploaded on its own. It found that since mySpace was a free for all platform and any user could upload any content to it, it did not initiate transmission, nor choose the audience or receiver, and therefore the content uploaded was outside of mySpace's "tacit or expressed control or knowledge". As far as the overriding powers of the Copyright Act are concerned, the division bench found that the Intermediaries Guidelines provides an expanded requirement of due diligence, such as publication of terms of use prohibiting the uploading of unlawful or infringing materials, which mySpace has done. Further, 79(3) read with Rule 3(4) of the Guidelines requires the intermediary to take down any infringing content on receiving actual knowledge, or by receipt of email or in writing, in which case it must take down content within 36 hours or lose safe harbour provisions. Quite obviously, this rule envisions the applicability of safe harbour provisions for intermediaries even in cases of copyright infringement.

13. Proposed Amendments to Intermediary Guidelines Rules

The newly proposed amendments to the Intermediary Guidelines[27] indicate that the State would really like to return intermediaries back to the status which existed prior to *mySpace v. Super Cassettes*. In fact, this amendment to guidelines would apply more stringent terms on all intermediaries. In terms of cooperation with government needs, it seems there is much more that could be desired of intermediaries. If these proposed amendments come to pass, Intermediaries would be required to proactively seek out and prohibit the uploading of unlawful content. This would recreate a situation where intermediaries must take responsibility for the kind of speech made on their platforms, seeking out defamatory, incendiary, copyright infringing or other unlawful acts in cyberspace. Instead of waiting for complaints to put a stop to unlawful acts, intermediaries would be expected to proactively locate and take down unlawful content, failing which they will lose their safe harbour protections.

This see-sawing on the question of take down of content, the absence of clear guidelines, the differential standard with regard to copyrighted and other speech, herald similar tidings for the enforcement of the right to be forgotten, pending greater clarity on the broad limits of the exercise of the right, and its interaction with technological feasibility. Uncritical take

27 MeitY, 'Draft Intermediary Guidelines Amendment 2018' <https://www.prsindia.org/billtrack/draft-information-technology-intermediaries-guidelines-amendment-rules-2018>.

down of content on the issuance of government orders is something that one must be wary of with the right to erasure of persons in public office, in issues involving behaviour outside the course of employment.

Indeed, it would be useful to examine what has been the tendency of Indian courts as they have attempted to define the contours of a right to have information about oneself be deindexed from Google, or erased from the Internet.

14. {Name Redacted} versus the Registrar General

The most striking application of the Right to be Forgotten in India has been in a Karnataka state High Court judgement which has invoked the modesty of a woman instead of a right to privacy to enforce a right to be forgotten.[28] The writ petition was filed before the court seeking immediate removal of the name of the petitioner's daughter from High Court's digital records. The petitioner's daughter had filed a criminal complaint against her husband at some stage in the litigation between the husband and wife. In the final stages of a parallel Civil suit, she had agreed to a compromise which included withdrawing the criminal allegations against her husband and the matter had been amicably resolved and thus, she approached the court which quashed the criminal proceedings. It was the contention of the petitioners that the appearance of the vitals of these proceedings on doing a simple Google or Yahoo search of the petitioner's daughter's name would have repercussions on her relationship with her husband and reputation in society. The court took this into account and asked the court Registry to mask the woman's name in the cause title of the order passed in the proceedings instituted by her husband, who was the accused in those criminal proceedings, and also wherever her name appeared in the body of the order. The Court went on to say that her name need not be masked in the High Court's website or in certified copies of the order.

To implement this order, Google and other search engines which gather data by automatic algorithms that "crawl" through the internet and create links to all information present on it, would have to selectively de-index links to the High Court website that would otherwise appear in their search results. What is most curious though, is that, unlike the Gujarat High Court, the Karnataka High Court did not seek appropriate provisions of law to support its order to mask the petitioner's daughter's name, and de-index search results corresponding to the case. By way of explanation, the Court offered its view that its decision "is in line with the trend in Western countries where they follow this as a matter of rule "Right to be

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28 {Name Redacted} vs Registrar General on 23rd January 2017, W.P. No. 62038 of 2016 (GM-RES), https://indiankanoon.org/doc/12577154/ (last visited Aug 30, 2018).

forgotten" in sensitive cases involving women in general and highly sensitive cases involving rape or affecting the modesty and reputation of the person concerned." Much is problematic with this line of argument by the Hon'ble court. Whereas the right to be forgotten which has emerged in Western countries has little to do with sensitive cases involving women and entirely to do with a gender-neutral right to privacy of the individual where the individual interest overrode the interests of the data controller and the "preponderant interest of the general public in having... access to the information." The second half of the explanation regarding "modesty and reputation" may stand muster to scrutiny if delinked from the first half of the sentence, and taken in the context of the substantial Indian jurisprudence offering anonymity to victims of rape and sexual assault, in criminal proceedings against their perpetrators. There is 228 A (3) of the IPC which punishes the publication of the name of the victim, and though it doesn't apply against judgments published by High Courts or Supreme Court, several judgments from 2003 onwards have advised courts to avoid mentioning the victim's name.[29]

15. Implications of the Aadhaar Cases: Puttaswamy v State 2017, Puttaswamy v State 2018

Undeniably, the most important development in recent times has been the discussion over the UIDAI, the issue of the Universal Identification Authority of India card, more popularly known as Aadhaar.

In 2014, Justice Puttaswamy and Mahesh Khanna instituted a writ petition against the vires of the scheme issuing the UIDAI card, a unique identity card, along the lines of a social security number, which would be used to link all government provided services owed to every citizen of India. The multiplicity of cards, for accessing government subsidised ration for persons living below the poverty line, for accessing gas subsidies, election voter card, various yojana/ scheme cards for housing, schooling or other benefits, PAN card for tracking sale, purchase and taxation, etc, were causing bureaucratic inconveniences. The Aadhaar card was touted as the card to end all cards. Several civil society members were concerned about the kind of ability a single identity database would create for surveillance of individuals, and the power it would give to the government over its subjects. Did the promise of convenience in distribution of state largesse outweigh the concerns of creating the perfect tool for abuse by a totalitarian regime?

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29 Devika Agarwal, 'Anonymity for Rape Victims: Law Must Strike Delicate Balance on Holding Internet Intermediaries Liable' (*Firstpost*, 9 June 2018) <https://www.firstpost.com/india/anonymity-for-rape-victims-law-must-strike-delicate-balance-on-holding-internet-intermediaries-liable-4503863.html> accessed 30 August 2018.

Then in 2016, the Aadhaar Act was passed (as a money bill) and it gave the protection of legislative enactment to the UIDAI card which had been until then just a policy. While in the process of hearing arguments about the constitutionality of Aadhaar, the Supreme Court found that there was some ostensible lack of clarity over the status of a right to privacy under the Indian constitution. The argument was that a 6 judge bench in *MP Sharma* had found that the Indian constitution did not guarantee a right to privacy. The first part of our problem here is, whether the right to privacy, of which the right to be forgotten is a part, or a facet, is guaranteed under the Indian constitution. Explicitly, we can tell by a bare reading of the Constitution that it does not state that there is a right to privacy in those words. It does, though, guarantee a right to life and personal liberty, under article 21. It seems fairly logical to bring a right to privacy under such a right to personal liberty, because, as Warren and Brandeis have argued, a right to privacy can be characterised as a right to be let alone, an aspect of personal liberty. Yet, *Kharak Singh* and *MP Sharma* were both built on the *Gopalan* doctrine according to which the fundamental rights are to be read as silos, and as exclusive of each other. Using this formula, in *MP Sharma* where the constitutionality of using books of account maintained by the accused himself which were found during tax raids was tested against Art 20(3), the right against self-incrimination, the Supreme Court held the view that unlike the US Constitution where a right to privacy had been found to exist under the US Constitutional fourth amendment, a similar right was not present under the 20(3) of the Indian Constitution, and since it was excluded from the scope of Art 20(3) it could not be sought to be covered elsewhere. In *Kharak Singh* where the constitutionality of a police regulation was tested against Art 19(1)(d), similarly, a freedom to move freely throughout the territory of India was found to not be infringed by a midnight knock on the petitioner's door. Since it was excluded from the scope of 19(1)(d), it could not be found to be covered under any of the other rights, as per the *Gopalan* doctrine. This idea that a law of preventive detention, for instance, was to be tested only against Art 22 which was a complete code in itself was challenged and left behind after *RC Cooper* and *Maneka Gandhi*. It should be noted, though, that in both cases, either minority or majority or dissenting judgments noted that and quoted *Wolf v. Colorado* and found that a right to privacy is to be found under an expounded scope of 'personal liberty'. These latter decisions established that fundamental rights were interrelated and could not be read in isolation from each other. The idea was established that personal liberty was a concept not encoded entirely in Art 21 but was only given special recognition through Art 21. The settled position in constitutional law now is that the validity of a state action is not to be tested against its object but the effect it has on the constitutional guarantees of freedom. With this evaluation, it becomes clear that earlier decisions which refused to engage with the existence of a right to privacy were mistaken in their assumptions about how to read the fundamental rights in relation

with each other, and therefore, to the extent that they excluded the application of Art 21 on a case where protections under Art 20(3) were found to be inadequate to provide cover, the reasoning of these decisions are no longer binding.

The plurality decision of the SC finds that although the subsequent decision of *Gobind v. State of MP* does not contain an explicit statement of the guarantee of a right to privacy, *Gobind* did lay the groundwork for the decisions that followed. The reasoning in *Gobind* relies on an assumption that a right to privacy is guaranteed, it even refers to the developments of the US Supreme Court with regards to the right to privacy in cases such as *Griswold v. Connecticut* and *Roe v. Wade*, and it includes a rider that such a fundamental right must be subject to restrictions based on compelling public interest.

Much has been said about Justice Chandrachud's exemplary judgement in this case, and many have waxed lyrical about his prose, his clarity, the structure of the opinion, and that it has, remarkably for Indian judgements, an index. There is little Chandrachud, J. leaves to be said about the right to privacy. From a discussion of the present confusion over precedents, to an in-depth engagement with the origins of a right to privacy, taking us back to Locke and property, to challenges to the idea of the impenetrability of the home by the state from feminist jurisprudence, to different facets and dimensions of privacy that have been upheld by Indian courts over the years where privacy has been implicit in the protection of other fundamental rights.

It is not in Justice Chandrachud's but in Justice Sanjay Kishan Kaul's separate, yet succint, opinion, though, that we find reference to and engagement with the right to be forgotten.

Justice Kaul seems to have truly appreciated the threats that big data is posing if left unregulated and unchecked. According to his opinion, there is no question about whether or not privacy is a right. The question is whether privacy is a common law right or a fundamental right, part of the grundnorm. He says privacy is an inherent right, about respecting the wishes of an individual and it is undesirable to ignore a person's wishes without a compelling reason to do so. As Kaul, J., rightly points out, the global conversation on privacy has reemerged in force in its contrast against the safeguarding of security. Privacy interests arise versus the state as well as versus non-state actors. Privacy concerns qua the state relate to surveillance and profiling. He recognizes that technological progress has created tools which were hereinbefore not available to the state to aid in its practices of surveillance, and these tools have invasive abilities and potential that are unimaginable. The EU GDPR defines profiling as any form of automated processing of personal data which evaluate personal aspects relating to a natural person to analyse or predict aspects of that

natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements. Such profiling, per Kaul, J., may lead to discrimination along the lines of religion, caste, location, etc., even though it can be a tool for furthering public interest and national security.

Privacy concerns can also arise qua non-state actors, parties to whom we may even explicitly grant access to our information. Kaul, J. is appropriately fascinated by the fact that Uber, facebook, alibaba, airbnb 1. are all just data aggregators, 2. do not produce the information they exploit in their businesses, and 3. have access to intimate details of the lives of its users, such as places they frequent, the people they know, the consumer goods they prefer, the places they travel to. The access to private, personal, confidential information in the hands of non-state actors is all pervasive in this digital economy. Justice Kaul's opinion acknowledges that knowledge about a person gives power over that person. This power is usually asociated with Big Brother type state surveillance, but even non-state actors can wield it in ways that will chill speech and curtail democratic freedoms. Hence, there is an unprecedented need for regulation over the extent to which data can be stored, processed and used by non-state actors as well as the State. He reiterates that privacy is essential to liberty and dignity and is being upheld not just as a right but as a right fundamental to our constitutional polity, and that the fascet of privacy that most bothers us today is informational privacy. The most important contribution of Justice Kaul's opinion is to expound on two aspects of informational privacy which were left out by previous opinions: the right to publicity and the right to be forgotten. He foregrounds this discussion with stating that "the right of an individual to exercise control over his personal data and to be able to control his/her own life would also encompass his right to control his existence on the internet." He cannily points out that people evolve and they should not be forced to carry the burden of their mistakes throughout their lives, neither should they live in fear that their expressions will be associated with them forever and thus refrain from expressing themselves.

"68. Whereas this right to control dissemination of personal information in the physical and virtual space should not amount to a right of total eraser*(sic)* of history, this right, as a part of the larger right of privacy, has to be balanced against other fundamental rights like the freedom of expression, or freedom of media, fundamental to a democratic society.

69. Thus, the European Union Regulation of 2016 has recognized what has been termed as 'the right to be forgotten'. This does not mean that all aspects of earlier existence are to be obliterated, as some may have a social ramification. If we were to recognize a similar right, it would only mean that an individual who is no longer desirous of his personal data to be processed or stored, should be able to remove it from the system where the personal

data/ information is no longer necessary, relevant, or is incorrect and serves no legitimate interest. Such a right cannot be exercised where the information/ data is necessary, for exercising the right of freedom of expression and information, for compliance with legal obligations, for the performance of a task carried out in public interest, on the grounds of public interest in the area of public health, for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, or for the establishment, exercise or defence of legal claims. Such justifications would be valid in all cases of breach of privacy, including breaches of data privacy."

These few paragraphs capture a great deal. Even though the usage of "if we were to recognize a similar right" implies that the judgment is not recognizing a right to be forgotten, it is speculating on what the limits of such a right would be, if provided. It suggests that a right to be forgotten would not be a right to be forgotten, but would allow an individual who so desired to "remove it from the system where the personal data/ information is no longer necessary, relevant, or is incorrect and serves no legitimate interest". Even though it references the GDPR, this characterisation of the right to be forgotten captures more closely the idea as forged in the Google Spain case rather than the technicalities and qualifications of the GDPR provision on the right to erasure.

After establishing that a right to privacy was guaranteed by the Indian constitution under the lattices of Articles 15, 19, 21, the *Puttaswamy v UoI* judgement aka the Aadhaar judgement from 2018, went on to discuss the vires of the UIDAI Act. It did not find the Act to be ultra vires the Constitution, but it did make changes to some provisions.

For instance the judgment finds that the time period for data retention in the UIDAI Act is violative of the right to be forgotten. It decrees decreasing it from 5 years to 6 months, except in cases where retention is ordered by court. There is no provision of deleting biometric information once the data has been gathered, in any circumstances.[30] This opinion also quotes Kaul, J.'s opinion in 2017 Puttaswamy in relation to the right to be forgotten.

16. Sri Krishna Committee's Proposed Personal Data Protection Bill

The developments on the Right to be forgotten in European Court of Justice is based on the provisions for erasure in the European Data Protection Directive, 1995. Whereas, the Indian High Courts so far have not received clear indication from the legislature of implementing a right to be forgotten policy in the Indian jurisdiction, it has been mentioned in the Sri Krishna Committee Report, and it is present under section 27 of the Personal Data Protection

30 Justice K. S. Puttaswamy v. Union of India, 2017, para 205, CJI's opinion, pg 282.

Bill proposed by the SriKrishna Committee as The Right to be Forgotten in a chapter titled Data Principal Rights. Interestingly, though, the Right to be Forgotten in the proposed Bill takes the shape of a right to have a data fiduciary discontinue the disclosure of personal data shared with the data fiduciary. A lot will depend on what a data fiduciary is defined as. In the Bill, a data fiduciary is any person, including State, company, juristic entity or individual who determines the purpose and means of processing personal data. In order to arrive at the Google Spain decision, the Court had determined that Google and other search engines did, in fact, process data and so were data controllers. The qualifier of "who determines purpose and means" of data processing makes the scope of data fiduciary quite broad, and hinges on the understanding of the phrase "who determines". What actions make some individual or entity qualify as determining purpose and means of data processing? For instance, in the case of blockchains, as it is with GDPR's definition, the phrase "alone or in conjunction with others" could bring participants in a blockchain network under the scope of the provision, but the question of whether participants in a blockchain network "determine" the purpose and means of data processing poses a puzzle.

Even in terms of effects of the provision, the Bill's provision reads unlike a right to be forgotten and more like a right to have recording and sharing discontinued. It does not require the erasure of the data that has already been shared until the moment of objection. It only provides for discontinuance of sharing of data by data fiduciary. Neither does it aspire to have data fiduciary erase all data accrued with them until that time. In this sense, it is technically quite feasible for Blockchain networks to comply with this provision. Yet, given that the nature of Blockchain networks is different from the rest of the internet, where a removal of a link (i.e. discontinuation of sharing) shall impair the publicity of the information contained in that link, the value of blockchains lies in its ability to retain all history of exchanges in a snapshot which proves the authenticity of the information contained in that blockchain. Clearly, this provision will not be effective at providing informational privacy of data stored on blockchains.

As opposed to the GDPR, the Indian Personal Data Protection Bill creates an Adjudication wing (proposed Section 68) with Adjudicating Officers who will be responsible for determining whether cases are eligible to seek protection of Data Principal Rights proposed under Chapter VI. The GDPR does set up a Supervisory Authority in each member state, but it doesn't directly involve the authority with the implementation of data subject rights.

17. Conclusion

In conclusion, there are a variety of encumbrances that futuristic technology will have to overcome to comply with the newly created data privacy norms. So far, privacy-by-design solutions have focussed on making it mandatory to erase data, and preventing data controllers from keeping data unto perpetuity.[31] The very qualities that, for example, makes Blockchains so valuable, such as secure means of accountability, transparency and provability in transactions, solving the problem of double-booking and trust gaps in digital society, also sets it up to run afoul of the Right to be Forgotten. There are certainly some ways to avoid this unfortunate collision, for instance, careful phrasing of the right to be forgotten to prevent its incongruence with the nature of blockchains, but these will not be effective remedies for other technologies, forcing legislators to do as they are doing now: playing constant, infinite, catch-up with technological advances.

Meanwhile, in India, the Right to be Forgotten has taken a dimension of its own, that exceeds and, in some instances, ignores the historical evolution of the Right in the EU and UK. Further, there appears to be a divergence emerging between the common law understanding of the right to be forgotten which is being developed by the courts, and the statutory framing of the right to be forgotten which is more limited in scope, closer to its GDPR counterpart.

India's experience with the regulation of Intermediaries is quite concerning, as it suggests that we must be careful before entrusting wide, discretionary powers to private corporations (such as acting as quasi-adjudicatory bodies *vis a vis* the Right to be Forgotten) as their instinct for self-interest and self-preservation outweighs public interest. As the application of the Right to be Forgotten broadens in India, it will acquire shades that are currently not apparent. Greater clarity is required on the broad limits of the exercise of the Right to be Forgotten and its interaction technological feasibility, else it shall experience the same uncertainties as intermediaries have in relation to taking down of copyrighted content.

Ultimately, as the altercation of the Right to be Forgotten with Blockchain technology suggests, we need our courts to rise to the challenge that new technology presents, else we are doomed to a future of unending legislative catch-up. In the absence of courts developing agility in legislative interpretation of data protection norms, either technological growth shall be stunted, or there will be ever-diminishing respect for the legal principles, that have been so painstakingly established, in the technological sector.

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31 Mayer-Schoenberger (n 21).

International Air Transport Agreement, 1944: Challenges and Prospects

Manaswi*

Abstract: *The orderly development of international air transport is envisaged both under the Chicago Convention and the Montreal Convention. The development of international air transport has reached a crucial juncture. The choice is between maintaining a status quo via restrictive protectionist bilateral regime hampering development of air transport to its fullest potential or a plurilateral alternative for fuller grant of traffic rights via market expansion, where a multilateral superstructure stands unachievable. Ditching the outdated thinking focusing only on the national carriers and even subsidizing inefficient airlines , will truly serve the rising demand of air passengers.*

Keywords*:* International Air Transport, Chicago Convention, Montreal Convention, Traffic Rights, Market Expansion

1. Introduction

The Paris Convention, 1919[1] reflected the first multilateral advancement in the field of international air transport. The next significant convention to deal with myriad of political, technical and economic situations along with the boom in air traffic, was held at Chicago on 7th December, 1944. The convention, on one side, witnessed intense lobbying by United States for complete freedom in operation of airlines on international routes. But on the other hand, Britain and Canada called for international authorities for regulation of air transport. While, Australia and New Zealand wanted one authority to internationalize the major transport lines. Thus, after unsuccessful efforts to include the freedoms as a part of Chicago convention itself, two separate agreements were signed along with the convention. While the "international air services transit agreement", provided the right to fly over and the privilege to land for non-traffic purposes, the "international air transport agreement", contained the traffic rights.

Dissecting the Bottlenecks

Even during the negotiations of Chicago convention , most participants vehemently opposed the five freedoms being granted without frequency or capacity restrictions. They feared a monopoly in hands of United States due to the consequences of laissez faire and free market

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Convention Relating to the Regulation of Aerial Navigation, Oct 13,1919, 11, L.N.T.S.173, article 1: every state has complete and absolute sovereignty over the airspace above its territory

forces operating against the smaller nations. United States had already developed a strong base for aviation industry while most other nations especially the developing countries lacked even the basic infrastructural framework. Hence the transport agreement failed to become a part of the Chicago Convention.

Multilateral regime creates a superstructure of one international market where there exists none. The underlying issue, for a free-market philosophy to prosper, needs a rough parity in bargaining position of the nations. Thus, envisaging multilateral set up which maintains "equality of opportunity" while ensuring maintenance of state sovereignty, manifests several issues, the most important of which are:-

1.1. Freedom of air vis a vis the protectionist tendencies

Historical emphasis on protecting air transport as a "public utility" industry and need for its protection from wide-open competition, free ridership has translated into stringent governmental regulations of international airlines. The fear of predatory competition further restricts the foreign ownership of national airlines in most nations for instance the minimum national ownership requirement for registration of aircraft in US was raised from 51% to 75% by Central Aeronautics Act and the same still continues[2]. The requirements of "substantial ownership and effective control"[3] restrictions were introduced to prevent pedaling of traffic rights in undesirable hands, which is now linked with presumed state responsibility for national airline's prosperity. This concern percolates agreement formulation stage, service conditions determination and grant of traffic rights. Such restrictive practices manifest themselves into: "discriminatory user charges, ground handling, airway user charges" under bilateral agreements[4].

All these issues of restrictive practices deepen primarily where terms of reciprocal agreements are viewed as unfair by one contracting party but the criteria for unfair or discriminatory practices varies across nations. ICAO Procedures to correct the unfair situation are unsatisfactory since the words therein e.g. "insofar as possible", "as it may find practicable" impose only weak obligations.

Further, the bilateral agreements make it difficult to obtain fifth freedom traffic rights which need explicit authorization by the third nation involved. These fifth freedom rights

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2 US C. L.No. Civil Aeronautics Act , Pub L.No. 75-706,52 Stat 973 (1938) S. 1(13)

3 International Air Services Transit Agreement, Article 1 S.5, International Air Transport Agreement Article 1 S.6

4 CAB Report to Congress(1978)

are seen as third and fourth freedom of other nations who, in order to protect their own airlines, either don't grant these freedoms at all or demand adequate protection before granting the same.

In fact the globalization and ever-increasing competition, also makes nations to use national security and prestige reasons for maintaining a status quo situation via a protectionist bilateral regime for instance US used the national defense reasons for not placing air traffic rights under GATS. The economic protectionism imposes a barrier, in applying national treatment under GATS[5] and thus opening richest aviation market to smallest nations. Although, the Chicago Convention itself contained provisions for "freedom of action"[6] by states in national emergency situations and thus the national defense reason is only a veil to practice economic protectionism. Thus, the protectionist policy has resulted in patchwork of several restrictive bilateral agreements.

1.2. The freedom of air vis a vis peculiarity of third world nations

Most national airlines, especially in developing and less developed nations, for instance Africa, Latin America, perceive bilateralism as an economic shield to ensure their survival, via shielding inefficient airlines, as against the direct and collateral consequences of open competition on domestic airlines. These nations are mostly destination points not traffic sources. The small airlines face issues of small fleet, weak currencies, less dense routes networks, poor aircraft utilization, lack of finances, management and expertise, amongst others. Further IATA, which was created for resolving unsettled economic issues of Chicago Convention, has not shown much interest in protecting interest of smaller airlines. The unfair practices, structural disadvantages, restricted traffic rights and exchange of routes without preferential treatment, are other problem areas faced by these nations[7].

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5 Whether International Airline Service Should be included In the General Agreement on Tariffs and Trade(GATT): Hearing before the Sub commission on aviation of the House Comm on the Judiciary, 101st Cong., 1st session 18 (1989) [Hereinafter GATT-Airline Hearing],at 35 (statement of Rep. Sherwood Boehlert)

6 Chicago Convention,1944, article.89

7 "The effects of discriminatory and unfair civil aviation practices on the growth of air transport in developing countries", United Nations Conference on Trade and Development, T/B/860, 21July 1981, p.38

1.3. Fifth freedom traffic rights vis a vis choice of forum

The prime issue in case of forum air accidents involve –uncertainty of which nations' law is to be applied, financial resources of airlines at stake, forum shopping, problem of establishing aircrafts liability[8]. There has been a shift from fault-based liability under Warsaw Convention to strict liability regime under Montreal Convention, but the problem arises since different nations are signatories to different conventions. The compensation to be paid varies accordingly. Thus, for instance if the state of registry of the aircraft is bound by Warsaw Convention(or even by the Hague Protocol) and the aircraft can prove that it took all the necessary measure [9] then it can escape the liability completely. Thus, the aircrafts either to escape liability completely or to reduce the same, in case such burden arises . They register in nations with lenient regime, like Ethiopia.

Also, the judicially created doctrine of Forum Non-Convenience makes predictability of outcome uncertain due to discretionary nature of the doctrine. Thus, the dissatisfaction of international air travel among IATA members shows its higher complexity than that in 1929[10].

2. Historical Genesis of the Air Transport Agreement

The year 1919 marked the first prominent development in international air transport with the Paris Conference[11] laying down the groundwork for air regulation. The resultant convention was based on the principle of issue ad coelum[12], and thus marked a succession to the previous conflict between preserving state's sovereignty and granting air freedom, that arose in 1910 Paris Conference[13]. This conflict was evidenced in the first article[14] of 1919

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8 Francis Lyall, The Warsaw Convention-Cutting the Gordian Knot and the 1995 Intercarrier Agreement, 22 SYRACUSE J.INT'L L.& COM.67, 68-69(1996)

9 Warsaw Convention, 1929, Art.20

10 Francis Lyall, The Warsaw Convention-Cutting the Gordian Knot and the 1995 Intercarrier Agreement, 22 SYRACUSE J.INT'L L.& COM.67, at 67

11 Convention Relating to the Regulation of Air Navigation, Oct 13,1919 ,11 L.N.T.S. 173

12 Edward McWhinney, International Law and the Freedom of the Air-The Chicago Convention and the Future, 1 Rutgers-Cam L.J. (1969)

13 John C.Cooper, The International Air Navigation Conference, Paris 1910, 19 J.AIR L.& COM.127-43 (1952) (analysis of air navigation conferences on control of air space)

14 Supra n.1, article 1-"every state has complete and absolute sovereignty over the airspace above its territory"

Conference. Thereafter, the myriad of technical, political and economic problems called for a multilateral solution which, conferences prior to 1944 for instance the Ibero-American or Pan-American Convention, failed to achieve. Attempts to initiate international operations in pre-war era, were marred by restrictive nationalistic and anti-competitive tendencies. Consequently, the foreign flag carriers were refused even the technically or commercially feasible routes by a state exercising its sovereignty to protect interest of its national carriers or even where such routes were utilized, they were subjected to huge frequency and capacity restrictions. For instance, Italy demanded a share in receipt of British Imperial Airways to allow its landing in its territory[15]. Similarly, frequency restrictions were effectuated in the carriers operating between U.S. and France; U.S. and UK. Also development of domestic rather than international operations, was the primary focus of several nations in South America.

With this background in picture and weighing the trade-off between bilateral and multilateral negotiations, 52 nations assembled for the Chicago Conference in 1944. The nations struck a unanimous chord on technical aspects, but on economic matters stated opined divergently. In fact, the Chicago Convention[16], itself, on the one hand envisaged "equality of opportunity"[17] based advancement of international air transport, while on the other recognized state to have "complete and exclusive sovereignty over the airspace above its territory"[18], which discouraged most nations from free internationalization of air transport at the cost of state sovereignty.

Thus, at the negotiations of Chicago Conference ,United States advocated for a laissez faire market with free competition and thereby propagated "complete freedom of air" for developing the air transport "soundly and economically"[19]. While United Kingdom to supported the creation of "International Air Authority" for regulation of frequency, capacity , apportioning of air routes, among others. This proposition was backed by Canada by a more comprehensive framework. Single authority to internationalize main airlines, was suggested by Australia and New Zealand. Thus, broadly, the restrictive approach, was led majorly by Britain, which, called for, prevention of subsidized national prestige-oriented operations of air services and a check on unfair competitive advantage in favor of United

15 Oliver Lissitzyn, International Air Transport and National Policy. New York, Council on Foreign Relations, 396 (1942)

16 Convention on International Civil Aviation, Dec 7, 1944, 61 Stat. 1180, T.I.A.S. 1591, 15 U.N.T.S. 295

17 Ibid, Preamble

18 Ibid, article 1

19 Ibid, Preamble

Nations. But United States in its liberal outlook, was convinced that a vigorous overhauling of the international air transport to recognize its passenger coverage potential, time and cost saving, and progressive rate reduction. However, the skeptic view of most nations with respect to a multilateral regime and fear of domination by US, led them to dissent United States' view.

The resultant irreconcilable difference of opinions of nations resulted in the above-mentioned rights being given in the form of "privileges". The first two freedoms, i.e., the freedom to fly over the territory of other nation and the freedom to land for non-traffic purposes were incorporated in International Air Transit Agreement. While, the remaining three commercial privileges, i.e., the privilege of carrying passenger and cargo to (third freedom) and from(fourth freedom) the contracting state to the state of nationality, ,respectively and the privilege of carriage between two foreign destinations(fifth freedom), were incorporated in International Air Transport Agreement. Amongst the participating nations 29 accepted the former agreement and this number of signatories over the time period reached 133 nations[20], while the signatories for later agreement have come down from 15 (including acceptance by 3 nations with reservations)[21] to 11 nations[22] , with US backing out in 1946.

3. The Protectionist Approach

Various scholars have alleged the transport agreement to have turned to a dead letter with the most controversial being the fifth freedom .The restrictive view of traffic rights as property rights to be traded, usually via bilateral exchanges, in a way that balance of trade is maintained, is the reminiscent of mercantilist theory which still governs aircraft industry[23].In fact, the fifth freedom traffic rights, being in the nature of privileges, can be withdrawn by contracting nation via notice of six months to ICAO Council[24]. The above-mentioned privileges are with respect to "scheduled international services"[25] which

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20 Available at https://www.icao.int/secretariat/legal/List%20of%20Parties/Transit_EN.pdf, last assessed on 07.02.1993

21 Greece, Turkey, and United States accepted the transport agreement with reservations.

22 Available at https://www.icao.int/secretariat/legal/List%20of%20Parties/Transport_EN.pdf, last assessed on 07.02.2019

23 Oswald Ryan, Recent Developments in United States International Air Transport Policy, 1 Air Aff. 45 (1946)

24 International Air Transport Agreement, 1944, Article IV Section 1

25 Ibid, Article I, Section 1

need to be exercised "in accordance with the provisions of Chicago Convention"[26]. As opposed to the non-scheduled flights, which are subjected to only normal conditions and limitations[27], while scheduled international air service require "special permission or other authorization"[28] for operation in other state. Consequently, unilateral or bilateral agreement was the only way out for the availability of these privileges with respect to scheduled flights. This seems puzzling given the huge development of charter industry in the recent years which enjoy the protection of article 5 unlike strict regulation of scheduled services. In fact, article 6 established "charter of bilateralism"[29] and became "the starting point of restrictive bilateralism in the exchange of operational and traffic rights…"[30]. The problems in formulation of economic policies, with respect to traffic rights, continued even in post Chicago agreements.

The 1919 reciprocity principle re-asserted its dominance in exchange of traffic rights. The rift of restrictive- liberal approach reached a sort of compromise between US and UK, via Bermuda I Agreement, which , though, contributed greatly to liberalizing air transport services, yet, the principle of State Sovereignty strengthened the national government's role in international regime[31]. Also, nationality of airlines was inextricably linked with "substantial ownership and effective control"[32] criteria, which was initially incorporated in transit and transport agreements, to address the wartime concerns of identifying parties involved in such dealings and thereby to prevent free ridership and the issue of rights being pedaled in undesirable hands. This state sovereignty and strict ownership requirements formed the core of most bilateral agreements wherein traffic rights, like ownership rights, demanded right price to be given away[33]. Also foreign ownership, which invites predatory competition fears is, thereby, subjected to stringent regulations. For instance, US fixes 75%[34] holding of voting interests in hands of nationals, as its ownership requirement, additionally "… the applicant bears the burden of establishing that the substance of the

26 Ibid, Article I, Section 2

27 Supra n.17, Article 5

28 Supra n.17, article 6

29 Henry A. Wassenbergh, Parallels and Differences in the Development of Air, Sea and Space Law in the Light of Grotius'Heritage, 9 ANNALS AIR & SPACE L. 163, 171 n.16 (1984)

30 Ibid

31 Nicholas M.Matte, Treatise on Air-Aeronautical Law 229-50 (1981)

32 Supra n.13, Article I Section 6

33 Jacques Naveau, International Air Transport in a Changing World, 45 (1989)

34 Definition of 'citizen' in Federal Aviation Act

transaction is such as to be in accordance with the policy, as well as the literal terms of the specific statutory requirements…"[35]. Late 1970s ushered the era of deregulation in US, yet the strict foreign ownership restrictions continued.

In fact, foreign aircrafts often face discrimination either in form of overt acts , for instance, state subsidization, stringent ownership criteria or via stringent user charges, tariff and other subtle practices of higher landing fees, access issues at high density airports related to take off or landing, among others[36]. This is the wrong protectionism, where the civil aviation, seen as "face of the state"[37], views aircraft industry as a public utility sector which needs restrictive regulations. This runs counter to "sound and economic" operation of airlines inbuilt in Chicago Convention's preamble.

The air passenger rise has made blending "the economic realities that would accommodate changing social and technological needs with such immutable and sacrosanct principles as State Sovereignty and individuality of air carriers"[38], an impossible task. For instance, though the 1995 bilateral exchange between United States and Japan involving rights of Federal Express had Japan express its dissatisfaction for US building extensive network in Asia in routes which, as per Japan "belonged to its national carriers"[39]. Similarly, higher price, far lesser service and greatly reduced access to significant international hub at Heathrow , was the result of excessively regulated Bermuda II regime between US and UK.

The narrow interpretation of state interest promotes the heavy subsidization of even those airlines which are almost bankrupt for e.g., as happened in the case of Iberia, the Spanish airline. For staunch supporters, such restrictive regime, provides economic protection to national airlines from wide competition even if it comes at cost of higher safety efficiency and nations, including United States play the trump card of national security concerns for ignoring liberal exchanges, for instance, US used it for not placing air transport under GATS regime because of its underlying national treatment principle, which would risk opening

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35 Daetwyler, d/b/a Interamerican Airfreight Co., Foreign Permit, 58 C.A.B., 118,121 (1971)

36 Melvin A Brenner, James O Let & Elihu Schott, Airline Deregulation, p. 109, n.84

37 Henri A. Wassenbergh, Regulatory Reform- A Challenge to Intergovernmental Civil Aviation Conferences, 11 AIR L. 31,31 (1986)

38 R.I.P Abeyratne, The Air Traffic Rights Debate- A Legal Study, 18 Annals of Air & Space Law L. 3,27 (1993)

39 Andrew Pollack, Air Dispute Causes Role Reversal; Japan, Not U.S., Seems to favor Managing Trade, INT'L HERALD TRIB, 17(1995)

the richest aviation market to the smallest and heavily regulated nations[40]. Ironically, the Chicago Convention itself gives "freedom of action" to the nations in national emergencies[41] and hence the national security argument falls weak on that ground.

States in geographically or strategically advantageous locations use airspace sovereignty reasons to get exonerous concessions before granting traffic rights, which further hampers "equality of opportunity" principle. For instance to allow landing at Azores while using trans-Atlantic route, Portugal, used its unfair bargaining advantage to get Lebanon made the last port of call. The extra governmental concern in well-being of national airlines carriers comes forth in form of preferential immigration services, advertising restrictions, monopolies on check-in, reservation[42], etc, which triggers further in bilateral exchanges as a reciprocal reaction by contracting governments. This defoliates availability of adequate air transportation for the public. Though the Chicago Convention in its objective aims to "avoid discrimination between contracting states"[43], yet the non-binding recommendations by ICAO to overcome the unfair situation impose weak obligation. The cumbersome regulation and divergent relief mechanism under bilateral agreements if further problematic.

4. The Nexus between third World and Freedom of Air

Protection from foreign competition, rather than economic development, of domestic airlines has been the priority for least developed and developing nations. The colonization induced implications for aviation industry merited differently for them. For instance, while colonies of Belgium and Portugal, were allowed limited political activities, France allowed parallel liberty in such activities, UK gave the self-determination freedom to varying extents[44]. Thus fragmentation along artificial boundaries, frustration of economies of scale, wasteful investments in port building by small nations (Limalo and Venables, 1999), further deepened the north-south divide. Also in regions like Africa, additional problems on account of poor air network development, monopoly carrier operation on major routes, subsidization of inefficient airlines via scarce resources, over political interference inhibiting development of hub and spoke system(Heinz and O'Connell, 2013), lack of

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40 GATT-Airline hearing, statement of James E Landry, Air Transport Association of America

41 Supra n.17, art 89

42 Centre for Research of Air and Space Law, Legal, Economic and Socio-Political Implications of Canadian Air Transport , (McGill, Montreal, 1980), at 596

43 Supra n.17, art 44(g)

44 Kenneth Button, Gianmaria Martini and Davide Scotty, African Decolonization and Air Transportation,49 Journal of Transport Economics and Policy, (2015) at 628

requisite skilled personnel, corruption, inadequate internet services and lack of requisite investment in fleet modernization, reduce the effect of liberalization policies aimed at post Yamoussoukro Decision in 1999[45]. The fear of domination by mega carriers of developed nations continues to exist[46].

Here ,even "equality of opportunity"[47] principle seems a distant dream in absence of requisite technical, financial assistance and skilled personnel. Majority of participants at the Chicago Conference were in consensus to maintain status quo with regard to possessions, zones of influence and the colonies. In fact several bilateral agreements post the conference also relied on colony based bargaining strength and thus its argued that post-colonial era would have produced different consequences of these bargains had they occurred today[48]. Since the conference failed to reach any economic consensus, IATA was formed for the same in Havana, 1945 but here again the mega carriers had most say in major decision making[49]. Neither was IATA too interested in protecting interest of smaller airlines nor its positive lobbying efforts in this regard fruitful with the wave of bilateralism sweeping exchange of commercial rights and ICAO's mandate limited its role to harmonizing conflicts[50]. The era of mega carriers and mergers saw developing nations being crippled by inefficient weak airlines. Most contribution in the early 1980s to the international schedule flights was attributed to newly industrialized nations of Korea, Thailand, Malaysia, while majority of Asia, Africa and Latin America[51] remained paralyzed.

These regions are often destination of traffic rather than its source and such refusal of traffic rights gives them "less than a fair deal"[52]. The discriminatory computer reservation

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45 Ibid

46 David Woolley, Civil Aviation in Africa: struggling against major disadvantages, Interavia (1983), p.918, see also International Air passenger and freight transport: Africa,(1984), ICAO Circular 189-AT/73

47 Supra n.17, Preamble

48 Robert L. Thorton, International Airlines and Politics : a study in adaptation to change, Ann Arbor, Michigan: University of Michigan Press, (1970), at 72

49 V H L Duboureq (of KLM) quoted in KGJ Pillai, The Air Net, New York, Grossman, 141,(1969)

50 Eugene Sochor, International Civil Aviation and the Third World: How Fair is the System? 10 Third World Quarterly, (1988) at 1302

51 Ibid

52 'The effects of discriminatory and unfair civil aviation practices on the growth of air transport in developing countries', UNCTAD, T/B/860, 21 July 1981, p.38

system, control of focal hubs proves further deleterious for these nations. A typical problem which arises with respect to bringing positive changes in Chicago Convention favor of third world nations needs approval "by a two-thirds vote of the assembly"[53], which would be difficult for them to muster given the fact that balance of trade is shifted in favor of developing nations. Broad technical, financial, monetary, economic cooperation can help achieve new economic order in true sense. Given this scenario a mid way between wide open competition and narrow nationalist protectionism, via strengthening the bargaining position of these nations, is the need of the hour.

5. Plaintiff's Choice of Forum: Forum Shopping

The jurisdictional and venue motion practice governs the early stages of litigation in aviation accidents. The Montreal Convention provides for the additional fifth jurisdiction of "principle and permanent residence of plaintiff"[54], in addition to the four jurisdictions[55] already recognized under the Warsaw Convention 1929. But US courts, the most lucrative choice of forum for the plaintiff, especially in terms of compensation, continue to decline the exercise of jurisdiction on forum non convenience doctrine where alternative forum has jurisdiction or where defendant is unduly burdened or where the legal or administrative concerns make the exercise of jurisdiction inappropriate. The expansion of national aircrafts involved in international ventures, for instance Air Afrique, SAS, etc along with separate set of actions for separate defendants., the airline, the air traffic controller, component manufacturer, increases the complexity of causes of action and forum choice for the plaintiff. Also, unlike the civil law nations, the common law nations allow greater flexibility to dismiss cases for want of appropriate forum[56].

The doctrine was officially recognized in US since Gulf Oil case[57] where the court enumerated both public interest and private interest factors of speed, easy access to proof, reduction in court docket congestion, trial at place having local interest, as grounds for rejecting jurisdiction[58]. The doctrine was expanded in Piper Aircraft Co. v Reyno[59] to dismiss

53 Supra n.7, article 94(a)

54 Montreal Convention 1999, Article 33(2)

55 Ibid, Article 33(1), also enumerated under Warsaw Convention, 1929, article 28

56 Katherine R.Dieterich, Forum Non-Convenience and the Warsaw Convention : Leaving the Turbulence Behind? 33 Hofstra Law Review, (2005)

57 Gulf Oil Corporation v Gilbert 330 US 501 (1947)

58 Ibid, at 508

59 454 US 235, 241 (1981)

cases even if jurisdictional criteria of Warsaw Convention[60] was satisfied .However, in 2002 precedence was given to treaty obligations over procedural laws in Hosaka [61]decision which divorced from applying this doctrine on grounds of court docket congestion. But the courts are unwilling to give up their discretionary power and thus continue application of this principle which resurfaces the jurisdictional issue under Montreal Convention as well.

Dr Francis Lyall noted the major problems in international air accidents : uncertainty of application of municipal law in case of passengers travelling to several places; new airline suffering huge financial losses; different compensation regime in different nations and the resultant forum shopping with passengers trying to get maximum compensation while airlines trying to being matter in jurisdictions with lenient regulations, for instance, Ethiopia; and difficulty in proving airline's fault[62].

The Warsaw Convention, 1929, set a pro carrier fault-based liability regime in cases of aviation accidents, mainly to promote aircraft industry which was in infant stage then and at the same time ensuring minimum compensation to the passengers. However, the limit of liability, was doubled under the Hague Protocol, 1955[63] and the liability under Warsaw Convention could be escaped by proving that the airline took all the "necessary measures"[64], in cases involving personal injury which gave edge to the aircrafts having greater information in this regard. Only a "willful misconduct"[65] could take off liability limit set under article 22 of the Convention. US was unsatisfied with the liability cap and threatened withdrawal from Warsaw system . It entered into a private strict liability-based agreement, i.e., Montreal Agreement , 1966,with IATA members where liability cap in personal injury was raised to 75000$ but the agreement was limited to US passengers and cargo. Thus death of passenger from US would entitle him to a recovery of 75000$ via, while one from Hague Protocol nation would be entitled to 2,50,000SDRs, still another from original Warsaw Convention nation still had liability cap set by article 22.

60 Martin Davis, Time to change the Federal Forum Non-Convenience Analysis, 77 TUL L REV, 309, 386 (2002), n.335

61 Hosaka v United Airlines Inc 305 F.3d 989,994 (9th Cir. 2002)

62 Francis Lyall, The Warsaw Convention-Cutting the Gordian Knot and the 1995 Intercarrier Agreement, 22 Syracuse J. Int'l L. & Com. 67, 68-69 (1996)

63 The limit of liability of in case of personal injury was increased from 1,25,000(article 22, Warsaw Convention,1929) gold francs to 2,50,000 gold francs under Hague Protocol (article XI of Hague Protocol, 1955 which deleted and replaced article 22

64 Warsaw Convention, 1929, article 22

65 Ibid, article 25

Finally the Montreal Convention,1999, entered into force in 2003, which provided a pro consumer strict liability regime "consolidating Warsaw Convention and related instruments"[66] . It provided for strict liability up to 100000 SDRs[67] and beyond that fault-based liability, in cases of death or injury of passengers[68] and also provided for insurance[69] to cover aviation accidents. Yet, partial or even total exoneration of liability is allowed in cases of contributory negligence[70] from passengers.

The passengers to a Montreal Convention signatory nation, say from Canada and another passenger on the same international flight belonging to Warsaw Convention signatory , say a passenger from Lesotho, for the same personal damage, might fall under different jurisdictions with wide difference in their compensation. Even if nations are party to above mentioned conventions , ensuring compliance with their obligations is a difficult task. For instance, Ethiopia became a party to Montreal Convention in 2014 and international instrument, rather than Domestic Commercial Code governs internal air accidents, yet the courts show a poor track record of adhering to them and instead apply the domestic laws[71].

Also, the choice of law in aviation accidents varies. Pre 1960s, Lex loci delictus was applied at most places. If we take the instance of US characterization phase or compelling interest test[72] was applied . The 1960s marked examining the nexus between various jurisdictions and parties or the "centre of gravity" [73]test. Later tort liability came to be governed on Lex loci delictus ground while for other issues law of place having strongest interest in the matter applied[74]. A movement from stringent Lex loci delictus to analyzing interest and policy of the nation in the matter involved was made in Griffith v United Air Lines Inc.[75] . Thus different states within US itself continue to be governed by different tests in deciding

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66 Montreal Convention, 1999, Preamble

67 Supra n.55, article 21

68 Supra n.54, article 17

69 Supra n.54, article 50

70 Supra n.59, article 20

71 Mengistu G v. Ethiopian Airlines and Customs & Excise Tax Administration, Supreme Court of Ethiopia, Civil Appeal file No. 825/81

72 Emery v Emery 45 Cal 2d 421, 289 P.2d 218(1955); 41 Cal 2d 859, 264 P. 2d 944 (1953)

73 Kilberg v Northeast Airlines Inc. 9 N.Y.2d 34, 172 N.E.2d 526 1961

74 Babcock v Jackson 12 N.Y. 2d 473, 240 N.Y.S 2d 743, 191 N.E.2d 279 (1963)

75 416 Pa. 1, 203 A. 2d 796 (1964)

the choice of laws[76]. In fact in an interesting case of In Re Air Crash at Belle Harbor[77], which crashed in Belle Harbor with its tail landing in Jamaican bay, compensatory damages only up to pecuniary losses were given to ground victims by applying New York laws, while maritime nexus of the disaster led to application of federal admiralty laws to give non pecuniary damages as well to the passengers. Thus, the variation can occur not only across different accidents but also within a particular accident as well, depending on the circumstances.

Precisely because of then on uniform liability regime, jurisdictional issues and choice of law issues , all intricately linked to forum shopping the nations are hesitant in granting fifth freedom traffic rights , where the national carrier flies between two foreign destinations, the uncertainty surrounding above issues in case of aviation accidents acts as a further barrier to full exchange of traffic rights.

6. Pluralistic Alternative to the Multilateral Regime

Given the interplay of factors discussed above multilateralism failed to achieve the requisite support and instead resulted in patchwork of restrictive bilateral agreements. This stems essentially from the economic, political, financial differences and inequalities in bargaining strength of nations. Such circumstances call for a plurilateral regime as a viable alternative given the growing state interdependence, and the demerits of short-term restrictive policies embedded in national ostentation. In fact the Chicago Convention itself recognizes pooling arrangements[78]. Air Afrique, Gulf Air, Pan-Arab, SAS are outstanding examples of such plurilateral agreements. Such agreements, where the like-minded nations having a rough parity in bargaining position remove undue restrictions, including the intra community market entry, pricing and capacity restrictions, with liberal exchange of traffic rights. For instance the success of SAS amongst Scandinavian nations in establishing a single enterprise with single head office was attributed to linguistic, cultural similarity and cooperation to promote freedom of air liberally within these nations[79]. Apart from higher administrative and commercial efficiency, via a uniform transport regulatory authority, such trading blocks can achieve rise in negotiating power, sect oral balance and economies of scope. Also the hub and spoke mechanism can help reduce air traffic congestion via the

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76 Richard C.Coyle, Choice of Law in International Aviation Accidents, 16 Forum 658 (1980)

77 2006 U.S. Dist. LEXIS 27387 (S.D.N.Y. 2006)

78 Supra n.7, Article 77

79 Edward M Weld, ICAO and the major problems of International Air Transport, 20 J.Air L. & Com. 454 (1953), at 458

hub acting as focal point for carrying passengers to major international destinations from the network of spokes within the contracting states. Such agreement guarantees a move towards fair regime on liberal lines in the form acceptable even to the most protectionist states.

The most remarkable dismantling of trade barriers took place in the European Community .With the treaty of Rome establishing the European Economic Community ,a single regulatory regime was created throughout Europe. The hub and spoke operations were established in Barcelona by KLM Royal Dutch Airlines. Also, the European Economic Community Treaty provided for liberalization via a common market. The treaty further empowers the EC Council to take appropriate measures for air transport[80]. The issues of civil aviation for instance discriminatory pricing, fall under EC's antitrust laws[81] and post the Nouvelles Frontieres decision[82] capacity, pooling , tariff related restrictive agreements are necessarily to be in consonance with the antitrust laws. The Single European market of EU, formed post the Single European Act, 1987, provide for a broad exchange of third, fourth and to a considerable extent the fifth freedom traffic rights. A series of reforms ushered in with the three deregulation packages between 1987 and 1992 with full cobatage rights within EU being granted by the third package, entering into operation 1997 onwards. It provides a level playing field for all nations .The Road Map of 2005 envisaged exclusion of nationality clause in bilateral agreements between member state and a third nation, formation of common aviation area with neighbors, and entering negotiations with strategic partners[83]. The 2012 External Aviation Policy incorporated these principles. Several such plurilateral agreements have been entered into with Albania, Morocco , US, Serbia, among others.

Far from the restrictive bilateral regime, the US-EU Open Skies agreement of 2007, marked "centerpiece for today's reinvigorated transatlantic relationship"[84], without capacity or route limitations. Also grant of full combative rights and relaxation of foreign ownership requirements, which allowed more than 50% equity stake to EU Nationals on a case-by-

80 Treaty Establishing the European Economic Community, March 25, 1957, ,16 298 U.N.T.S. 11art 84(2)

81 Ministere Public v Asjes, 1986 E.C.R. 1425

82 Ibid

83 Panayotis Christidis, Four shades of Open Skies: European Union and four main external partners, Journal of Transport Geography 50 (2016), at 106

84 EU News Release, Open Skies: Jacques Barrot in Washington to sign Historic Aviation Deal at the EU-US Transatlantic Summit (April 30,2007), https://www.eurunion.org/News/press/2007/2007044.htm (last visited Feb 8,2019)

case basis[85], was another significant achievement of this agreement. The resultant rise in passenger traffic and economic benefits has been appreciable ever since then. Also, the agreement with Morocco of 2006, truly centered on principles of Road Map, 2005 allows for full exchange of traffic rights without capacity restrictions. Thus, the willingness of EU negotiating partners to remove limitations bears directly on degree of liberalization. Nevertheless, no matter the extent, a move towards relaxing restrictions surely furthers the exchange of traffic rights more as compared to a restrictive bilateral regime.

Similarly the Andean Pact between Bolivia, Columbia, Ecuador, Peru and Venezuela (withdrew in 2006), provided for full exchange of traffic rights with gradual transition in granting fifth freedom traffic rights. Post Yamoussoukro II Ministerial Decision, plurilateral agreement between African nations provides a simple notification procedure to exchange the traffic rights. The plurilateral agreement between the ASEAN Nations namely, ASEAN Multilateral Agreement on Air Services, 2009, is similarly moving towards a full exchange of traffic rights and a Single Aviation Market Similar to that of EU amongst the ASEAN nations, providing "each designated airline shall have a fair and equal opportunity to compete"[86]. This can tilt the balance in favor of third world nations where historical indifferences have been an additional barrier to free exchange of traffic rights. Additionally, such agreements also reassess flag carriers and concept of state owned enterprises by bringing all regulations under a common arena.

Also, with regard to air accidents, common safety rules for all contracting states, raises the predictability of applicable damage laws since the damage laws applicable in turn depends on choice of law rules, a plurilateral arrangement as that in EU ensures that its choice of laws apply, namely Rome I[87] and Rome II[88] , which increases predictability of damage laws and largely solves the issue arising from variation in choice of laws as in US. Also the EU261[89] cover compensation to passengers for inconvenience on account of flight cancellation or delay.

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85 Open Skies Agreement, 2007 O.J. (L 134)

86 ASEAN Multilateral Agreement on Air Services, 2009, Article 12

87 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), Article 5(2),(3)

88 Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 June 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), Article 4

89 European Union Regulation 261/2004

Thus, a plurilateral agreement with common safety norms and uniform regulatory authority within the trading blocks might solve the liberalization problems to an appreciable extent. As mentioned above, the benefits of such approach are enjoyed by both developed as well as developing nations in terms of rise in bargaining power, extensive network of air transportation, fuller exchange of traffic rights, and more importantly the meeting the rise in number and demand of air passengers at reasonable prices. The airlines in developing nations might enter into similar plurilateral arrangements amongst themselves to increase their bargaining strength and be given temporary assistance so that they enter into "measured competition" with the developed ones[90] .Also, where, within a plurilateral agreement common safety and aviation norms govern nations, the unpredictability factor associated with aviation accidents reduces to certain extent. Thus the dead letter skepticism, associated with transport agreement will gradually weaken.

7. Conclusion

With regard to aviation accidents, the possibility of dismissal of plaintiff's claim on discretionary grounds of forum non conveniens must be considered beforehand by considering appropriateness of alternate forum, plaintiff's residence, choice of rule of law and associated theories . Each situation needs to be analyzed on a case by case basis and choice of forum rather than being parochial should dispense international justice. Practically, the positive improvements brought about by Montreal Convention, fail to trickle effectively because at municipal level local laws, govern damage issues. At present, not all nations can be expected to become party to this convention when infact, in reality, many find even the liability cap of Warsaw Convention high. But, conformity of national legislation to international treaty is definitely workable and infact becomes easier when nations are governed by common aviation norms under a plurilateral agreement.

The plurilateral approach gives a push to cooperative spree, howsoever arduous, fulfilling the long-term goal of moving "step forward", envisaged under the Chicago Agreement, even if it comes at cost of short-term hardships.

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90 Henry A Wassenbergh, The Future of Multilateral Air Transport Regulation in the Regional and Global Context, 8 Annals Air & Space L.263 (1983)

Reservational Jurisprudence and Economic Criteria: An Analysis

Dr. Shilpi Gupta*[1]

Abstract: *Our Apex Court has been holding since the very beginning that poverty is linked with backwardness and is can be a relevant factor in the determining process of reservation. In M.R. Balaji v. State of Mysore the court underlined that backwardness was in the ultimate analysis the result of poverty to a larger extent. The Court, thus observed, "It is true that social backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that only shows the relevance of both castes and poverty in determining the backwardness of citizens." However, the above proposition was qualified by the Supreme Court in Janki Pershad v. State of Jammu and Kashmir.[2] It was observed that although poverty was one of the important indicia of backwardness, it could not be the exclusive test of social backwardness.*

1. Introduction:

Poverty is not linked with members of the lower castes only. They may also be economically better and strong than some of the members of the forward casts. Taking into consideration this state of affairs prevalent in our social structure the parliament has passed the constitutional amendment (124th Amendment Act, 2019) regarding 10% quota for the economically weaker sections of our country. The Act has fixed the following criteria for the beneficiaries.

1. Annual Family Income of less than Rs. 8.00 lakh
2. Not owning more than five acres of land.
3. Not owning a flat of 10000 sq. feet or more.
4. Land of 100 sq. yards in notified Municipal Area.
5. 200 yards in non-notified area.

2. Relevancy of poverty in the reservational jurisprudence:

Our Apex Court has been holding since the very beginning that poverty is linked with backwardness and it can be a relevant factor in the determining process of reservation.

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1 * Assistant Professor, Department of Law, MGKVP, Varanasi AIR 1963 SC 649.

2 AIR 1973 SC 930

In *M.R. Balaji v. State of Mysore*[3] the court underlined that backwardness was, in the ultimate analysis, the result of poverty to a larger extent. The Court, thus observed –

"It is true that social backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that only shows the relevance of both castes and poverty in determining the backwardness of citizens."

However, the above proposition was qualified by the Supreme Court in *Janki Pershad v. State of Jammu and Kashmir*.[4] It was observed that although poverty was one of the important indicia of backwardness, it could not be the exclusive test of social backwardness. If poverty was made the sole basis of classification, said the Court, a very large proportion of the Indian population would have to be regarded as socially and educationally backward. The Court went on to hold that if reservations are made only on the ground of economic conditions, an untenable situation may arise because even in sections which are recognized socially and educationally forward there are large pockets of poverty. A similar opinion was expressed by the Supreme Court in *State of Uttar Pradesh v. Pradip Tandon*.[5]

In *State of Kerla v. Krishna Kumari*[6] it was held that relevancy of poverty is an important point to be taken into consideration in determining the backwardness. In K.S. Jayshree v. State of Kerla,[7] the court observed that-

"Social backwardness can contribute to educational backwardness and educational backwardness may perpetuate social backwardness. Both are often no more than inevitable corollaries of the extremes of poverty and the deadening weight of custom and tradition."

The Court has concluded in *Indra Sawhney v. Union of India*[8] means test i.e. an economic criterion, cannot be the only and exclusive basis for the identification of socially and educationally backward classes. It may, however, be a consideration or basis along with and in addition to social backwardness, but it can never be the sole criterion. The Court has, however, explained that the economic advancement can be made a basis for the rule of exclusion. The Court terms it 'means-test' and has explained that the "means-test" signifies imposition of an income limit for the purpose of excluding 'creamy layers' of backward

3 AIR 1963 SC 649.

4 AIR 1973 SC 930

5 AIR 1975 SC 563.

6 AIR 1975 Kerla 131.

7 AIR 1976 SC 2381

8 AIR 1993 SC 477.

classes from the backward class. The Court has ruled that it is not a question of permissibility or desirability of such test but one of proper and more appropriate identification of a class- a backward class. The income of a person can be taken as a measure of his social advancement but his economic advancement should be so high that it necessarily means social advancement.

Thus, the Court in this case has emphasized that the means test should be applied with care. A realistic line must be drawn between those who are socially and educationally advanced and who are not so.[9]

Irrespective of the fact that poverty has been held to be a relevant factor in determination of backwardness, the court has been resisting the economic inequalities on the ground that this will enable the socially and educationally advanced sections of the society to claim reservational benefits. Thus, Dandekar and Rath has concluded that from the point of view of subsistence level about 40 percent of India's population will be treated as backward.[10]

In Indira Sawhney v. Union of India[11], Mr. Justice Swant observed that-

"Article 16(4) is specifically designed to give a due share in the State power to those who have remained out of it mainly on account of their social and, therefore, educational and economic backwardness. The economic criteria will thus lead, in effect, to the virtual deletion of Article 16(4) from the Constitution. Poverty by itself is not the test of backwardnes.[12]

Professor Jitendra Mishra, thus concludes that- A carefully perusal of the judgments of the Supreme Court prior to the *Indra Sawhney case*[13] makes it evidently clear that barring a few exceptions the Court has been uniform in reaching the conclusion that caste and economic criteria are the relevant factors for identification of the Other Backward Classes and that neither can be the sole or dominant criteria for the very purpose. Poverty is not linked with the members of lower caste only, they may also be economically better and strong than some of the members of forward castes. Therefore, caste, poverty and occupation must be taken into consideration and the 'means-test' must vary from time to time so that the change

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9 Equality versus Justice. The Problem of Reservations for Backward class, Professor Jitendra Mishra, Deep and Deep Publication, 1996, p. 132-133.

10 Poverty of India, 1971.

11 AIR 1993 SC 477.

12 Ibid at p. 657-88.

13 AIR 1993 SC 477.

in economics scenario must be taken care of. However, both these tests have been held to have a relative value.

Professor Parmanand Singh is of the view that- In India a vast majority of rural population is engaged in agricultural occupation and if an income ceiling in terms of money is fixed then it might discriminate in favour of those whose income is difficult to estimate such as farmers, traders and other members of the self-employed class. The income of these people is often unrecorded or concealed especially when the income is in kind like foodgrains or services. In case of these persons employment or taxation records will not be ordinarily available and thus it will be difficult to estimate their income. An income test will surely discriminate against those whose salary records are maintained such as government servants or those employed in autonomous institutions.

Then, what should be the line to demarcate between the affluent and the poor in society like ours where large segments of the population lives outside the money-economy? The problem of the removal of poverty is a part of the general developmental programme of a welfare state which can be achieved by such measures as economic ceiling on land holdings, abolition of bonded labour, abolition of rural indebtedness, living wages to labourers, conferment of land ownership on those who till the soil, general industrial and technological advancement and provision for better education, housing and better food and health care for the poor. In our submission these re-distributive measures should not be mixed up with the notion of compensatory discrimination which is designed primarily to eliminate inequalities associated with structural and environmental factors. An exclusive income test for classifying backward classes would thus ignore the historical context under which inequalities of income, wealth, education and occupation is closely related to the rigid caste-structure. Backwardness has to be judged by one's social standing and educational attainments rather than by one's economic position alone.[14]

Really speaking the ghost of reservation has extended its arms a round all the political parties. The U.P.A. Government on the eve of General Election in 2014 extended reservation in Educational institution and government's job to jats. The present government has done the same on the eve of election in 2019 by amending the constitution and providing 10% reservation to economically weaker sections of our society belonging to general class. According to Dr. S.N. Singh- The policy of reservation which was intended to be a temporary measure to be in operation for a very limited class of people for a limited period of time has become a permanent feature expanding its scope and coverage day by day without any justified reasons/ grounds. The action of the state in increasing the percentage of reservation

14 Equality, Reservation and Discrimination in India, Deep and Deep Publications, Delhi, 1982, pp. 184-185.

upto maximum permissible limit stipulated by the Supreme Court and giving its benefit to ever expanding list of persons identified solely on the basis of caste or religion definitely indicates the failure of the state in reducing "social and educational backwardness" and in uplifting the status of the classes of persons covered under SC/ST category during last over six decades. Unfortunately, the national commission for scheduled castes and the national commission for scheduled tribes established under article 338 and 339, respectively of the Constitution have consistently failed to discharge their constitutional obligation of evaluating the "progress" of socio-economic development of these two categories of persons under the union and the states as mandated under articles 338(5)(c) and article 338-A(5)(c). It must be kept in mind that giving of concessions/ reservations to one category of persons even without proper data/ information at the cost of others has the worst effect of dividing the population resulting in avoidable tensions and reverse discrimination. While the concept of 'creamy layer' was propounded by the Supreme Court for denying the benefit of reservation to socially and educationally backward classes, no such concept applies in the case of scheduled castes and scheduled tribes who are reaping the benefit of reservation since 1950. How is reservation justified for highly affluent among the scheduled castes and scheduled tribes who have been beneficiaries for such a long time?

Further, while the class deriving the benefit of concession/ reservation gets an automatic feeling that they are "backward", those deprived of them feel jealous that they are deprived of their constitutional right to equality despite they being more meritorious for no fault of their or merely because they do not belong to a particular caste/ class/ religion on which they have no control. It may also be remembered that while upholding the constitutional validity of the Central Educational Institutions (Reservation in Admission) Act, 2006 by which 27 percent seats were reserved for OBCs excluding creamy layer, the majority of the judges were of the view that review should be made as to the need for continuance of reservation at the end of every five years. Nothing has begun till date even though five years have lapsed. A time has, therefore, come when it becomes imperative for the central government to constitute a high powered commission headed by a retired judge of the Supreme Court to go through the entire gamut of issues pertaining to reservations. To all categories of citizens, particularly with a view to ascertain as to who have been the beneficiaries of reservations till date and whether time is ripe to do away with all kinds of reservations, replacing the present day reservation system with some other kind(s) of affirmative action programmes. Instead of expanding the scope of concessions/ reservations to appease some class/category of persons for extraneous considerations as at present, all efforts must be genuinely made to

scrap them and take other effective measures to bring about rea "equally" to all classes and categories of persons in the country which is governed by rule of law.[15]

In fact, when we evaluate the beneficiaries of reservation of non-general classes through the mirror of statistics, we find that only a meager number of the candidates were selected because of the paucity of jobs. Sonalde Desai thus writes-[16]

The following statistics from the Union Public Service Commission provide a sobering view of ground realities. In 2014, only 0.14% applicants to the UPSC were selected. Moreover, the general category and OBCs have the highest success rate, about 0.17%, and SCs have the lowest, about 0.08%. This may be because of the perception that it is easier for SCs to be recruited via the reserved quota and this may have led to a large number of SCs taking the civil services examination. One might say that many of these candidates are not qualified for these jobs. However, if we look at the candidates who made it past the preliminary examination (providing preliminary quality assurance), the picture is equally grim. Only about 8% of the candidates who took the main examination succeeded. Here the success rate is 8.2-8.3% for SC and ST candidates, 9.9% for OBCs and 7.8% for the general category. This suggests that in spite of the grievances of upper castes, reserved category applicants are not hugely advantaged.

The above statistics tell us that in spite of reservations, a vast proportion of reserved category applicants do not find a place via the UPSC examination. I suspect statistics from other fields may tell a similar story. This implies that if we expect reservations to cure the ills of Indian society, we may have a long wait.

Really speaking, it must be gathered through the reliable statistics which categories of people truly benefited from the reservation only then reservation policy should be updated. Our constitution through its preamble provides equally of status and of opportunity. The caste system denies this and advances the inequalities. The ultimate aim of the Government should be to remove inequalities of all kinds. Sonalde Desai[17] is quite right when she writes that.

The Bill promises 10% reservation to individuals classified as economically backward. However, while a number of criteria were discussed in the parliamentary debate, the Bill is quite silent on this. Assuming that among the criteria discussed in Parliament, those that are

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15 Annual Survey of Indian Law, 2012, pp. 190-191.

16 The Hindu January 11, 2019, p. 8, A solution in search of a problem.

17 The Hindu, January 19, 2019, p. 8. A Solution in search of a problem,

currently applied to the definition of the Other Backward Classes (OBC) creamy layer are the ones to be used, it is not clear how useful they would be. While the OBC creamy layer has been created to exclude people who are clearly well off, the EWS quota, in contrast, is expected to focus on the poor. One of the criteria — the income threshold of 8 lakh per annum — has been mentioned. The National Sample Survey (NSS) of 2011-12 shows that the annual per capita expenditure for 99% of households falls under this threshold, even when we take inflation into account. Similarly, as per the India Human Development Survey (IHDS), the annual household incomes of 98% of households are less than 8 lakh. Even if we apply all the other criteria for exclusion (e.g. amount of land owned and size of home), the Bill would still cover over 95% of the households. So, who are we excluding? Almost no one.

While the benefits of the EWS quota are likely to be minimal, the cost may be higher than one anticipates. First, it is important to remember that general category jobs are open to everyone, including Scheduled Caste (SC), Scheduled Tribe (ST) and OBC individuals. Thus, by removing 10% jobs from the "open" category, it reduces the opportunities for currently reserved groups. Hence, this is by no means a win-win situation. This may be particularly problematic for OBCs since OBC reservation is limited to 27% of the seats whereas the OBC population is at least 40% of the population, possibly more. Thus, this move is almost certain to result in calls for greater OBC reservation, particularly if a constitutional amendment to increase the proportion of reserved seats from 50% to 60% is already being adopted.

Reservation, it must the noted, is not the panacea for the ill of unemployment. It gives only psychological satisfaction. It is a play of words in the hand of politicians. It is but natural that many political leaders have criticized the amendment and have termed is a kind of deception to the people. They have also said that the Government will use in as a weapon in the election.

However, it is a kind of Reverse discrimination. The phrase 'reverse discrimination' may mean different things to different people. The phrase is sometimes charged with being a term of prejudice and is restricted to refer to those situations where an absolute preference is given to the preferred groups. On times, the phrase is used neutrally and is taken to refer to social tendency that provides extra preference to otherwise unjustly disadvantaged persons or groups in a field formally open to competition. In this sense, the two phrases- 'reverse discrimination' and 'preferential treatment' – have the same import.[18] The only merit of this act is that it does not steal from the SC, ST and Other backward classes. Their limit of

18 Equality Justice and Resource discrimination, Dr. C.L. Anand, 1987, p. 13.

50% remains in Tact. The Bill has been challenged in the Apex Court on the ground that it violates the constitutional provision and its is also against the ruling of Indira Sawhney case. It must be remembered than in *Indira Sawhney's case*[19] the court was required to pronounce judgment on the constitutional validity of two office memorandum and a of the central govt.

They were as follows –

On the basis of the Mandal Commission's Report only in 1990 an Office Memorandum was issued by the Government of India on 13th August, 1990 which inter alia reads:

Government have carefully considered the report and the recommendations of the Commission in the present context regarding the benefits to be extended to the socially and educationally backward classes as opined by the Commission and are of the clear view that at the outset certain weightage has to be provided to such classes in the service of the Union and their public undertakings. Accordingly, orders are issued as follows:

- 27% of the vacancies in civil posts and services under the Government of India shall be reserved for SEBC.
- The aforesaid reservation shall apply to vacancies to be filled by direct recruitment. Detailed instructions relating to the procedure to be followed for enforcing reservation will be issued separately.
- Candidates belonging to SEBC recruited on the basis of merit in an open competition on the same standards prescribed for the general candidates shall not be adjusted against the reservation quota of 27%.
- The SEBC would comprise in the first phase the castes and communities which are common to both the list in the report of the Mandal Commission and the State Government's lists. A list of such castes/communities is being issued separately.
- The aforesaid reservation shall take effect from 7.8.1990. However, this will not apply to vacancies where the recruitment process has already been initiated prior to the issue of these orders.

Similar instructions in respect of public sector undertakings and financial institutions including public sector banks will be issued by the Department of Public Enterprises and Ministry of Finance respectively.

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19 AIR 1993 SC 477.

3. Notification of Government of India, 1991:

The Officer Memorandum issued by the Government of India on 13th August 1990 was amended by an other Office Memorandum issued by the Government of India on September 25th, 1991. The very purpose to amend the Office Memorandum of 13th August, 1990, as stated in the opening paragraph of this Office Memorandum, is as follows:

- to classify the SEBCs into two categories, namely, SEBCs and the poorer sections of SEBCs, and to give the latter the benefit of reservation on preferential basis; and
- to create a new category of "Other Economically Backward Sections" of people which are not covered by any existing schemes of reservation, and to provide reservation in services for them.

To effectuate these two objectives, the Government of India had decided to amend the said Office Memorandum of 13 August, 1990. This amended order provides that :

- Within the 27% of the vacancies in civil posts and services under the Government of India reserved for SEBCs, preference shall be given to candidates belonging to the poorer sections of the SEBCs. In case sufficient number of such candidates are not available, unfilled vacancies shall be filled by the other SEBCs candidates.
- 10% of the vacancies in civil posts and services under the Government of India reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservation.
- The criteria for determining the poorer sections of the SEBCs or other economically backward sections of the people who are not covered by any of the existing schemes of reservations are being issued separately.

The court upheld the First memorandum but invalidated the addition of 10 percent by the second. What will be the fate of the present amendment by the authors of the fate of constitutional interpretation, will be keenly awaited.

4. Conclusion:

This amendment, no doubt, is politically motivated. It may give political benefit to the Movers of Amendment. However, by opposing it in many ways, the opponents are also expected to be benefited Rs.10 lakh upper limit needs to be lowered, if the True intention of the Amendment is to be achieved.

This, reservation, in ultimate analysis, is more about politics than social Justice we totally agree with the editorial comment of Hindu on this issue. The learned editor writes-

If the amendment is challenged, a question that will arise is whether financial incapacity warrants special treatment. With the income ceiling for eligibility likely to be fixed at 8 lakh a year the same as the 'creamy layer' limit above which OBC candidates now enjoying reservations become ineligible an uneasy parity has been created between socially and educationally backward classes with limited means and those who are socially and educationally advanced with the same limitation. The other issue that has come up frequently when quotas are increased by State governments is that exceeding the 50% limit offends the equality norm. In Nagaraj (2006), a Constitution Bench ruled that equality is part of the basic structure of the Constitution. It said the 50% ceiling, among other things, was a constitutional requirement without which the structure of equality of opportunity would collapse. There has been a string of judgments against reservations that breach the 50% limit. Another issue is whether reservations can go to a section that is already adequately represented in public employment. It is not clear if the government has quantifiable data to show that people from lower income groups are under-represented in its service. Reservations have been traditionally provided to undo historical injustice and social exclusion suffered over a period of time, and the question is whether they should be extended to those with social and educational capital solely on the basis of what they earn.[20]

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20 The Hindu, January 9, 2019, p. 8.

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“धर्मो विश्वस्य जगतः प्रतिष्ठा।
लोके धर्मिष्ठं प्रजा उपसर्पन्ति।
धर्मेण पापमपनुदति।
धर्मे सर्व प्रतिष्ठितम्।
तस्माद्धर्म परमं वदन्ति।”

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